KOONMEN v. BENDER and SEVEN OTHERS
ROYAL COURT (Bailhache, Bailiff and Jurats Potter and Bullen): July 19th, 2002
Conflict of Laws—jurisdiction—forum conveniens—plaintiff to show Jersey most appropriate jurisdiction for trial of action which did not start in Island as of right—factors to be considered include residence of defendants; location of assets, documents, witnesses and lawyers; existence of other related actions in jurisdiction; law applicable; whether trusts and companies administered from within jurisdiction
Civil Procedure—service out of jurisdiction—affidavit in support—setting aside leave to serve out not justified by failure to make full disclosure, if no prejudice to defendant and adequate information supplied to allow judge to make decision

The plaintiff applied for an order that funds in a trust be distributed equally between himself and the first defendant.

The plaintiff and the first defendant established a hedge fund which yielded profits of US$139m. Under a tax-efficient scheme designed by the third defendant, the profits were held by the AEB Trust, a discretionary trust drafted in Jersey but established in Anguilla, and AIA Anguilla, an Anguillan company. STAL, an Anguillan company, was the sole trustee of AEB Trust. It was wholly owned by STL, the Jersey company of which the third defendant was a director and principal.

The first defendant and the plaintiff agreed to (a) wind up the hedge fund and divide the profits between them; and (b) transfer the accumulated infrastructure and intellectual property to the plaintiff to enable him to continue in business alone. STAL, as trustee of the discretionary AEB Trust, proposed a distribution of 57.5% of the assets to the first defendant and 42.5% to the plaintiff.

The plaintiff claimed that (a) the distribution proposed by STAL was in breach of an agreement between himself and the first defendant to share the profits equally; (b) if that was not the case, the capital settled in the AEB Trust at a time when there were no beneficiaries was held on a resulting trust; and (c) STAL had tried to force him to settle his dispute with the first defendant. The Judicial Greffier granted leave to serve proceedings out of the jurisdiction on the defendants who were not residents of or incorporated in Jersey.

The defendants applied for an order setting aside the process served on them by the plaintiff and a declaration that Jersey was *forum non conveniens* for the trial of the action. STAL and AIA Anguilla submitted that leave to serve out of the jurisdiction should be set aside as (a) the plaintiff had failed to make full and frank disclosure of facts adverse to his application when applying for leave to serve out; (b) in any event, the central matter of the dispute was the AEB Trust, an Anguillan trust which contained an exclusive jurisdiction clause in favour of Anguilla; and (c) they were incorporated in Anguilla. STL and the third defendant submitted that, although they were subject to the jurisdiction of the Jersey courts, it was not the most appropriate forum for the trial of the action.

The plaintiff submitted in reply that Jersey was the appropriate forum for trial as (a) the first defendant was not a resident of Anguilla; (b) the third defendant and STL were

resident or incorporated in Jersey and were accordingly subject to the jurisdiction of the court; (c) more than 70% of the AEB Trust and the assets of AIA Anguilla were held in Jersey; (d) STAL was wholly owned by STL; and (e) the remaining defendants had not appeared to argue the question of *forum conveniens*.

Held, dismissing the defendant's application:

(1) The court had jurisdiction to serve the proceedings out of the jurisdiction on the defendants who were not resident or incorporated in Jersey under the Service of Process (Jersey) Rules 1994, r.7(j) as part of the trust property of the AEB Trust was the "trust property of a foreign trust situated in Jersey" within the meaning of art. 5 of the Trusts (Jersey) Law 1984 (para. 9).

(2) Moreover, there were serious issues to be tried in respect of the plaintiff's first and third causes of action, namely whether (a) the AEB Trust was a discretionary trust or subject to an agreement by which the profits were to be shared equally; and (b) STAL had attempted to force the plaintiff to settle his dispute with the first defendant. There was no resulting trust issue to be tried, however, as the trust deed specified that, if the principal trusts failed, the trust fund was to be held for charitable purposes determined by the trustee. Leave to serve out against STAL and AIA Anguila on this ground would therefore be set aside (paras. 16–20).

(3) When determining whether to exercise its statutory discretion to call for the appearance before a Jersey court of foreign defendants, the court was to take into account the nature of the dispute, and the legal and practical issues involved, *e.g.* local knowledge, availability of witnesses and their expense, to determine the most suitable location in the interests of the parties and the ends of justice. The burden of proof lay on the plaintiff to show that Jersey was clearly the most appropriate jurisdiction for the trial of an action which did not start in the Island as of right (paras. 22–23; para. 36; para. 39).

(4) In this case, Jersey had the most substantial connection with the dispute and the issues for resolution as (a) six of the eight defendants, including the principal architect of the offshore arrangements, were either within or had submitted to the jurisdiction of the Jersey courts; (b) STAL was administered from Jersey; (c) AIA Anguilla had no physical presence in either jurisdiction; (d) the exclusive jurisdiction clause contained in the AEB Trust deed was unclear; (e) more than 70% of the AEB Trust and the assets of AIA Anguilla were held in Jersey; (f) the Anguillan law of trusts was not dissimilar to the Jersey law of trusts; (g) London and Jersey lawyers were managing the plaintiff's proceedings against the first defendant in other jurisdictions; (h) it was easier for the principal witnesses to appear before a court in Jersey; (i) the documentation was in Jersey, Ireland and Anguilla; and (j) the defendant was to continue with proceedings which had already been brought in Jersey against some of the defendants. It was therefore in the interests of justice that the action be tried in Jersey (paras. 37–38).

(5) Furthermore, the plaintiff's failure to make full and frank disclosure when applying for leave caused no prejudice to the defendants as the documentation in question would not, if disclosed to the Greffier Substitute, have affected his decision to order service out of the jurisdiction. It was primarily for the judge considering the application to serve out of the jurisdiction to consider whether sufficient information had been provided to make a decision (paras. 14–15).

Cases cited:

(1) *Amin Rasheed Shipping Corp.* v. *Kuwait Ins. Co.*, [1984] A.C. 50; [1983] 2 All E.R. 884; [1983] 2 Lloyd's Rep. 365; (1983), 127 Sol. Jo. 492, followed.

(2) *Ellinger* v. *Guinness*, [1939] 4 All E.R. 16, followed.
(3) *Gheewala* v. *Compendium Trust Co. Ltd.*, 1999 JLR 154, followed.
(4) *Practice Direction (Service out of jurisdiction)*, 1987–88 JLR *N*–6, referred to.
(5) *Rothmer* v. *Hill Samuel (C.I.) Trust Co. Ltd.*, 1991 JLR 74, considered.
(6) *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhouri Islami Iran*, [1994] 1 A.C. 438; [1993] 4 All E.R. 456; [1994] 1 Lloyd's Rep. 1; (1993), 137 Sol. Jo. (L.B.) 239, *dicta* of Lord Goff considered.
(7) *Spiliada Maritime Corp.* v. *Cansulex Ltd.*, [1987] A.C. 460; [1986] 3 All E.R. 843; [1987] 1 Lloyd's Rep. 1; (1986), 130 Sol. Jo. 925, considered.
(8) *Virani* v. *Virani*, 2000 JLR 203, *dicta* of Birt, D.B. applied.

Legislation construed:

Trusts (Jersey) Law 1984, art. 5: The relevant terms of this article are set out at para. 9.

Royal Court Rules 1992 (R. & O. 8509), r.6/7A(8), as added by the Royal Court (Amendment No. 12) Rules 1997 (R. & O. 9106): "A party who fails to make an application in accordance with paragraph (3) of this Rule within the time specified in sub-paragraph (a) or sub-paragraph (b) thereof (whichever is applicable) shall be deemed to have submitted to the jurisdiction of the Court in the proceedings."

Service of Process (Jersey) Rules 1994 (R. & O. 8715), r.7: The relevant terms of this rule are set out at para. 9.

A.R. Binnington for the plaintiff;
D.J. Benest for the first defendant;
N.F. Journeaux for the second defendant;
M.H.D. Taylor for the third, fourth and seventh defendants.
The remaining defendants did not appear and were not represented.

1 **BAILHACHE, BAILIFF:** On June 17th, 18th and 19th, 2002, the court heard submissions from counsel in relation to a summons dated February 25th, 2002, issued by the second, third, fourth and seventh defendants in the following terms:

> "1. The court should not order on the application of the second and seventh defendants—
>
> (a) that the proceedings or service of the proceedings on the second and seventh defendants should be set aside;
>
> (b) that in respect of the second and seventh defendants the order of the Judicial Greffier dated December 20th, 2001 giving leave to serve the proceedings out of the jurisdiction should be set aside;
>
> (c) that in the circumstances of the case the court has no jurisdiction over the second and seventh defendants in respect of the subject matter of the claim or the relief or remedy sought in the proceedings.
>
> 2. The court should not order on the application of the third and fourth defendants—
>
> (a) that in the circumstances of the case the court has no jurisdiction over the third and fourth defendants in respect of the subject matter of the claim or the relief or remedy sought in the proceedings; and/or

(b) that Jersey is not the most appropriate forum to hear the proceedings and that Anguilla is a more appropriate forum and the proceedings should be stayed in this jurisdiction."

At the hearing, counsel for the third and fourth defendants did not pursue para. 2(a) of the summons. On June 27th, the court dismissed the summons and indicated that it would give its reasons at a later date. This we now proceed to do.

Background history

2 The plaintiff ("Mr. Koonmen") and the first defendant ("Mr. Bender") are both American citizens. Mr. Koonmen is resident in Japan and Mr. Bender is resident in Costa Rica. It appears that in 1996, Mr. Bender, who is an investment adviser, established a hedge fund ("the Amber Fund"). In or about July 1999, Mr. Bender became associated with Mr. Koonmen, who is a securities trader. Mr. Koonmen claims that their association was in the nature of an equal partnership. The hedge fund business was very successful and yielded profits in excess of US$139m. In the plaintiff's Order of Justice, they are referred to as "the Virginia profits" and it is convenient to continue to refer to them in that way. Approximately US$84m. of the Virginia profits are held in a settlement called the Amber Employee Benefit Trust ("AEB Trust") and approximately US$50m. by the seventh defendant, Amber Investment Advisers Ltd. of Anguilla ("AIA Anguilla").

3 The AEB Trust was drafted in Jersey by Bedell Cristin but established in Anguilla by deed dated January 4th, 2000. It was apparently not executed until some time in February 2000. The settlor was the fifth defendant, Amber Investment Advisers Ltd. of the Cayman Islands ("AIA Cayman"). When questioned by the court as to who was the beneficial owner of AIA Cayman, Mr. Journeaux for the second defendant, Sinel Trust Anguilla Ltd. ("STAL") stated that Mr. Bender was "the moving force" behind the company. Further funds were later introduced into the AEB Trust by Amber Investment Advisers Ltd. of the British Virgin Islands ("AIA BVI"). The original trustee was the eighth defendant, Intertrust (Anguilla) Ltd. ("Intertrust Anguilla"). STAL is currently the sole trustee of AEB Trust. On the face of it, the AEB Trust is a discretionary trust.

4 AIA Cayman was the original means whereby the Virginia profits were designed to be sheltered in a tax-efficient structure. The architect of the scheme was Mr. Bart Wijsmuller, the third defendant. Mr. Wijsmuller is resident in Jersey, one of the two principals of Sinel Trust Ltd., the fourth defendant ("STL"), and a director of STL. STAL is a wholly-owned subsidiary of STL. Both Mr. Bender and Mr. Koonmen were formally contracted to work for AIA Cayman which was the investment adviser to the Amber Fund and which received some of the substantial fees now forming part of the Virginia profits. At or about the beginning of 2000, probably with a view to protecting the Amber Fund and/or the Virginia profits from one of Mr. Bender's alleged creditors, AIA Anguilla replaced AIA Cayman as investment adviser to the Amber Fund. Through 2000, the Amber Fund paid fees to AIA Anguilla which in turn paid some of these fees into the AEB Trust.

5 At the end of October 2000, Mr. Bender and Mr. Koonmen agreed to wind up the Amber Fund. Mr. Bender was apparently ill and wanted to retire from the hedge fund business. Mr. Koonmen was to continue in business on his own account. Part of the arrangements was that the infrastructure and intellectual property that had been built up would go to Mr. Koonmen. The arrangements were negotiated by Mr. Koonmen with Mr. Wijsmuller acting for Mr. Bender. One of the issues was the valuation of a Jersey company

Blue Edge Global Ltd. ("BEG") which owned much of the infrastructure through a subsidiary Blue Edge Technologies K.K. ("BET"). Because BEG was to go to Mr. Koonmen, a value had to be placed upon it so that (in Mr. Koonmen's contention) a corresponding adjustment could be made to the 50:50 division of the Virginia profits. Another issue was the payment of bonuses to the employers of BET. Eventually, an agreed value of $12m. was placed upon BEG.

6 Problems began to arise in 2001 culminating at a meeting on April 5th, 2001 attended by Mr. Lipkind, a US attorney then acting for Mr. Koonmen, Mr. Joseph Brice, the managing director of STAL and Mr. Philip Sinel. Mr. Sinel is a Jersey advocate in the firm of Sinels and co-owner with Mr. Wijsmuller of STL. At that meeting, it was asserted by Messrs. Brice and Sinel that the AEB Trust was a discretionary trust and that STAL proposed to distribute the AEB Trust assets as to 57.5% to Mr. Bender and as to 42.5% to Mr. Koonmen. Mr. Koonmen and his advisers regarded this as a repudiation not only of the agreement to share the Virginia profits 50:50 but also of the agreement reached with Mr. Wijsmuller on behalf of Mr. Bender in December 2001.

7 On June 13th, 2001, STAL, with a view to distributing BEG to Mr. Koonmen, purchased BEG for $12m. from Mr. Bender's offshore structure using AEB Trust assets. This was done, it is claimed by Mr. Koonmen, only two weeks after Mr. Sinel had assured Mr. Koonmen's advisers that there was going to be no movement of AEB Trust assets in the near future.

Issues for resolution

8 The issues for resolution in relation to this summons are as follows:

(a) So far as STAL and AIA Anguilla are concerned, should leave to serve out of the jurisdiction be set aside? This issue gives rise to three subsidiary issues:

> (i) Does the court have jurisdiction under one or more of the limbs of r.7 of the Service of Process (Jersey) Rules 1994?
>
> (ii) Is there a serious issue to be tried in respect of each cause of action?
>
> (iii) Is Jersey clearly the appropriate forum for the trial of the action?

It is to be noted that the burden of proof here lies upon Mr. Koonmen.

(b) So far as Mr. Wijsmuller and STL are concerned, have they established that Jersey is not the most appropriate forum for the trial of the action, and that the appropriate forum is Anguilla? It is to be noted that the burden of proof here lies upon Mr. Wijsmuller and STL.

9 So far as the first issue is concerned, counsel for both STAL and AIA Anguilla concede that the court does have jurisdiction under r.7. Rule 7 provides that—

> "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 . . ."

Article 5 of the Trusts (Jersey) Law 1984 provides that the court has jurisdiction where, *inter alia*, "any trust property of a foreign trust is situated in Jersey." Counsel concede that some assets of the AEB Trust are situated in Jersey and that the court accordingly has jurisdiction under r.7(j).

10 The next question is whether there is a serious issue to be tried in respect of each cause of action. We bear in mind the words of Lord Goff of Chieveley in *Seaconsar Far East Ltd.* v. *Bank Markazi Jomhouri Islami Iran* (6), commending the approach of Stuart-Smith, L.J. in the Court of Appeal ([1994] 1 A.C. at 455):

> "It seems to me to be wholly inappropriate once the question[s] of jurisdiction and forum [conveniens] are established for there to be prolonged debate and consideration of the merits of the plaintiffs' claim at the interlocutory stage."

11 For the reasons set out below, we have established the question of *forum conveniens* and, accordingly, we endeavour to be as succinct as possible in relation to the merits. There are three material elements of the claim. Mr. Koonmen claims that (a) the expressed discretionary trusts of the AEB Trust are subject to the Virginia agreement, by which Mr. Bender and Mr. Koonmen were to share the Virginia profits equally; (b) in the alternative, the capital settled on the AEB Trust by AIA Cayman at a time when there were no beneficiaries may be held on a resulting trust for AIA Cayman; and (c) STAL's conduct amounted to a breach of trust in relation to the acquisition of BEG, the steps taken to control BET and its refusal to pay the bonuses to employees of BET.

12 Before considering each element of the claim, it is convenient to deal first with an argument advanced by counsel for STAL that embraces both the first and third elements. Counsel submits that there was a serious

failure to make full and frank disclosure to the Greffier Substitute when the application was made for leave to serve out. Without intending any disrespect to the lengthy arguments addressed to us on this point, we think that they can be treated relatively briefly. The submission is that the affidavit of Mr. Jonathan Wheeler of December 13th, 2001 was defective in that it had annexed to it only three documents, *viz.* the Order of Justice, a fax cover sheet from STAL and a copy of the AEB Trust deed. None of the correspondence and documents detailing exchanges between STAL and its advisers on the one hand and the legal advisers of Mr. Koonmen on the other were exhibited. It is submitted, therefore, that the arguments advanced at this hearing as to why leave should not be granted were not placed before the Greffier. Counsel for STAL relied upon *Practice Direction (Service out of jurisdiction)* (4) and *Rothmer* v. *Hill Samuel (C.I.) Trust Co. Ltd.* (5) for the proposition that full and frank disclosure was required. Tomes, Deputy Bailiff stated (1991 JLR at 82):

> "I agree that there is a duty on the person who swears an affidavit in support of an application for leave to serve without the jurisdiction to make full and frank disclosure, including matters adverse to his application."

13 It must be recalled, however, that the court is considering in this context whether there is a serious issue to be tried. Counsel for Mr. Koonmen drew our attention to two authorities. The first is *Ellinger* v. *Guinness* (2). Leave had been given to serve certain defendants out of the jurisdiction in Germany and application was made to set aside that order. Morton, J. stated ([1939] 4 All E.R. at 24–25):

> "The only other point taken by counsel for the applicants is that there was in the present case a failure to disclose material facts to the court, at the time when the order of April 26th, 1939 was made. He has strongly criticised the affidavits of Mr. Phillips. Counsel for the applicants says, and I agree with him, that the *ex parte* application under Order 11 is one upon which the utmost good faith must be

observed by an applicant. He says further that certain facts were not disclosed which ought to have been disclosed, and he says finally that, if these facts had been disclosed, I would not have given leave for service out of the jurisdiction. I now know all the material facts. I think that this is a proper case in which to give leave for service out of the jurisdiction under R.S.C., Ord. 11, r.1 (*g*). In these circumstances, I do not think that the order giving such leave ought to be set aside unless that order was obtained by something which amounts to an attempt to deceive the court. Counsel for the applicants does not suggest that Mr. Phillips deliberately intended to deceive the court, but he argues that certain facts ought to have been stated in Mr. Phillips' affidavit which were not stated. I do not propose to

refer to these facts in detail, but I think that Mr. Phillips' first affidavit does err on the side of brevity. I think it would have been a better affidavit if it had stated the facts in more detail, and in particular had made it clear that the transactions between the plaintiff on the one hand and Metall on the other hand took place at a time when the plaintiff was a German national domiciled in Germany, and that the terms of business provided that German law was to apply and the German courts were to have exclusive jurisdiction."

14 We have examined carefully the affidavit sworn by Mr. Wheeler. It is true that it does not include reference to the correspondence and other documents that have been relied upon in relation to the arguments as to whether there is a serious issue. But this is a sin (if it be one) of omission rather than commission. Counsel for STAL did not submit that there had been any deliberate intent to deceive the Greffier Substitute on the part of Mr. Wheeler and, indeed, there is no evidence of any such intention. As in the case of *Ellinger* (2), we think it could be said that the affidavit errs slightly on the side of brevity. But counsel did not suggest that any prejudice had been caused to STAL or AIA Anguilla by reason of that brevity. STAL was, for obvious reasons, fully aware of the correspondence between it and the legal advisers of Mr. Koonmen, and of the meeting that had taken place.

15 Counsel for Mr. Koonmen also drew attention to the recent case of *Virani* v. *Virani* (8), where Birt, D.B. stated (2000 JLR at 213):

"The fact that an affidavit in support of an application for leave to serve out of the jurisdiction is defective (in that it does not comply with r.9) does not of itself necessarily invalidate any order for leave to serve out. It is primarily for the judge considering the application to serve out of the jurisdiction to consider whether the affidavit is in sufficient form and whether it gives him sufficient information to make a decision. The success of an application to set aside leave on grounds of failure to comply with the requirements of r.9 will depend upon the facts of the case, including any prejudice to the defendant, the extent and effect of any non-disclosure by the plaintiff and whether the court is satisfied that, notwithstanding the failure, there are clearly valid grounds for leave to serve out."

Counsel for STAL submitted that these remarks were *obiter*. That may be right but they appear to us nonetheless to be very much in point here. In our judgment, the non-disclosure caused no prejudice to the defendants and the documentation in question would not, if disclosed to the Greffier Substitute, have affected his decision to order service out.

16 In relation to the first element of the claim, counsel for STAL submitted that the AEB Trust was plainly a discretionary trust and

adduced evidence that Mr. Koonmen and his advisers had treated it as such. There was no evidence that the settlors of funds (*i.e.* AIA Cayman, AIA BVI and AIA Anguilla) had intended the AEB Trust to be anything but a discretionary trust. On the other hand, counsel for Mr. Koonmen submitted that the existence of the Virginia agreement was, for the purposes of this hearing, undisputed. There was evidence that the AEB Trust was intended to be a Rabbi Trust and that, if the appropriate rules had been made, they would have provided for any distributions by STAL to be in accordance with the terms of the Virginia agreement. Furthermore, none of the objections raised by counsel in relation to the AEB Trust had any bearing on Mr. Koonmen's claim for 50% of the assets of AIA Anguilla based upon the Virginia agreement. On the evidence presently before the court, we are quite unable to find that there is no serious issue to be tried on this first element of the claim.

17 In relation to the second element, counsel for STAL conceded that if the AEB Trust had failed to declare effective trusts or trusts which wholly disposed of the beneficial interest, there would be a resulting trust for the settlor. He submitted, however, that the definition of "beneficiaries" in the deed provided for "all present and future employees of the settlor or a subsidiary of the settlor." Even if there were no known beneficiaries at the time of the establishment of the AEB Trust, the income was to be accumulated and could be held pending the coming into existence of beneficiaries. There could therefore be no resulting trust. As against that, counsel for Mr. Koonmen submitted that there was doubt as to whether employees of future subsidiaries of the settlor could be beneficiaries of existing funds. We have to say that this was not, in our view, counsel for Mr. Koonmen's strongest point. However, the further point advanced by counsel for STAL was that, in any event, there was a long-stop trust in favour of charities. Clause 5(7) of the trust deed provides:

> "Subject as aforesaid the trustees shall hold the trust fund upon trust as to both capital and income for such charitable purposes as the trustees shall determine and in default of and subject to such determination for charitable purposes generally."

This submission seems to us to be correct. Even if the principal trusts fail, the trust fund is to be held for such charitable purpose as the trustees may determine. There can therefore be no resulting trust for AIA Cayman. In relation to the second element of the claim, there is no serious issue to be tried and, in relation to STAL and AIA Anguilla, leave to serve out in that respect must be set aside.

18 We turn to the third element of the claim, namely whether STAL's conduct amounted to a breach of trust. Counsel for STAL submitted that the fatal flaw in this claim, so far as it related to the purchase of BEG by

STAL as trustee of the AEB Trust, was that Mr. Koonmen, through his lawyers, consented to and even encouraged the purchase. Counsel relied in particular upon a letter dated May 30th, 2001 from Withers (Mr. Koonmen's lawyers) to STAL, the concluding part of which stated: "Let us get the transfer under way."

19 In our judgment, the letter of May 30th, 2001 has to be set in context and, in particular, against the background of the increasingly acrimonious dispute between Mr. Koonmen on the one hand and Mr. Bender and STAL on the other. That dispute has a number of facets which it is unnecessary for these purposes to describe. The case for Mr. Koonmen is that the agreement to the acquisition of BEG expressed in the letter of May 30th, 2001 was conditional, and those conditions had not been met. Mr. Koonmen also asserts that STAL

wrongly used its ownership of BEG to attempt to gain control of BET from him and wrongly refused to pay bonuses to the employees of BET in order to force him into a global settlement of his dispute with Mr. Bender. The resolution of all these disputed issues of fact will be a matter for the court of trial. We are quite unable to conclude that there is no serious issue arising out of the third element of the claim.

20 Our conclusion on the second sub-issue is that we are satisfied that there is a serious issue to be tried on the first and third elements of Mr. Koonmen's claim.

Forum conveniens

21 We turn finally to the question of *forum conveniens* or, as the Court of Appeal preferred to express it in *Gheewala* v. *Compendium Trust Co. Ltd.* (3), the determination of the appropriate jurisdiction in which to hear the action. As is evident from the terms of the summons cited at para. 1 above, the court is here being asked to make a determination from two perspectives, namely that of the plaintiff, Mr. Koonmen, as to whether service out upon STAL and AIA Anguilla should be ordered and that of the third and fourth defendants, Mr. Wijsmuller and STL, as to whether or not a stay should be granted.

22 In *Spiliada Maritime Corp.* v. *Cansulex Ltd.* (7), Lord Goff of Chieveley referred to a passage from *Amin Rasheed Shipping Corp.* v. *Kuwait Ins. Co.* (1), where Lord Wilberforce expressed the principle behind the English equivalent of r.9 of the Service of Process (Jersey) Rules 1994 as follows ([1984] A.C. at 72):

> "The intention must be to impose upon the plaintiff the burden of showing good reasons why service of a writ, calling for appearance before an English court, should, in the circumstances, be permitted upon a foreign defendant. In considering this question the court must take into account the nature of the dispute, the legal and

> practical issues involved, such questions as local knowledge, availability of witnesses and their evidence and expense.

23 Lord Goff continued at ([1987] A.C. at 480–481):

> "I cannot help remarking upon the fact that when Lord Wilberforce came, at the end of the passage from his speech which I have quoted, to state the applicable principle, his statement of principle bears a marked resemblance to the principles applicable in forum non conveniens cases. It seems to me inevitable that the question in both groups of cases must be, at bottom, that expressed by Lord Kinnear in *Sim v. Robinow*, 19 R. 665, 668, viz. to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice. That being said, it is desirable to identify the distinctions between the two groups of cases. These, as I see it, are threefold. The first is that, as Lord Wilberforce indicated, in the Order 11 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 Order 11 cases the plaintiff is seeking to persuade the court to exercise its discretionary power to permit service on the defendant outside the jurisdiction. Statutory authority has specified the particular circumstances in which that power *may be* exercised, but leaves it to the court to decide whether to exercise its discretionary power in a particular case, while providing that leave shall not be

granted ‘unless it shall be made sufficiently to appear to the court that the case is a proper one for service out of the jurisdiction:’ see R.S.C., Ord. 11, r.4(2).

Third, it is at this point that special regard must be had for the fact stressed by Lord Diplock in the *Amin Rasheed* case [1984] A.C. 50, 65, that the jurisdiction exercised under Order 11 may be ‘exorbitant.’ This has long been the law. In *Société Générale de Paris v. Dreyfus Brothers* (1885) 29 Ch. D. 239, 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 L.J. in *The Hagen* [1908] P. 189, 201, and by Lord Simonds in your Lordships’ House in *Tyne Improvement*

Commissioners v. Armement Anversois S/A (The Brabo) [1949] A.C. 326, 350. The effect is, not merely that the burden of proof rests on the plaintiff to persuade the court that England is the 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.”

24 The court is looking at the two sides of the same coin. It is convenient therefore to examine the principles and the relevant considerations in relation to both parts of the summons, that is the first and second issues identified at para. 8 above, before applying them. All counsel were agreed that it was necessary, as laid down in *Gheewala* (3), to consider the separate position of each of the defendants.

25 Mr. Bender is resident in Costa Rica. He too originally issued a summons challenging the order granting leave to serve the Order of Justice upon him out of the jurisdiction, and/or seeking a stay on grounds of *forum non conveniens*. In breach of r.9, the summons was not supported by an affidavit. Under pressure from Mr. Koonmen to file the affidavit, Mr. Bender sought to withdraw his summons. On May 30th, 2002, the court gave leave to Mr. Bender to withdraw his summons and ordered him to pay Mr. Koonmen’s wasted costs. On June 10th, 2002, Mr. Bender served a further summons asking to be “joined to the hearing” of this summons so as to be heard (a) on the issue of *forum non conveniens* and to argue for a stay in favour of Anguilla; and (b) on the issue of the merits of Mr. Koonmen’s claim “insofar as they are relevant to the issues which the court is asked to decide in relation to the issues of forum *or otherwise*” [Emphasis supplied]. After argument, and eventually by consent, the court granted para. (a) but dismissed para. (b). We make no comment on this procedural history other than to observe that Mr. Bender is now to be treated as having consented to the jurisdiction, but as having the right to argue in favour of Anguilla as being the appropriate jurisdiction. Generally, Mr. Bender adopted the arguments of STAL with which we deal below, and argued that the central axis of dispute was the AEB Trust. The AEB Trust was an Anguillan trust governed by Anguillan law and the matter should be heard in Anguilla.

26 STAL is incorporated in Anguilla. Its directors are Mr. Brice, who is resident in Anguilla, and STL. It is a wholly-owned subsidiary of STL. Counsel for STAL submitted that the appropriate jurisdiction was Anguilla. STAL is the trustee of the AEB Trust, the proper law of which is Anguillan law. Counsel argued that the AEB Trust contained an exclusive jurisdiction clause and that, at the lowest, there was a presumption that the action should be heard in Anguilla. That submission was founded upon three provisions of the AEB Trust. Clause 1 is the interpretation clause. Sub-clause (1)(k) provides:

> "(k) 'the Proper Law' means the law to the exclusive jurisdiction of which the rights of all parties and the construction and effect of each and every provision of this settlement shall from time to time be subject and by which such rights, construction and effect shall be construed and regulated."

Under the heading "Proper Law," Clause 2 provides:

> "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 hereof."

27 Under the heading "Power to change Proper Law," Clause 14 provides (so far as material):

> "(1) The trustees may at any time during the trust period by deed declare that:
>
> (a) this settlement shall from the date of such declaration take effect in accordance with the law of some other state or territory in any part of the world (being a place under the law of which trusts are recognized and enforced); and
>
> (b) the forum for the administration thereof shall thenceforth be the courts of that state or territory.
>
> (2) As from the date of any such declaration the law of the state or territory named therein shall be the law applicable to this settlement and the courts hereof shall be the forum for the administration thereof but subject to any further exercise by the trustees of the power contained in sub-clause (1) hereof."

28 Counsel for STAL relied particularly upon the words "to the exclusive jurisdiction of which" *etc.* in Clause 1(1)(k), "which said Island [*i.e.* Anguilla] shall be the forum for the administration thereof" in Clause 2, and "the forum for the administration thereof shall thenceforth be the courts of that state or territory" in Clause 14(1)(b). Counsel for STAL conceded that there were ambiguities but argued that, taken in the context of the whole of the AEB Trust deed, these passages conferred exclusive jurisdiction upon the courts of Anguilla.

29 We cannot accept that submission. We take it as axiomatic that clear words are required to create an exclusive jurisdiction provision in a trust deed. The words relied upon by counsel for STAL are far from clear. The only reference to exclusivity is found in the definition of the "Proper

Law." The definition is not a model of good drafting. It is difficult to know what is meant by "the exclusive jurisdiction" of "the law." We note that the expert evidence of Mr. Courtney Abel, an Anguillan barrister, does not assert that the passages relied upon by counsel for STAL confer exclusive jurisdiction but only that they make "the court of Anguilla the forum of choice." We cannot interpret that definition, even when read with Clauses 2 and 14, as conferring exclusive jurisdiction upon the courts of Anguilla. In summary, STAL argues that Anguilla is the jurisdiction with which the action has the closest and most natural connection.

30 Mr. Wijsmuller is resident in Jersey and is accordingly subject to the jurisdiction of this court. He contends, however, that Anguilla is the appropriate jurisdiction and that he would be prepared to submit to the jurisdiction of the Anguillan court.

31 STL is incorporated in Jersey and is also subject to the jurisdiction of this court. Like Mr. Wijsmuller, STL argues that Anguilla is the appropriate jurisdiction and that it would be prepared to submit to the jurisdiction of the Anguillan court.

32 Neither AIA Cayman nor AIA BVI has appeared to contest the Greffier's order that it be served out of the jurisdiction. Both defendants are therefore deemed, by virtue of Royal Court Rules 1992, r.6/7A(8), as added by the Royal Court (Amendment No. 12) Rules 1997 to have submitted to the jurisdiction of the court. Neither defendant has appeared to argue the question of *forum conveniens.*

33 AIA Anguilla is a wholly-owned subsidiary of STAL. It is incorporated in Anguilla and contends that that territory is the appropriate jurisdiction for the hearing of the claims against it.

34 Intertrust Anguilla has neither appeared to contest the Greffier's order, nor to argue the question of *forum conveniens*. It is deemed, by virtue of r.6/7A(8) to have submitted to the jurisdiction of the court.

35 In summary, therefore, six of the eight defendants are either within the jurisdiction or are deemed to have submitted to the jurisdiction of the court. Five of the eight defendants argue that Anguilla is the appropriate jurisdiction for trial. Three of the defendants have not appeared and are neutral.

36 We remind ourselves of the *dictum* of Lord Wilberforce in *Amin Rasheed* (1) cited at para. 22 above. Lord Goff stated in *Spiliada* (7) that the relevant factors in the search for the appropriate jurisdiction ([1987] A.C. at 478)—

> ". . . include not only factors affecting convenience or expense (such as availability of witnesses), but also other factors such as the law

> governing the relevant transaction ... and the places where the parties respectively reside or carry on business."

The test is where "the case may be tried more suitably for the interests of all the parties and the ends of justice" (*ibid.*, at 476). The court looks for the most natural forum, namely that (*ibid.*) "with which the action has the most real and substantial connection."

37 The principal issues for determination in this case appear to us to be as follows:

(a) The existence of the Virginia agreement. This is said to be an oral agreement made between Mr. Bender and Mr. Koonmen in Virginia, and is, accordingly, subject to the law of that state. No-one suggests, however, that Virginia is the appropriate jurisdiction. Furthermore, there is no evidence before us denying the existence of the Virginia

agreement and, on the face of it, the evidence adduced on behalf of Mr. Koonmen is strong.

(b) The effect of the Virginia agreement upon the AEB Trust and the true nature of the AEB Trust. These issues will be determined by Anguillan law which is the proper law of the AEB Trust. However, the evidence suggests that the Anguillan law of trusts is not too dissimilar from either the English or the Jersey law of trusts. Indeed, the AEB Trust was drafted by a firm of Jersey lawyers.

(c) The conduct of STAL, STL and Mr. Wijsmuller. These issues may also be governed by Anguillan law but, as they are principally matters of fact, they should not pose any practical problems for this court.

38 We turn to the question of which jurisdiction the issues in this action have the most real and substantial connection. The following matters appear to us to be the most important.

(a) Six of the eight defendants are either within or have submitted to the jurisdiction. It is true that STAL and AIA Anguilla are incorporated and have their place of business in Anguilla. It seems clear from the evidence, however, that STAL is, at least in part, administered from Jersey. The fax coversheet exhibited to Mr. Wheeler's first affidavit is headed "Sinel Trust Anguilla Ltd., Administration Address: 79 Bath Street, St. Helier, Jersey, C.I." Moreover, Jersey telephone and fax numbers are given. AIA Anguilla is a subsidiary of STAL and seems to have no physical presence either in Anguilla or Jersey.

(b) Proceedings between Mr. Bender and Mr. Koonmen are afoot not only in Jersey and Anguilla but also in Japan and elsewhere. These proceedings are being coordinated and managed by lawyers in London and in Jersey. From the viewpoint of convenience, Jersey is relatively close to London whereas Anguilla is 4,500 miles away.

(c) A substantial part of the AEB Trust and the assets of AIA Anguilla are held in Jersey. About 70% of the underlying assets of the AEB Trust and a similar percentage of the funds of AIA Anguilla are held in Jersey.

(d) The principal witnesses, apart from Mr. Koonmen and Mr. Bender, neither of whom lives either in Jersey or Anguilla, are likely to be Mr. Sinel, Mr. Wijsmuller, Mr. Brice, Mr. Phillips (a senior employee of BET) and witnesses from Bedell Cristin who drafted the AEB Trust. There may be witnesses from Ireland. Mr. Sinel, Mr. Wijsmuller and the witnesses from Bedell Cristin are resident in Jersey, and Mr. Phillips is content to come to Jersey to give evidence. Mr. Brice is resident in Anguilla.

(e) It appears from the evidence that the principal architect of all the offshore arrangements put in place for Mr. Koonmen and Mr. Bender was Mr. Wijsmuller. He was originally the adviser to Mr. Bender and, on the evidence currently before the court, it was Mr. Bender who introduced Mr. Koonmen to Mr. Wijsmuller. When the time came to negotiate a division between Mr. Koonmen and Mr. Bender, it was Mr. Wijsmuller who conducted the negotiations on behalf of Mr. Bender. Later, in 2001, when the relationship between Mr. Koonmen and Mr. Bender deteriorated, the court has formed the impression that it was Mr. Wijsmuller and Mr. Sinel who were at the heart of the discussions with Mr. Koonmen's advisers. We do not say that Mr. Brice was uninvolved but we have formed the impression that the controlling players in the affairs of STAL were Mr. Sinel and Mr. Wijsmuller. Indeed, this should not be surprising given that they are the ultimate beneficial owners of STAL.

(f) The documentation required to be put in evidence is in both Jersey and Anguilla. The major part is probably in Jersey. There is also evidence on the computers of Mr. Koonmen

and Mr. Bender but, as with all electronic evidence, this can be brought with ease either to Jersey or to Anguilla. It is said that there is also documentation in Ireland. It may be marginally more convenient to bring that to Jersey than to Anguilla.

(g) Proceedings against Mr. Bender, AIA Cayman, AIA BVI and Intertrust Anguilla in Jersey have not been challenged by those parties and will, according to counsel for Mr. Koonmen, continue in any event. To duplicate proceedings by requiring Mr. Koonmen to bring an action in Anguilla against the Anguillan-based defendants, STL, and Mr. Wijsmuller would clearly involve all the parties in additional expense.

39 e have reached the firm conclusion that Mr. Koonmen has discharged the burden of showing that Jersey is clearly the appropriate forum for the trial of the action. In our judgment, all the above factors demonstrate clearly that the most real and substantial connection between this dispute and the issues for resolution is with Jersey and not with Anguilla. It is in the interests of justice that the action should be tried in

this jurisdiction. It follows that we are not satisfied that STL and Mr. Wijsmuller have established that the appropriate forum is Anguilla rather than Jersey so that a stay should be ordered.

40 Subject only to the conclusion reached at para. 17 above, for all the above reasons we dismissed the summons brought by the second, third, fourth and seventh defendants.

Order accordingly.