



**Popat v Popat et al**  
Royal Court  
23rd July, 2015

**JUDGMENT**  
**32/2015**

**Dispute between family members. Plaintiff's inter partes application for leave to serve outside the jurisdiction. Applications of the First and Third Defendants and the Fourth Defendant to set aside the ex parte orders made in respect of them.**

**Approved Text**  
**23.07.2015**

**IN THE ROYAL COURT OF GUERNSEY**  
**(ORDINARY DIVISION)**

**Between:** **ALNASHIR POPAT** **Plaintiff**

**-and-**

(1) **MR ADIL POPAT**  
(2) **MR AZIM POPAT**  
(3) **MRS GULZAR POPAT**  
(4) **SEAGRACE LIMITED**  
(5) **LOUVRE TRUST (GUERNSEY) LIMITED** **Defendants**

**Hearing date: 16<sup>th</sup> June 2015**

**Judgment handed down: 23<sup>rd</sup> July 2015**

**Before: Richard James McMahon, Esq., Deputy Bailiff**

**Advocate for the Plaintiff: Advocate A M Ozanne**  
**Advocate for the First & Third Defendant: Advocate A M Davidson**  
**Advocate for the Fourth Defendant: Advocate S H Davies**  
**The Second and Fifth Defendants did not appear**

**Cases & legislation referred to:**

Royal Court Civil Rules 2007  
*Carlyle Corporation Limited v Conway* (unreported, 22 July 2011)  
*ABCI v Banque Franco-Tunisienne* [2002] ILPr 31  
*Cobra Business Ventures Limited v Green Field Capital Limited* (unreported, 9 July 2012)  
*AK Investment CJSC v Kyrgyz Mobil Tel Limited* [2012] 1 WLR 1804  
*Carvill America Incorporated v Camperdown UK Ltd* [2005] EWCA Civ 645  
*The White Book* (The Civil Procedure Rules Practice Direction 6B)  
*The Trusts* (Guernsey) Law, 2007  
*The Brabo* [1949] AC 326  
*Massey v Heynes & Co* (1888) 21 QBD 330

## Introduction

1. This is a dispute between members of the Popat family. The Fifth Defendant, Louvre Trust (Guernsey) Limited, is a Guernsey-registered company. The Plaintiff's Cause alleges that the Fifth Defendant has had delegated to it the day-to-day administration of a trust holding part of the profits from the Popat family businesses. Those businesses began in the 1940s in Kenya and led to the incorporation in 1968 of Simba Motors Limited to enable the distribution of Mitsubishi motor cars. The businesses have been successful since that time and have developed into interests held in other countries as well. Through HM Sergeant, the Plaintiff has effected good service on the Fifth Defendant of the Summons commencing these proceedings dated 16 February 2015. The Fifth Defendant is represented by Collas Crill.
2. The First Defendant is the Plaintiff's younger brother. The Second Defendant is the Plaintiff's older brother. The businesses in question were initially established by the three brothers' father, Abdulkarim Chaturbhi Popat, together with their five uncles. Simba Motors Limited was owned by the six of them and a Madatali Premji. Their father died in 2013. The Third Defendant is their mother. The Fourth Defendant is a Gibraltar-registered company. The Plaintiff asserts that the sole function of the Fourth Defendant is to hold the part of the profits of the family businesses, which he alleges are held on trust and of which he and his two brothers are equal one-third beneficiaries.
3. The Cause pleads that the portion of the wealth generated by the family businesses and held on trust was held by the brothers' father until in 1996/1997 there was some settlement of the respective interests of the branches of the family amongst the father and his siblings. After that time, the assets were held by the brothers' father and the First Defendant. Following the death of their father, the Plaintiff alleges that the First Defendant has acted in breach of duty in a number of ways. He alleges that information sought by him has been denied because of the secretive manner in which the First Defendant has operated. He also alleges that the First Defendant has denied that the Plaintiff has any interest in the assets. The allegations against the Second to Fifth Defendants are not pleaded in negligence at this stage, but as them each giving knowing assistance to the First Plaintiff in the breach of the latter's duties. As an alternative, proprietary estoppel has been advanced. The Plaintiff claims that he would not have continued as managing director of Simba Colt Motors Limited up until 2007 had it been suggested that he would not enjoy his one-third share of the assets alleged to be held on trust. The relief sought includes a number of declarations in respect of the assets alleged to be held on trust, all necessary accounts and enquiries and an injunction against the Fourth and Fifth Defendants from dealing with the one-third share of the assets claimed by the Plaintiff. The Plaintiff also seeks an injunction against any of the First to Third Defendants from procuring or permitting the Fourth and Fifth Defendants to act in that manner and from dealing with the Plaintiff's share of the assets or dealing with the Popat Family Foundation, which is mentioned in paragraph 2 of the Schedule to the Cause.

## Service outside the jurisdiction

4. Given that the Fourth Defendant is a Gibraltarian corporation and the First, Second and Third Defendants are resident in Kenya, Canada and Kenya respectively, the Plaintiff made an Application pursuant to rules 8 and 9 of the Royal Court Civil Rules, 2007 dated 11 February 2015. The evidence in support of that Application was the First Affidavit of James Stott, sworn on 9 February 2015. That Application was heard in the usual way *ex parte* by the Bailiff on 13 February 2015. Advocate Alison Ozanne, who represents the Plaintiff, prepared a note of the short hearing. I have also seen an unofficial transcript of the hearing, which was also prepared by Advocate Ozanne's firm. From these documents, it is apparent that the

Bailiff had in mind the approach to such applications set out in his own leading judgment in *Carlyle Corporation Limited v Conway* (unreported, 22 July 2011) and addressed the three elements of the test for leave to serve outside the jurisdiction. The Bailiff commented that Guernsey appeared to be the proper forum for the action, at least at the stage of considering the matter *ex parte*. This was because the presence of the Fifth Defendant administering the trust implied that documentation, which was an element of the relief sought by the Plaintiff, was here in Guernsey. The Bailiff expressly noted that, if the other Defendants wished to challenge the matter *inter partes*, they could do so. After a discussion about the manner of service, an order granting leave to serve the First to Fourth Defendants by courier at the addresses given (and, in the cases of the First and Third Defendants, also at their lawyers in Nairobi) was made by him.

5. By Applications, both dated 2 April 2015, the First and Third Defendants, represented by Advocate Davidson, and the Fourth Defendant, represented by Advocate Davies, have applied to set aside the *ex parte* Order for service outside the jurisdiction. The Second Defendant has not challenged the order for service made in respect of him and has submitted to the jurisdiction. The Second Defendant is represented by Advocate Cole. Neither the Second nor the Fifth Defendant participated in the hearing of the other Defendants' Applications to set aside the order for service out.
6. The evidence in support of the First and Third Defendants' Application is contained in two Affidavits sworn by the First Defendant on 14 April and 11 May 2015. The evidence in support of the Fourth Defendant's Application is contained in two Affidavits sworn by Peter Thomson, a director of several companies within the Fiduciary Group in Gibraltar, on 17 April and 11 May 2015. Those companies are the sole director and the members of the Fourth Defendant. Mr Stott swore an Affidavit in reply on 24 April 2015 and the Plaintiff also relies on a further Affidavit sworn by Michael Rogers on 4 June 2015, which exhibits a single letter unearthed by the Plaintiff during a further search of the documents he has in his possession.

## The law

7. The Advocates are in broad agreement about the approach that the Court should take to the present Applications. The *inter partes* hearing looks at the original application for leave to serve out afresh. As the Bailiff explained in the *Carlyle* case (at para. 21):

*“At this hearing I have to consider afresh the Plaintiffs’ application for leave to serve the non-resident Defendants out of the jurisdiction. It is neither an appeal against, nor a review of, the decision of LB Talbot QC made at the ex parte hearing. The burden lies on the Plaintiffs to prove all the issues which determine whether permission should have been granted in the first place (Artley AG v Joint Stock Company Almazy Rossii-Sakha) (English Court of Appeal unreported 8<sup>th</sup> March 1995). As Hoffman J explained in ISC Technologies Limited v Guerin [1992] 2 Lloyds Rep 430 at p434:*

*“the question is therefore whether [the ex parte] order was rightly made at the time it was made” Of course the Court can receive evidence which was not before the master and subsequent events may throw light upon what should have been relevant considerations at the time. But I do not think that leave which was rightly given should be discharged simply because circumstances have changed. That would mean that different answers could be given, depending upon how long it took before the application came to be heard. The position is quite different when the application is for a stay on grounds of*

*forum non conveniens. In such a case, the appropriate time to consider the matter is the date of the hearing”.*”

8. The importance of the hearing being a *de novo* determination is that the original materials are those on which the Plaintiff must rely. Consequently, although there is a right of reply to the evidence and arguments of the Defendants challenging the original leave decision, the Plaintiff is unable to advance any new jurisdictional bases supporting his application (*ABCI v Banque Franco-Tunisienne* [2002] ILPr 31, at para. 45), without invoking the curative power of the court. This is particularly relevant to the so-called jurisdictional gateway element.
9. It is appropriate, therefore, to follow the same approach as was taken in the *Carlyle* case and adopted in *Cobra Business Ventures Limited v Green Field Capital Limited* (unreported, 9 July 2012). The starting point is rule 8 of the Royal Court Civil Rules, 2007, which provides:

- “(1) *The Court may give leave to effect service of a document out of the jurisdiction.*
- (2) *The Court shall not make an order under paragraph (1) unless satisfied (by affidavit or otherwise) that the matter to which the document relates-*
  - (a) *is properly justiciable before the Court, and*
  - (b) *is a proper one for service out of the jurisdiction.*
- (3) *An order of the Court under paragraph (1) shall state-*
  - (a) *the form, manner and time in which, and conditions subject to which, service is to be effected, and*
  - (b) *the minimum period which must elapse between the date of service and the date upon which the matter may be pursued.*
- (4) *Where the Court makes an order under paragraph (1), proof of service in accordance with the order shall be by affidavit or, where service was effected by the Sergeant, by the relation of the Sergeant.”*

10. Because there is no further guidance in the Rules as how to apply rule 8(2), this Court adopts the three-limbed test drawn from *AK Investment CJSC v Kyrgyz Mobil Tel Limited* [2012] 1 WLR 1804. Paragraph 71 of the judgment of the Judicial Committee of the Privy Council states:

*“On an application for permission to serve a foreign defendant (including an additional defendant to counterclaim) out of the jurisdiction, the claimant (or counterclaimant) has to satisfy three requirements: Seaconsar Far East Ltd. v Bank Markazi Jomhouri Islami Iran [1994] 1 AC 438, 453-457. First, the claimant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. Carvill America Inc. v Camperdown UK Ltd [2005] EWCA Civ 645, [2005] 2 Lloyd’s Rep 457, at [24]. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context “good arguable case” connotes that one side has a much better argument than the other: see Canada Trust Co v Stolzenburg (No. 2) [1998] 1 WLR 547, 555-7 per Waller LJ, *affd* [2002] 1 AC 1; Bols Distilleries BV v Superior Yacht Services [2006] UKPC 45, [2007] 1 WLR 12, [26]-[28]. Third, the claimant must satisfy the court that in all the circumstances the Isle of Man is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the*

*circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.”*

I will take each of these three limbs in turn.

## Discussion

### *Merits*

11. In determining whether there is a serious issue to be tried, as stated in the *AK Investments* case, there are obvious parallels with the test applied when summary judgment is sought. As noted by Clarke LJ in *Carvill America Incorporated v Camperdown UK Ltd* [2005] EWCA Civ 645, “*the test is not a high one*”. Despite this, Advocates Davidson and Davies invite me to conclude that, on the pleaded case and the evidence advanced on behalf of the Plaintiff in support, the prospects of the Plaintiff are no more than fanciful.
12. On behalf of the Plaintiff, Advocate Ozanne has summarised the essence of the Plaintiff’s claim as being a difficult family dispute which will require careful consideration of the evidence at trial. It is alleged that the First Defendant has been secretive in his dealings with the assets the Plaintiff says are held on trust and that the Fourth Defendant was incorporated to hold these assets. The Plaintiff alleges that the Fifth Defendant administers the affairs of the Fourth Defendant and so controls the trust assets, albeit that ultimately the First to Third Defendants control those assets. The Plaintiff’s claim is that he has been improperly sidelined from participation as a beneficiary in the family trust’s affairs.
13. In response, Advocate Davidson points out that the Plaintiff’s pleaded case really amounts to a claim that there are accounts and assets somewhere, but the Plaintiff does not know where they are or by whom they are held, and that there exists some unspecified express trust, or possibly even a constructive trust, which might be a Guernsey trust. Although the Fourth Defendant is regarded by the Plaintiff as the pivotal party, the evidence now shows that its link to Guernsey is the existence of a cash account of approximately £75,000 held here. The Plaintiff’s reliance of the existence of an earlier trust (the Almancil Settlement), which the Fifth Defendant ceased to administer in 1999 and which is apparently no longer in existence, is an indication of the problems the Plaintiff faces.
14. On behalf of the Fourth Defendant, Advocate Davies has drawn attention to the evidence from Mr Thomson that, despite the assertion by Mr Stott that there are reasonable prospects of success, there is confirmation that the assets to which the Plaintiff has referred have not been owned by the Fourth Defendant. He submits that the evidence in the two Affidavits of Mr Stott is woefully short and inadequate, which is perhaps symptomatic of a poorly particularised and speculative claim on the part of the Plaintiff.
15. The First Affidavit of Mr Stott in support of the Plaintiff’s application does little more than confirm that the Plaintiff has told him that the pleaded case is accurate. I do not regard the absence of any direct evidence from the Plaintiff as affecting my assessment of whether the merits test has been satisfied. As is noted at para. 6.37.6 of the commentary in *The White Book*, it is not unusual for applications for leave to serve outside the jurisdiction to be determined on evidence given by one of the lawyers instructed. However, Mr Stott’s Second Affidavit, responding to the evidence of others, goes into more detail, although not directly about the matters said to be in dispute and the prospects of success. It does also exhibit a letter dated 17 April 2015 from Collas Crill, who represent the Fifth Defendant, explaining the review of the files undertaken, which confirmed that the Fifth Defendant “*nor any associated or group companies provides, or has in the past provided services to Seagrace*

*Limited*”. That letter further explains that Louvre Trustees Limited, being a wholly owned subsidiary of the Fifth Defendant, had been the trustee of a different Popat family trust (the Almancil Settlement) prior to the termination of that settlement.

16. Some details about the Fourth Defendant are set out elsewhere in the evidence. The share register of the Fourth Defendant was exhibited to Mr Thomson’s First Affidavit. The current members are Fiduciary Trust Limited, holding 999 shares, and Fiduciary Nominees Limited, holding just 1 share. These shareholdings were acquired on 6 March 1989. Previously, Dominus Management Limited and Dominus Nominees Limited held 500 shares each. It appears that these 1,000 shares were placed into trust at around that time. A memorandum of wishes dated 16 March 1989, apparently signed by the First Defendant, indicates as much and asks that he and his two brothers should be regarded as equal beneficiaries of that particular trust. Mr Thomson further deposes to the fact that he cannot locate any trust deed in relation to this purported settlement affecting the shares in Seagrace Limited. The First Defendant’s Second Affidavit then clarifies that this memorandum of wishes relates to a trust in Gibraltar, which was never administered in and does not have any connection with Guernsey.
17. In his First Affidavit, the First Defendant refers to a dispute between the Plaintiff and their father that was resolved in 2007 and that “*this would constitute a clean break from the family*”. He refers to a series of written agreements, but does not exhibit copies of them. The letter exhibited to Mr Rogers’ Affidavit is undated but appears to be signed by the First Defendant. It is on the Fourth Defendant’s Seagrace Limited headed paper, showing that there was a representative office at 87 Gloucester Place in London. The contents deal with Munira’s account and AmEx expenses. I understand that Munira is the Plaintiff’s wife. I believe there is also passing reference in the letter to the Plaintiff’s two children. Because of the uncertainty as to when this document was sent, or even why it was sent, it is difficult to know what to make of it. The London address is one of the properties said by the Plaintiff to have been an investment made with monies paid into the offshore accounts he alleges form the basis of the trust in respect of which he now makes his claim.
18. In the light of all this evidence, I take the view that there has been, and quite possibly still is, an undercurrent of dispute between members of the Popat family. The pleaded case, which I take at face value, is just adequate to put this dispute into play. When considering whether the Plaintiff has satisfied the merits element of the three-limbed test, it is important to remember that the Court is considering the action brought against each of the foreign defendants separately. In effect, the application for leave to serve out of the jurisdiction is a combination of applications in respect of each Defendant against which it is sought to bring the proceedings. Although the First Defendant (and so the other Defendants) may have a complete answer to the Plaintiff’s case, from the evidence adduced, especially acknowledging that it is not the right time to descend into resolving factual dispute more appropriate for a trial, I cannot conclude that the Plaintiff has no, or only a fanciful, prospect of success against the First Defendant. Similarly, because of the allegation that the Fourth Defendant is involved in the alleged trust arrangements, the merits element of the case against it is also, in my view, satisfied. This is not a particularly high threshold for the Plaintiff to surmount.
19. I would potentially have had more difficulty in relation to the Third Defendant. It is not suggested by the Plaintiff that his mother is a beneficiary of the trust he claims exists or that she has ever been. Instead, all that is said is that she will assist the First Defendant in his breaches of duty, although there is no real indication from the evidence as to how it is envisaged that this will happen. Paragraph 15.2 of the Cause refers to the Third Defendant having refused through her Kenyan lawyers to provide the information sought by the Plaintiff. That correspondence has not been put into evidence by Mr Stott so I am unable to form a

view as to whether this was a justified stance or not for the Third Defendant’s lawyers to take. Accordingly, looking at her position in isolation, which is how I consider the Court must, for my own part I would not have been persuaded that the Plaintiff had satisfied the merits test. However, even though I pressed Advocate Davidson on this point, he did not wish to distinguish between the positions of the First and the Third Defendant, so I will do no more than express what my view would have been if the two cases had been advanced differently.

20. Although I have given the first limb of the test more attention because of the additional evidence before me than was before the Bailiff *ex parte*, I have reached the same conclusion as he did, namely that the Plaintiff’s case that there is a trust where the First Defendant is not telling the Plaintiff what the latter says he is entitled to know and where monies may have been misappropriated is sufficient to meet the merits test.

*Jurisdictional gateway*

21. Turning to the second limb of the test, Advocate Ozanne’s original Skeleton Argument drew attention to the Civil Procedure Rules Practice Direction 6B, which is used by this Court as the guidance to follow in this regard, and she relied on paragraph 3.1(1), 3.1(2), 3.1(3) and 3.1(12):

“**3.1** *The claimant may serve a claim form out of the jurisdiction with the permission of the court under rule 6.36 where-*

*General grounds*

- (1) *A claim is made for a remedy against a person domiciled within the jurisdiction.*
- (2) *A claim is made for an injunction ordering the defendant to do or to refrain from doing an act within the jurisdiction.*
- (3) *A Claim is made against a person (“the defendant”) on whom the claim form has been or will be served (otherwise than in reliance on this paragraph) and-*
  - (a) *there is between the claimant and the defendant a real issue which it is reasonable for the court to try; and*
  - (b) *the claimant wishes to serve the claim form on another person who is a necessary or proper party to the claim. ...*

*Claims about trusts etc.*

- (12) *A claim is made for any remedy which might be obtained in proceedings to execute the trusts of a written instrument where-*
  - (a) *the trusts ought to be executed according to English law; and*
  - (b) *the person on whom the claim form is to be served is a trustee of the trusts.”*

At the hearing before the Bailiff, Advocate Ozanne also drew attention to section 4 of the Trusts (Guernsey) Law, 2007. In her Skeleton Argument, this was raised under the heading relating to the third limb of the test relating to the appropriate forum. This was regarded by the Bailiff as a strong argument in favour of granting leave to serve outside the jurisdiction.

22. When she began her oral submissions, Advocate Ozanne also referred to paragraph 3.1(15) and 3.1(16) as providing jurisdictional gateways on which the Plaintiff could rely:

“(15) A claim is made for a remedy against the defendant as constructive trustee where the defendant’s alleged liability arises out of acts committed within the jurisdiction.

(16) A claim is made for restitution where the defendant’s liability arises out of acts committed within the jurisdiction.”

Of course, to do so potentially falls foul of the principle derived from *ABCI v Banque Franco-Tunisienne* (*supra*). However, in any event, the purported reliance on either of these jurisdictional gateways is, in my view, misplaced because the Plaintiff has not pleaded a case that any of the foreign Defendants against which he wishes to institute these proceedings has committed any act within the jurisdiction of the Court. The only way that both of these gateways can be read is if there is some obvious connection to something done within the jurisdiction of this Court by the person in respect of whom leave to serve out is being sought. It is not enough to say that someone else has done something within the jurisdiction. That is more the basis on which leave pursuant to sub-paragraph (3) might be sought. Accordingly, I have not considered further either of these jurisdictional bases, because, in any event, I am satisfied that they do not assist the Plaintiff.

23. Although Advocate Ozanne had advanced sub-paragraph (2) before the Bailiff *ex parte*, the Bailiff was not minded to give leave to serve outside the jurisdiction on the basis of this gateway. He seemed to regard the prayer for injunctive relief as being something that might have been included so as to found jurisdiction and was not persuaded that it would do so. Advocate Ozanne has referred to the commentary in *The White Book* at para. 6.37.27 as supporting her contention that this gateway is made out because the injunctions sought are part of the package of substantive relief the Plaintiff wishes to obtain. Once again, I take the view that the reference to the defendant being ordered to do or to refrain from doing an act within the jurisdiction shows that this gateway is narrower than it would be if it were simply referring to seeking an injunction. It must be the particular Defendant in respect of whom leave to serve outside the jurisdiction is sought who must be the subject of the injunction. In respect of the Fourth Defendant, what is sought is an injunction restraining it (and/or the Fifth Defendant) dealing with the Plaintiff’s one-third share of the alleged trust assets. In relation to the First and the Third Defendants, the injunction is to restrain them from procuring the Fourth and/or Fifth Defendant so to act and also from dealing with the Plaintiff’s one-third share and also dealing with the Popat Family Foundation (although quite how that links to the remainder of the pleading claim is not clear to me). This relief is not, therefore, directed to acts within the jurisdiction of this Court. Accordingly, as was the case with the Bailiff, I am not persuaded that there is a good arguable case that sub-paragraph (2) offers an acceptable jurisdictional gateway on which the Plaintiff can rely.

24. It is common ground that none of the First, Third or Fourth Defendants is domiciled in Guernsey. I do not read sub-paragraph (1) as meaning that as long as the Plaintiff brings proceedings against someone domiciled in Guernsey (eg, the Fifth Defendant, which is a Guernsey-registered company) this means that the jurisdictional gateway in respect of all other prospective defendants has been opened. If that were the case, sub-paragraph (3) would be unnecessary. Instead, I read it as meaning that the person in respect of whom leave to serve out is sought is domiciled here, but not present within the jurisdiction to be able to effect service through HM Sergeant in the normal manner. For example, if an individual is domiciled in Guernsey but resident elsewhere, the Court will not agonise any further over the jurisdictional gateway because the evidence shows the Court can take jurisdiction over that

person through domicile. However, that is not the case here and so sub-paragraph (1) cannot be relied on by the Plaintiff.

25. Sub-paragraph (3) covers the position where there are going to be (or already are) proceedings before the Court because a defendant can be served as of right. This does not extend to a defendant in respect of whom leave to serve out of the jurisdiction is required. In the present case, because the Fifth Defendant has been validly served at its registered office, sub-paragraph (3) is engaged. It would not be engaged if proceedings had not been commenced against the Fifth Defendant and the application in respect of, say, the Third Defendant were said to be dependent on obtaining leave to serve the First Defendant. The principles of sub-paragraph (3)(b) seem to me to reflect the test for the addition of a party to proceedings found in rule 37(1)(b) of the 2007 Rules. However, the Plaintiff must first satisfy sub-paragraph (3)(a).
26. The Fifth Defendant must be shown to be a real party rather than a token party. The Plaintiff must establish that there is between him and the Fifth Defendant “*a real issue which it is reasonable for the court to try*”. Advocate Davies has referred to how this issue was dealt with in the AK Investments case (at para. 73), which was cited with approval at para. 23 of the Carlyle judgment:

*“The necessary or property party head of jurisdiction is anomalous, in that, by contrast with the other heads, it is not founded upon any territorial connection between the claim, the subject matter of the relevant action and the jurisdiction of the English court: The Brabo [1949] AC 326, 338, per Lord Porter. Pigott, Foreign Judgments and Jurisdiction (3<sup>rd</sup> ed, 1910), pt III, p 238, said: “This is perhaps the most important of the sub-rules, for it throws the net of jurisdiction over a wider area; and the principle of considering the nature of the cause of action which pervades the whole subject, appears here to be ignored.” Consequently as Lloyd LJ said in The Goldean Mariner [1990] 2 Lloyd’s Rep 215 at 222:*

*“I agree ... that caution must always be exercised in bringing foreign defendants within our jurisdiction under O.11 r.1(1)(c). It must never become the practice to bring foreign defendants here as a matter of course, on the ground that the only alternative requires more than one suit in more than one different jurisdiction.”*”

Having set the tone in that passage, I note that Lord Collins then proceeded to set out a number of other considerations. The first is the motive in suing the defendant served as of right, to whom he referred as “*the anchor defendant*”. He concluded (at para. 79) that, if the anchor defendant is being sued only for the purpose of bringing in the foreign defendants, it “*is a factor in the exercise of the discretion and is not an element in the question whether the action is “properly brought” against [the anchor defendant], provided that there is a viable claim against [the anchor defendant]*”. In that regard, His Lordship referred to the principle that an action is not properly brought against the anchor defendant if it is bound to fail (see The Brabo [1949] AC 326). Another question to address as to whether the foreign defendant is a proper party is by asking whether, if both had been within the jurisdiction, they would both have been proper parties to the action (see Massey v Heynes & Co (1888) 21 QBD 330).

27. The difficulty for the Plaintiff is that the Fifth Defendant has been included in his action because of the allegation in para. 11 of the Cause:

*“Seagrace has delegated the day to day administration of its affairs and control of the Offshore Wealth to Louvre who since 2013 act on the instructions given by or on behalf of Adil, Azim and/or Gulzar.”*

However, on the Plaintiff’s own evidence (ie, the letter from Collas Crill exhibited by Mr Stott) this assertion has been shown to be flawed. Further the Plaintiff has been unable to advance any evidence that shows that there is a real issue to be determined between the Plaintiff and the Fifth Defendant. The real issues in the present case are between the Plaintiff and the First Defendant and possibly between the Plaintiff and the Fourth Defendant. The other Defendants may to a greater or lesser degree be proper parties to the issues raised in both of those cases, but that is not the approach that sub-paragraph (3) permits. Advocate Ozanne has described the Fourth Defendant as “*pivotal*”, which rather implies that this is the Defendant who is being regarded as the anchor defendant. However, as I have just explained, that is not how this jurisdictional gateway works.

28. For these reasons, when I start solely with the Fifth Defendant, as I must do for those purposes, and consider the Plaintiff’s action against it, I query whether there is a real issue to be tried between them that it is reasonable for this Court to try. From all the evidence before me, it seems as though the Plaintiff will not be able to prove that there is anything relevant with which the Fifth Defendant can assist. Advocate Ozanne has referred to the contents of the Collas Crill letter as showing that the Fifth Defendant was the trustee of another settlement of the Popat family, but the trustee of the Almancil Settlement was a different entity within the Louvre group of companies. In my view, the Plaintiff has failed to discharge his burden of establishing that sub-paragraph (3)(a) applies. Had he done so, I would have made a similar comment about the position of the Third Defendant as distinct from the position of the First Defendant and the Fourth Defendant, both of whom would, in my view, have been shown to be proper parties to be convened to the action.
29. None of this really matters, though, because section 4(1) of the Trusts (Guernsey) Law, 2007 assists. This subsection provides:

*“The Royal Court sitting as an Ordinary Court (“the Royal Court”) has jurisdiction in respect of–*

- (a) a Guernsey trust, and*
- (b) any other trust –*
  - (i) a trustee of which is resident in Guernsey,*
  - (ii) any property of which is situated or administered in Guernsey, or*
  - (iii) the terms of which provide that the Royal Court is to have jurisdiction.”*

Because the Court, along with everyone else, is bound by the terms of this domestic primary legislation, I take the view that this is an area where the jurisdictional gateways in the CPR PD6B on trusts are overridden by this jurisdictional provision. Accordingly, rather than looking at the application in the light of sub-paragraph (12), which was relied on by Advocate Ozanne, I prefer to look simply at section 4(1) of the 2007 Law. If this section confers jurisdiction on the Court, then clearly the Plaintiff has established the requisite jurisdictional gateway, ie, the second limb of the test in the *AK Investments* case.

30. Although the Plaintiff has not excluded the possibility that the trust of which he claims to be a beneficiary is a Guernsey trust, I do not consider that he has adduced sufficient evidence that this is the case for section 4(1)(a) to apply. Instead, he relies on section 4(1)(b)(ii). Before the Bailiff, the bare pleaded case pointed towards the administration of the alleged trust being in Guernsey through the Fifth Defendant. That is no longer the primary basis on which the Plaintiff relies. However, there is now the admission in Mr Thomson’s First Affidavit that the Fourth Defendant holds a small amount of cash on deposit in Guernsey (about £75,000) for

the purposes of administration of the company. Had Mr Thomson wished to be more expansive about whether this money is part of the Fourth Defendant’s own monies or exists for some purpose other than the alleged trust advanced by the Plaintiff, he could have done so, but he has not. Accordingly, the current state of the Plaintiff’s case is that he asserts that the Fourth Defendant was incorporated to hold the funds that he alleges form the trust assets and that this is “*its sole function*” (para. 10 of the Cause) and there is now confirmation that this amount of the Fourth Defendant’s monies are to be found in Guernsey. In those circumstances, I am satisfied that, for the purposes of establishing this Court’s jurisdiction, the Plaintiff has brought his action within section 4(1)(b)(ii) of the 2007 Law because he has a better argument than the Defendants on this issue. He has satisfied the second limb of the test.

*Appropriate forum*

31. The final limb of the test is for the Plaintiff to demonstrate that Guernsey is clearly and distinctly the appropriate forum. This was the limb that was the most contentious before the Bailiff and remained so *inter partes*. In doing so, Advocate Ozanne has referred to the commentary in *The White Book* (at para. 6.37.15.4:

*“Subject to the differences set out below, the criteria that govern the application of the principle of forum conveniens where permission is sought to serve out of the jurisdiction are the same as those that govern the application of the principle of forum non conveniens where a stay is sought in respect of proceedings started within the jurisdiction. Those criteria are set out in The Spiliada, above:*

- (i) *The burden is upon the claimant to persuade the court that England is clearly the appropriate forum for the trial of the action.*
- (ii) *The appropriate forum is that forum where the case may most suitably be tried for the interests of all the parties and the ends of justice.*
- (iii) *One must consider what is the “natural forum”; namely that with which the action has the most real and substantial connection. Connecting factors will include not only factors concerning convenience and expense (such as the availability of witnesses), but also factors such as the law governing the relevant transaction and the places where the parties reside and respectively carry on business.*
- (iv) *In considering where the case can be tried most “suitably for the interests of all the parties and the ends of justice” ordinary English procedural advantages such as a power to award interest, are normally irrelevant as are more generous English limitation periods where the claimant has failed to act prudently in respect of a shorter limitation period elsewhere.*
- (v) *If the court concludes at that stage that there is another forum which is apparently as suitable or more suitable than England, it will normally refuse permission unless there are circumstances by reason of which justice requires that permission should nevertheless be granted. In this inquiry the court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdictions. One such factor can be the fact, if established objectively by cogent evidence, that the claimant will not obtain justice in the foreign jurisdiction. Other factors include the absence of legal aid or the ability to obtain contribution in the foreign jurisdiction.*
- (vi) *Where a party seeks to establish the existence of a matter that will assist them in persuading the court to exercise its discretion in their favour, the evidential burden in respect of that matter will rest upon the party asserting it.”*

32. In support of this limb, Advocate Ozanne originally relied on the Fifth Defendant's administration of the Fourth Defendant and the fact that it will hold a wealth of information relating to the assets, both of which have now been shown not to be the case, the possibility that Guernsey law is the proper law of the alleged trust, which I somehow doubt, that section 4 of the 2007 Law confers jurisdiction on this Court, that there is no more appropriate court or jurisdiction to deal with matters and that for the eventual relief to be meaningful Guernsey is most likely to provide it. In her reply Skeleton Argument, Advocate Ozanne has added that Louvre was involved with the Almancil Settlement, but that was not, it seems, the Fifth Defendant but another entity, the Second Defendant has submitted to the jurisdiction, which is not, in my view relevant to whether it is the appropriate forum for a dispute involving any of the other Defendants challenging jurisdiction, and that the First and Third Defendants have not offered any alternative jurisdiction and concerns that instituting proceedings in Gibraltar may not be effective because the Fourth Defendant has not been particularly forthcoming here. There is also reference to the evidence showing a long and established connection with Guernsey.
33. In response, Advocate Davidson again draws attention to the way the Plaintiff's case was put that the link between the pivotal Fourth Defendant and the Fifth Defendant satisfies the required Guernsey connection, whereas the evidence no longer supports such a link. Both he and Advocate Davies present positive cases that Gibraltar is the more suitable forum. Further, Advocate Davies submitted that if the jurisdictional link is the Fourth Defendant's monies deposited in Guernsey, the Plaintiff's pleaded case is that the First Defendant and not the Fourth Defendant is the alleged trustee of the trust of which the Plaintiff claims to be a beneficiary, which is another factor pointing away from Guernsey and towards Gibraltar.
34. I remind myself that the primary burden rests on the Plaintiff and not the Defendants to satisfy the Court as to the appropriate forum for the trial of this case. The evidence in support of the *ex parte* application on this issue was, I think, rather thin. The commentary in para. 6.37.6 of *The White Book*, referring to *ABCI v Banque Franco-Tunisienne* (*supra*), suggests that the position in England and Wales is that the applicant has an obligation to bring to the attention of the court "*any matter which, if the other party were represented, that party would wish the court to be aware of*". By this time an *inter partes* hearing occurs, any default on the applicant's part should, of course, be demonstrated by the respondent putting before the Court material that he wishes to be considered. In the present case, I am satisfied that there are relevant factors that should have been put before the Bailiff by the Plaintiff. However, this is not an appeal from or a review of the *ex parte* order granted, so all I can properly do is to consider afresh whether the Plaintiff has satisfied me that Guernsey is clearly and distinctly the appropriate forum.
35. Having considered all the evidence, I still feel that there is more background information about the Popat family's affairs that should have been provided by the Plaintiff. No one has really explained why it is said that matters in 2007 may have resolved matters between the Plaintiff and his father or, in the Plaintiff's case, why this is not relevant. In my view, it was incumbent on the Plaintiff from the outset to have provided more detail about any dealings he has had involving Guernsey. It is not sufficient for him to have asserted that the Fifth Defendant has been administering the Fourth Defendant without actually putting in anything known to him to support that assertion. The content of the subsequent letter from Collas Crill perhaps could and should have been known before proceedings were commenced. I wonder why the Plaintiff, through his Advocates, had not at least invited either of these Defendants to comment on the link between them he has alleged. In any event, the pleaded case is that the First Defendant is the trustee and there does not appear to be any link between the First Defendant and Guernsey that has been put forward. All the Plaintiff has done is to produce a

handful of documents, most of which are from quite some time ago, showing some peripheral links to Guernsey.

36. At the time of the *ex parte* hearing, the Plaintiff's belief was that there would be documentation held by the Fifth Defendant in Guernsey which provided a clear link to this Court being the appropriate place for the trial. This was obviously a key factor in the Bailiff's decision. However, the link to Guernsey has shifted quite considerably now. It seems most unlikely that anyone currently in Guernsey will have much to offer at trial. Accordingly, the bulk of the witnesses to be called will be from elsewhere, particularly from Gibraltar. Having regard to everyone's convenience and expense, these factors point away from holding a trial in Guernsey. In my view, Guernsey is not the natural forum for this dispute. Indeed, the arrangements the Popat family appear to have had historically, has pointed more towards Gibraltar than Guernsey throughout. I think the Plaintiff did not make this as clear as he should have done from the outset. I have, therefore, reached the conclusion that there is another forum which is more suitable than Guernsey, or at worst as suitable as Guernsey. I have not been persuaded by Advocate Ozanne that there are any reasons of justice that require that leave to serve outside the jurisdiction should be granted. I am aware that the courts in Gibraltar will approach any action instituted there in much the same way as this Court would, so there is no risk of injustice to anyone were the action to be tried there.
37. Because the Plaintiff has failed to discharge the burden he bears in relation to the third limb of the test, I am satisfied that the Applications of the First and Third Defendants and the Fourth Defendant to set aside the *ex parte* orders made in respect of them should be granted.

#### *Discretion*

38. If I am wrong to conclude that the Plaintiff has failed to satisfy me that the third limb of the test derived from the *AK Investments* case, I would still have been minded to grant the Applications to set aside through the exercise of the Court's discretion to refuse leave to serve outside the jurisdiction. I have already referred to para. 79 of the judgment of Lord Collins in the *AK Investments* case about the way in which using an anchor defendant to bring foreign defendants before the court can impact on the way in which the Court's discretion might be exercised. The Plaintiff's case must, I think, involve more than a one-third share of £75,000. The principal assets of the trust he alleges he benefits from must, therefore, be somewhere else. Because his case is that the Fourth Defendant is pivotal, I struggle to understand why he is relying on the Fifth Defendant as the anchor defendant rather than commencing proceedings in Gibraltar and arguing similarly there. As I have indicated, I do not understand why there had not been correspondence with the Fifth Defendant, or the Fourth Defendant, before commencing these proceedings. Paragraph 15 of the Cause refers to correspondence passing between his English solicitors and the Kenyan lawyers of the First and Third Defendants, but this has not been provided to the Court in support of the application for leave to serve outside the jurisdiction. The Plaintiff should, in my view, have been more forthcoming as to why he wishes to rely on section 4 of the 2007 Law in these circumstances. Because he has left some areas unanswered, I would have refused his application for this reason.

#### **Conclusion**

39. As a result of reviewing all the evidence placed before the Court on this *inter partes* application for leave to serve outside the jurisdiction, I am persuaded that the Applications to set aside the *ex parte* order as against the First and Third Defendants and the Fourth Defendant should be granted. This outcome arises because I am not satisfied that the Plaintiff has demonstrated that Guernsey is clearly and distinctly the appropriate forum.

Consequently, the Plaintiff's case against these Defendants is not, in my judgment, properly justiciable before the Court and not a proper one for service out of the jurisdiction. As I have indicated, I would have been minded to set aside the order against the Third Defendant in any event for other reasons, had they been advanced on her behalf by Advocate Davidson.

40. Both Applications also seek costs orders. I imagine that the parties will agree that costs should follow the event in the normal way. If so, that is the order I make. However, if any party wishes to seek any variation on that default order, they should indicate as much to the other parties concerned and the Greffe within 14 days of the handing down of this judgment and list the matter before a suitable Interlocutory Court in due course.