

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

Common Law and Equity Division

2017/CLE/gen/00777

IN THE MATTER of the Deed of Settlement dated the 26th May, 2005 and designated as the A.B. Insurance Trust Settlement

AND IN THE MATTER of Section 48 of the Trustee Act 1998 (Chapter 176 Revised Statute Laws of The Bahamas 2000)

BETWEEN

ANN MAXINE PATTON

Plaintiff

AND

**ALVAREZ, JIMENEZ, DE PASS, S.A. A/K/A
ALVAREZ AGUILAR ABOGADOS ASOCIADOS, S.A.**

(in its capacity as the Trustee of the A.B. Insurance Trust Settlement)

First Defendant

AND

JAMES ALFRED WALKER JR.

(in his capacity as the Protector of the A.B. Insurance Trust Settlement)

Second Defendant

Before: The Honourable Madam Justice Indra H. Charles

Appearances: Mr. Sean Moree and Mrs. Vanessa L. Smith of McKinney, Bancroft & Hughes for the Plaintiff
Mr. Marco Turnquest and Ms. Chizelle Cargill of Lennox Paton for the Second Defendant
First Defendant served but has not entered an appearance

Hearing Date: 13 June 2019

Trust - Trust established in this Jurisdiction – Trustee moved to another jurisdiction – Did governing law remain Bahamian Law – Burden on Plaintiff to establish that court has jurisdiction – Burden shifts to Defendant challenging jurisdiction – Credibility of witnesses – Governing law of trust is Bahamian law – Court has jurisdiction under section 79A (1)(a) of Trustee (Amendment) Act, 2011

Service out of the jurisdiction – No leave to serve out – Order 11 rule (1)(2) and Order 12 rule 7(1) of the Rules of the Supreme Court, 1978 considered – Alleged procedural irregularities

The Settlor established a Discretionary Trust (“the Settlement”) in The Bahamas in 2005. Initially, the Trustee was a Bahamian Corporation and the governing law of the Settlement was the law of The Bahamas. In or about 2006, the Settlor moved the trusteeship to Costa Rica. The issue before the Court was whether the governing law also moved to that jurisdiction. The Second Defendant (“the Protector”) alleged that, as Protector, and in accordance with the wishes of the Settlor, he changed the governing law to Costa Rican law when the trusteeship moved to Costa Rica. In support of his allegation, the Protector relied on his own account and that of a witness who worked at the previous trustee’s corporation. He also relied on an unexecuted document entitled “Acceptance of Successor Trustee Appointment: The A.B. Trust Settlement”. The First Defendant (“the Trustee”) was served but did not enter an appearance.

The Settlor died in 2010. The Plaintiff, his wife, was tried for his murder but acquitted on three occasions. She now faces a fourth trial.

The Plaintiff filed an Amended Originating Summons seeking the removal of the Trustee and the Protector. Before that application could have gotten off the ground, the Protector filed two applications (“the application”). The application challenges the jurisdiction of the Court and seeks an order to set aside service on him because of the fact that leave was not obtained to serve out of the jurisdiction and alleged procedural irregularities.

The Plaintiff alleged that the governing law of the Settlement is the law of The Bahamas as provided for in the Settlement itself. Her position is fortified by the opinions which the Trustee sought in 2010 from a renowned Queen's Counsel in this jurisdiction as well as from a law firm in Miami, Florida. The Plaintiff alleged that it is strange for the Trustee to seek these opinions in 2010 (shortly after the death of the Settlor) if the governing law was not Bahamian Law.

HELD: Finding that the governing law of the Trust is the Law of The Bahamas, the Second Defendant’s application is dismissed with Costs to the Plaintiff in the sum of \$25,000.00.

1. The Court did not find the Protector and his witness to be credible and rejected their evidence. In the circumstances, the documentary evidence before the Court prevails. The governing law of the Settlement was and remains the law of The Bahamas.
2. In accordance with section 79A(1)(a) of the Trustee (Amendment) Act, 2011, the Court has jurisdiction to hear and determine any claim relating to the Settlement. Leave to serve out is not required: **RTL v ALD and others** [2014] 3 BHS J. No. 83 relied upon. Order 12 rule 7 of the Rules of the Supreme Court does not apply.
3. With respect to service, it appears to be accepted that if the Court finds that the governing law of the Settlement is the law of The Bahamas, then leave to serve out is not necessary. In the circumstances, the Court finds that both Defendants were properly served. The

Protector is in possession of all documents. He has also retained Counsel within the jurisdiction who also has all of the documents. If there are any procedural irregularities (which was not found), those could be corrected. The Court is reminded that “[I]n the pursuit of justice, procedure is a servant and not a master: Lord Collins in **Texan Management Limited v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 at paragraph 1.

RULING

Charles J:

Introduction

[1] Pursuant to Order 12 rule 7 of the Rules of the Supreme Court, 1978 (“RSC”), the Second Defendant (“Mr. Walker”) seeks an order that service of the Amended Originating Summons on him be set aside on two discrete grounds namely:

1. The Court does not have jurisdiction over him and the A.B. Insurance Trust Settlement (“the Settlement”) since the governing law was changed to Costa Rican law and there is no basis to assume jurisdiction pursuant to section 79A of the Trustee (Amendment) Act, 2011 and;
2. Service of the Amended Originating Summons with the supporting affidavits was irregular.

Procedural history

[2] On 23 June 2017, the Plaintiff (“Mrs. Patton”) filed an Originating Summons with supporting affidavits seeking the following:

1. An Order that the First Defendant (“AJD”) be removed as Trustee of the Settlement and for Peter James DeLisi (“Mr. DeLisi”) to be appointed as successor Trustee of the Settlement and;
2. That the Second Defendant (“Mr. Walker”) be removed as Protector of the Settlement and for John Michael Koonmen (“Mr. Koonmen”) to be appointed as successor Protector of the Settlement.

- [3] An Amended Originating Summons was filed on 27 June 2017 changing Mr. Walker's address from Costa Rica to Puerto Rico ("Amended Originating Summons").
- [4] On 6 August 2017, Fernando Alonso Castro Esquivel, a notary public of San José, Costa Rica, served Juan De Dios Alvarez Aguillar ("Mr. Alvarez") personally as a representative of AJD with the Amended Originating Summons and the supporting affidavits of Mr. DeLisi and Mrs. Patton.
- [5] The Amended Originating Summons and supporting affidavits were served on Mr. Walker on 25 October 2017 at 1837 Covey Rise Farm Road, Sparta, Georgia, USA by Mr. DeLisi.
- [6] By Summonses filed on 8 November 2017 and 31 October 2018 respectively (together "the application"), Mr. Walker seeks the following:
1. An Order pursuant to Order 12 rule 7 of the Rules of the Supreme Court 1978 ("RSC") setting aside service of the Amended Originating Summons and all other pleadings in the action purportedly served on Mr. Walker on the grounds that Mrs. Patton's claim does not fall within section 79A of the Trustee Act and/or under Order 11 rule 1(2) or any other basis upon which the Court may exercise jurisdiction over him;
 2. Alternatively, without prejudice to Mr. Walker's position that the Court does not have jurisdiction, an Order pursuant to Order 12 rule 7 that the purported service on Mr. Walker be set aside on the basis that pursuant to Order 11(2) only service of a Notice of Amended Originating Summons is permissible and not service of the Amended Originating Summons itself;
 3. Costs of and occasioned by this application be paid by Mrs. Patton to Mr. Walker and any other relief.

Salient facts

- [7] On or about 26 May 2005, John Felix Bender, the Settlor (“Mr. Bender”) established the Settlement for asset protection and estate planning purposes.
- [8] The sole asset of the Settlement was a substantial life insurance policy on Mr. Bender’s life issued by Lighthouse Capital Insurance Company (“Lighthouse Capital”) which is a Cayman Islands company. The Settlement is a discretionary trust with the initial beneficiaries being Mrs. Patton, Mr. Bender’s children, his parents and siblings. Mr. Walker was appointed and remains its sole Protector. Oceanic Bank and Trust Company Limited (“Oceanic”) was the initial trustee of the Settlement. However, in or about 2006, AJD, a Costa Rican law firm was appointed as sole trustee of the Settlement. Mr. Alvarez was the partner in AJD who oversaw the Settlement.
- [9] On 10 January 2010, Mr. Bender was shot and succumbed. Mrs. Patton was subsequently charged with his murder. Already, she had been tried three times. She was acquitted twice at trial and once on appeal. Following her acquittal after the third trial in September 2015, the prosecution appealed and the case was referred to the Cartago Court of Criminal Appeals (“the Appeal Court”) to determine whether she should be tried a fourth time. The Appeal Court decided in the prosecution’s favour and so, Mrs. Patton is awaiting the fourth trial for the murder of her husband.
- [10] After Mr. Bender’s death, Lighthouse Capital paid out the insurance policy proceeds to AJD which consisted of certain promissory notes, stocks in Ocean Blue Holdings Ltd (a Cayman Islands company) and an investment in Exponential Biotherapies Inc.
- [11] In the present action, ADJ has not entered an appearance.

Relevant provisions of the Settlement

- [12] The Settlement was established on 26 May 2005 between Mr. Bender and Oceanic. Part 4 deals with the Power and Authority of the Trustees. Part 4.32

empowers the Trustee to move the Settlement to another jurisdiction subject to the Protector's approval. It provides:

“Trust Situs. In their absolute and uncontrolled discretion to transfer this Settlement to another country whereupon the rights of all the parties and of all the Specified Class and the construction and effect of each and every provision hereof shall be subject to the exclusive jurisdiction of and construed only according to the laws of such other country which shall thenceforth be the forum for the administration hereof notwithstanding that one or more of the Trustees hereof may from time to time be resident or domiciled elsewhere than in such other country. Immediately after such transfer of this Settlement the Trustees shall transfer or cause to be transferred the Trust Property to the new trustee or trustees. This power may be exercised by the Trustees on more than one occasion should they in their absolute and uncontrolled discretion deem further changes in the jurisdiction of this Settlement to be in the best interests of the Settlement and/or the Specified Class.”

[13] Part 6 deals with the Protector and the Protector's Powers. Part 6.3 provides that:

“The Protector may in his absolute discretion:

- (a) remove and appoint trustees by notice in writing which shall be annexed to this Settlement;**
- (b) in so doing, if desired by the Protector, change the legal situs and governing law of this Trust; and**
- (c) by instrument in writing delivered to the Trustees transfer the office of Protector hereof to any other Person.”**[Emphasis added]

[14] Part 6.15 addresses liability and indemnity of the Protector. It states:

“The Protector shall owe no fiduciary duty towards nor be accountable to any person with an interest in the Trust Property under this Settlement or to the Trustees. Except in the case of actual fraud or willful default, the Protector shall not be accountable or liable for any act of omission or commission regarding the powers granted to him under the Settlement. The Protector shall not be liable for relying absolutely on the opinions of counsel or other experts to this Settlement as to matters within their competence. The Protector shall be entitled to reimbursement of all proper expenses incurred by him in the performance of his duties, including any legal expenses incurred in connection with any question which may arise with reference to the Protector's duties or powers under this Settlement. The Protector shall also be entitled to be indemnified out of the Trust

Property and the income thereof against all legal and other expenses incurred in any legal or other proceeding relating to the exercise or non-exercise of his power and duties under this Settlement.”

[15] Unquestionably, Mr. Walker is vested with wide powers under the Settlement. In other words, as Mrs. Patton stated, Mr. Bender reposed great trust and confidence in Mr. Walker.

[16] Part 8.1 of the Settlement is particularly important. It focuses on the proper law of the Settlement and provides:

“The Proper Law of this Settlement is the law of the Commonwealth of The Bahamas and its validity, construction and all rights hereunder are to be governed by the Laws of the Commonwealth of The Bahamas.” [Emphasis added]

The legislative framework

Jurisdiction

[17] The question of whether the Court has jurisdiction in this action is governed by section 79A of the Trustee (Amendment) Act, 2011 (“the Act”). It provides:

“79A. Jurisdiction of the court.

(1) The Court has jurisdiction to hear and determine any claim concerning a trust where –

(a) the governing law of the trust is the law of The Bahamas;

(b) a trustee of the trust is ordinarily resident, incorporated or registered in The Bahamas;

(c) any of the trust property is situate in The Bahamas (but only in respect of that property);

(d) the administration of the trust is carried on in The Bahamas;

(e) the Court is otherwise the natural forum for litigation; or

(f) the trust information confers jurisdiction on the Court (but only to the extent of the jurisdiction so conferred).

- (2) Subsection (1) shall apply –**
- (a) to claims against persons whether within or outside the territorial jurisdiction of the Court; and**
- (b) in addition to any other circumstances in which the Court has jurisdiction.**
- (3) In this section, “claim” includes any application or other reference that may be made to the Court under this Act, the Purpose Trusts Act and the Perpetuities Act.”**

Discussion and analysis

- [18] The primary issue in this application is whether the Court has jurisdiction over the Settlement pursuant to section 79A of the Act.
- [19] Mr. Walker argues that this Court has no jurisdiction over the Settlement since the governing law was changed to Costa Rican law in or about 2006 when AJD, a Costa Rican law firm, was appointed as sole trustee of the Settlement. Mr. Alvarez was the partner of AJD who oversaw the Settlement. Mr. Walker next argues that when AJD was appointed as trustee, the proper law of the Settlement was changed to Costa Rican law. While Mrs. Patton accepts that, in or about 2006, the Trustee was changed to AJD, the First Defendant, she insists that the governing law of the Settlement has always been and remains the law of The Bahamas.
- [20] I start off with the burden of proof. It is not disputed that Mrs. Patton must prove that the Court has jurisdiction over the Settlement. According to learned Counsel, Mr. Moree who appeared for Mrs. Patton, she does so by relying on Part 8.1 of the Settlement to substantiate her position that the proper law of the Settlement is Bahamian law and remains so to this very day. According to Counsel, Mrs. Patton has discharged that burden by relying on the Settlement itself.
- [21] Since Mr. Walker is challenging jurisdiction, the evidential burden now shifts to him to satisfy the Court, on a balance of probabilities, that the governing law had changed to Costa Rican law, as he says, in 2006 when the Trustee was changed to AJD.

[22] Learned Counsel, Mr. Turnquest who appeared for Mr. Walker, submits that it is not disputed when the Settlement was initially set up, the governing law of the Settlement was Bahamian law and Oceanic was its Trustee. However, when Oceanic was removed as Trustee in 2006 in favour of the Costa Rican law firm of AJD, the governing law of the Settlement changed to Costa Rican law.

[23] In this regard, Counsel relies on the affidavits of Mr. Walker filed on 18 December 2017 and 10 May 2018. Mr. Walker alleged, in the main, that:

1. When the Trust was initially set up, its governing law was Bahamian law as Oceanic was a Bahamian company. However, in or about the spring of 2006, Mr. Bender asked him to consider removing Oceanic as trustee of the Trust in favour of AJD under the direction of Mr. Alvarez, who is a prominent Costa Rican lawyer and Director of the law firm. Mr. Bender had renounced his United States citizenship and permanently moved to reside in Costa Rica with Ms. Bender (Mrs. Patton). During this time, Mr. Bender explained to him that Mr. Alvarez was his key trusted legal advisor and that, as a resident of Costa Rica, he was consolidating all of his planning and business affairs with Mr. Alvarez and his firm in Costa Rica. This included moving other trusts, previously established by him by changing trustee to appoint AJD as the new sole trustee of those other trusts. As Protector, he considered Mr. Bender's request and agreed to it. He then removed Oceanic, as trustee, in favour of AJD, as successor trustee, in Costa Rica. [Emphasis added]
2. When he removed Oceanic as trustee in favour of AJD as successor trustee in 2006, his clear recollection and belief is that he also changed the governing law of the Settlement from Bahamian law to Costa Rican law, to be consistent with Mr. Bender's wish that all of his financial affairs and estate planning would be centred in Costa Rica under the administration of AJD. A protector's power to change the Governing law of the Settlement is clearly provided for in the Trust Deed. As far as he is concerned, it would be inconsistent with Mr.

Bender's wishes to remove the trusteeship of the Settlement to a Costa Rican firm but to allow the Trust to be governed by Bahamian law. [Emphasis added]

3. He located an unexecuted copy of his appointment of AJD as Trustee which expressly states his intent to removing Oceanic "*in favour of Alvarez, Jimenez, De Pass S.A. as the successor Trustee and to henceforward have the Trust be governed by the laws of Costa Rica (the domicile of the successor Trustee) in all matters pertaining to the Trust.*"
4. With respect to the unexecuted copy of the document referred to above, Mr. Walker said that he has been unable to locate an executed copy of it or any other document appointing AJD as trustee of the Settlement because of his relocation from the United States to Puerto Rico. Mr. Walker further averred that Mr. Alvarez advised him that AJD no longer has any trust documents pertaining to his firm's appointment as trustee since its files and computers were removed in 2012 in an action brought at the direction of Mrs. Patton in Costa Rica pertaining to other trusts established by Mr. Bender and administered by Mr. Alvarez and his law firm. He said that Mr. Alvarez further advised him that all these documents are in the possession of Mrs. Patton or her agents and nominees. He stated that Mrs. Patton has omitted to include the most critical documents whereby he appointed AJD as trustee and moved the Trust to Costa Rica. He believes that the omission is intentional.

[24] Mr. Turnquest contends that Mr. Walker's recollection is supported by the averments contained in the affidavit of David E. Richardson ("Mr. Richardson") exhibited to the second affidavit of Mr. Walker filed on 10 May 2018: Exhibit JW-1 sworn to on 28 February 2018 in Georgia. The very affidavit was re-sworn on 21 November 2018 at Nassau, New Providence and filed as a separate document in this action on 23 November 2018.

[25] In his affidavit, Mr. Richardson states that he is presently the sole shareholder and Director of Mid-Ocean Consulting Ltd, a duly licensed Bahamas International Company service provider. He alleged that:

1. In 2005 and 2006, he worked with Oceanic Bank and Trust Company in Nassau, Bahamas (“Oceanic”). He was instrumental to introducing John Bender to Oceanic in 2005 when he chose Oceanic to serve as the initial Trustee of the A.B. Insurance Trust Settlement. [Emphasis added]
2. To his recollection, knowledge and belief, in the late Spring of 2006, Mr. Bender expressed his wish that the Trust be moved to Costa Rica, Mr. Bender’s country of residence, to be placed under the local administration and control of the Costa Rica law firm, Alvarez, Jimenez, De Pass, under the direction of his trusted personal lead attorney, Juan Alvarez. Mr. Bender was not dissatisfied with the services provided by Oceanic. Rather, he had negative experiences with other international trust jurisdictions and trust administration and litigation, and as a resident of Costa Rica he wanted the Trust moved to Costa Rica to be a Costa Rican trust under the consolidated control and jurisdiction of his selected Costa Rican law firm and personal lead attorney. The intent of removing Oceanic as Trustee in favour of Alvarez, Jimenez, De Pass was to move the Trust to Costa Rica for all purposes. If the Trust was intended to remain a Bahamas trust, Oceanic would have remained in place as Trustee. [Emphasis added]
3. To his recollection, knowledge, and belief, James Walker, as Protector of the Trust, accordingly exercised his authority at Mr. Bender’s request to remove Oceanic in favour of Alvarez, Jimenez, De Pass in Costa Rica as successor Trustee, and in so doing the governing law was changed from the Bahamas to Costa Rica so that the Trust would be a Costa Rican trust for all purposes, in accordance with Mr. Bender’s wishes. [Emphasis added]

4. To his recollection, knowledge and belief, with the transfer of the Trust from Oceanic to Alvarez, Jimenez, De Pass in 2006, the Trust had no further Bahamas connection (no Bahamas Trustee, settlor, beneficiary, trust asset or, governing law). The Trust in its entirety was moved to Costa Rica, as Mr. Bender wished. The Trust records were delivered from Oceanic to Alvarez, Jimenez, De Pass in Costa Rica as the successor Trustee and the matter was concluded.” [Emphasis added]

[26] That is a summary of the affidavit evidence of these two gentlemen.

[27] Learned Counsel Mr. Turnquest submits that neither Mr. Walker nor Mr. Richardson has been able to locate the original documents showing that Oceanic was replaced in favour of AJD. However, it would be inconsistent for Mr. Bender to have the Settlement transferred to Costa Rica with AJD as trustee and still have the Settlement governed by Bahamian law which AJD would not have been familiar with.

[28] He next submits that, on the other hand, Mrs. Patton, who has come to the Bahamian Court seeking assistance (a) does not dispute that AJD is the current trustee of the Settlement and (b) despite obtaining a court order in Costa Rica granting her access to all of AJD’s documents related to the Settlement, has not produced any documents related to the transfer of the Settlement from Oceanic to AJD. Mr. Turnquest criticized Mrs. Patton for not producing any evidence relating to the Settlement to support her position. Here, I remind Mr. Turnquest that the evidential burden rests with Mr. Walker since he is the one challenging the jurisdiction of the Court. For her part, Mrs. Patton emphasizes that the jurisdiction of the Court is founded in Part 8.1 of the Settlement.

[29] As Mr. Turnquest correctly submits, the only evidence before the Court is Mr. Walker’s word corroborated with that of Mr. Richardson that he changed the governing law when he was asked by Mr. Bender to change and move the Settlement from The Bahamas to Costa Rica which he did.

- [30] No doubt, the credibility of Mr. Walker and Mr. Richardson is at the heart of this application. Both Mr. Walker and Mr. Richardson swore affidavits. Neither has come to Court to be cross-examined. Therefore, what I have is the untested evidence of these two gentlemen who are integrally involved in Lighthouse Capital which is the sole asset of the Settlement.
- [31] In his biography on the webpage of Mid Ocean Consulting, of which Mr. Richardson is the sole shareholder and Director, it states that “*in 2009, Mid-Ocean advised the Lighthouse Capital group in the formation of US Commonwealth Life ...based in Puerto Rico and now has assets in excess of \$US 1 billion.*”: see Exhibit “ACDS-2” of the affidavit of Andrew Smith, Counsel and Attorney-at-Law in the firm of McKinney, Bancroft & Hughes, filed on 5 November 2018.
- [32] Mr. Walker and Mr. Richardson know each other very well and as Mr. Moree argued, they are not independent witnesses. I agree.
- [33] Mr. Walker alleged that a significant amount of documents pertaining to this matter was misplaced when he relocated from the US to Puerto Rico. In addition, he was advised by Mr. Alvarez that AJD no longer has any trust documents since their files and computers were removed in 2012 in an action brought at the direction of Mrs. Patton. It is unusual that neither of these two attorneys can lay their hands on any documents pertaining to such an important issue. Surely, even if AJD’s computers were removed, information could be retrieved from other computers. There must have been correspondence between the parties prior to the change. Except for an unexecuted Acceptance of Successor Trustee Appointment – “Exhibit JW3 – Mr. Walker’s evidence is based on his recollection, knowledge and belief.
- [34] In my opinion, it is highly unusual that Mr. Walker, a US trained attorney, still carries around paper files in a highly technological world and cannot produce one single correspondence with respect to the change of the governing law. I do not believe his evidence.

[35] In paragraph 7 of the affidavit of Mr. Richardson, he stated:

“This Affidavit is based on my recollection, knowledge and belief of events that happened almost twelve years ago now (sic). I do not have any Trust documents or records in my possession or otherwise available to me.”

[36] It is indeed a long time. Memories do fade. However, Mr. Richardson has a very graphic recollection of what transpired in late spring of 2006 without the benefit of any documents. This is remarkable but implausible. I will explain why. In his affidavit, Mr. Richardson said that he has worked in the international private bank and trust company sector for over twenty-five years including working for Oceanic in 2005 and 2006. However, in his biography, it states: **“2003 through 2005 saw new tenure at Oceanic Bank and Trust Limited as President of the Bank ...and since 2005, he serves as President and CEO of Mid-Ocean Consulting Ltd, of which he is the sole shareholder and Director.”**

[37] So, if his biography is correct, from since 2005, he has been the President and CEO of Mid-Ocean Consulting and not Oceanic. The Settlement was established on 26 May 2005. So, when Mr. Richardson stated that in the late Spring of 2006, Mr. Bender expressed his wish that the Trust be moved to Costa Rica....and Mr. Bender was not dissatisfied with the services provided by Oceanic, Mr. Richardson was no longer employed with Oceanic but was running Mid-Ocean Consulting.

[38] I pose this question: why would Mr. Bender be having such conversation with Mr. Richardson when Mr. Richardson was no longer employed with Oceanic?

[39] In terms of the years that Mr. Richardson was employed at Oceanic, his on-line biography conflicts with what he has alleged in his affidavit. If Mr. Richardson cannot recall when he worked for Oceanic, I find it very strange that he can recall so vividly what took place about twelve years ago. He strikes me as a stranger to the truth.

- [40] His account also materially corresponds with what Mr. Walker stated in his affidavits. To emphasize, both men are also intrinsically involved in Lighthouse Capital, the sole asset of the Settlement.
- [41] On the whole, I am unable to believe either Mr. Walker or Mr. Richardson that when the trusteeship moved to Costa Rica, the governing law was also changed to Costa Rica in accordance with Mr. Bender's wishes.
- [42] Also, this is a case where Mr. Bender has tragically passed away and he is not here to say what he wished. According to Mr. Turnquest, the "Acceptance of Successor Trustee appointment: The A.B. Trust Settlement", although unexecuted, points to AJD's acceptance as Trustee and the governing law of the Settlement being changed to Costa Rican law. He next submits that, pursuant to Part 6.3 of the Settlement, there is no special requirement for the Notice to be in writing. That may be so but surely, all attorneys including Mr. Walker, are aware that courts will place greater credence to contemporaneous documentary evidence as opposed to evidence coming from witnesses, whose memories may fade with the passage of time and who may also fabricate their evidence. Other times, there may be "an axe to grind".
- [43] On the other hand, Mrs. Patton relies on documentary evidence in the form of the Settlement itself to demonstrate that the governing law of the Settlement was and has always been Bahamian law. She alleges that the Settlement evidences that the governing law is The Bahamas and that while Mr. Walker disputes this, to date he has not provided any evidence to support a change in the governing law of the Settlement.
- [44] Mr. Moree submits that the unexecuted document and their evidence fall woefully short in establishing a change of the governing law of the Settlement.
- [45] Mr. Moree also relies on two letters; one from Mr. Sean McWeeney QC of Graham Thompson to AJD written on 28 July 2010 and the other from Adorno & Yoss dated

24 June 2010: see affidavit of Ann Maxine Patton filed on 23 June 2017 at Tabs. 50 and 52.

[46] I begin with the letter from Adorno & Yoss to AJD. In this letter dated 24 June 2010 entitled "A.B. Insurance Trust Settlement", Messrs. Adorno & Yoss wrote to AJD as follows:

"You have asked me to give you my comments on certain of the provisions of the trust relating to your rights thereunder. The trust provides that it is to be governed by the laws of The Bahamas, which I am not familiar with. My analysis only deals with the plain reading of the agreement subject to verification by a Bahamian lawyer."

[47] In the penultimate paragraph, Messrs. Adorno & Yoss wrote:

"It well may be that you could consider movement of the trust to a jurisdiction which does not permit a distribution to a person committing the homicide."

[48] Then, on 28 July 2010, Mr. McWeeney QC wrote:

"You posed eight specific questions in your e-mail of the 14 July and I now answer them as follows:

"Q. 6: Can the Protector oppose or deny the trustee from changing the trust situs (jurisdiction) to (a jurisdiction different from) The Bahamas?

A: The Trustees have power under Clause 4:32 to change the situs of the trust (which would automatically change the governing law as well), subject to 30 days prior notice being given to the Protector (under Clause 6. 10)... (It should be noted in this regard that where the Protector is removing the trustees and appointing new trustees, he also has power to change the situs of the trust (see Clause 6.3(b))."

[49] These letters ("opinions") are telling. Mr. Moree argued that if the governing law had changed in 2006, as contended by Mr. Walker, why then would the Trustee of the Settlement, a law firm, be seeking an opinion from a Bahamian lawyer in July 2010 on the position of the Settlement when the governing law was not Bahamian

law. He said that he cannot fathom one reason why AJD would do that except that the Settlement must be governed by Bahamian law.

[50] On the other hand, Mr. Turnquest implored the Court not to speculate on the motives of AJD in obtaining these opinions since AJD has elected not to partake in these proceedings. According to learned Counsel, there could have been a number of reasons why AJD obtained Mr. McWeeney's opinion as well as that of the Miami lawyer.

[51] Furthermore, says Counsel, the fact that Mr. McWeeney produced an opinion 'purportedly' concerning the Settlement does not prove that the Settlement is governed by Bahamian law or that the Bahamian court has jurisdiction. Mr. Turnquest vociferously argues that Mr. McWeeney did not expressly state that the trust deed he was considering was governed by Bahamian law. Further, according to Mr. Turnquest, there is not an iota of evidence of what documents were given to Mr. McWeeney or if he was in fact considering documents relating to the Settlement. He said that Mrs. Patton herself alleged that Mr. McWeeney was given false information to prepare his opinion. I can deal with this issue straight away. In paragraph 123 of her affidavit filed on 23 June 2017, Mrs. Patton stated:

"Mr. McWeeney QC's opinion, which was written on the basis of false information in his instructions, namely that I had been accused of killing John and was running a temporary insanity defence (see paragraphs 126 and 127 below), would have shown Mr. Alvarez when he received it that (i) the Protector has very real powers over the trustee and could use them to appoint new trustees; and (ii) if he simply gave me nothing I could do nothing about it (see paragraphs 6,10 and 11 of the opinion)."

[52] Paragraph 123 is not ambiguous. It is a simple sentence. She specifically stated that the false information provided to Mr. McWeeney related to the information given to him that she had killed her husband and was running a temporary insanity defence. So, to submit that Mrs. Patton herself claims that Mr. McWeeney was given false information to prepare his opinion is a manifest misinterpretation of the sentence.

[53] I however agree with Mr. Turnquest that a court must not enter into the realm of speculation. However, a court is entitled to draw reasonable inferences from the stated facts.

[54] According to the letters from Adorno & Yoss and Mr. McWeeney, the subject matter under consideration is headed **Re: The A.B. Insurance Trust Settlement (“the Trust”)**. So, the eight questions which were posed by AJD concerns the Settlement. As Mr. Moree correctly pointed out, Question 6 is particularly important. It states:

“Q. 6: Can the Protector oppose or deny the trustee from changing the trust situs (jurisdiction) to (a jurisdiction different from) The Bahamas?”

[55] I pose another question: why would AJD pay a sum of about \$8,000.00 to obtain the opinion of a Queen’s Counsel? There must be a reason for that. The proper or logical inference to be drawn from these facts is that the Trustee (a law firm) was very much aware that the Settlement was still governed by Bahamian law.

[56] So, in 2010, AJD was clearly under the impression that the governing law of the Settlement was the law of The Bahamas. When the trusteeship was transferred to AJD in Costa Rica in 2006, the Settlement continued to be governed by the law of The Bahamas. Today, the governing law still remains the law of The Bahamas.

[57] Mr. Moree also referred to section 6 of the Trusts (Choice of Governing Law) Act which states:

“In determining the governing law of the trust, consideration shall first be given to the terms of the trust in issue and to any evidence therein as to the intention of the parties and the other circumstances of the trust shall be considered only if the terms of the trust fails to provide such evidence as to the intention of the parties.”

[58] According to Mr. Moree, the Settlement says that the governing law is the law of The Bahamas and there is no notice in writing to change that except the evidence of two witnesses who are not independent. Mr. Turnquest submits that the

Protector is the person who could make the change and he said that he did. As I indicated earlier, I did not find the evidence of Mr. Walker or Mr. Richardson to be credible. Documentary evidence proves otherwise.

[59] Before concluding, I would say that in my experience, it is not uncommon for a trust to have a foreign trustee and still be governed by the laws of another country, In this case, The Bahamas. Like everything else, there are advantages and disadvantages. An advantage in retaining a Bahamian trust is that the settlor is permitted to retain an interest in both income and capital during his lifetime without causing the trust to be deemed a testamentary trust under sections 3(1) and 3(2)(i) of the Act. There are also some disadvantages because a foreign trustee would have to be acquainted with the laws of The Bahamas as Mr. Turnquest correctly pointed out. That said, I do not wish to tread on speculative matters as to what was operating in Mr. Bender's mind. One thing is clear to me: Mr. Bender was a shrewd investor who did not wish to pay US taxes or, for that matter, any taxes. He renounced his American citizenship for that reason.

[60] For all of the above reasons, I find that the governing law of the Settlement is the law of The Bahamas. Therefore, this Court has jurisdiction to hear and determine any claim relating to the Settlement pursuant to section 79A (1)(a) of the Act. The section empowers the Supreme Court to hear and determine the action brought by Mrs. Patton AND serve the Amended Originating Summons out of the jurisdiction without the leave of the Court.

Service out of the jurisdiction of the Amended Originating Summons

[61] Having come to the conclusion that the governing law of the Settlement is the law of The Bahamas, I am of the opinion that both Counsel had agreed that leave would not be required to serve out of the jurisdiction: see page 37 lines 9-20 of the Transcript of Proceedings.

[62] In the event that I am wrong to come to this conclusion, I shall carry on; albeit briefly.

[63] Mr. Walker relies on RSC Order 12 rule 7(1) which provides that:

“A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within fourteen days after entering the appearance, apply to the Court for an order setting aside (*sic*) the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the writ or notice on him out of the jurisdiction.”

[64] Mr. Walker relies on four grounds to set aside service of the Amended Originating Summons specifically:

1. The failure to obtain leave to serve the Amended Originating Summons out of the jurisdiction;
2. The failure to serve a concurrent Amended Originating Summons;
3. The failure to indorse the Amended Originating Summons with “*not for service out of the jurisdiction*” and
4. The fact that Mr. Walker was served in Georgia, USA despite the indorsement on the Amended Originating Summons as his residence in Puerto Rico.

[65] RSC Order 11 rule (1)(2) provides that:

“Service of notice of a writ in any place out of the jurisdiction, is permissible without the leave of the court if every claim made in the action begun by the writ is one which by virtue of an enactment the Supreme Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within its jurisdiction.”
[Emphasis added]

[66] Further, Section 79A of the Act provides (1) “The Court has jurisdiction to hear and determine any claim concerning a trust where – (a) the governing law of the trust is the law of The Bahamas.”

[67] As the governing law of the Settlement is the law of the Bahamas, then the Court has jurisdiction to hear this matter.

[68] This point was already dealt with in **RTL v ALD and others** [2014] 3 BHS J. No. 83 where the third and fourth Defendants applied to set aside service of an Amended Originating Summons and the Order of the Registrar granting leave to serve same out of the jurisdiction. Winder J. held that leave is not required to commence an action relating to a trust governed by Bahamian law nor is leave necessary to serve originating process out of the jurisdiction. At paragraph 12 of the judgment, the learned judge said:

“The Plaintiff argues that there was no requirement to seek leave to serve the Originating Summons out of the jurisdiction. I agree.”

[69] The learned judge continued:

“16. In *UBS Trustee (Bahamas) Ltd. v. Peters* [2004] 4 BHS J No. 26, Barnett CJ held that leave was not necessary with respect to service of an Originating Summons out of the jurisdiction where a statute authorizes a trustee to bring the action and gives the court the jurisdiction to determine it....

.....

18. Subsequent to the ruling in *UBS v Peters* the Parliament of The Bahamas enacted Section 79A Trustee Act (Jurisdiction of the Court), which expressly delineates the jurisdiction of the Court in these matters. Section 79A(1), which came into effect on 30 December 2011, empowers the Court with”....jurisdiction to hear and determine “any claim concerning a trust where—

- (a) the governing law of the trust is the law of The Bahamas;**
- (b) a trustee of the trust is ordinarily resident, incorporated or registered in The Bahamas;**
- (c) any of the trust property is situate in The Bahamas (but only in respect of that property.);**
- (d) the administration of the trust is carried on in The Bahamas;**
- (e) the Court is otherwise the natural forum for litigation; or**

(f) the trust information confers jurisdiction on the Court (but only to the extent of the jurisdiction so conferred)."

19. Subsection 79A (2) further provides that "Subsection (1) shall apply—

(a) to claims against persons whether within or outside the territorial jurisdiction of the Court; and (b) in addition to any other circumstances in which the Court has jurisdiction."

20. In the context of the instant dispute it seems therefore that the position is now beyond doubt that the Court is empowered by Section 79(A) to hear and determine any claims (against persons whether within or outside the jurisdiction) on either of the grounds that the governing laws of the trust is the Bahamas, the trustee of the trust is ordinarily resident, incorporated or registered in The Bahamas or the administration of the trust is carried on in The Bahamas. The court having been vested with this jurisdiction, the requirement for leave is obviated.

21. I find therefore that in all the circumstances, having regard to the claims sought in the Amended Originating Summons, leave was not required to commence the action or serve it out of the jurisdiction on the third and fourth defendants. [Emphasis added]

[70] Mr. Turnquest did not appear to find favour with this judgment but, as Mr. Moree correctly submitted, the relevant statutory framework and the authorities could hardly be clearer. Where the Court has jurisdiction to hear the matter by virtue of satisfying any of the subsections of section 79(A) of the Trustee Act, leave is not required to serve the Amended Originating Summons out of the jurisdiction.

[71] With respect to the other grounds dealing with service, learned Counsel Mr. Turnquest agrees that these are essentially procedural irregularities.

[72] Mr. Moree does not concede that there are any procedural irregularities in service: see paragraphs 16 to 25 of the written skeleton arguments of the Plaintiff dated 23 October 2018.

[73] I agree with Mr. Moree that there are no irregularities in service but, even if there were, the Court is not interested in arid and technical points but to carry on with the Amended Originating Summons and to correct procedural irregularities (if any).

Mr. Walker was served at an address he gave. He is in possession of the documents. He has retained Counsel within the jurisdiction who is also in possession of the documents. So let us carry on with the substantive matter.

[74] Very often, I am reminded of my own judgment which was appealed to the Privy Council in **Texan Management Limited v Pacific Electric Wire & Cable Company Limited** [2009] UKPC 46 where, in delivering the decision of the Board, Lord Collins said, at paragraph 1:

“It has often been said that, in the pursuit of justice, procedure is a servant and not a master.”

[75] I have always been guided by these judicious words.

[76] In the premises, I will dismiss the Summonses filed by Mr. Walker on 8 November 2017 and 31 October 2018 respectively with costs to Mrs. Patton.

Costs

[77] Since Mrs. Patton is the successful party in the proceedings, the issue of costs arises. In the exercise of my discretionary powers, I will assess costs at \$25,000.00. Mr. Walker would like to be heard on whether he or the Settlement should be ordered to pay these costs. I have agreed to adjourn the determination of this discreet issue to a date to be set at the Case Management Conference.

[78] Case Management Conference will take place on Wednesday, 3 June 2020 at 10:00 a.m. to address any interlocutory matters which may arise and to set down the Amended Originating Summons for hearing. If an in-person hearing is not possible, then the Court will determine the appropriate means for this hearing.

Dated this 13th day of May, A.D. 2020

**Indra H. Charles
Justice**