SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

HCVAP 2008/008

BETWEEN:

AMAZING GLOBAL TECHNOLOGIES LIMITED

Appellant

and

PRUDENTIAL TRUSTEE COMPANY LIMITED

Respondent

Before:

The Hon. Mr. Hugh Rawlins	Chief Justice
The Hon. Mr. Michael Gordon, QC	Justice of Appeal [Ag.]
The Hon. Mde. Rita Joseph-Olivetti	Justice of Appeal [Ag.]

Appearances:

Mr. Keithley F. T. Lake with Ms. Jean M. Dyer and Ms. Michelle N.Smith for the Appellant

Mr. Gerhard Walbank with Ms. Camille Cato for the Respondent

2009: January 13;
May 4.

Civil Appeal – civil procedure – interim relief - whether the court was the forum conveniens for determination of the dispute - whether the trial judge exercised her discretion properly in granting leave to serve out of the jurisdiction – Part 7.3 of the Civil Procedure Rules 2000 (CPR 2000)

The appellant ("Amazing Global") is a company incorporated in Guernsey, with 4 subsidiary companies incorporated in Nevis. The respondent ("Prudential") is a corporation which provides international corporate trustee services and operates out of offices in London. On 26th June 2008, Prudential made an ex parte application seeking to enforce the security granted on behalf of noteholders pursuant to a Noteholder Security Trust Deed. By this application, Prudential sought, among other things, the appointment of a receiver of the assets of Amazing Global and an order granting permission for the claim and other legal documents to be served on Amazing Global out of the jurisdiction pursuant to Part 7.3 of the Civil Procedure Rules 2000 (CPR 2000). On 27th June 2008, the order was granted, as prayed. At an inter partes hearing, Amazing Global sought to have the order of 27th June 2008, set aside. By order of 21st July 2008, the order of 27th June 2008, was confirmed save to the extent that it was varied to permit access to funds for the purpose of financing this litigation. Amazing Global appealed on the ground that Saint Christopher and Nevis was not a convenient forum for the determination of the dispute and that the judge erred in

permitting service out of the jurisdiction. The learned judge failed to give reasons for so exercising her discretion. However, this latter fact was not challenged on appeal.

Held: allowing the appeal, setting aside the order of the court below and awarding costs to the appellant to be assessed, if not agreed:

1. The appellate court must have access to the reasoning of the trial court. Absent that reasoning, the appellate court is forced to apply, de novo, its own reasoning and hence its own discretion to the circumstances of the case.

   IPOC International Growth Fund Limited v LV Finance Group Limited et al British Virgin Islands Civil Appeal No. 20 of 2003 and 1 of 2004 which applied Flannery v Halifax Estate Agencies Limited [2000] 1 WLR 1507 followed. AEI Rediffusion Music Ltd. v Phonographic Performance Ltd. [1999] 1 WLR 1507 applied.

2. Part 7.3 of the CPR 2000 governs service of process out of the jurisdiction in specified proceedings and is in permissive not mandatory terms. The principles underlying the exercise of the discretion under Part 7.3(2)(b) are that the case must be a fit and proper one for service of proceedings out of the jurisdiction and the local courts must be the appropriate place ("forum conveniens") for the trial of the action.

3. In an application for permission to serve out, the court must identify the forum in which the case can be suitably tried for the interests of all the parties and the ends of justice, that is, it must determine whether the local court is the more appropriate or "natural" forum for the trial than any other available foreign forum. If however the court is of the view that substantial justice will not, or may not, be done in the natural forum, it may hold that justice requires that the case be tried in the foreign forum.

   Spiliada Maritime Corporation v Cansulex Ltd. [1987] AC 460 and Cherny v Deripaska [2008] All ER D37 applied.

4. Having regard to the fact that Amazing Global's only connecting factor with this jurisdiction is that it is the parent of a number of international business companies incorporated in Nevis, neither the Nevisian subsidiaries nor the registered agents of those companies are parties to the suit, the Loan Note Deeds (which are more than likely to be relevant in interpreting the Security Trust Deed) declare the proper law of the contract to be English law and give the English courts exclusive jurisdiction to hear and resolve any disputes arising under the Deeds, the court is of the view that the jurisdiction of England is by far the more appropriate jurisdiction within which to bring this suit. There is no issue of the English jurisdiction being in some way deficient in providing access to justice. The learned judge accordingly erred in permitting service of process out of the jurisdiction. The effect of so holding is that the claim and all interim relief must fall away.

JUDGMENT

[1] GORDON J.A. [AG.]: The appellant company, hereinafter referred to as "Amazing Global", is a company incorporated in Guernsey. It is part of a reasonably complex corporate structure comprising, inter alia, 4 subsidiary companies incorporated in Nevis. We were advised that in addition to the 4 Nevis subsidiaries the group contained companies incorporated in Russia, the Ukraine, Azerbaijan, Italy and Barbados, among other places.

[2] The respondent company, hereinafter referred to as "Prudential", is a corporation providing international corporate trustee services and operating out of offices in London. Prudential is a subsidiary of Prudential plc, a company incorporated in England.

[3] Prudential was constituted Security Trustee pursuant to a Noteholder Security Trust Deed dated April 2, 2008. Under that trust deed, Prudential's functions were, inter alia, to enforce the security on behalf of the noteholders, in accordance with directions given by them in an extraordinary resolution as defined in the trust deed. Pursuant to an extraordinary resolution of the noteholders dated June 11, 2008 Prudential made an ex parte application, filed on June 26, 2008 to the high court for certain interlocutory relief against Amazing Global. The principal reliefs sought were:

- the appointment of a receiver of the assets of Amazing Global , wherever situate and whether directly held or indirectly held or otherwise owned by Amazing Global with power to do all things which the receiver in his absolute discretion considers to be reasonably necessary to take possession, get in and secure the property of Amazing Global "including, but not limited to shares owned or otherwise held by [the appellant] in certain corporations incorporated in Nevis; in a word, with plenipotentiary powers;
- injunctions in support of the receivership;
- an order as to filing and service of the claim;
- an order granting permission for the claim and other documents of legal process to be served out of the jurisdiction on Amazing Global pursuant to Civil Procedure Rules 2000 ("CPR 2000") Part 7.3

[4] The order sought (to which reference in greater detail will be made later) was granted *ex parte* on June 27, 2008 (hereafter referred to as "the June 27 order"). On July 18, 2008 an

application by Amazing Global was filed seeking the setting aside of the June 27 order and more specifically, inter alia, orders that:

- Daniel, Brantley & Associates, who were named as defendants, be removed from the proceedings;
- the order appointing the receiver and granting interlocutory injunctive relief be set aside in its entirety;
- the order granting permission for Prudential to serve the claim and all other legal process outside the jurisdiction be set aside.

[5] The grounds of the application, so far as relevant to this judgment were:

- breach by Prudential of the duty of full disclosure on an ex parte application for the appointment of a receiver and injunctive relief in that Prudential failed to disclose that the Security Trust Deed was obtained by fraudulent means and hence could form the basis of no legal claim;
- neither Prudential nor Amazing Global were incorporated within the Federation, but rather were incorporated in England and Guernsey respectively;
- the Security Trust Deed and other relevant loan and security documents are, by their terms, governed by the laws of England;
- none of the conditions required to be met by Part 7.3 of the CPR 2000 permitting service out of the jurisdiction were satisfied;
- that there was no nexus between the Federation and the proceedings and that the proper forum for the trial of the dispute was England where the potential witnesses are likely to reside;
- that contrary to the June 27 order which ordered at paragraph 16 that a "Claim be filed within 14 days of to-days date and served in due course" a claim was in fact filed on July 14, 2008 and thus outside the time allotted for doing so; and, finally
- that contrary to the mandatory provisions of Part 7.5 of CPR 2000 no order was made in relation to the time for filing an acknowledgment of service or a defence.

[6] The application to set aside the June 27 order was heard and resulted in an order of the court dated July 21, 2008 (hereafter "the July 21 order"). In that order, inter alia, the court held that the statement of case filed on July 14, 2008 'is deemed properly filed'. The July 21 order also ordered that the time for filing an acknowledgment of service be 35 days and the time for filing a defence 56 days, respectively, from service of the statement of case. The July 21 order also ordered that Daniel Brantley and Associates be removed as parties from the proceedings.

[7] The July 21 order further ordered:

- "That the order of June 27, 2008, permitting the Receiver to take complete sole and exclusive control of all bank accounts containing credit balances which are balances held to the account or order of the First Defendant/Applicant (Amazing Global Technologies Limited) be varied so as to permit the First Defendant/Applicant (Amazing Global Technologies Limited) access to such amounts as to cover its reasonable legal fees and expenses occasioned by these proceedings against it, the consent of the Receiver on these matters is not to be unreasonably withheld."

Impliedly, therefore, even though not expressly, the June 27 order was confirmed, save to the extent it was varied, at the inter partes hearing.

[8] It is a matter of very considerable regret that the learned trial judge failed to give any written reasons for her decision. This lack of reasons is of crucial importance in that each of the substantial parts of the June 27 order as confirmed or varied by the July 21 order are discretionary orders. In the case of Ipoc International Growth Fund Limited v LV Finance Group Limited et al[1] this court gratefully adopted the learning in the English court of appeal case of Flannery v Halifax Estate Agencies Limited[2]. At paragraphs 10-11 of the Ipoc case this court held as follows:

> "Before the Court of Appeal in England, both parties [in the Flannery case] accepted that there was adequate evidence for the trial judge to have come to a conclusion in favour of either party, but, as the Court of Appeal commented, the judgment was "entirely opaque. It gives the judge's conclusions but not his reasons for reaching that conclusion." The Court of Appeal went on to make a number of general comments on a judge's duty to give reasons which are summarized below: (i) The first reason for a judge to give reasons for a decision is that the duty is part of due process, and therefore of justice. The rationale of that statement has two principal aspects. Firstly, the parties should be left in no doubt as to why they have lost or won, especially the losing party. Without reasons given, the losing party is in no position to know whether the court has misdirected itself, and thus whether he may have an available appeal. The second is that the giving of reasons concentrates the mind of the judge. (ii) The first principal aspect recited above, that the parties be left in no doubt as to why they have lost or won, "implies that want of reasons may be a good self standing ground of appeal." If it is impossible to tell whether the trial judge has gone wrong on the facts or the law, the losing party would be deprived of his chance of appeal unless the appellate court entertains an appeal based on the lack of reasons itself. (iii) The extent of

[1] BVI Civil Appeal No 20 of 2003 and 1 of 2004 delivered 19 September 2005
[2] [2000] 1 W.L.R 377

> the duty to give reasons will depend on the complexity of the matter to be resolved. It may be enough where there is a straightforward dispute as to simple fact after summarizing the evidence for the judge to simply state that one version of the facts is preferred to another. However, where the dispute is more complex, and both sides have canvassed differing analyses of the circumstances, the judge must explain why one side is preferred to the other. The learning expressed in Flannery is gratefully adopted in this jurisdiction."

[9] The appellant has chosen not to ground his appeal, even in part, on the failure of the trial judge to give reasons. I, therefore, in the phraseology of to-day, shall not go there.

[10] In the absence of reasons given by the trial judge for the particular exercise of her discretion, this court is left at a serious disadvantage in determining whether that discretion was correctly exercised. In AEI Rediffusion Music Ltd v Phonographic Performance Ltd[3] Lord Woolf MR expressed the constraints on an appellate court in varying the exercise of a discretion by the court below in this way:

> "Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or has taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion that he has not balanced the various factors fairly in the scale."

Implicit in this statement of trite law is the requirement that the appellate court must have access to the reasoning of the trial court. Absent that reasoning, then the appellate court is forced to apply, de novo, its own reasoning and hence its own discretion to the circumstances of the case.

The grounds of appeal

[11] There are in fact only four grounds of appeal with which this court need be concerned, notwithstanding that in the notice of appeal there are eleven separate grounds with one of those grounds being sub-divided into five sub grounds. The court finds it necessary to recall for the benefit of practitioners Part 62.4 (5) of CPR 2000 which reads as follows:

> "(5) The grounds of appeal under paragraph 1 (c) must set out –
> (a) concisely;
> (b) in consecutively numbered paragraphs; and

[3] [1999] 1 W.L.R. 1507 at 1523

(c) under distinct heads;
the grounds on which the appellant relies, without any argument or narrative." (emphasis added)

The repetition of the same point many times in different formulations advances the appellant's case not one whit, and can become tiresome to the spirit. Because of the mandatory requirement that the parties file skeleton arguments, the purpose of the grounds of appeal is merely to foreshadow those issues which will be dealt with more fully in the skeleton arguments. Indeed, one sees a certain parallel in the new dispensation of CPR 2000 between grounds of appeal and the required skeleton arguments and pleadings and witness statements.

[12] The first two grounds of appeal which I will deal with together are, firstly, the issue of the convenient forum and, secondly, the issue of service out of the jurisdiction pursuant to Parts 7.2 and 7.3 of CPR 2000. A good starting point would be to reproduce the relevant parts of Part 7.2 and 3:

"General rule as to service of claim form out of jurisdiction
7.2 A claim form may be served out of the jurisdiction only if –
(a) rule 7.3 allows; and
(b) the court gives permission.

Service of claim form out of jurisdiction in specified proceedings
7.3 (1) The court may permit a claim form to be served out of the jurisdiction if the proceedings are listed in this rule.

Features which may arise in any type of claim
(2) A claim form may be served out of the jurisdiction if a claim is made –
(a) against someone on whom the claim form has been or will be served, and –
(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
(ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is a necessary and proper party to that claim;
(b) for an injunction ordering the defendant to do or refrain from doing some act within the jurisdiction; or
(c) for a remedy against a person domiciled or ordinarily resident within the jurisdiction."

[13] The trial judge in the June 27 order at paragraph 17 ordered that Prudential had permission "[I]n accordance with CPR 7.3 (2) (b) and CPR 7.3 (2) (c)" to serve the claim and all other legal process out of the jurisdiction.

[14] Both in Part 7.3 (1) and (2) the language is permissive, not mandatory. In other words, the court has a discretion which is to be exercised, as all such discretions are, judicially.

[15] On September 26, 2008 an amended claim form and statement of claim was filed. The claim form claims against Amazing Global: "Relief as further set out in the Statement of Claim filed herewith, on account of [Amazing Global's] breaches of a Debenture dated 2nd April 2008 and other security documents (together the "Security Documents"), including two sets of Loan Notes Deeds…."

[16] As I apprehend the transaction, the Loan Note Deeds are the primary evidence of the debt by Amazing Global to the noteholders and the Debenture is the security document securing by way of mortgage, charge, pledge, lien or any other security interest the interest of the noteholders.

[17] At clause 2.1 of the Debenture the Chargor (Amazing Global) covenants that it will on demand of the security trustee (Prudential) pay and discharge any of the secured liabilities when due. "Secured Liabilities" are defined in the Debenture as meaning "all present and future liabilities and obligations of the Chargor (Amazing Global) to the Noteholders …… including without limitation interest, commission, costs charges and expenses charged by the relevant Noteholder at rates agreed between it and the Chargor". The secured liabilities become due pursuant to the terms of the Deed Constituting US Dollar Denominated Convertible Secured Loan Notes dated 15th December 2006 (referred to in the statement of claim and hereafter as the Loan Note Deeds).

[18] Expressed differently, the Debenture is not a 'stand-alone' agreement but rather one which is ancillary to and buttresses the rights of the noteholders and the obligations of Amazing Global as expressed in the Loan Note Deeds.

[19] Clause 8 of the Loan Note Deeds reads as follows:

"GOVERNING LAW AND JURISDICTION

8.1 This Deed is governed by, and shall be construed in accordance with, English law.

8.2 The courts of England shall have exclusive jurisdiction to hear and decide any suit, action or proceedings and to settle any disputes, which may arise out of or in connection with this Deed or the Notes (respectively, "Proceedings" and Disputes") and, for these purposes, for the benefit of the Noteholders the Company irrevocably submits to the jurisdiction of the courts of England.

8.3 The Company irrevocably waives any objection which it might at any time have to the courts of England being nominated as the forum to hear and decide any Proceedings and to settle any Disputes and agree not to claim that the courts of England are not a convenient or appropriate forum.

8.4 The Company, without prejudice to any other mode of service permitted by law, shall irrevocably appoint an agent for the service of process in England in relation to any proceedings on terms reasonably satisfactory to the Noteholders within 30 days after the Notes are issued and shall keep such appointment current until all Notes have been fully redeemed."

[20] It is, therefore, clear that the Loan Note Deeds not only stipulate English law as the proper law of the contract, but stipulate that the courts of England have exclusive jurisdiction.

[21] At the end of his argument, learned counsel for the respondent was asked by the court what would be the effect if the court were to find with the appellant on the issue of the inappropriateness of service out of the jurisdiction in this case. With disarming candour and commendable brevity, learned counsel responded that the claim would be dead and all interim relief would fall away. I agree with learned counsel. On that basis, I am of the view that that issue should first be examined.

[22] Once the July 21 order ordered that Daniel Brantley and Associates be removed as parties from the proceedings[4] it is clear that the only basis on which the trial judge could have ordered service of process out of the jurisdiction would have been pursuant to Part 7.3(2)(b) of the CPR 2000. As remarked above, Part 7 is permissive and not mandatory.

[4] See paragraph [6] above

[23] As stated in The Caribbean Civil Court Practice at page 95:

> "The principles underlying the exercise of this discretion (subject to reinforcement by the overriding objective) reflect those formerly under the ENG RSC[5]. Those principles are that:
> (1) it is a fit and proper case for the service of the proceedings out of the jurisdiction…
> (2) the local courts are the appropriate place (the 'forum conveniens') for the trial of the action."

[24] Any discussion of forum conveniens inevitably starts with a consideration of Spiliada Maritime Corporation v Cansulex Ltd[6], the locus classicus on forum issues. Lord Goff of Chieveley, who delivered the principal opinion, said the following in respect of what he described as the fundamental principle:

> "It is proper therefore to regard the classic statement of Lord Kinnear in Sim v Robinow (1892) 19 R. 665 as expressing the principle now applicable in both jurisdictions [English and Scots]. He said at page 668: 'the plea can never be sustained unless the court is satisfied that there is some other tribunal, having competent jurisdiction, in which the case may be tried more suitably for the interests of all the parties and for the ends of justice'"[7]

[25] In Cherney v Deripaska[8], a case deriving from the English High Court, Christopher Clarke J said the following, in like vein:

> "…I return to the central question: whether Mr. Cherney has shown that *England* [read Nevis] *is the proper place in which to bring the claim*. In the *Spiliada* [1987] AC 460 Lord Goff approved and applied Lord Kinnear's famous dictum in *Sim v Robinow* [1892] 19 R 665, that the task of the court, both in an application for permission to serve out and in a stay application, is to identify the forum in which the case can suitably be tried for the interests of all the parties and the ends of justice. In a service out case the first stage is for the claimant to show that England [read Nevis] is clearly the more appropriate forum for the trial than any other available foreign forum and, hence, the "natural" forum. Even if England is not the natural forum, the claimant may establish – the second stage – that substantial justice will or may not be done in the natural forum so that justice requires that the case be tried in England."[9]

[26] There is no issue in this case of having to consider the second stage which only comes for consideration if for one reason or another the alternative jurisdiction is in some way

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[5] English Rules of the Supreme Court
[6] [1987] AC 460
[7] At p. 474
[8] [2008] All ER D37
[9] At p. 252

deficient in providing access to justice. This issue has not been raised in respect of the English jurisdiction.

[27] The sole connecting factor with this jurisdiction in the relationship between the respondent and the appellant is that the appellant purportedly is the parent of a number of International Business Companies incorporated in Nevis. The Nevisian subsidiaries are not parties to the suit, nor is the Registered Agent of those companies. The entity enjoined, the appellant, is a company incorporated in Guernsey. It therefore appears to me that the jurisdiction of England (or even perhaps Guernsey) is by far the more appropriate jurisdiction within which to bring this suit. Of compelling persuasion to me is that it is more likely than not that any dispute regarding the Security Trust Deed is likely to involve the Loan Note Deeds, which, as observed above, contain provisions not only declaring the proper law of the contract to be English law, but also contain an exclusive forum clause giving the English courts exclusive jurisdiction to hear and resolve any disputes arising under the Deeds.

[28] In the circumstances, I would allow the appeal by the appellant against the order of the trial judge permitting service of process out of the jurisdiction. As learned counsel for the respondent conceded, such a finding would result in the end of the claim and the falling away of all of the ancillary orders.

[29] In the premises, the order of this court is that the appeal is allowed with costs to the appellant such costs to be assessed, if not agreed. The order of the learned trial judge made on June 27, 2008 and continued by order dated July 21, 2008 is set aside.

Michael B. G. Gordon, QC
Justice of Appeal [Ag.]

I concur.

Hugh A. Rawlins
Chief Justice

I concur.

Rita Joseph-Olivetti
Justice of Appeal [Ag.]