EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

ANGUILLA

AXAHCVAP2014/0008

BETWEEN:

THORNTON TOMASETTI INC.

Appellant

and

ANGUILLAN DEVELOPMENT CORPORATION LTD.

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mde. Louise Esther Blenman	Justice of Appeal

On written submissions:

Ms. Shaniel Hunter for the Appellant
Ms. Tara Carter for the Respondent

2015: September 15.

Civil appeal – Interlocutory appeal – Forum non-conveniens – Whether learned master failed to give reasons – Whether learned master erred in the exercise of discretion in not setting aside service out of the jurisdiction

The appellant, a company incorporated in and carrying on business in New York, offered to provide structural and site/civil engineering services for the respondent, a company registered in Anguilla. The proposals were executed at the appellant's New York office and had no choice of law provision. The lead designer of the project, the architect and the construction manager were all located in the United States. The respondent asserted that the professional services were in relation to services and property in Anguilla. The appellant stated that it performed services predominantly within the United States.

The respondent terminated the appellant's services under the proposals and filed a statement of claim alleging breach of contract and negligence by the appellant. A master

granted the respondent an order to serve the statement of claim and claim form on the appellant outside the jurisdiction – in New York. At the inter partes hearing before another master, the appellant unsuccessfully sought: (a) to set aside the order granting permission to serve out of the jurisdiction; (b) in the alternative, an order that the court should not exercise its jurisdiction in the matter; and further in the alternative (c) to strike out the respondent's statement of claim.

The appellant has appealed against the second master's decision alleging that the decision was unjust by reason that the master failed to give written reasons for her decision and that she incorrectly exercised her discretion having failed to take into account relevant matters and having took into account irrelevant matters.

Held: allowing the appeal; setting aside the order of the master dated 21st October 2014 and ordering costs to be paid to the appellant on this appeal and in the court below to be assessed if not agreed within 21 days, that:

1. A judge should give his reasons in sufficient detail to show the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. Whether reasons are adequate depends on the nature of the case. In this case, the master was not conducting a trial or a mini trial; she had affidavits on which she was not going to hear cross-examination. The learned master did not have to be satisfied on a balance of probabilities that facts were established. The requirement for service out of the jurisdiction provides for an evaluation, not a finding. In that regard, although no written decision was given, the master sought to explain in the recitals to the order, her reasons for making the order. The basis upon which she acted and which informed her decision was fairly obvious. In the circumstances, this ground of appeal fails.

   Flannery and Another v Halifax Estate Agencies Ltd. (trading as Colleys Professional Services) [2000] 1 WLR 377 applied; **English v Emery Reimbold Strick Ltd** [2002] 1 WLR 2409 applied; **Trust Risk Group SpA and AmTrust Europe Ltd [2015] EWCA Civ 437** applied.

2. An appellate court should not interfere with the exercise of discretion of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court.

   Nilon Limited and Another v Royal Westminster Investments S.A. and Others [2015] UKPC 2 applied.

3. In service out of the jurisdiction cases, the claimant is seeking to get the court to exercise its discretionary power. The burden rests upon him to persuade the court as to the appropriate forum for the trial of the action. The task of the court is to identify the forum in which the case can be suitably tried for the interests of all the

parties and for the ends of justice. The place of commission is an appropriate starting point when considering appropriate forum for the resolution of dispute. The master's recitals did not address this issue. Given the relevance of the place of commission as an important starting point, and while recognising that it cannot be viewed in isolation when considering appropriate forum, it ought to have been part of the evaluation process. In the circumstances, the master erred in not making the place of commission part of the evaluation exercise.

AK Investment CJSC v Kyrgyz Mobil Tel Limited and Others [2011] UKPC 7 applied; **VTB Capital plc v Nutritek International Corp and others** [2013] UKSC 5 applied; **Deripaska and Cherney** [2009] EWCA Civ 849 applied; **Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)** [1987] AC 460 applied.

4. The location of the witnesses is also a very relevant consideration in deciding the issue of appropriate forum. The learned master stated in her recitals that all the witnesses are located within the United States, however failed to give proper effect to, or properly take into account that very relevant consideration. The learned master attached no weight to the possible injustice to the appellant in defending the claim given the impediments/inconvenience/costs that would result in proceeding in Anguilla. This is an injustice that cannot be said to occur to either the appellant and/or the respondent if the matter was heard in the New York Court.

   VTB Capital Plc v Nutritek International Corporation [2013] UKSC 5 applied.

5. The master having erred in the exercise of her discretion, this Court can intervene and exercise its discretion afresh. An evaluation of the factors of location of alleged commission coupled with the location of the relevant witnesses, points more in favour of New York and away from Anguilla as the more appropriate forum which best meets the end of justice.

   Nilon Limited and Another v Royal Westminster Investments S.A. and Others [2015] UKPC 2 applied; **VTB Capital plc v Nutritek International Corp and others** [2013] UKSC 5 applied; **Deripaska and Cherney** [2009] EWCA Civ 849 applied; **Spiliada Maritime Corporation v Cansulex Ltd (The Spiliada)** [1987] AC 460 applied.

JUDGMENT

[1] **BAPTISTE JA**: This is an interlocutory appeal. Thornton Tomasetti Inc. ("the appellant") appeals the order of Master Taylor-Alexander dismissing its application to strike out Anguillan Development Corporation's Ltd. ("the respondent") statement of case and disputing the court's jurisdiction; alternatively, requesting

that the court does not exercise its jurisdiction to hear the matter. Master Taylor-Alexander had to decide whether the order for service outside the jurisdiction granted by Master Glasgow at an ex-parte hearing should be set aside on the bases that: (1) the case was not a proper one for the court's jurisdiction and (2) that the Anguilla court was not the appropriate forum for the matter.

[2] Essentially, the appellant complains that Master Taylor-Alexander: (i) improperly exercised her discretion in the matter by failing to take into account relevant matters and taking into account irrelevant matters; (ii) made conclusions and findings of facts that were unsupported by the evidence; and (iii) failed to deliver a written judgment. The appellant submits that the learned master should have exercised her discretion to order that the court had no jurisdiction to try the claim and should have discharged the order of Master Glasgow granting leave to serve the statement of claim and claim form out of the jurisdiction. The appellant also contends that service out was the exercise of an exorbitant jurisdiction and this was an important factor militating against service out.

[3] Before addressing the grounds of appeal, it is useful to refer to the background of this matter. I note that some of the factual matters are disputed. It is common ground that the appellant is incorporated in and carries out business in New York and that the respondent is a company registered in Anguilla. The appellant offered to provide structural and site/civil engineering services for the respondent. Both proposals were executed at the appellant's New York office. Neither of the proposals had a choice of law provision. The respondent asserts that the professional services, essentially project supervision and management and engineering, were in relation to services and property in Anguilla. The appellant states that it performed services predominantly within the United States. The lead designer of the project, the architect and the construction manager were all in the United States.

[4] The respondent, having terminated the appellant's services under the two proposals, filed a statement of claim on 19th May 2014 alleging breach of contract and negligence by the appellant. By order of Master Glasgow, the respondent was permitted to serve the statement of claim and claim form on the appellant outside the jurisdiction – in New York. At the inter partes hearing before Master Taylor-Alexander, the appellant sought: (a) to set aside the order granting permission to serve out of the jurisdiction; (b) in the alternative, an order that the court should not exercise its jurisdiction in the matter; and further in the alternative (c) to strike out the respondent's statement of claim. By order dated 21st October 2014, Master Taylor-Alexander dismissed the application for an order that: (i) the court had no jurisdiction to try the claim and (ii) to strike out the claim as disclosing no reasonable ground for bringing it.

[5] It would be useful at this stage to set out the master's order containing the recitals. It states:

> "UPON this matter coming on for the hearing of two applications (1) to set aside the order for service out of the jurisdiction, and (2) to strike out the claim filed;
>
> AND THE COURT having read the submissions filed and having heard the parties:
>
> The court concluding that the defendant has not established to the satisfaction of the court that the service out should be set aside; namely:
>
> (a) That based on the amended pleading the claimant has in fact disclosed a reasonable cause of action;
> (b) Based on the revised procedural rules service out is permitted in the circumstances of this case.
> (c) That given the defendant's strongest case as to the location of the witnesses within the United States. I remain unconvinced that New York Law and the New York courts should be the proper jurisdiction. All the witnesses are located throughout the United States and not in New York. The nexus that they all share is the claimant and the location of the property for which they were all contracted that is Anguilla.
> (d) Their claim does not only sue for architectural design breach, the issues are wider on the claim and include other

obligations which the claimant submits the defendant failed on, such as structural engineering works;

IT IS NOW ORDERED THAT:

1. The application for an order that this court has no jurisdiction to try this claim be and is hereby dismissed.
2. The application to strike the claim as not disclosing any reasonable ground for bringing the claim is likewise dismissed…"

Grounds of Appeal

[6] The first ground of appeal alleges that as a matter of law, the decision was unjust by reason that the master failed to give written reasons for her decision. The second ground represents a challenge to the master's exercise of discretion. In essence, the complaint is that the decision was wrong in law because the exercise of the master's discretion was flawed for failing to take into account relevant matters and taking into account irrelevant matters.

[7] Among the matters it is complained that the master failed to take into account are, that the appellant displaced the burden of proving on the issue of forum non-conveniens, that the action has the most real and substantial connection with the United States and that the fact that the sole potential witness for the appellant was deceased, this would accordingly prejudice the appellant's ability to properly defend the claim. The appellant would therefore have to rely on other project participants to properly defend the matter, all or most of whom resided in the United States and were compellable and/or subject to the subpoena power of the United States. The agreements relied on only made provisions for limited visits to Anguilla throughout the performance of the services. It was for the respondent who sought service out to prove that Anguilla was clearly the most appropriate forum, rather than any other available forum. The matter was not a claim for defective construction but a claim for services rendered in the United States. Accordingly, the location of the project was irrelevant or of limited relevance. Services under the contract in dispute were substantially performed in the United States; therefore any breach occurring under such agreements necessarily must have occurred in the United States.

Reasons for decision

[8] The appellant submits that the learned master failed to proffer a written judgment in support of her decision. The appellant recognised that the learned master's order made brief statements explaining her decision to dismiss the application to set aside service out of the jurisdiction, however, contends that the recitals contained in the order are merely conclusionary and failed to highlight the reasons for dismissing the application to serve outside the jurisdiction. With respect to paragraph (b) of the recitals, the appellant states that the learned master failed to highlight the relevant sections of the rules and circumstances of the case that supports her conclusion that service outside was permissible in this case. The appellant also complains that the learned master failed to state how she arrived at the finding in paragraph (c) that "[i] remain unconvinced that New York Law and the New York courts should be the proper jurisdiction". The learned master also failed to show how she arrived at her finding at paragraph (d) and the impact of such a finding on her decision. The appellant avers that the learned master failed to show the significance, implications, impact and the reasoning for her finding in paragraph (c) that "[a]ll the witnesses are located throughout the United States and not New York." The master also failed to do the same in relation to paragraph (d). The master failed to provide any reason or make an order relating to the appellant's alternative application, requesting that the court does not exercise its jurisdiction to hear the matter. In the premises, the appellant submits that given that the master failed to proffer reasons for the exercise of her discretion, this Court must decide the matter afresh and apply its own discretion to the circumstances of the case.

[9] On the other hand, the respondent's position is that the learned master provided a preamble that clearly informed the parties of her reasoning for coming to her decision. Further, the case before the court was not incredibly complex and the learned master considered the affidavit evidence and skeleton arguments. The respondent submits that an order should not be set aside simply because a judge did not give reasons and relies on **Susan Barbara Hodge, appointed Trustee of**

the Estate of Raymond Arnold Dodge aka Ray Dodge et al v Michael Simanic et al.[1] The Court can look at the material before the lower court, the submissions and the evidence.

The Law

[10] In **Flannery and Another v Halifax Estate Agencies Ltd. (trading as Colleys Professional Services)**,[2] Henry LJ, giving the judgment of the court made the following general comments on the duty to give reasons:

> "(1) The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind; if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
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> "(2) The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself.
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> "(3) The extent of the duty, or rather the reach of what is required to fulfil it, depends on the subject matter. Where there is a straightforward factual dispute whose resolution depends simply on which witness is telling the truth about events which he claims to recall, it is likely to be enough for the judge (having, no doubt, summarised the evidence) to indicate simply that he believes X rather than Y; indeed there may be nothing else to say. But where the dispute involves something in the nature of an intellectual exchange, with reasons and analysis advanced on either side, the judge must enter into the issues canvassed before him and explain why he prefers one case over the other. This is likely to apply particularly in litigation whereas here there is disputed expert evidence; but it is not necessarily limited to such cases.

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[1] SKBHCVAP2003/0015 (delivered 12th January 2004, unreported), para. 9.
[2] [2000] 1 WLR 377 at pp. 381-382.

"(4) This is not to suggest that there is one rule for cases concerning the witnesses truthfulness or recall of events, and another for cases where the issue depends on reasoning or analysis (with experts or otherwise). The rule is the same: the judge must explain why he has reached his decision. The question is always, what is required of the judge to do so; and that will differ from case to case. Transparency should be the watchword."

[11] The duty to give reasons was also addressed by the court in **English v Emery Reimbold Strick Ltd**,[3] Lord Phillips MR said at paragraph 17:

> "As to the adequacy of reasons, as has been said many times, this depends on the nature of the case: see for example Flannery's case [2000] 1 WLR 377, 382. In Eagil Trust Co Ltd v Pigott-Brown [1985] 3 All ER 119, 122 Griffiths LJ stated that there was no duty on a judge, in giving his reasons, to deal with every argument presented by counsel in support of his case."

Lord Phillips MR then quoted the following statement of Griffiths LJ:

> "When dealing with an application in chambers to strike out for want of prosecution, a judge should give his reasons in sufficient detail to show the Court of Appeal the principles on which he has acted and the reasons that have led him to his decision. They need not be elaborate. I cannot stress too strongly that there is no duty on a judge in giving his reasons, to deal with every argument presented by counsel in support of his case. It is sufficient if what he says shows the parties and, if need be, the Court of Appeal the basis on which he acted… (see Sachs LJ in Knight v Clifton [1971] Ch 700, 721)."

[12] At paragraph 18, Lord Phillips MR said:

> "In our judgment, these observations of Griffiths LJ apply to judgments of all descriptions. But when considering the extent to which reasons should be given it is necessary to have regard to the practical requirements of our appellate system."

At paragraph 19 he stated:

> "It follows that, if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the judge reached his decision. This does not mean that every factor which weighed with the judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this

[3] [2002] 1 WLR 2409; [2002] EWCA Civ 605.

> process. It need not involve a lengthy judgment. It does require the judge to identify and record those matters which were critical to his decision. If the critical issue was one of fact, [it] may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

[13] Appropriate guidance is obtained from the above cases with respect to the duty to give reasons for decision. Parties are undoubtedly entitled to know why judges make their decisions. This necessarily entails giving reasons for decisions – though the reasons may be briefly stated – and not merely announcing conclusions. While it is true that no written decision was given, the master sought to explain in the recitals to the order, her reasons for making the order under appeal. The situation here is more akin to adequacy of reasons as opposed to the absence of reasons.

[14] Whether reasons are adequate depends on the nature of the case. The appellant made references to the master making findings or failing to show how she arrived at findings. In that regard it must be recognised that the master was not conducting a trial or a mini trial. The master had affidavits on which she was not going to hear cross-examination. She did not have to be satisfied on a balance of probabilities that facts have been established. The requirement for service out of the jurisdiction provides for an evaluation, not a finding.[4]

[15] As stated earlier, some of the factual matters are in dispute. Where the issue is forum non-conveniens or where the documentary evidence contains a sharp clash of evidence about the facts, the exercise carried out by the judge is an evaluative one, sometimes with "predictive" element and with more than one possible "right" answer. The evaluation of factors relevant to the determination of the appropriate forum and of disputed evidence is very much the province of the first instance judge.[5]

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[4] See Beatson LJ in Trust Risk Group SpA and AmTrust Europe Ltd [2015] EWCA Civ 437, para. 42.
[5] See Beatson LJ in Trust Risk Group SpA and AmTrust Europe Led [2015] EWCA Civ 437, para. 33.

[16] A vital issue before the master was whether the order for service outside the jurisdiction should be set aside. The appellant's position is that the recitals are merely conclusionary and failed to highlight the reasons for dismissing the application to set aside service outside the jurisdiction. The question is whether the master gave reasons in sufficient detail to show the principles or bases upon which she acted. This would require the master to identify and record those matters which were critical to her decision. In the context of appropriate forum, in **VTB Capital Plc v Nutritek International Corpn and others**,[6] Lord Neuberger commented that the essentially relevant factors should, in the main at any rate, be capable of being identified relatively simply and in many respects, uncontroversially. There is little point in going into much detail; when determining such applications, the court can only form preliminary views on most of the relevant legal issues and cannot be anything like certain about which issues and what evidence will eventuate if the matter proceeds to trial. Although Lord Neuberger was not dealing with reasons for decision, it would be useful to take note of his admonition.

[17] Although the master could have been more expansive in her reasons, the basis upon which she acted and which informed her decision, is fairly obvious. In the circumstances, this ground of appeal fails.

Service out of the jurisdiction – legal principles

[18] The application to serve the statement of claim and claim form out of the jurisdiction was made under rules 7.2, 7.3(3)(a) and 7.3(4) of the **Civil Procedure Rules 2000** ("CPR"). Rule 7.2 of the CPR ordains that a claim form may be served out of the jurisdiction only if rule 7.3 allows and the court gives permission. Rule 7.3(3)(a) provides for a claim form to be served out of the jurisdiction if a claim is made in respect of a breach of contract committed within the jurisdiction. With respect to tortious claims, rule 7.3(4) states that a claim form may be served out of the jurisdiction if a claim in tort is made and the act causing the damage was committed within the jurisdiction or the damage was sustained within the

[6] [2013] UKSC 5, at para. 83.

jurisdiction. Rule 7.7 deals with applications to set aside service under rule 7.3. Rule 7.7(1) provides that any person on whom a claim form has been served out of the jurisdiction under rule 7.3 may apply to set aside service of the claim form. Rule 7.7(2) gives the court a discretion to set aside service, if service out of the jurisdiction is: (a) not permitted by the rules; (b) the claimant does not have a good cause of action; or (c) the claim is not a proper one for the court's jurisdiction.

[19] The three basic principles relating to service out of the jurisdiction were addressed by Lord Collins in **AK Investment CJSC v Kyrgyz Mobil Tel Limited and Others**.[7] On an application for permission to serve a foreign defendant out of the jurisdiction, three requirements have to be satisfied. 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. 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. Third, the claimant must satisfy the court that in all the circumstances the forum which is being seised 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.

[20] In service out of the jurisdiction cases, the claimant is seeking to get the court to exercise its discretionary power. The task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice; the burden is on the claimant to persuade the court that England (in this case, of course, Anguilla) is clearly the appropriate forum for the trial of the action.[8]

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[7] [2011] UKPC 7; [2012] 1 WLR 1804, at para. 71.
[8] See Lord Collins in AK Investment CJSC v Kyrgyz Mobil Tel Limited and Others, [2011] UKPC 7, at para. 88.

[21] In one of the recitals to the master's order she stated: "[i] remain unconvinced that New York Law and the New York courts should be the proper jurisdiction". Counsel for the appellant argued that the master had to be cognizant of the new facts produced at the inter-partes hearing while she was reviewing Master Glasgow's decision permitting service out of the jurisdiction at the ex-parte hearing. It was not the appellant's burden to prove that New York was the proper forum.

[22] I note that it has not been indicated what these new facts were and how they could have impacted the decision. Further, I do not regard the recital as imposing any burden on the appellant to prove that New York was the proper forum. The statement has to be looked at in context. It does not stand by itself. It forms part of paragraph 3 of the recitals. The sentence immediately preceding states, "[t]hat given the defendant's strongest case as to the location of witnesses within the United States". The remaining sentences in the paragraph refer to the location of witnesses and the nexus that they all share. The statement is part and parcel of what the master believed to be the appellant's case. As will be seen later, location of witnesses is an important factor in considering the issue of appropriate forum.

An exorbitant jurisdiction?

[23] The appellant submits that the master erred in principle in her approach to service out. It argues that it is not located within Anguilla and for that reason the court ought to approach and undertake with great care such an exorbitant jurisdiction of allowing service outside the jurisdiction. Basically, the issue as crystallised would be whether a defendant not ordinarily subject to the jurisdiction of the Anguilla court and who does not accept jurisdiction should be compulsorily brought there as a defendant. For that reason it was said that the court, in either granting permission to serve out of the jurisdiction or refusing to set aside service out, is exercising an exorbitant jurisdiction over those not within its ordinary reach.[9] This represents the traditional view of service out.

[9] See para. 41 of Trust Risk Group Sp A and Am Trust Europe Limited [2015] EWCA Civ 427.

[24] Service out has traditionally been regarded as the exercise of an exorbitant jurisdiction and that is a consideration which has been of importance in determining whether permission to serve out of the jurisdiction should be granted.[10] Although in this regard, Lord Clarke agreed with the approach set out by Lord Sumption at paragraph 53 of the **Abela** case. As Lord Sumption explained in paragraph 53, this characterisation of the jurisdiction as exorbitant was originally based on the notion that the service of proceedings abroad was an assertion of sovereign power over the defendant and a corresponding interference with the sovereignty of the state in which process was served. Lord Sumption opined that this was no longer a realistic view of the situation.

[25] Lord Sumption pointed out that the adoption in English law of the doctrine of forum non-conveniens and the United Kingdom's accession to a number of conventions regulating the international jurisdiction of national courts, means that in the overwhelming majority of cases where service out is authorised there will have been either a contractual submission to the jurisdiction of the English court or else a substantial connection between the dispute and England. Lord Sumption also recognised the existence of a far greater measure of practical reciprocity than in the past, reflected in the fact that litigation between residents of different states is a routine incident of modern commercial life. He pointed out that a jurisdiction similar to that exercised by the English court is now exercised by the courts of many other countries and that the basic principles on which the jurisdiction is exercisable are similar to those underlying a number of international jurisdictional conventions. In that regard, he noted the Brussels Convention (and corresponding regulation) and the Lugano Convention.

[26] I respectfully agree with and adopt the approach of Lord Sumption. In adopting that approach and for the reasons stated by His Lordship, I would not regard service out in this case as the exercise of an exorbitant jurisdiction. Consequently, I do not agree with the appellant on that issue.

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[10] Per Lord Clarke in Abela and others v Baadarani [2013] UKSC 44, at para. 45.

Appropriate Forum

[27] In **VTB Capital plc v Nutritek International Corp and others**,[11] Lord Mance said at paragraph 12, "[t]he locus classicus in relation to issues of appropriate forum at common law is Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada) [1987] AC 460, where Lord Goff of Chieveley gave the leading speech". Lord Goff addressed how the principle of forum non-conveniens is applied when the court is exercising its discretion to serve out. He identified as the underlying aim in all cases of disputed forum, "to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice".

[28] Counsel for the appellant contends that even if the master rightly found that Anguilla was the "natural forum" she had to go on to the next test of determining whether substantial justice may not be done in the natural forum. The recitals reveal that no such analysis was done. Counsel submits that if that analysis had been performed, the master would have found that given all the witnesses are located in the United States and the obstacles of compelling witnesses to give evidence in Anguilla, (b) the disputed services were performed in the United States and the cost and inconvenience associated with a trial in Anguilla, substantial justice would not have been done in Anguilla. To the extent that counsel refers to what the master would have found, it needs to be restated that the requirement for service out provides for an evaluation, not a finding.

[29] In **Deripaska and Cherney**[12] Waller LJ stated at paragraph 20 that in **The Spiliada**,[13] Lord Goff made it clear that it would be better to distinguish between "natural", i.e the forum with which the case has the most natural connection, and "appropriate" which may be different, to meet the ends of justice.[14] Waller LJ stated that the summary in the notes on page 22 of the White Book under CPR 6.37(4) Forum Conveniens correctly summarised the position:

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[11] [2013] UKSC 5.
[12] [2009] EWCA Civ 849.
[13] Spiliada Maritime Corpn v Cansulex Ltd (The Spiliada) [1987] AC 460.
[14] See p. 478A.

"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 first 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 for 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 him in persuading the court to exercise its discretion in his favour, the evidential burden in respect of that matter will rest upon the party asserting it."

At paragraph 21, Waller LJ stated that that summary correctly emphasises, in relation to service out, the distinction between what may at stage one seem the "natural forum", as the place with which the case has the closest connection, and ultimately the "appropriate or proper forum" which a plaintiff can establish, even if England is not the "natural forum" if justice requires that permission to serve out be given.

[30] The fundamental question of the appropriate forum is a matter within the discretion of the judge. Consequently, an appellate tribunal can only interfere with the exercise of discretion in accordance with well settled principles.[15] It is also trite law that in appeals from the exercise of a discretion an appellate court should not interfere with a decision of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court.[16]:

[31] Essentially, this appeal is about the appropriate forum and whether the master correctly exercised her discretion in not setting aside service out of the jurisdiction. In addressing that issue, the first matter to be considered is whether there is any basis for regarding the master's decision in refusing to set aside service out of the jurisdiction as flawed, thus attracting appellate intervention and impelling this Court to exercise its discretion afresh. The second question would be what conclusion this Court should reach on the issue as to appropriate forum. The second question would be engaged if the master's decision was so plainly wrong that it was outside the generous ambit within which reasonable disagreement is possible.

[15] Per Lord Collins in AK Investment CJSC v Kyrgz Mobil Tel Limited and Others [2012] 1 WLR 1804; [2011] UKPC 7 at para. 139.
[16] Per Lord Collins in Nilon Limited and Another v Royal Westminster Investments S.A. and Others, [2015] UKPC 2 at para. 16.

[32] Two important matters are engaged here: the place of commission; and the location of witnesses. The place of commission is an appropriate starting point when considering appropriate forum for the resolution of dispute. A core factor in the search for the appropriate forum is the question of the location of witnesses.[17]

[33] Both parties submitted on the place of commission. The master's recitals did not address that issue. The appellant contended that it provided cogent evidence to show that the services for which the respondent's claim relates were performed predominantly within the United States and asserted that the respondent did not provide any evidence in the lower court to dispute such a fact.

[34] Although the place of commission is a relevant starting point when considering appropriate forum for dispute resolution it cannot be viewed in isolation or by itself. Its importance may be dwarfed by other countervailing factors. The position was explained by Lord Mance in **VTB Capital plc v Nutritek International Corp and others**[18] at paragraph 51:

> "The place of commission is a relevant starting point when considering the appropriate forum for a tort claim. References to a presumption are in my view unhelpful. The preferable analysis is that, viewed by itself and in isolation, the place of commission will normally establish a prima facie basis for treating that place as the appropriate jurisdiction. But, especially in the context of an international transaction like the present, it is likely to be over-simplistic to view the place of commission in isolation or by itself, when considering where the appropriate forum for the resolution of any dispute is. The significance attaching to the place of commission may be dwarfed by other countervailing factors."

[35] In my judgment, given the relevance of the place of commission as an important starting point, and while recognising that it cannot be viewed in isolation when considering appropriate forum, it ought to have been part of the evaluation process. In the circumstances, the master erred in not making the place of commission part of the evaluation exercise.

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[17] See VTB Capital Plc v Nutritek International Corporation [2013] UKSC 5; [2013] AC 337, at para. 62, per Lord Mance.
[18] [2013] UKSC 5.

[36] From a reading of the recitals, it is obvious that the master's order was largely informed by her views as to the location of the witnesses. The appellant submitted that Anguilla is not the more appropriate forum for the matter given the finding by the master as to the location of the witnesses in the United States. The recitals indicate that the master was of the view that the appellant's strongest case was the location of the witnesses within the United States. Given that position, the master articulated her lack of conviction that New York Law and the New York courts should be the proper jurisdiction. In support of that position, the master pointed out that all the witnesses are located throughout the United States and not in New York. Can the master's statement be taken to mean that if all the witnesses were located in New York, New York Law and the New York courts would be the appropriate forum? They being located throughout the United States, New York and the New York courts could not be the appropriate forum? Anguilla therefore is the appropriate forum? I am afraid that I am unable to support the master's analysis and conclusion.

[37] In my judgment, the statement of the master as to the location of the witnesses is clearly of significance and is a very relevant consideration in deciding the issue of appropriate forum. It is of significance because the place of location of the witnesses is an important factor and has been described as a core factor in the search for the appropriate forum. The location of the witnesses being a core factor and having stated that all the witnesses are located within the United States, the learned master failed to give proper effect to, or properly take into account that very relevant consideration. The appellant pointed out that these witnesses were essential in the interests of justice. Further, the need to have access to the said witnesses was underscored by the fact that the main witness for the appellant was deceased and to resolve the matter, any court would have to rely on evidence to be given by other project participants located within the United States and subject to United States subpoena power.

[38] The learned master in her recitals stated that "[t]he nexus that they [the witnesses] all share is the claimant and the location of the property for which they were all

contracted that is Anguilla." Based on this statement the appellant submitted, and I agree, that the learned master gave little or no weight to the fact that the witnesses were located within the United States and attached no weight to the possible injustice to the appellant in defending the claim given the impediments/inconvenience/costs that would result in proceeding in Anguilla, an injustice that cannot be said to occur to either the appellant and/or the respondent if the matter was heard in the New York Court.

[39] The leaned master was highly influenced by the location of the property and respondent regardless of the fact that the evidence suggested that the services in dispute were performed predominantly in the United States and the agreements relating to the service envisioned very limited visits to Anguilla.

[40] For all the above reasons, the master erred in not setting aside service out of the jurisdiction and reached a conclusion which she was not entitled to reach on the basis of applying the relevant principles to the facts of the case. An evaluation of the factors of location of alleged commission coupled with the location of the relevant witnesses, points more in favour of New York and away from Anguilla as the more appropriate forum which best meets the end of justice. Accordingly, this is an appropriate case for the court to intervene and set aside service out of the jurisdiction. In my judgment, that would be sufficient to dispose of the appeal in favour of the appellant.

Dismissal of application that court ought not to exercise its jurisdiction

[41] The appellant also criticised the learned master for failing to provide any reason or make an order relating to the appellant's alternative application that the court should not exercise its jurisdiction to hear the matter. In that regard, the appellant contends that either the master did not address her mind to this alternative application or misdirected herself as to how it should be addressed. It appears that the master did not address her mind to the alternative position that the court should not exercise its jurisdiction. However, in view of the court's conclusion that

service outside the jurisdiction should be set aside, it is unnecessary to address that ground.

Disposition

[42] It is ordered that the appeal is allowed; the order dated 21st October 2014 is set aside; and costs are awarded to the appellant on this appeal and in the court below to be assessed if not agreed within 21 days.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Louise Esther Blenman
Justice of Appeal