

Court of Appeal Sitting
TERRITORY OF THE VIRGIN ISLANDS
4th May 2009

Coram: Hon. Chief Justice Mr. Hugh A. Rawlins
Hon. Justice of Appeal (Ag.) Mr. Michael Gordon Q.C.
Hon. Justice of Appeal (Ag.) Mr. Davidson Baptiste

JUDGMENT

**Amazing Global Technologies Limited v Prudential
Trustee Company Limited
[Civil Appeal No. 8 of 2008] – Saint Christopher and
Nevis**

Appearances:
Appellant: Mr. Patrick Thompson holding papers for Mr. Keithley Lake
Respondent: Mr. John Carrington holding papers for Mr. Gerhard Walbank.

Issues: 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.

Result: The appeal was allowed, the order of the court below set aside and
costs awarded to the Appellant to be assessed if not agreed.

Reason: It was held that:

- (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.

HIGH COURT CRIMINAL APPEALS

Lorne Parsons v The Queen [Criminal Appeal No. 2 of 2006]

Appearances:

Appellant: Sir Richard Cheltenham, Q.C. absent

Respondent: Mr. Terrence Williams, Director of Public Prosecutions

Issue: Murder – appeal against sentence

Result: The appeal is adjourned to Wednesday 6th May, 2009.

Reason: To allow the Appellant to make contact with his counsel.

**Clinton Hamm v The Queen
[Criminal Appeal No. 3 of 2006]**

Appearances:

Appellant: No appearance for the Appellant

Respondent: Mr. Terrence Williams, Director of Public Prosecutions

Issue: Murder – appeal against sentence

Result: The appeal is adjourned to Wednesday 6th May, 2009.

Reason: To allow the Appellant to make contact with his counsel.

**Jerry Martin v The Queen
[Criminal Appeal No. 2 of 2008]**

Appearances:

Appellant: Dr. Joseph Archibald, Q.C.

Respondent: Mr. Terrence Williams, Director of Public Prosecutions

Issue: Murder – appeal against conviction and sentence

Result: The hearing of this appeal is adjourned to the next sitting of the Court in this Territory commencing 28th September, 2009.

**Dwight Callwood v The Queen
[Criminal Appeal No. 8 of 2007]**

Appearances:

Appellant: Mr. Herbert McKenzie

Respondent: Mr. Terrence Williams, Director of Public Prosecutions

Issue: Manslaughter – appeal against conviction and sentence

Result: The appeal is adjourned to Wednesday 6th May, 2009.

**Brian Walters v The Queen
[Criminal Appeal No. 1A of 2008]**

Appearances:

Appellant: Dr. Joseph Archibald Q.C.

Respondent: Mr. Terrence Williams, Director of Public Prosecution

Issue: Manslaughter – appeal against conviction

Result: The Application was withdrawn by Notice of Withdrawal filed on April 24th, 2009 and is dismissed accordingly.

HIGH COURT CIVIL APPEAL

**Thomas Townsend v Persistence Holdings Limited
[Civil Appeal No. 8 of 2004]**

Appearances:

Appellant: Mr. Sydney Bennett, Q.C. with Ms. Anthea Smith

Respondent: Mr. Gerard Farara, Q.C.

Issues: Agreement for Sale - provision in Agreement on whether the Appellant/Claimant was estopped by convention from enforcing their legal right to rescind the Agreement for Sale.

Result: The matter is adjourned to the next sitting of the Court in Antigua and Barbuda. Skeleton Arguments to be filed by the end of next week.

Reason: The panel was not properly constituted, in accordance with the Privy Council's guidance to hear the appeal.

MAGISTERIAL CIVIL APPEALS

**Sharada Shaw and Matthew Owen v David Penn and Myrla–May Penn
[Magisterial Civil Appeal No. 2 of 2008]**

Appearances:

Appellants: Mr. Ian Mann

Respondents: Mr. Patrick Thompson

Issue: Landlord and Tenant – whether the Magistrate erred in finding that the Appellants were liable for rent and in awarding costs

Result: The appeal is adjourned to Wednesday 6th May, 2009

**Claudius Blyden v Tarris Hill Trading Limited
[Magisterial Civil Appeal No. 3 of 2008]**

Appearances:

Appellant: Mr. Glenroy Forbes

Respondent: Mr. Lewis Hunte, Q.C.

Issues: Monies due for goods sold – appeal against Magistrate’s decision – section 155(3) of the Magistrate’s Code of Procedure Act

Result: The appeal was withdrawn and is accordingly dismissed with costs to the Respondent in the sum of \$1000.00.

**Yvonne Remington v Betteto Frett
[Magisterial Civil Appeal No. 6 of 2008]**

Appearances:

Appellant: Mrs. Dionne Boreland-Fearon holding for Mrs. Susan Demers

Respondent: No appearance for the Respondent

Issues: Landlord and Tenant – whether the Respondent had, at the trial, proven that she was entitled to the return of her security deposit.

Result: The appeal is adjourned to Wednesday 6th May, 2009

MAGISTERIAL CIVIL APPEAL

Coram:

Hon. Chief Justice Mr. Hugh A. Rawlins
Hon. Justice of Appeal Mrs. Janice George-Creque
Hon. Justice of Appeal (Ag.) Mr. Davidson Baptiste

**Bert Smith v Carlton George
[Magisterial Civil Appeal No. 7 of 2008]**

Appearances:

Appellant: Mrs. Marie-Lou Creque

Respondent: Mrs. Dionne Boreland-Fearon

Issues: Appeal against order of Magistrate – debt owing – defendant not served with claim

Result: The appeal was adjourned to the next sitting of the Court in this Territory in the week commencing 28th September, 2009. By consent, the Appellant shall pay \$800.00 costs for today to the Respondent.

APPLICATIONS

**Belmont Estate Limited v Registrar Of Lands & Tara Ford Lyle
[Civil Appeal No. 11 of 2008]**

Appearances:

Appellant: Mrs. Hazel-Ann Hannaway-Boreland

Respondents: Mr. Baba Aziz for the 1st Respondent
Mr. Gerard Farara, Q.C. for the 2nd Respondent

Issues:

Land-Law – Application for extension of time to file Notice of Appeal – Application to strike out Notice of Appeal.

Result:

- 1. The Application to strike out the Notice of Appeal is granted.**
- 2. The Application for extension of time is dismissed.**
- 3. The Appellant to pay costs in the sum of \$1500.00 to Tara Ford Lyle.**

Reason:

The Application was out of time and the Affidavit in support of the Application contains insufficient reasons for the delay to permit the court to extend the time on the requirements contained in rule 26.8 of CPR 2000 for relief from sanctions.

**Rudy Lim, Utaryo Suwanto and Eka Sinto Kasih Tija
v Precious Treasure Global Inc., Tristar Global Holdings Corporation and AMS Trustees Limited**

[Civil Appeal No. 23 of 2008]

Appearances:

Appellants: No appearance

Respondents: Mr. Richard Evans

Issues:

Commercial Law – Application for leave to appeal

Result:

- 1. The Application is struck out for want of prosecution.**
- 2. Costs for today in the sum of \$1500.00 to be paid to the Respondent by the Appellants.**

Result:

There is no appearance by the Appellants. Counsel representing the Appellants is no longer on the record. The Court is satisfied that the Appellants were notified of the sitting.

**The Attorney General v Daphnie Alves
[Civil Appeal No. 20 of 2008]**

Appearances:

Appellant: Mr. Baba Aziz

Respondent: Mr. John Carrington

Issues:

Application for withdrawal of Application for leave to appeal

Result:

- 1. The Application filed on 22nd October 2008 on behalf of the Attorney General for leave to appeal is withdrawn and accordingly dismissed.**
- 2. By consent, Solicitors for the Attorney General are granted leave to incorporate the aspects of the said leave Application that are not in their Notice of Appeal that was filed on 28th November 2008 into the said Notice of Appeal by way of an Amended Notice of Appeal.**
- 3. The Amended Notice of Appeal shall be filed and served on or before 25th May 2009.**
- 4. The appeal shall proceed in accordance with Part 62 of the CPR 2000.**
- 5. Costs for today is reserved pending the determination of the appeal.**

5th May 2009

Hon. Chief Justice Mr. Hugh A. Rawlins
Hon. Justice of Appeal Mrs. Janice George-Creque
Hon. Justice of Appeal Ms. Ola Mae Edwards

**Danone Asia Pte Limited v Golden Dynasty Enterprise
Limited
[Civil Appeal No. 2 of 2009]**

Appearances:

Applicant: Mr. Mark Forte and Mr. Richard Evans

Respondent: Mr. Stephen Moverley Smith, Q.C. with Ms. Elizabeth Weaver, Mr. Christopher Young and Mr. Nicholas Fox

Issues:

Commercial Law – Application to set aside Order - whether leave to appeal was required.

Result:

- 1. The decision on the Application to set aside the Order is reserved.**
- 2. The stay that was granted in these proceedings shall remain pending determination of the Stay Application.**
- 3. The Court shall make available its own decision and other decisions that are found to the parties and in that case shall issue written direction on those cases.**
- 4. The three applications by the Claimants to adduce further evidence filed 26th January 2009 and 8th April 2009 and Application to strike out Notice of Appeal filed 9th April 2009 and the Application that was filed 12th January 2009 seeking continuation of the stay by the Defendants are adjourned pending decision on the setting aside applications.**
- 5. Costs is reserved.**

6th May, 2009

Coram: Hon. Justice of Appeal Ms. Ola Mae Edwards
Hon. Justice of Appeal (Ag.) Mr. Michael Gordon Q.C.
Hon. Justice of Appeal (Ag.) Mr. Davidson Baptiste

HIGH COURT CRIMINAL APPEALS AGAINST SENTENCE

Lorne Parsons v The Queen [Criminal Appeal No. 2 of 2006]

Appearances:

Appellant: Mr. Patrick Thompson holding papers for Sir Richard Cheltenham, Q.C.

Respondent: Mr. Terrence Williams, Director of Public Prosecutions

Issue: Murder – appeal against sentence

Result: The hearing of the appeal is adjourned to the next sitting of the Court in this Territory commencing 28th September, 2009.

Reason: The Court accepted the view of both the Appellant and Respondent that it is appropriate to await the passing of the Parole Act before re-sentencing the Appellant.

Clinton Hamm v The Queen [Criminal Appeal No. 3 of 2006]

Appearances:

Appellant: Mr. Patrick Thompson holding papers for Mr. Hayden Sinclair-Douglas

Respondent: Mr. Terrence Williams, Director of Public Prosecutions

Issue: Murder – appeal against sentence

Result: The hearing of the appeal is adjourned to the next sitting of the Court in this Territory commencing 28 September, 2009.

Reason: The Court accepted the view of both the Appellant and Respondent that it is appropriate to await the passing of the Parole Act before re-sentencing the Appellant.

MAGISTERIAL CIVIL APPEAL

**Yvonne Remington v Betteto Frett
[Magisterial Civil Appeal No. 6 of 2008]**

Appearances:

Appellant: Mrs. Dionne Boreland-Fearon holding for Mrs. Susan Demers

Respondent: Mrs. Lorna Shelly-Williams

Issue: Landlord and Tenant – whether the Respondent had proven at the trial that she was entitled to the return of her security deposit.

Result: The matter was adjourned to the next sitting of the Court commencing 28th September 2009 on the joint application of Counsel for the parties.

Reason:

HIGH COURT CRIMINAL APPEAL AGAINST CONVICTION AND SENTENCE

**Dwight Callwood v The Queen
[Criminal Appeal No. 8 of 2007]**

Appearances:

Appellant: Mr. Herbert McKenzie

Respondent: Mr. Terrence Williams, Director of Public Prosecutions and Mr. Valston Graham

Issues:

Manslaughter – appeal against conviction and sentence – whether the summing up to the jury by the learned judge on manslaughter in the circumstances of this case amounted to a misdirection in law – whether the sentence was unduly severe in the circumstance of the case – did the learned judge err when she took into account the death of the other person in the accident despite the fact that the jury returned a verdict of not guilty on the count regarding the deceased.

Result:

- 1. The appeal against conviction was dismissed.**
- 2. The appeal against sentence was allowed. The sentence of 4 years' imprisonment was reduced. The Appellant has been in custody since November, 2007 and the time served is deemed to be sufficient sentence which amounts to approximately 2 years.**

Reason:

- 1. There is no merit in the complaint against the summing up of the learned judge particularly in the context of R v Adomako [1995] 1 AC 171, [1994] 3 All ER 79.**
- 2. The learned judge made an error in taking into account the second death when sentencing the Appellant (this was conceded by the Respondent) and this was improper. The Appellant is therefore entitled to a reduction in his sentence on this basis.**

MAGISTERIAL CIVIL APPEAL

**Sharada Shaw et al v David Penn et al
[Magisterial Civil Appeal No. 2 of 2008]**

Appearances:

Appellant: Mr. Ian Mann

Respondent: Mr. Patrick Thompson

Issues: Landlord and Tenant – whether the Magistrate erred in (a) finding that the Appellants were liable to pay rent for the entire month of November, 2006 when the tenancy agreement expired on 9 November, 2006; (b) failing to deduct the security deposit of US\$1,200.00 from the judgment debt; and (c) in awarding costs in the sum of US\$1,623.35 as well as legal fees of US\$500.00 – whether there was any evidence before the Magistrate in respect of mitigation and who has the burden of proof in that regard.

Result: The appeal is allowed to the extent that the judgment of US\$7,631.75 be reduced by the sum of US\$2,540.00 that is: US\$840.00 - rent for the month of November, 2006 (this was conceded by the Respondents); US\$500.00 – the claim for legal fees that was not proven; and US\$1,200.00 – the security deposit that should have been deducted.

Reason:

1. The Magistrate erred in finding that the Appellants were liable to pay the rent for the entire month of November, 2006 as the lease expired on 9 November, 2006. The Appellants were only liable to pay rent up to 9 November, 2006.
2. There was no evidence before the Magistrate as to how the claim of US\$500.00 for legal fees was accrued and therefore the claim was not proven at trial.
3. The Respondents were fully compensated for the rent for the remaining term of the lease and for damages done to the premises by the judgment of the learned Magistrate. There is no reason for the Respondents to keep the security deposit in addition to the compensation they received. The learned Magistrate should have deducted the security deposit from the amount awarded to the Respondents in her judgment.
4. Mitigation was not raised before the learned Magistrate and as such she had no evidence on which to have dealt with mitigation in her judgment. In addition, the burden of proof was on the Appellants to show that the Respondents did not mitigate and they did not discharge this burden.