IN THE SUPREME COURT OF BERMUDA
CIVIL JURISDICTION
2010: No. 180
(Commercial List)

BETWEEN:

SAAD INVESTMENTS COMPANY LIMITED

(In Caymanian Liquidation)

Plaintiff

-v-

(1) GREENWAY SPECIAL OPPORTUNITIES FUND LTD

(2) CREDIT AGRICOLE (SUISSE) SA

Defendants

RULING

(In Chambers)

Date of Hearing: December 3, 2010
Date of Ruling: December 7, 2010

Mr. Kevin Taylor, Marshall Diel & Myers,
for the Applicant/2nd Defendant ("CAS")

Mr. Nathaniel Turner, Attride-Stirling & Woloniecki,
Attorneys for the Plaintiff/Respondent (acting by its
Caymanian Joint Official Liquidators -"SICL")

Introductory

1. CAS, a Swiss bank based in Geneva, applies by Summons dated August 25, 2010 for the following relief in an action also commenced against the Fund, a Bermudian company, namely an Order that:

> "*1.The Plaintiff's Concurrent Specially Indorsed Writ issued by this Honourable Court on 11 June 2010 be set aside as against the Second Defendant on the basis that the Plaintiff and the Second Defendant agreed in writing that the Courts of Switzerland have jurisdiction to adjudicate upon any disputes between them or, in the alternative, that Switzerland is the convenient forum in any event;*
>
> *2. The Order of this Honourable Court for injunctive relief dated 8 June 2010 be set aside as against the Second Defendant…*"

2. On June 8, 2010, I granted leave to serve SICL out of the jurisdiction pursuant to Order 11 rule 1(1) (b) (an injunction was sought) and (c) (CAS was a necessary and proper party). I also made an Order in the following substantive terms:

> *"1. The appointment by Order dated the 18th day of September, 2009 by the Grand Court of the Cayman Islands of Hugh Dickson, Stephen John Akers and Mark Byers as Joint Official Liquidators of Saad Investments Company Limited is recognised by this Court;*
>
> *[2.] That an Injunction be granted, restraining the First Defendant, until trial in this action or further order, whether by itself, its servants or agents, or otherwise howsoever, from making payments or distributions (in cash or otherwise) in relation to the Shares held in the Second Defendant's name, as nominee for the Plaintiff, to any party other than the Liquidator of the Plaintiff; and*
>
> *3.Against the Second Defendant, Credit Agricole (Suisse) SA:*
>
> *That an Injunction be granted, restraining the Second Defendant, until trial in this action or further order, whether by itself, its servants or agents, or otherwise howsoever, from making payments or distributions (in cash or otherwise) in relation to the Shares held in its name as Nominee for the Plaintiff, to any party other than the Liquidator of the Plaintiff…*"

3. CAS did not pursue its application to discharge the injunction, which Mr. Taylor characterized as relief merely incidental to setting aside service. Mr. Turner contended that the inclusion of this prayer in the Summons, combined with the failure of CAS to enter a conditional appearance (or any appearance at all) was sufficient to justify

dismissing the application on the grounds that CAS had submitted to the jurisdiction of the Court. This came very close to a submission because the injunction does not automatically fall away if SICL is required to pursue its claim in Switzerland. On balance I find that this limited step of formally seeking, in the Summons challenging jurisdiction, but not actively pursuing substantive relief did not constitute a submission to the jurisdiction, and reject SICL's attempt to dismiss the application on these grounds alone.

4. Mr. Potts, for the 1st Defendant, made a brief cameo appearance; he departed having made a submission he invited the Court to consider without ruling on in his client's favour. This was to the effect that the claim against the Fund was liable to be struck-out as premature, a factor which the Court was invited to have regard to in considering the CAS application. In practical terms, this intervention was either an attempt to provide indirect assistance to the 2nd Defendant or to take the 1st Defendant's threatened strike-out application on a trial run. While I heard Mr. Potts over Mr. Turner's objections, I see no justification for considering the merits of the case against the 1st Defendant in the context of an application which does not challenge the validity of the grant of leave to serve out on those grounds. This is doubtless because jurisdiction may be founded under Order 11 rule 1(1) (c), assuming the necessary and proper party requirement is met, even if the claim against the locally resident party ultimately fails[1].

5. CAS, understandably, did not challenge the validity of the service abroad order either on the ground that the action did not seek injunctive relief (within Order 11 rule 1(1)(b)) or on the ground that CAS was not a necessary and proper party (within Order 11 rule 1 (1)(c)). Rather, as it emerged in the course of argument, CAS primarily sought to enforce an exclusive jurisdiction clause (the "ECJ") and only secondarily contended that Switzerland was a more appropriate forum. The application therefore required the Court to have regard to the essential characteristics of the Plaintiff's claims against the 2nd Defendant for the purposes of determining (a) whether they were caught by the ECJ, and (b) whether Switzerland was a more appropriate forum for adjudicating the claims.

6. The primary relief sought by SICL as against CAS by its Amended Specially Indorsed Writ of Summons is orders as follows:

> "a. *That an Injunction be granted, restraining the Second Defendant, until trial in this action or further order, whether by itself, its servants or agents, or otherwise howsoever, from making payments or distributions (in cash or otherwise) in relation to the Shares held in its name as Nominee for the Plaintiff, to any party other than the Liquidators.*
>
> *Nothing contained in this order shall prevent the Second Defendant from making payments at the request of the Swiss Bankruptcy Office of funds physically in Switzerland, in the event that such a Trustee is appointed.*

[1] *Masri-v- Consolidated Contractors International Company SAL* [2009] SC (Bda) 12 Com (11 February 2009), paragraphs 64-66.

b. That the Second Defendant transfer to the Plaintiff, the Shares which it holds as nominee for the Plaintiff."

7. The dispute arises in this way. It is common ground that CAS is the registered owner of shares in the Fund ("the Shares") and that some redemption payments were remitted by the Fund to CAS in Switzerland prior to June 8, 2010 and that other payments are currently due to be paid to the registered owner of the Shares but are effectively frozen by the June 8 injunction. SICL contends that CAS is wrongfully refusing to comply with its obligations as a trustee; CAS contends that it has a valid security interest over the monies held by the Fund which extinguishes any beneficial interest SICL would otherwise have had in the monies payable in respect of the Shares. It relies on a 1998 Pledge Agreement (containing the ECJ) and a debt said to be owed by SICL to an affiliate of CAS, which was assigned to CAS after the June 8, 2010 injunction was obtained. SICL denies the existence of the security interest in question and suggests that CAS may hold the Shares for SICL's benefit under some other as undisclosed nominee agreement.

8. The pivotal insolvency dimension apart, the present application might have appeared to be a simple case where the real dispute between the parties was governed by Swiss law and fell within the ECJ, with the relief sought against the Fund only properly arising if and when the Plaintiff established its right to receive the Shares or their proceeds. However the insolvency of the Plaintiff meant that the practical result of enforcing the ECJ, based on the 2nd Defendant's own expert evidence, would likely be as follows. The Joint Official Liquidators (the "JOLs") would have no ability to sue in Switzerland at all. Assets which are contended to belong to the Plaintiff and liable to be distributed for the benefit of its worldwide creditors would be remitted to the 2nd Defendant in Switzerland where, assuming a Swiss Mini-Bankruptcy Trustee took proceedings to establish their ownership by the Plaintiff, the assets would be distributed on a priority basis to the Plaintiff's Swiss creditors. This raised serious doubts as to whether it would be appropriate to give effect to the ECJ.

Findings: does the dispute fall within the ECJ?

9. While it is possible that the Shares were acquired for SICL's benefit under a nominee agreement not yet disclosed by CAS or found by the JOLs in SICL's own records, the best available evidence suggests that the Shares were purchased by CAS for the benefit of SICL (a) under General Conditions incorporating the ECJ and Swiss governing law clause on which CAS relies, and (b) under the terms of SICL's February 22 2005 instruction letter to CAS rather than the earlier Pledge Agreement.

10. The June 24, 1998 Pledge Agreement required SICL to pledge its assets to CAS "*to guarantee all present and future claims of the Bank, irrespective of their legal nature or cause...The Pledge constituted in Favour of the Bank guarantees all claims that the Swiss branch of the Bank holding the pledged assets, that the head office of the Bank and/or that any Swiss or foreign branch of the Bank might have against the Debtor...*" (clause 4). It is at least arguable that SICL agreed to be bound by any future assignment to CAS of a debt owed to other branches of the Bank.

11. Nevertheless, and subject to clause 4, clause 2 of the Pledge Agreement provides as follows:

> "*The administration of the pledged assets and any necessary measures for the maintenance of their value and for the safeguard of any rights attached thereto (collection of receivables, drawings, terminations, conversions, reimbursements, etc.) are the exclusive responsibility of the Pledgor...*"

12. On November 14, 2003, CAS sent to SICL an update to its General Conditions which provided in material terms as follows:

> "*7.29: APPLICABLE LAW, PLACE OF EXECUTION AND JURISDICTION All relations between the Bank and its client are subject to Swiss law, especially all matters concerned with their performance, interpretation, validity or execution.*
>
> *The place of execution of all obligations, the place of debt collection proceedings (the latter only for clients domiciled abroad) and the place of exclusive jurisdiction in all proceedings is in Switzerland at the domicile of the Bank's office conducting the business relationships with the clients. However, the Bank is entitled to institute proceedings at the client's domicile or before any other competent court...*"

13. SICL invested through CAS in the Fund pursuant to the following letter sent by SICL's Chairman on February 22, 2005 to the Bank:

> "*...We now instruct you to subscribe, on our behalf, in the above Fund in the amount of USD 20m (United States Dollars Twenty Million), such shares to be held in our account with you and to be freely transferable from such account, provided all borrowings with you on the security of those shares have been repaid by us...*"

14. These documents are exhibited to the First Babel Affidavit, sworn on August 24, 2010 in support of the CAS application to set aside. If the Shares were purchased on the terms of the latter instruction letter, it is (a) clear that the Bank's General Conditions containing the ECJ apply to SICL's existing account with the Bank, but (b) unclear that the Shares were acquired subject to the terms of the 1998 Pledge Agreement which is neither expressly nor impliedly referred to in the instruction letter. On the contrary, the instruction letter contemplates a far narrower security interest, limited to the repayment of "*all borrowings with you on the security of those shares".*

15. Mr. Taylor for CAS conceded that the only security interest referred to in the evidence is that based on a debt owing to the UK branch of the Bank which was assigned to CAS on or about June 23, 2010, after the monies payable to CAS by the Fund from Bermuda were frozen by the June 8 injunction. The fact that such assignment was made suggests that CAS accepts that, even assuming the Pledge Agreement applies to the Shares, the

Agreement did not operate without more to create a security interest in favour of other branches of the Bank which were not a party to the 1998 Agreement.

16. Thus CAS' own case appears to be based on the implicit premise that a beneficial security interest in the proceeds of the Shares beneficially owned by SICL was conveyed to it in respect of the debt assigned to it on June 23, 2010 by virtue of that assignment, in breach of the spirit (if not the letter) of the June 8 injunction. From a Bermuda law perspective, it is difficult to see how it is even arguable that an assignment could have such effect as the assignee only acquires such rights as the assignor had under the original legal relationship. However, the material presently before the Court suggests that the Shares were not held by CAS on terms that they secured indebtedness incurred by SICL under separate loan arrangements with other affiliated entities. It is thus seems strongly arguable at this stage that the proceeds of the Shares held in Bermuda by the Fund are beneficially owned by SICL.

17. In summary, I find that the dispute between SICL and CAS as to who beneficially owns the proceeds of the Shares held by the Fund in Bermuda falls within the ECJ contained in the Bank's General Conditions which were incorporated by implication into the agreement pursuant to which CAS acquired the Shares as SICL's nominee. This dispute accordingly falls to be determined in accordance with Swiss law.

Findings: the ability of SICL to sue in Switzerland and the practical implications of allowing the dispute to be determined in Switzerland

18. The JOLs have failed to obtain recognition in Switzerland at first instance and at the intermediate appellate level, although an appeal against these decisions is pending before the Supreme Court. They sought recognition with a view to suing there before commencing the present proceedings, after the Geneva Court rejected their appeal against the first instance decision on May 27, 2010.

19. According to Professor Thomas Kader, the only independent expert who reported on behalf of CAS, the Swiss law position is as follows. A Swiss Mini-Bankruptcy must be commenced by the JOLs for liquidating Swiss assets. Because the Shares were held be an intermediary resident in Switzerland, the Shares would be considered to be located in Switzerland. The Mini-Bankruptcy proceedings (opened after evidence in relation to the present application was filed) would (a) be opened upon recognition of the Caymanian liquidation proceedings, and (b) be limited to adjudicating the claims of Swiss-domiciled secured or unsecured creditors to assets located in Switzerland.[2] After such claims were satisfied, any remaining assets would be remitted to the JOLs.

[2] According to page 9 of the JOLs' November 19, 2010 Report to Creditors, the Mini-Bankruptcy will distribute Swiss assets to secured creditors and "*any other Swiss Protected Creditors (the JOLs are not aware of any such creditors)*". This optimistic view appears to assume the assignment relied upon in these proceedings to be ineffective both in terms of supporting a secured and unsecured claim by the Swiss domiciled CAS. It also supports the inference that the majority of unsecured creditors have claimed in the principal liquidation.

20. Professor Kader opines that precautionary measures may be obtained by the JOLs in the Swiss Mini-Bankruptcy Proceedings; it was argued that these measures could include proceedings to freeze any monies remitted to CAS in Switzerland pending the resolution of the dispute as to their beneficial interest. His Opinion does not explain what approach is likely to be taken by the administrator of the Mini-Bankruptcy to the pursuit of claims designed to recover disputed assets such as the present claim.

21. The Opinion is somewhat vague on precisely what role the JOLs would be able to play in the mini-Bankruptcy Proceedings. Mr. Roy, SICL's Swiss lawyer opining before Professor Kadner and to whom the Professor was entitled to respond, opines that "*these ancillary proceedings, once opened, would be administered by the competent Swiss bankruptcy office or a person appointed by it.*" The Professor does not challenge Mr. Roy's assertion that recognition of the JOLs appointment would not entitle them to enforce the ECJ in Switzerland and would merely enable them to communicate and gather information. The weight to be attached to Mr. Roy's Opinion due to his lack of independence becomes irrelevant to the extent that his views are not positively challenged.

22. Professor Kader's Opinion also fails to clarify the basis of distribution to Swiss creditors which will apply. I am unwilling to assume in favour of SICL that Swiss creditors will be paid on a priority basis out of Swiss assets. However, there is no evidence which presently suggests that the Swiss Court would cooperate with the Caymanian Court to ensure a world-wide *pari passu* distribution to all creditors on a worldwide basis, although I accept that such a pooling agreement is theoretically possible, should the sums involved justify the expense of such complicated arrangements. Some form of preference seems likely, with the extent only uncertain. There is at a minimum, therefore, a real risk that any monies which this court permits to be remitted to Switzerland and which are found to belong to SICL will be distributed on a preferential basis to Swiss creditors. I do not ignore the fact that is unclear if any Swiss creditors apart from CAS exist.

23. I am therefore bound to accept Mr. Turner's submissions to the effect that (a) the JOLs will be unable to enforce the ECJ in Switzerland directly at all; and (b) the decision on whether or not to pursue the claim on behalf of SICL at all will be made by the Swiss Mini-Bankruptcy Trustee.

Findings: applicable legal principles

Enforcement of exclusive jurisdiction clauses

24. It was common ground that there is a strong public policy imperative in favour of requiring parties to exclusive jurisdiction clauses to honour their contractual bargain and resolve their disputes by the contractually agreed mechanism in the contractually agreed forum. Such applications are usually made as applications to permanently restrain the commencement or continuation of proceedings brought in breach of the clause or as applications to stay the offending proceedings. Mr. Taylor submitted that the relevant principles were authoritatively stated in paragraph [25] of Lord Bingham's judgment in

Donoghue-v-Armco [2002] 1 All ER 749 at 759-760 (HL). The passage relied upon by counsel can be better understand if read together with the preceding paragraph on which Mr. Turner partially relied:

> " *24. If contracting parties agree to give a particular court exclusive jurisdiction to rule on claims between those parties, and a claim falling within the scope of the agreement is made in proceedings in a forum other than that which the parties have agreed, the English court will ordinarily exercise its discretion (whether by granting a stay of proceedings in England, or by restraining the prosecution of proceedings in the non-contractual forum abroad, or by such other procedural order as is appropriate in the circumstances) to secure compliance with the contractual bargain, unless the party suing in the non-contractual forum (the burden being on him) can show strong reasons for suing in that forum. I use the word "ordinarily" to recognise that where an exercise of discretion is called for there can be no absolute or inflexible rule governing that exercise, and also that a party may lose his claim to equitable relief by dilatoriness or other unconscionable conduct. But the general rule is clear: where parties have bound themselves by an exclusive jurisdiction clause effect should ordinarily be given to that obligation in the absence of strong reasons for departing from it. Whether a party can show strong reasons, sufficient to displace the other party's prima facie entitlement to enforce the contractual bargain, will depend on all the facts and circumstances of the particular case. In the course of his judgment in The Eleftheria [1970] P 94, 99-100, Brandon J helpfully listed some of the matters which might properly be regarded by the court when exercising its discretion, and his judgment has been repeatedly cited and applied. Brandon J did not intend his list to be comprehensive, but mentioned a number of matters, including the law governing the contract, which may in some cases be material. (I am mindful that the principles governing the grant of injunctions and stays are not the same: see Aérospatiale at p 896. Considerations of comity arise in the one case but not in the other. These differences need not, however, be explored in this case).*
>
> *25.Where the dispute is between two contracting parties, A and B, and A sues B in a non-contractual forum, and A's claims fall within the scope of the exclusive jurisdiction clause in their contract, and the interests of other parties are not involved, effect will in all probability be given to the clause. That was the result in Mackender v Feldia AG [1967] 2 QB 590; Unterweser Reederei GmbH v Zapata Off-Shore Co (The Chaparral) [1968] 2 Lloyd's Rep 158; The Eleftheria [1970] P 94; DSV Silo- und Verwaltungsgesellschaft mbH v Owners of the Sennar and 13 Other Ships (The Sennar (No 2)) [1985] 1 WLR 490; British Aerospace Plc v Dee Howard Co [1993] 1 Lloyd's Rep 368; Continental Bank NA v Aeakos Compania Naviera SA and Others [1994] 1 WLR 588; Aggeliki Charis Compania Maritima SA v Pagnan SpA (The Angelic Grace) [1995] 1 Lloyd's Rep 87; and Akai Pty Ltd v People's Insurance Co Ltd [1998] 1 Lloyd's Rep 90. A similar approach has been followed by courts in the United States, Canada, Australia and New Zealand: see, for example, M/S Bremen v Zapata Off-Shore Co (1972) 407 US 1;*

Volkswagen Canada Inc v Auto Haus Frohlich Ltd [1986] 1 WWR 380; FAI General Insurance Co Ltd v Ocean Marine Mutual Protection and Indemnity Association (1997) 41 NSWLR 559; and Kidd v van Heeren [1998] 1 NZLR 324." [emphasis added]

25. Mr. Turner for SICL submitted that strong grounds for not enforcing the clause existed here having regard to the factors identified by in *The Eleftheria* [1970] P 94 at 99-100. These factors, and indeed the entire rhythm of the principles in this area of the law, do not march easily in step with the distinctive jurisdictional body of principles concerned with cross-border insolvency. However, if one were limited to recourse to the "solvent" jurisdictional factors relevant to the discretion to enforce the ECJ, I would conclude as follows:
    (a) the evidence is located partially at least in Switzerland, but this factor is somewhat neutral as the dispute appears likely to involve primarily legal argument rather than oral evidence;

    (b) Swiss law applies, so the costs would be reduced by a trial in Switzerland even though it is unclear whether the law differs from Bermudian law to any material extent;

    (c) CAS is domiciled in Switzerland, and SICL chose to do business with it there;

    (d) there is no basis for concluding that CAS does not genuinely desire trial in Switzerland;

    (e) none of the traditional procedural disadvantages would mitigate against requiring SICL to sue in Switzerland.

26. Having regard to these traditional jurisdictional principles alone, I would not find that strong grounds exist for displacing the strong presumption in favour of giving effect to the ECJ; CAS would be entitled to a stay the present proceedings in favour of litigation in Switzerland pursuant to the clause.

The impact of insolvency on the discretion to enforce the ECJ

27. Although the JOLs did not on behalf of the Caymanian Grand Court which appointed them formally seek the assistance of this Court by way of a Letter of Request, the application for the interim injunction (and leave to serve CAS abroad) implicitly required the Court to (a) recognise the appointment of the JOLs and (b) assist them in their administration of the Caymanian winding-up of SICL in its place of incorporation by helping them to recover assets located here for distribution in the Caymanian liquidation. In this regard, the crucial averments in the First Akers Affidavit provided as follows:

"*52. The funds in question belong to the estate of SICL, a Cayman Islands company in official liquidation in the Cayman Islands under the supervision of the Grand Court of the Cayman islands (the "Estate"). As such, in the ordinary course, the unsecured creditors of the Estate would be would all be treated pari passu under Cayman Islands law (subject to any subordination as between unsecured creditors or set off or netting rights).*

53. The injunction is necessary and damages would not be an adequate remedy to the Plaintiff. If the injunction is not ordered, the money from the Redemption of the Shares will be paid to the Second Defendant in Switzerland and could be tied up, possibly for years, in a Swiss mini-bankruptcy (which the JOLs would be not be able to control), to the prejudice of the unsecured creditors; in particular in view of the possibility that unsecured Swiss creditors may be entitled to distributions from the Swiss mini-bankruptcy estate."

28. As a matter of common law, the Court may (a) (and usually does) recognise liquidators appointed by the court of the company's domicile and the effects of a winding-up order made by that Court[3], and (b) has a discretion pursuant to such recognition to assist the primary liquidation Court "*by doing whatever it could have done in the case of a domestic insolvency*"[4]. The June 8, 2010 Order in formally recognising the appointment of the JOLs signified that this Court was not simply making an ordinary interim freezing order in support of SICL's claim; this Court was also assisting officers of the Caymanian Grand Court to preserve what appeared to be potentially assets belonging to the liquidation estate. It would be inconsistent with established judicial policy in Bermuda and England and Wales for this Court to remit assets which may belong to the primary liquidation estate to a third forum where an ancillary liquidation proceeding, before a court only competent to deal with assets located there, is taking place. In the course of argument, Mr. Turner made it clear that the JOLs main concern was really the Bermuda-based assets.

Conclusion: disposition of 2nd Defendant's application to enforce the ECJ

29. Accordingly, and bearing in mind that CAS does not (despite paragraph 2 of its Summons) seek to obtain substantive relief in this action by pursuing an application to discharge the injunction, the only real question which arises is whether the present action should be stayed pending the determination of the disputed security issue in Switzerland pursuant to the ECJ. Much of the prejudice of which SICL complains need not arise if the redemption monies remain in Bermuda until their true beneficial ownership can be determined. The only outstanding issues of complaint of any substance appear to me to be:

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[3] Fletcher, '*Insolvency in Private international Law*', 2nd edition (Oxford university Press: Oxford, 2005), paragraphs 3.91 – 3.92

[4] Per Lord Hoffman in Cambridge *Gas Transportation Corp. –v- Official Committee of Unsecured Creditors of Navigator Holdings plc and others*[2007] 1A.C. 508 at 518 (P.C.); *Re Foundation Partners* [2009] SC (Bda) 36 Com (29 July 2009).

(a) firstly, and fundamentally, whether the Swiss Mini-Bankruptcy would be competent to deal with the ownership of monies located in Bermuda, as opposed to the Shares which I accept (based on Professor Kader's evidence) be regarded as located in Switzerland under Swiss law for bankruptcy purposes;

(b) whether SICL would have a fair hearing of the claim it seeks determined in Bermuda, having regard to the dramatically significant fact that the claim would only be pursued by a Swiss trustee (if at all) for the primary benefit of the Swiss Mini-Bankruptcy estate. This means that:

(i) the JOLs will not be able to either pursue the claim at all, in circumstances where

(ii) it is unclear (and seems unlikely) that a Swiss trustee would determine that it is commercially viable to pursue a claim which will not result in a direct distribution to Swiss creditors (because the relevant assets are actually located in Bermuda, even if they are notionally located in Geneva for jurisdictional purposes).

30. In my judgment these concerns are meritorious and constitute strong grounds for not enforcing compliance with the ECJ; the onset of insolvency has made substantial compliance with the ECJ (as regards funds located in Bermuda) impossible. As regards these monies, a further point (not addressed in argument) mitigates against compelling SICL to rely on the Swiss trustee to pursue this claim. CAS' case appears to be substantially based on assignment agreement executed after this Court effectively froze any disposition of assets held by the Fund which potentially belonged to SICL. This Court is uniquely competent to determine whether or not, assuming the assignment agreement validly created a security interest over the Shares under Swiss law on June 23, 2010, this aspect of Swiss law should be given effect to as regards funds preserved at the relevant time by this Court by way of assistance to the JOLs and the Caymanian Grand Court.

31. In part because of this additional unusual factual and legal issue, the possibility of inconsistent findings by the Swiss Court in relation to the Shares and any redemption funds already remitted to CAS there, and this Court in relation to the Bermuda monies (and any future distributions made in Bermuda), is not problematic as different factual and legal considerations will likely arise. Absent this wrinkle, the Swiss claim would have a distinctive character being brought (primarily) for the benefit of a distinctive ancillary liquidation estate in any event. Most importantly, SICL cannot meaningfully pursue any claim in respect of monies already received by CAS in Geneva without the intervention of the Swiss Mini-Bankruptcy trustee. Based on the evidence presently before the Court, SICL has by opening the Swiss Mini-Bankruptcy proceedings elected to pursue the recovery of Swiss assets in that forum.

32. CAS, hamstrung by its inability to both challenge jurisdiction and apply for the discharge of the injunction, has failed to make out a case for setting aside service of the Writ on it on *forum non conveniens* or other grounds. However, having regard to the fact that

SICL's JOLs appointed in the Plaintiff's domicile have sought the assistance of this Court on behalf of the primary liquidation, I find that Bermuda is the most appropriate forum to determine whether or not redemption monies frozen by the June 8 injunction granted by this Court are beneficially owned by the Plaintiff or the 2nd Defendant, the ECJ notwithstanding. Save to this extent, I would stay the present proceedings until further order in light of the Plaintiff's current election to pursue its entitlement to distributions made in respect of the Shares to CAS in Geneva through the Swiss Mini-Bankruptcy proceedings.

33. Unless either party applies by letter to the Registrar within 21 days to be heard as to costs, I would order that the costs of the present application should be (as between the Plaintiff and the 2nd Defendant) costs in the cause.

Dated this 7th day of December, 2010 _____

KAWALEY J