

A challenge against a leave to serve out of the jurisdiction application, previously granted by the Court, on the bases that: the first limb of requirement of the test for leave was not satisfied, the service effected on the Second respondent was not lawful and that the Judge ought not to have exercised their discretion to grant leave out of the jurisdiction.

[2021]GRC008

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

Civil No. 2329

IN THE MATTER BETWEEN:

SUDHIR KUMAR GUPTA

First Applicant

and

NISHA GUPTA

**Second Applicant
("together the Applicants")**

-AND-

D.S.O. LIMITED

First Respondent

and

SANDEEP GUPTA

Second Respondent

and

GUNJAN JAIN

Third Respondent

("together the Respondents")

Hearing date: 25 March 2021

Judgment handed down: 5 May 2021

Before: Jessica E Roland, Deputy Bailiff

Counsel for the Applicants: Advocate M C Newman

Counsel for the Second and Third Respondents: Advocate A R Lyall

The First Respondent was not represented and did not take part.

Cases, texts & legislation referred to:

The Royal Court Civil Rules, 2007

The Companies (Guernsey) Law, 2008

Cobra Business Ventures Ltd v Greenfield Capital Ltd (Royal Court 27/2012)

Popat v Popat et al 23 July 2015 (Royal Court 32/2015)

Prodefin Trading Limited v Midland Resources Holding Limited & Others (Royal Court 7/2017)
Midland Resources Holding Limited and another v Prodefin Trading Limited [2017] GLR 304
Tchenguiz v Hamedani (Akers intervening) [2015 GLR 154]
O’Neill v Phillips [1999] 1BCLC 1
Easyair Limited (t/a Openair) v Opal Telecom Limited [2009] EWHC 339
Cecil v Bayat [2011] 1 WLR 3086
Altimo Holdings and Investment Limited v Kyrgyz Mobil Tel Limited [2011] UK PC7
Apex Global Management Limited v Fi Call Limited [2015] EWHC 3269 (Ch)
Abu Dhabi Commercial Bank PJSC v Bavaguthu Raghuram Shetty, Khaleefa Butti Omair Yousif Almuhairi, Saeed Mohamed Butti Mohamed Alqebaisi, Prasanth Manghat, Suresh Kumar Vadakke Kootala, Prashanth Shenoy [2020] EWHC 3423
Hollington on Shareholders' Rights 9th Ed.

Introduction

1. On the 11 December 2020, I granted leave on an ex parte basis, for the Applicants to serve an Unfair Prejudice Application (the “Application”) on the Second and Third Respondents out of the jurisdiction. The First Respondent (the “Company”) is a Guernsey registered company.
2. The Second and Third Respondents have applied to set aside the December order. The Applicants and the Second and Third Respondents have served skeleton arguments which were supplemented at length in oral argument. I also have two affidavits from the First Applicant and a number of affidavits, filed by both sides from lawyers within the respective advocates’ offices. I have also had the benefit of expert evidence filed on behalf of the Applicants and the Second and Third Respondents.

Background

3. The Company is a company registered in Guernsey on the 23 December 1987. The Company was formed to hold a 46.21% equity share in Asian Hotels (West) Ltd (“AHWL”), a company incorporated in India. The shareholding of the Company is divided as follows: 39.2% to the First Applicant, 10.8% to the Second Applicant, 39.1% to the Second Respondent and 10.9% to the Third Respondent. This effectively divides the capital into 50/50 proportions between the two “sides” in the matter now before the court. The Applicants are part of the branch of the family known as the Sudhir group (the Applicants and their children) and the Second and Third Respondents (plus their father and mother) are part of the family group known as the Sushil group. The First Applicant and the Second Respondent are uncle and nephew respectively. The Second Applicant is the First Applicant’s wife and the Third Respondent is the First Applicant’s niece (and the sister of the Second Respondent).
4. The shareholding ownership in the current proportions was as a consequence of transfers made by the First Applicant and Second Applicant to the Third Respondent. The only evidence before the Court in relation to how the Company was to operate and agreements that were made in relation thereto has been provided by the Applicants, by virtue of an affidavit of the First Applicant.
5. Likewise, evidence of the breakdown in relations and the consequences which the First and Second Applicants say amount to unfair prejudice, are set out in that affidavit. It does not appear that there is a great disagreement about what has happened, only what the effect is, however, it is not disputed that for the present purposes, in any event, the Applicants’ case is to be taken at its highest.
6. It is clear from the affidavit of the First Applicant, that relations between the two sides “have deteriorated”. The Applicants say that such is the current state of affairs that it amounts to

unfair prejudice and they seek the court's assistance to grant relief on that basis. The Second and Third Respondents decry this personification of the state of affairs or of their actions and it is described as no more than "mere family bickering".

7. The First and Second Applicants live in India, the Second Respondent has joint residence, including for tax purposes, in India and Malta. The Third Respondent lives in the USA.
8. The Second and Third Respondents challenge the leave I granted on 11 December 2020 for the Applicants to serve the Guernsey proceedings out of the jurisdiction on the Second and Third Respondents in India and the USA respectively on three bases:
 - (a) That the first limb of requirement of the test for leave as set out in *Tchenguiz v Hamedani* is not satisfied, that is to say, that the court should not be satisfied that there is a serious issue to be tried on the facts (that there is a substantial question of fact or law or both) such issue being one as to which there is a real (as opposed to a fanciful) prospect of success;
 - (b) That in relation to the Second Respondent only, service in the form obtained by the Applicants in December 2020 was not lawfully effected on the Second Respondent; and
 - (c) That I should not have exercised my discretion to grant leave out of the jurisdiction.

The Law

9. On an overseas Respondent's application to set-aside an order for service out of the Jurisdiction, there is an inter partes hearing of the original ex parte application for that Order. The burden of satisfying the court of the qualifications for the service out is on the Plaintiff.
10. The parties were agreed on the principles for an application for leave to serve out of the jurisdiction.
11. The starting point is the discretion under Rule 8 of the Royal Court Civil Rules, 2007 which provides as follows:

"Service out of the jurisdiction

8. (1) *The Court may give leave to effect service of a document out of the jurisdiction.*
- (2) *The Court shall not make an order under paragraph (1) unless satisfied (by affidavit or otherwise) that the matter to which the document relates-

is properly justiciable before the Court, and

is a proper one for service out of the jurisdiction.*
- (3) *An order of the Court under paragraph (1) shall state-

the form, manner and time in which, and conditions subject to which, service is to be effected, and

the minimum period which must elapse between the date upon which the matter may be pursued.*
- (4) *Where the Court makes an order under paragraph (1), proof of service in accordance with the order shall be by affidavit or, where service was effected by the Sergeant, by the relation of the Sergeant."*

12. The leading authority is the Court of Appeal's decision in *Tchenguiz v Hamedani* [2015 GLR 154] at paragraphs 66 – 68:

- “66. *It is common ground that the approach to the exercise of the discretion to be adopted in the present case was that explained by the Deputy Bailiff (as he then was) in Carlyle Capital Corp. Ltd. v. Conway (9). What is “properly justiciable” and “proper” for service out is to be considered in the light of the judgment of Lord Collins of Mapesbury in AK Inv. CJSC v. Kyrgyz Mobil Tel Ltd. (2) ([2012] 1 W.L.R. 1804, in particular at para. 71). However, that was a case on appeal to the Privy Council from the Isle of Man and concerned service of an originating process out of the jurisdiction; and the applicable rules of court resembled those in the Civil Procedure Rules of England and Wales and in the Jersey rules of court: those rules require that a cause proposed to be pursued against a foreign defendant must fit a specific description and not simply be within the description “properly justiciable”.*
67. *With the caveat mentioned in the previous paragraph (a caveat which we return to later in this judgment), the guidance given in Kyrgyz Mobil, as explained by the then Deputy Bailiff in the Carlyle Capital case, may give assistance in this Bailiwick as follows. In summary, to allow service out of the jurisdiction, the court must be satisfied that-*
- a) there is a serious issue to be tried on the merits (that is a substantial question of fact or law or both), such an issue being one as to which there is a real (as opposed to a fanciful) prospect of success;*
 - b) the cause is properly justiciable (the court being able, should it think fit, to draw assistance as to this from the approach taken by the courts in neighbouring jurisdictions in relation to the available “gateways” prescribed by their rules of court for service out of the jurisdiction);*
 - c) Guernsey is in the circumstances of the case clearly and distinctly the appropriate forum; and*
 - d) In the circumstances the court should exercise its discretion (given by r.8(1) of the RCCR) to allow service out.*
68. *In the present case, the Lieutenant Bailiff had in mind the approach taken in the Carlyle Capital case, which he found to represent the current practice of the Royal Court. Before us that is accepted, we think correctly, to be the position in Guernsey, subject always to the caveat we have mentioned above and to the fact that r.8(2) of the RCCR requires the court to be satisfied as to the two matters stated in paras. (a) and (b) of the rule (namely that the matter to which the document relates is properly justiciable and that it is a proper one for service out of the jurisdiction) before it can exercise the discretion given to it by r.8(1) of the RCCR to allow service out of the jurisdiction.”*

The parties' contentions summarised

13. The parties are agreed there is no argument in relation to limbs 2 and 3 of the test set out above. The Company is a Guernsey company and the relief sought is under The Companies (Guernsey) Law, 2008 and therefore there is no question that the cause is properly justiciable in this jurisdiction or that Guernsey is clearly and distinctly the appropriate forum.
14. However, the focus of argument was on the first limb of the test that there is a serious issue to be tried. Both parties relied on *Altimo Holdings and Investment Limited v Kyrgyz Mobil Tel Limited* [2011] UK PC7 which sets out that “*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. The current practice in England is that this is the same test as for summary judgment, namely whether there is a real (as opposed to fanciful) prospect of success e.g. Carville America Inc. v Camperdown UK Ltd [2005] EWCA Civ 645 [2005] 2 Lloyds rep 457 at [24]”.

15. The Applicants rely on their pleaded case for the Application and the affidavit filed in support by the First Applicant. This is a company which operated on a quasi-partnership basis. It is said that there was a relationship of mutual trust and confidence between the participants. The Applicants feel that their treatment by the Second and Third Respondents is unfair in the light of the relationship’s history, agreements and understanding between the members of the Company. The Second and Third Respondents have caused a breakdown of trust and confidence in the relationship between them as shareholders and as directors due to various incidents occurring overtime leading to a deadlock in the management of the Company. This is demonstrated most coherently by the refusal of the Second Respondent to make himself available for an urgent board meeting; by the deadlock at the board meeting dated 23 October 2020; and the breach of the duties by the Second and Third Respondents which are owed to each of the parties to the other under the quasi-partnership by excluding the Applicants from the management and affairs of the Company and in relation to the operation of the shareholding in AHWL. The Applicants urged the court to construe the conduct of the Company widely. This means taking into account the actions of the Second and Third Respondents in the context of the professional and working relationship of the parties but also taking into account the voting decisions in relation to AHWL although it is not the Company itself.

16. The Applicants rely on *Apex Global Management Limited v Fi Call Limited [2015] EWHC 3269 (Ch)* where Hildyard J described the “affairs of a company” for the purposes of an application based on unfair prejudice as follows:

“the affairs of a company could include the affairs of a wholly owned subsidiary with common directors; they could simply extend to any matter capable of coming before the board of the company in general meeting for its consideration and which could be the subject of a board or shareholder decision”

17. This they say will include the 46% shareholding in AHWL being the largest equity stake in that company and of which the First Applicant and Second Respondent are directors. Further, given that the only purpose of the Company is to hold the shareholding in AHWL, the conduct of the Second Respondent in particular in relation to the operation of the voting rights in this company which has been undertaken in breach of the quasi-partnership established between the parties. This quasi-partnership meant that the management decisions (including the business of the company and of shareholding in AHWL) would be on the basis of the agreement of all the shareholders. In the exercise of this agreement votes cast at the AGMs of AHWL were to be on the basis of joint agreement established prior to being cast.

18. Acting in breach of the rules of the quasi-partnership was prejudicial to the Applicants and unfair. The treatment of the Applicants by the Second Respondent in his correspondence provides background and reflects an intention to exclude the Applicants. The refusal of the Second and Third Respondents to make themselves available for a board meeting to deal with the voting at the AHWL AGM and thereafter casting votes in the absence of agreement was unfairly prejudicial to the Applicants as was the refusal to provide login details for the Company’s AGM. Likewise, the Second Respondent continuing to deal with Yes Bank Limited (“Yes Bank”) contrary to the clear indication by the First Applicant that the agreement that gave the Second Respondent his mandate to deal with Yes Bank exclusively had been withdrawn. These actions are set in a context where the Second Respondent has, the Applicants say sent aggressive and verbally abusive emails attacking the First Applicant,

personally threatening him with “vexatious” litigation, and making serious harmful and baseless allegations.

19. Relying again on the judgment of Hildyard J in *Apex Global Management Limited v Fi Call Limited* (*supra*) the Applicants say that way that the Second and Third Respondents have behaved towards the Applicants is such that there are clear parallels to the scenario referred to by Hildyard J at paragraph 44 i.e.

“if in a quasi-partnership context, one quasi-partner so denigrates the activities of another quasi-partner as regards the latter’s conduct of the company’s affairs as to make their constructive continuation in quasi-partnership unrealistic, that may well suffice”.

20. The Applicants say that such is the conduct of the Second and Third Respondents that it has severed any prospect of the quasi-partnership continuing. Further that the equitable considerations of justice and fairness which form the basis of a quasi-partnership are being undermined by the actions of the Second and Third Respondents and is unfairly prejudicial to the Applicants thus entitling them to seek a remedy under section 349 of The Companies (Guernsey) Law 2008.
21. In relation to the Second Respondent’s argument that leave should not have been granted to serve the Second Respondent in the manner that it was, the Applicants maintain that service in the manner undertaken was lawful. They rely on the expert evidence they obtained from Justice Moolchand Garg (retired) who opines that service by courier and post is not contrary to the objections made by India under Article 10 of the Hague Convention and are in accordance generally with Indian law and that the Second Respondent was duly served in accordance with the laws of India.
22. However if the Court finds against the Applicants on this then the Applicants rely on rule 9 (b) of the RCCR for service on the Second Respondent “in other manner permitted by law” i.e. by registered post, courier and email even though India is a signatory to the Hague Convention. They say it is evident that the order of the court is a reference to rule 9 although the reference is to “substituted service”. The Applicants argue that the circumstances found in the case of *Cobra Business Ventures Limited et al v Greenfield Capital Limited et al Guernsey Judgment 27/2012* are similar to those in this case. The facts in this case are such that whilst the discretion under this Rule must be “exercised cautiously”, it would be an appropriate exercise of the court’s discretion to do so. They rely on the delay in service exacerbated by the COVID 19 restrictions which will be highly prejudicial to the Applicants’ rights as shareholders and directors in the continuing unfair prejudice being suffered by them. Further that unless relief is granted soon, the relief will be rendered nugatory due to the Company being unable to function properly and the inability of the Applicants to vote at the AHWL meetings. Email was the method of communication of the parties with one another, this methodology of communication was contractually agreed by the parties in the Articles of Incorporation of the Company and this should be persuasive in deciding whether to allow service by this method.
23. The Company and the Third Respondent have been validly served which means that there are proceedings already before the Court. There is no doubt; the Applicants argue that the Second Respondent has had notice of the application. The Applicants argue that it was an appropriate exercise of the discretion of the court to grant leave. The arguments that the Second and Third Respondents make on the relief sought being unnecessary due to the offers being made are not made out. The offers made by the Second and Third Respondents are unsatisfactory. Within the broad powers of the Court under section 349 the court is entitled to consider the solutions proposed by the parties.

24. The relief sought is under the Companies (Guernsey) Law 2008 and in line with the statute the Royal Court of Guernsey is the only proper forum in which the matter may be heard. To set aside the leave granted would, they argue be in conflict with the overriding objective and the conflict of laws rules as it would deny the Applicants' access to the only forum for the matter.
25. The Second and Third Respondents are clear that they have not submitted to the jurisdiction of the Court. They argue that the Application does not have a real prospect of success. The claim is not more than merely arguable. They describe what has happened as "mere family bickering". They rely on a series of principles excerpted from Hollington on Shareholders Rights to support their position:
- (a) *"...[equitable] principles are to be applied according to settled and established equitable rules, whether arising independently of the statutory remedy or borrowed from the law of partnership under the remedy in appropriate circumstances labelled "quasi-partnerships", and not by reference to some indefinite notion of fairness".*
 - (b) *"the norm is that relations between shareholders are purely commercial and subject to no equitable restraints, whether borrowed from the law of partnership or not".*
 - (c) *"it is not enough merely to show that the relationship between the parties, even a quasi-partnership, has irretrievably broken down. There is no right of unilateral withdrawal for a shareholder when trust and confidence between shareholders no longer exist".*
26. They dismiss references in the affidavit by the First Applicant to the conduct of the Second Respondent in relation to Export Trade Corporation; the salaries from AHWL Limited received by the Sushil Group; the changes in the employment of the First Applicant's daughter with AHWL; and, disagreements about the appointment of tax consultants as variously irrelevant, not prejudicial and/or not unfair to the Applicants.
27. The Second Respondent had a widely drafted authority dated 18 May 2016 which was granted by the directors of the Company to deal with Yes Bank. This demonstrates, the Second and Third Respondents argue that the Second Respondent's actions in seeking further funding from Yes Bank including offering to pledge 10% of the shares were within the express agreement made by the parties and thus could not be a breach of the Applicants' rights and did not amount to unfair conduct within the meaning of the test. Further that as Yes Bank required a pledge of 30% shares of the Company and a personal guarantee from the First Applicant and Second Respondent and this was not forthcoming no prejudice was in fact suffered by the Applicants.
28. The tone and manner of the email correspondence from the Second Respondent to the First Applicant demonstrates no more than a mere break down in trust and confidence and that is insufficient for a finding of unfair prejudice. This is, they say, no more than disagreement and family bickering characterising the issue about the login details for the AGMs of the Company as "a spat". Thus, the Second and Third Respondent submit the conduct referred to by the Applicants in support of their Application falls far below the type of conduct that would justify a finding of unfair prejudice. It is, they submit *"certainly not prejudicial or unfair to the Applicants; it is little more than family bickering."*
29. The failure by the Applicants to accept the offers made by the Second and Third Respondents to resolve the dispute mean that the pursuit of the Application is an abuse of process and is liable to be struck out. It is submitted that the solution offered by the Applicants would have serious adverse tax consequences for the Second and Third Respondents but also that the Applicants should not be able to rely on tax to justify rejection of the offer.

30. The Second Respondent maintains that the form of service that was granted in relation to him in December 2020 was not lawful. The methods of service granted were not compatible with India's terms of accession to the Hague Convention because India has objected to service under the Hague Convention by informal methods. Service under the Hague Convention in India must be effected by way of the Central Authority and further the methods of service were not valid under Indian law. In support of these contentions, at the commencement of the hearing Advocate Lyall sought leave to adduce the legal opinion of Justice Vikramajit Sen (Retired) which was granted.
31. The Second Respondent argues that the first paragraph of the Act of Court did not specify what method of service was to be used in respect of the service out of the jurisdiction. The reference to substituted service suggests an order under Rule 7 which only applies to service within the jurisdiction. In any event in the circumstances of this case, the Applicants have not shown it is one where rule 9(b) should apply and further that the methods of service were unlawful under Indian law.
32. The final ground of challenge is under the fourth limb of the test in *Tchenguiz v Hamedani* that I ought not to have exercised my discretion to grant leave to serve out of the jurisdiction where (1) it was clear that the Application had no real prospects of success; and (2) the proposed method of service was not lawful.

Discussion

33. In *Prodefin Trading Limited v Midland Resources Holding Limited & Others* (Royal Court Judgment 7/2017) the then Bailiff, Sir Richard Collas confirmed that in order to succeed in an unfair prejudice application an applicant had to show that on the balance of probabilities:
 - “(1) first, that the matters of which he complains are either actual or proposed acts or omissions of the company or consist of the conduct of the company’s affairs;
 - (2) secondly, that those matters have caused prejudice to his interests as a member of the company; and
 - (3) thirdly, that the prejudice is unfair.”
34. Further that in line with the English authorities he held at paragraph 58:

“Those decisions show that the required degree of unfairness may be established: either by breach of an applicant’s contractual rights, especially where the board has acted in bad faith or for an ulterior purpose; or where equitable factors such as those available in a quasi-partnership relationship may be proved.”
35. Family-owned companies are commonly found to be quasi-partnerships. They exemplify a membership which is likely to be small, close knit, and bound by non-commercial considerations.
36. The surrounding facts and circumstances of the parties’ dealings such as the familial links, the manner in which the shares were transferred to equalise the shareholding between the Sudhir Group and the Sushil Group, the arrangements with regard to the management of the Company all point, at least at this stage, towards the Company being run as a quasi-partnership.
37. The manner of communication from the Second Respondent to the First Applicant is intemperate. On its own it may not suffice to establish the claim although arguably if it can be said to have reached a level where it makes the constructive continuation of the quasi-

partnership unrealistic it could be¹. Further, the threats of legal proceedings and claims including to the former Company secretary that the Applicants wish to leave the Company are not enough to amount to the basis of an unfair prejudice claim however they provide context for the current circumstances.

38. The irretrievable breakdown in the relationship of the parties of a quasi-partnership for any reason is not enough for an unfair prejudice claim alone however it is evident from the authorities “*that the breakdown must be in consequence of some breach of either legal right or equitable constraint affecting the conduct of the affairs of the company.*” (paragraph 47 *Apex Global Management Limited v Fi Call Limited* (*supra*)).
39. There does appear to be a good arguable case before this court from the evidence before it (which at this juncture of the proceedings I take at its highest) that there is a deadlock in the running of the Company. Further, that the Second and Third Respondents are relying on the deadlock to the detriment of the equitable considerations which appear to have existed until recently.
40. As mentioned above, a resolution dated 18 May 2016 gave the Second Respondent authority to execute documents on behalf of the Company for documentation in relation to AHWL with Yes Bank. A resolution dated 24 June 2016 (which appears to have replaced similar resolutions in 2014 and 2015) authorised either the First Applicant or the Second Respondent to act as representative of the Company at the AGMs of AHWL, and exercise all rights and powers under the resolution. Although previously these authorities had been renewed annually there is no evidence of this happening in 2017 to 2019. Evidently in 2016 at least the Company was able to operate on the basis that the parties had confidence in each other to be representative of the Company in their dealings in relation to the very purpose of the Company that is to say the operation of the rights of the shareholding in the AHWL.
41. However, on 13 May 2020 the First Applicant wrote by email to the Company secretary of AHWL stating that no one had voting rights on behalf of the Company and in particular that he has withdrawn authority for “*Sushil Ji or Sandeep Gupta*” to represent him. In what appears to be a response to this (in addition to various intemperate emails) the Second Respondent in two emails to various parties including Company secretary of AHWL asserts that the resolutions cannot be unilaterally retracted and that “*all resolutions remain effective*”.
42. On 24 September 2020 the First Applicant attempted to call a board meeting in the next 2-3 days to discuss economic substance implications for the Company and also the voting in the AGM of AHWL scheduled for the 30 September 2020. This led to flurry of emails between the Second Respondent, the First Applicant, a person called Mandavi Sharma who appears to be an officer of AHWL and the Company secretary (at that point Fort Group) who subsequently resigned on 25 September, 2020. The resignation appears to have been triggered by the view that the Fort Group did not have full company minutes and resolutions. The correspondence from the former Company secretary also set out that “*the directors would need to appoint a chairman to each individual meeting giving that person the casting vote*”. There is no evidence about who will be responsible for maintaining the company records going forward save the reference in the abortive board meeting dated 23 October 2020 which I mention below.
43. The Second Respondent amongst other comments in various emails on the 25 September 2020 made clear that his view was that the resolution of 2016 (which I take to be the one to represent the Company shareholding at the AHWL AGM) was being exercised with the approval of the First Applicant every year and that “*I don’t expect any change to that unless*

¹ See Hildyard J *Apex Global Management Limited v Fi Call Limited* (*supra*) paragraph 47 and 48

All shareholders get together to change that which can't be before October 13th because he was going on holiday.

44. Thus significantly it appears that the Second Respondent refused to make himself available for a Board meeting dealing with the voting at the forthcoming AGM for the AHWL and did so in circumstances where he knew one of the issues was the urgent discussion of the AHWL AGM. The exercise of the resolution was evidently on the premise that how the votes would be exercised would be discussed beforehand and did not entitle the Second Respondent to operate these unilaterally contrary to the family being in one accord about how it should be exercised. I note in passing it is not clear why the First Applicant did not seek to rely on the resolution as he also had authority under it to represent the Company. However from the voting records of the AGM of the AHWL it does appear that the Second Respondent exercised the votes on behalf of the Company and did so, it would appear, when he was not prepared to make himself available for a board meeting of the Company.
45. A board meeting was convened for 23 October 2020 by the First Applicant. On the proposed agenda was the appointment of a new Company secretary following the resignation of Fort Group; consideration of an appointment of a consultant to consider the impact of Guernsey economic substance legislation; and the revocation of the signing authority for the execution of documents with Yes Bank. The meeting was brief.
46. Under the Articles of Incorporation of the Company at 21.4: *“questions arising at any Board meeting shall be decided by a majority votes. Each director is entitled to cast a single vote. In the case of an equality of votes the Chairman shall have a second or casting vote”*. At the beginning of the meeting the directors (the Applicants and the Second and Third Respondents) could not agree on the appointment of a chairman.
47. Having failed to appoint a chairman due to deadlock the meeting ended. There is no evidence of any further board meetings. On the 29 October 2020 the First Applicant asked the Second Respondent for the log in details for the online e-voting facility which the shareholders of the Company use for the casting of votes for the AGM. The First Applicant's evidence is that the previous trust that had rested in the Second Respondent which meant that he and the Second Applicant could rely on the Second Respondent to vote on their behalf has gone and therefore they needed this information to exercise their votes themselves. The Second Respondent refused to provide this and told them to “ask the DSO secretary”. As the Second Respondent well knew there was no Company secretary as Fort Group had resigned.
48. On 24 November 2020 an individual from AHWL emailed Yes Bank seeking funding under something called the Emergency Credit Line Scheme which appears to be a scheme set up to assist with borrowing due to the financial distress caused by the Covid-19 pandemic. On 7 December 2020 the Second Respondent emailed the Bank with the following: *“I hereby give my consent to pledge 10% shareholding in DSO Limited, to raise funding to satisfy the bank requirements for extra funding by December 2020, I'll be moving Frwd [sic] towards the same as the necessary resolutions are already in my favour!”*
49. The First Applicant in his affidavit states that the Second Respondent was aware that the Second Applicant and he were against such a pledge. There is a strong argument that the Second Respondent could not have been in any doubt that the First and Second Applicants wished to revoke the 2016 resolution as the agenda to the abortive 23 October 2020 board meeting called by the First Applicant specifically referred to this. There is also the question about whether the Second Respondent was in any event attempting to go beyond the authority of what appears to be/have been a resolution dealing with merely the execution of documentation and not the ability to pledge shares. As the bank required a pledge of 30% of the shares of the borrowers and a personal guarantee of both the First Applicant and Second Respondent, this did not progress.

50. Despite the Second and Third Respondents attempting to minimise the actions primarily of the Second Respondent it seems to me to be very similar to the scenario set out in Hawkes v Cuddy (No.2) [2007] EWHC 2999 (Ch):

“228 Mr Hollington argued that in a case in which there is both a breakdown of trust and confidence and also deadlock, leading to the result that it has become impossible for the company to carry on business in the manner contemplated by the articles and the understandings between the shareholders, the court would wind up the company on the just and equitable ground. Thus far, in my judgment, he is right.

229 The next step in the argument is that the jurisdiction to wind up on the “just and equitable ground” and the jurisdiction to make an order under s.994 were co-terminous. In this he has the support of Jonathan Parker J. in Re Guidezone Ltd [2001] B.C.C. 692 . Jonathan Parker J. held:

that the winding-up jurisdiction is, at the very least, no wider than the s.994 jurisdiction: a proposition which is consistent with a winding-up order being the death sentence on a company and with the statutory recognition in s.125(2) of the Insolvency Act 1986 that a winding-up order is an order of last resort; and

if the conduct is not unfair for the purposes of s.994 , it cannot found a case for a winding-up order on the “just and equitable” ground.

230 In other words, what Jonathan Parker J. was saying was that conduct which would have justified a winding up on the just and equitable ground will always amount to unfair prejudice for the purpose of s.994

231Mr Hollington thus submits that if the circumstances are such that the court could make a winding-up order on the just and equitable ground, then it can give relief under s.994 in precisely the same circumstances. This, he says, must follow from Re Guidezone Ltd . He therefore submits that if there has been a breakdown of trust and confidence coupled with deadlock, leading to the result that the business of the company cannot be carried on in the way that was initially contemplated, relief can be granted on a petition under s.994 . Is this the same submission that Mr Hollington advanced unsuccessfully in O'Neill v Phillips ? I do not think it is. In O'Neill v Phillips the submission was based on the breakdown of trust and confidence alone. The submission that Mr Hollington advances now has the added features of deadlock and the resulting inability of the company to conduct its business in the manner initially contemplated. I accept this submission.”

51. I agree with the Second and Third Respondents that the evidence in relation to the Export Trade Corporation; to the salaries; the changes in employment contracts; and disagreements about the appointment of tax consultants would not make out an unfair prejudice claim however they do provide a background (although it is likely to be only part of it) of how the parties ended up in the place they are now. Up until the parties formed their implacable lines, the Company appears to have operated on a basis of cooperation and mutual trust. The evidence in relation to votes exercised by the Second Respondent on behalf of the other shareholders is that this was carried out without concern as it was on the basis of agreement and confidence that the agreement would be carried out. However, it is evident that the trust and confidence between the two groups has irretrievably broken down and significantly, the deadlock is such that the Company is unable even to hold a board meeting. Further whilst there are a number of resolutions extant, these are in circumstances where the deadlock in the

Company means that they cannot be formally revoked but nevertheless the Second Respondent has relied on these despite the knowledge that the Applicants no longer wish to be bound by them. These issues fall clearly into the ambit of the affairs of Company.

52. In considering whether the Applicants have shown that there is an arguable case that the Second and Third Respondents' actions are unfairly prejudicial, the case of *O'Neill & another v Phillips and others* at page 1098 paragraphs D- F gives important guidance:

*“In s 459 Parliament has chosen fairness as the criterion by which the court must decide whether it has jurisdiction to grant relief. It is clear from the legislative history (which I discussed in *Re Saul D Harrison & Sons plc* [1995] 1 BCLC 14 at 17-20) that it chose this concept to free the court from technical considerations of legal right and to confer a wide power to do what appeared just and equitable. But this does not mean that the court can do whatever the individual judge happens to think fair. The concept of fairness must be applied judicially and the content which it is given by the courts must be based upon rational principles. As Warner J said in *Re J E Cade & Son Ltd* [1992] BCLC 213 at 227: “The court ... has a very wide discretion, but it does not sit under a palm tree.” Although fairness is a notion which can be applied to all kinds of activities, its content will depend upon the context in which it is being used. Conduct which is perfectly fair between competing businessmen may not be fair between members of a family. In some sports it may require, at best, observance of the rules, in others (“it’s not cricket”) it may be unfair in some circumstances to take advantage of them. All is said to be fair in love and war. So the context and background are very important.”*

53. Advocate Lyall submitted that the fact that votes at the AGM did not appear to be adverse to what the Applicants would have wanted and that the Second Respondent was unable to use the shares as security because the Yes Bank required greater security than that which he had offered means that the Applicants have failed to show that there was any prejudice or that to the extent there was, the Applicants have not shown it was unfair prejudice. I disagree. It is enough for the purposes of this application for the Applicants to have shown it is unfair of the Second and Third Respondents to exercise the power given by the resolutions in these circumstances and in effect to exclude the Applicants from the management and decision-making of the Company which had been based hitherto on decisions being made together reflecting the parity of the shareholding. This puts this case in the category described by Hildyard J in *Apex* at paragraph 44:

“The concept of unfairness is open-textured; but it is to be applied judicially and must comprise some breach of either the terms on which it was agreed that the affairs of the company should be conducted or of equitable constraints which apply to the exercise of legal powers by reason of the nature of the relationship between the parties. that the relationship between shareholders may be subject to equitable considerations of a personal character which “make it unjust or inequitable to insist on legal rights, or to exercise them in a particular way”.

54. It is my judgment that the Applicants have managed to satisfy the test that there is serious issue to be tried and the Applicants have sufficient prospects of success. As the Deputy Bailiff (as he was then) set out in *Popat v Popat et al* 23 July 2015 Royal Court 32/2015 noting the test in *Carvill America Incorporated v Camperdown UK Limited* [2005] EWCA 645 “the test is not a high one”. The Applicants have demonstrated that on the pleaded case and the evidence advanced in support the Applicants have more than a “a fanciful prospect of success”².

² See *Easyair Limited (t/a Openair) v Opal Telecom Limited* [2009] EWHC 339

55. In relation to the relief sought, both sides have made offers to the other to resolve the impasse and have rejected the proposals by the other. Both parties have cited the tax consequences of the others offer as a reason (in whole or in part) to reject the offers made. It was accepted by both parties that as the Court of Appeal confirmed in Midland Resources Holding Limited and another v Prodefin Trading Limited [2017] GLR 304, the Court has a very wide discretion in terms of relief in unfair prejudice applications to do what is fair and equitable in all the circumstances of the case. In my view on the basis of the evidence before the Court at this time I am not persuaded that the pursuit of an unfair prejudice application in these circumstances is an abuse of process.
56. As set out above the second and third limb of the test in Tchenguiz v Hamedani (supra) have not been challenged by the Second and Third Respondents and I confirm my judgment in the ex parte application that those limbs are indeed satisfied. I am in agreement with the judgment of the Deputy Bailiff, as he was then, in Cobra Business Ventures Ltd v Greenfield Capital Ltd (supra) that I first need to be satisfied under rule 8 (1) and (2) that it is appropriate to grant leave out of the jurisdiction and therefore in my view this is where I must consider the fourth and final part of the test in Tchenguiz v Hamedani i.e. that in all the circumstances the court should exercise its discretion (given by r.8(1) of the RCCR) to allow service out. It is my view that having considered all the circumstances of the case I am satisfied that it is an appropriate exercise of the discretion of this court to grant leave to service out of the jurisdiction.
57. It is then necessary for me to consider how service is to be effected. I do not consider that the argument in relation to the reference to the “substituted service” in the Act of Court is helpful to the Second and Third Respondents. Although in retrospect this phrase should not have been used on the Act of Court as it only applies to service in the jurisdiction, it is clear from the Application that paragraph 2 was under rule 9(b) and indeed was apparent to the Second and Third Respondents in their first affidavit in support of their application to set aside the Act of Court and further that this was only considered after the principles of leave out of the jurisdiction were considered.
58. India is a signatory to the Hague Convention. Article 10 of the Convention provides for a signatory to indicate whether it objects to other methods of service other than through the Central Authority. India has objected under Article 10 therefore in accordance with the Convention service must be through India’s Central Authority which is the Ministry of Law and Justice. Service under this method is very slow. The evidence on behalf of the Applicants is that even pre-COVID19 restrictions that service had taken 14 months in a previous case.
59. Both parties relied on expert evidence from senior Indian lawyers in relation to the service in India.
60. The information that I had when granting leave to the Applicants in December 2020 was that “personal service by courier or process service is considered good service in India” (see the first affidavit of Margeaux Malherbe sworn on 9 December 2020). However having considered the expert evidence filed by both experts, I prefer the evidence, subject to my reservations below, of Justice Sen (retired) in relation to service of foreign process in India. According to Justice Sen the relevant Section of the Code of Civil Procedure in Section 29. This provides that:

“Summons and other processes issued by-

- (a) any Civil or Revenue Court established in any part of India to which the provisions of this Code do not extent, or*

- (b) any Civil or Revenue Court established or continued by the authority of the Central Government outside India, or
- (c) any other Civil or Revenue Court outside India to which the Central Government has, by notification in the Official Gazette, declared the provisions of this section to apply

may be sent to the Courts in the territories to which this Code extends, and served as if they were summonses issued by such Courts.”

61. The provision of Order V Rules 9-10 set out in the report of Justice Garg (retired) which would permit service in the methods provided in the Act of Court appear to apply a summons where the “*defendant resides within the jurisdiction of the Court in which the suit is instituted or has an agent resident with that jurisdiction who is empowered to accept service*” neither of which apply here.

62. Therefore the methods of service in the Act of Court were not available under rule 8(3). However it is then necessary to consider rule 9(b) and I turn again to words of the Deputy Bailiff as he was then in *Cobra Business Ventures Ltd v Greenfield Capital Ltd* (supra) at paragraph 58:

“If a document is to be transmitted outside of Guernsey for service in another place, when specifying the matters required by rule 8(3) proper regard should be had to whether the Hague Service Convention applies and, if so, how service needs to be effected to comply with its terms. However, rule 9(b) confers a wide discretion on the Court to order “service in some other manner” and, when it does so, rules 2 to 8 do not apply. In other words, the option of ordering service in some other manner is available in addition to the methods of service set out in rules 2 to 8.”

63. In those circumstances, before deciding whether or not to order service on the Third Respondent under rule 8 in a Convention-compliant manner, I turn to consider the alternative of ordering service under rule 9(b) but being mindful of respecting comity between India and this jurisdiction. As the Deputy Bailiff said in *Cobra Business Ventures Ltd v Greenfield Capital Ltd* (supra):

*“75. All of the cases refer in one way or another to the importance of respecting comity among nations. In the context of orders giving leave to serve a document in another place, this means paying proper regard to what is permissible and what is unlawful in that place. As I have already indicated, Counsel must bear the responsibility for alerting the Court to anything that would impact on the lawfulness of service by the methods being proposed. The words of Lord Westbury LC in *Cookney v Anderson* (1863) 1 De G J & S 365, 380-81, quoted by Stanley Burnton LJ in *Cecil v Bayat* (at para. [62]), offer a salient reminder:*

“The right of administering justice is the attribute of sovereignty, and all person within the dominions of a sovereign are within his allegiance and under his protection. If, therefore, one sovereign causes process to be served in the territory of another, and summons a foreign subject to his court of justice, it is in fact an invasion of sovereignty, and would be unjustifiable, unless done with consent ... ””

64. However, it is clear from the commentary at 6.40.3 of the White Book that the bar to service by other means is where the method is “positively contrary” to the law of that country (see also paragraph 113 of *Abu Dhabi Commercial Bank PJSC v Bavaguthu Raghuram Shetty, Khaleefa Butti Omair Yousif Almuhairei, Saeed Mohamed Butti Mohamed Algebaisi, Prasanth Manghat, Suresh Kumar Vadakke Kootala, Prashanth Shenoy* [2020] EWHC 3423).

Although Justice Sen uses words such as “forbidden” in his report, this terminology is not reflected in the Sections of the Indian code to which he has referred rather the word “may” is used nor is such absolutist wording used in the cases to which he has referred the court. As the Court of Appeal set out in *Emerald Bay Worldwide Limited v Barclays Wealth Directors (Guernsey) Limited et al 02/2014* at paragraph 14 in matters of foreign law:

“once the witnesses called to prove any foreign law have identified passages in the code of their country as containing the law applicable to the case, the local Court is at liberty to look at those passages and to consider what is their proper meaning: the court is bound to construe the relevant provisions and to determine their meaning and effect.”

65. It is my conclusion that the methods of service provided for under the 11 December 2020 Act of Court have not been shown to be positively contrary to the law of India. Having come to that conclusion I must then consider whether it is appropriate for me to make an order of effected service under rule 9(b). *Marashen Ltd v Kenvett [2017] WHC 1706 (Ch)* confirmed that it was possible for the Court to make “exceptional orders” under the English equivalent of rule 9(b) although “mere delay or expense cannot constitute a sufficient reason for ordering alternative service within the jurisdiction in a case in which the defendant is resident in an Hague Service Convention country”.
66. There is a significant difference between mere delay and where the failure of the application to progress will render the purpose of the application largely nugatory. I do not consider it necessary for the Applicants to issue injunctive proceedings in order to show this. Nor given the evidence about the length of delay and the prejudice there will be to the Applicants if this matter is not progressed do I consider the effect of Article 15 of the Hague Convention balances out the position sufficiently into the Second Respondent’s favour. The evidence before this court is that it could be the latter end of next year when service is obtained through the Hague Convention channels (even setting to one side the impact of COVID-19). The Applicants have asked for relief from the only jurisdiction that can assist and in circumstances where the Second and Third Respondents, on the evidence I have before me, appear to be willing to rely on board resolutions in the face of knowledge that the other two shareholders have given unequivocal confirmation that they no longer wish to be bound by the resolutions and where there is a good arguable case that the deadlock prevents the proper operation and the equitable obligations of the quasi-partnership to the unfair prejudice of the Applicants.
67. Good service has been achieved on the other parties and the Second Respondent obviously has notice of the proceedings. Another factor I also take into account is that as I had gleaned from the papers and was confirmed during the hearing by Advocate Lyall, the Second Respondent doesn’t just live in India but is also resident in Malta. Whilst I did not have evidence that the Second Respondent’s lifestyle could be referred to as “transient” nevertheless it does create a risk which I can take into account that service through official channels would not necessarily lead to the proceedings coming to his attention promptly. I also take into account that the Second and Third Respondents were willing to receive notices under the Articles of Incorporation of the Company by email and that prior to the issue of proceedings, the Third Respondent presumably with the agreement of the Second Respondent (he is copied into the email and the email is signed off as being from both the Second and the Third Respondent) had advised that they would provide details of their Guernsey lawyers including for the service of proceedings. It did cause me concern that it emerged during submissions at the hearing that there are proceedings in India in relation to AHWL. However, there was no evidence put before the Court by the Second and Third Respondents on these proceedings and the Advocate Newman did not appear to know anything about them. In the circumstances I came to the conclusion that it did not seriously prejudice the Second and Third Respondents’ position but I take this opportunity to remind parties that on a without notice application the Applicants must act in the utmost good faith and must disclose to the

court all matters which are material to be taken into account by the court in deciding whether or not to grant relief without notice and if so on what terms.

68. Therefore, in all the circumstances and reminding myself the power conferred by rule 9(b) should only be used exceptionally and exercised cautiously. I do consider that there are grounds here for the exercise of the power in this case.

Conclusion

69. The hearing on 25 March 2021 has enabled me to consider afresh the Applicants' application for leave to serve the Second and Third Respondents out of the Jurisdiction. The much more detailed analysis I have now undertaken on the competing arguments for and against making such an order has confirmed to me that the order made on 11 December 2020 was the right order to make and therefore it still stands.