Respondents' application to set aside leave to serve proceedings upon them out of the jurisdiction. General review of principles applicable to such leave under RCCR r 8. Previous order set aside.

[2023]GRC022

IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)

BETWEEN:	**BARRETT HODGSON LIMITED**	**Plaintiff/ Applicant**
	-and-	
	(1) MUHAMMAD ABBAS **(2) THE SALIM HABIB EDUCATION FOUNDATION**	**Defendants/ Respondents**

Before

HER HONOUR HAZEL ELEANOR MARSHALL KC
LIEUTENANT BAILIFF
Sitting alone

Hearing dates: 15, 16 May 2023

Judgment handed down: 12th June 2023

Advocate for the Plaintiff/Applicant: Advocate A Horsbrugh-Porter
Advocate for the Defendants/Respondents: Advocate G Dawes

Legislation and authorities referred to:

Legislation:

Guernsey:

Companies (Guernsey) Law 2008 ss 113, 114, 357, 357A and 365
Royal Court Civil Rules rr. 8(1), 8(2) and 10 (2)(a)

England and Wales:

Civil Procedure Rules Part 36.6 and PD 6B para 3.1

Cases:

Guernsey

Hitchins and ors v Lloyds TSB Offshore Trust Co Ltd [2011-12] GLR 336
Carlyle Capital Corporation Ltd vs Conway, Royal Court, 22 July 2011, (unreported)
Popat v Popat (2015) Judgment 32/2015 (RC)
Tchenguiz v Akers and Hamedani (2015) Judgment 33/2015 (CA)
Qudos Insurance AS (in bankruptcy) v Prinstad Limited (in voluntary liquidation) [2021] GRC 090

Re Joannou & Paraskevaides (Overseas) Ltd (in liquidation), Bowles and ors v Joannou and ors 2022 (Guernsey Judgment GRC 072

Isle of Man:

AK Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7

England and Wales:

Re Duomatic Ltd [1969] 2 Ch 365
Owners of Las Mercedes v Owners of the Abidin Daver [1984] AC 398
O'Sullivan v Management Agency Ltd [1985] QB 428
National Westminster Bank plc v Morgan [1985] AC 686
Rolled Steel Ltd v British Steel Corporation [1986] 1 Ch 246
Royal Bank of Scotland plc v Etridge (No 2) [2002] 2 AC 773
Konamaneni v Rolls Royce (India) Ltd [2002] 1 WLR 1269
EIC Services v Phipps 2003 BCC 931
C*arvill American Inc. v Camperdown UK Ltd* [2005] 2 Lloyds Rep 457
Dornoch Ltd v Mauritius Union Assurance Co Ltd [2005] EWHC 1887
Thomson v Foy [2009] EWHC 1076 (Ch)
VTB Capital plc v Nutritek International Corporation [2013] 2 AC 337
Eclairs Group Ltd v JKX Oil & Gas plc [2015] UKSC 71
Lungowe v Vedanta Resources Ltd. [2020] AC 1045,
Okpabi v Royal Dutch Shell [2021] UKSC 3

Textbooks:

Snell's *Equity* 33rd Ed paras 8-021 – 8-036

J U D G M E N T

This Application

1. By the Cause in this Action, dated 17 May 2022, the Plaintiff, Barrett Hodgson Limited ("**BHL**"), a Guernsey registered company, claims

    a. Against the First Defendant, ("**Mr Abbas**") equitable compensation for alleged breach of his fiduciary duties to the Plaintiff as a Director of the Plaintiff. The breach complained of consists of Mr Abbas' part in voting for, approving, authorising and implementing the transfer for no consideration from the Plaintiff to the Second Defendant, the Salim Habib Education Foundation (**"SHEF"**), a "not-for-profit" charitable organisation established in Pakistan, of the Plaintiff's approximately 88% shareholding (1,207,279 ordinary shares of Pakistan Rs100 each - "**the Shares**") in Barrett Hodgson Pakistan Private Limited ("**BHP**"), a valuable pharmaceutical company incorporated in Pakistan, such shareholding comprising the entire assets of the Plaintiff, pursuant to a Board Resolution of BHL recorded as made on 20 October 2016 in Karachi, and implemented by share transfers ("**the Transfers**") made on 9 November 2016. The equitable compensation claimed by the Plaintiff from Mr Abbas is the value of the BHP shares, which is said to be now of the order of £168 Mn (it was approximately £81.7Mn at the date of the Transfers), together with the dividends paid upon such Shares since the Transfers, and interest.

b. Against SHEF, a declaration that, by virtue of the circumstances of the share Transfers, SHEF held and/or holds the Shares upon a constructive trust for the Plaintiff, and an order for the return of the Shares (or their proceeds) together with their intervening income and interest, alternatively damages or equitable compensation in a similar quantum, for SHEF's "knowing receipt" (implicitly, therefore, of trust property), or unjust enrichment in respect of its receipt of the Shares and their income, or, in the further alternative, rescission or setting aside of the Transfers of the Shares in equity, together with restitution to the Plaintiff of them or their value, and their income since transfer, and interest.

2. On 17 May 2022 the Deputy Bailiff granted leave to the Plaintiff, to serve the proceedings on Mr Abbas and SHEF outside the jurisdiction of this Court, namely in Pakistan.

3. On 4 October 2022 the Defendants applied to this court to set aside the Order authorising service upon them out of this jurisdiction. This is the hearing of that Application.

4. Although this is thus, strictly, the Defendants' application, it is common ground that such a hearing takes place as a hearing, *de novo,* of the Plaintiff's original application, and thus that the burden rests on the Plaintiff to satisfy the Court that the order authorising service outside the jurisdiction should be upheld notwithstanding the Defendants' objections: *Carlyle Capital Corporation Ltd vs Conway,* Royal Court, 22 July 2011, (unreported) at [21].

History

5. The following facts are taken, largely, from the Cause where they are not controversial, and otherwise from the evidence as mentioned.

6. BHL was incorporated on 7 February 1992 by Dr Mohammed Salim Habib ("**Dr Habib**") and his then wife, Jennifer (née Hodgson Barrett). Dr Habib was the sole beneficial shareholder of BHL, his shares being held by nominee companies. BHL was incorporated, expressly in its Memorandum of Association, for the purpose of carrying on business as an investment holding company and a general commercial company.

7. Neither Dr Habib nor his wife had any connection at all with Guernsey. Whilst Mrs Habib was English, Dr Habib was a Pakistani national, and although his business seems to have been, or to have become, international, it appears to have been primarily centred in Pakistan, as well as possibly with interests in the USA, and in the UK. The business of BHL had no connection with Guernsey either. Guernsey was simply the jurisdiction of BHL's incorporation, apparently chosen as a convenient or beneficial off-shore location. BHL's incorporation was well before the days when pressure developed for a company to show some activity, or economic substance, in the jurisdiction of its incorporation.

8. On 2 September 1992 BHP was incorporated in Pakistan between BHL (60%), Dr Habib (39%) and Mrs Habib (1%), but by 2003, the shareholding had become BHL 88.4% and Dr Habib, 11.6%. Dr Habib was a director of BHP, as well as of BHL.

9. Dr Habib was a medical doctor, obviously also with commercial aspirations and aptitude. Over the years, BHP became a very successful pharmaceutical company. Its revenues in 2019 were equivalent to approximately £40Mn. It appears that Dr Habib also became involved in property development.

10. In 2000, a Dr Iram Afaq joined BHP as Business Development Manager. She claims credit for having brought about the great success of BHP subsequently. She and Dr Habib apparently had an intimate relationship for many years, starting shortly before that time, although she is about 30 years his junior. Dr Habib understood Dr Afaq's daughter, Fatima, to be his biological

child, and he treated her as such. There is some question about whether that is true, and also whether a marriage between Dr Habib and Dr Afaq, which took place in Karachi, in 2007, was bigamous on her part or not. Dr Afaq was previously married to a Shaikh Afaq Ahmed and it has been said that she claims to be again married to him currently. The true position is not clear, but it is not necessary for me to resolve these matters for present purposes.

11. Dr Habib's marriage to Jennifer Habib will therefore have come to an end by the time of the questioned marriage to Dr Afaq, but I do not know when this was, or whether this was through Jennifer's death or through divorce. Dr Habib has three older children ("**the children**") by his marriage to Jennifer, namely Benyamin, ("**Ben**"), Adam and Amina. All three children are resident in the UK, I think in London. Dr Habib revealed his relationship with Dr Afaq to the children in 2005.

12. Dr Afaq became a Director of BHP, I think in 2002. She was promoted to be Managing Director of BHP in 2004, becoming Deputy Chairman in 2008, and in 2022, apparently, its Chief Executive. Dr Afaq was also a director of BHL from 22 September 2002 until 8 April 2016.

13. Dr Habib was, or became, something of a philanthropist. In 2007, he established SHEF. SHEF was a "not for profit" organisation in Pakastani law, and a company limited by guarantee. SHEF has, as its name implies, the objective of promoting education, and in particular that of the youth of Pakistan. The members of SHEF at its incorporation were Dr Habib, Dr Afaq and a Mr Tariq Amin. Dr Afaq became the Managing Director and CEO of SHEF. Mr Abbas is now the Chief Operating Officer of SHEF, but I do not know how long he has held that post.

14. In 2010, SHEF received 100,821 shares in BHP as a donation, recorded as a "long term investment" and then valued at about £6.3 Mn. It appears that these shares had actually been held by Ben, having been given to him in about 2005 by Dr Habib, but Dr Habib required him, or wanted him, to relinquish them, and Ben complied. They were transferred to SHEF. Ben says that he was not aware who those shares were to be transferred to, only signing blank transfers at his father's request, and, by implication, reluctantly.

15. In 2015 - thus around a year before the complaints which are the subject of this action - SHEF obtained a government charter to establish a university in Karachi. The charter was implemented and the establishment was named the Barrett Hodgson University. In 2021 the name was changed to the Salim Habib University. Dr Afaq became a member of its Board of Governors in 2016 and is currently its Chancellor.

The events complained of

16. The transfer of the Shares now complained of was made, as noted above, pursuant to a resolution of the Board of BHL made on 20 October 2016 ("**the Resolution**") and implemented on 9 November 2016.

17. Dr Habib then was, as had always been the case, the 100% beneficial shareholder of BHL. The directors of BHL were then Dr Habib and Mr Abbas, who had become a director in April 2016, shortly after Dr Afaq ceased to be a director. Dr Habib was the Chairman of BHL. Under BHL's constitution, he therefore had a casting vote at Board meetings.

18. The Resolution to make a gift to SHEF of BHL's Shares in BHP was passed by Dr Habib and Mr Abbas at a Board Meeting held in Karachi. It also authorised Dr Habib to execute the necessary documentation to give effect to the gift. The next day, 21 October 2016, Dr Habib signed a Memorandum of Understanding with SHEF, acting through Mr Amin, under which it was recorded that the Shares were to be donated to SHEF for its "*self-sustainment*" and for the "*sole purpose of philanthropy in accordance with [its] objects*", and SHEF acknowledged its acceptance of such donation. The Board of BHP approved the Transfers of the Shares on 9

November 2016, (I understand, though it is not crucial, that at the time both Dr Habib and Mr Abbas were members of the Board of BHP, as well as Dr Afaq,) and BHP registered SHEF as the owner of the Shares. SHEF thus became the holding company of BHP.

19. Following the Resolution of BHL, on 24 October 2016, BHL issued an application to the Guernsey Companies Registry to be struck of the Register, (see *Companies (Guernsey) Law 2008* s 357 et seq), together with the necessary certificate of compliance pursuant to s 365, certifying that all relevant conditions for this were, or had been, complied with. This would therefore have contained a certificate that BHL then had no liabilities (see s 357A of the Law). Following the requisite two months' notice period, BHL was struck off the Register, in fact on 28 December 2016.

20. Following the Transfers, the ownership of BHP was: SHEF, 95.78%, and Dr Habib, 4.22%. However, eighteen months later, in April 2018, Dr Habib executed a deed of gift of a 4% holding out of his shares to Dr Afaq, stated to be "*in consideration of natural love and affection*".

21. It will be observed that it was not only Mr Abbas who was instrumental in causing BHL to dispose of the Shares to SHEF, but also Dr Habib himself. Indeed, since Dr Habib was the 100% shareholder of BHL, the interests of the "general body of shareholders" of BHL (being the entity to which Mr Abbas owed his fiduciary duties as a Director of BHL as a solvent company) were perfectly coincidental with the interests of Dr Habib himself. Also, as not merely a co-Director of BHL but also Chairman of its Board, Dr Habib was in a position to override any dissent which Mr Abbas might have manifested to the proposal to transfer the BHP shares. In those circumstances the obvious question is why the gift of the Shares should be subject to challenge, at all.

22. The answer is that the Cause asserts, in paragraphs 48-74,(I summarise) (a) that the transfer of the Shares was for an "improper purpose" because, being a gift, it was demonstrably not for the benefit of the declaredly commercial enterprise that was BHL, and (b) that Dr Habib's apparent consent to the relevant Resolution, the Memorandum of Understanding and the Transfers was vitiated by undue influence exercised upon him by Dr Afaq and/or Mr Abbas, as persons financially interested in SHEF through their employments and the benefits they gained thereby because of their executive control of SHEF, and by their knowledge - which must be imputed to SHEF - of the improper purpose of the Transfers as regards BHL and of the undue influence exercised on Dr Habib. It is asserted that Dr Habib could not ratify the Resolution or the Transfers, subsequently, for the same reasons.

23. In support of the plea of undue influence, the Cause pleads particulars of a relationship of trust and confidence reposed by Dr Habib in Dr Afaq (by reason of their personal relationship, and his giving her management of his business, financial, personal, and everyday affairs: para 71), and also in Mr Abbas (by reason of his being confided knowledge and management of Dr Habib's personal finances: para 72). The Cause pleads other transactions between Dr Habib and Dr Afaq said to have been brought about by her undue influence on him, to her financial advantage and to Dr Habib's disadvantage. These include the sale to her at an undervalue of his motor cars, his gift to her of his valuable 4% shareholding in BHP mentioned above, and the alleged diversion by her, to her own use, of monies which should have been paid to Dr Habib, or which he paid into their joint account for the purpose of pursuing a shopping centre development in Texas, but which Dr Afaq misappropriated. This latter was some US$3.4 Mn. The Cause asserts that the combination of the pleaded relationships of trust and confidence combined with a gift, on the scale of the gift of the Shares to an entity from which the trusted persons could extract significant benefits, is such as to "call for an explanation", and that in the absence of a satisfactory or reasonable explanation (which, it is pleaded, there is not), to give rise to an inevitable inference that it has been procured by undue influence.

24. The Cause also pleads acts subsequent to the Transfers as providing evidence in support of undue influence. These include the great amount of dividends which became payable to and were paid to SHEF, the large salary increases, and some very substantial "payments for loss of employment" made to Dr Afaq and Mr Abbas without apparent factual justification. The Cause pleads the alleged fact that the Pakistani authorities have questioned, and apparently revoked, the status of SHEF as a "not for profit" organisation on the grounds that its activities have become that of a commercial holding company, and that the authorities are allegedly investigating SHEF for malpractice, and also the fact that SHEF, under the executive control of Dr Afaq and Mr Abbas, attempted, in 2020, to sell the Shares, inconsistently with the fact that they were transferred as an endowment to procure the self-sustainability of SHEF. This attempt was prevented by litigation commenced in Pakistan in late 2021, as I will mention.

25. It is questionable whether much of this material has any proper place in a Cause pleaded in Guernsey, as it is expressly pleaded as evidence, and mere evidence should not be pleaded: see RCCR Rule 10 (2) (a). However, it is, naturally, material which the court will take into account in an application such as the present.

26. Dr Afaq says that, on the contrary, the idea for SHEF to sell its Shares in BHP in 2020 was Dr Habib's own idea, because the earnings on the Shares were more than required to run the University now that it was established, and he wanted to move on to another philanthropic project, namely founding a hospital.

27. The Cause asserts, further, that Dr Habib (who is now 89 and therefore would have been about 82 at the time of the Transfers) was in poor health, and that Dr Afaq and Mr Abbas failed to care for him or ensure that he was cared for. However, the time of this asserted state of affairs, as pleaded in the Cause relates to no earlier than 2020. It therefore appears that this fact is, again, relied on only as evidence, and not as having any direct impact as a circumstance of the Resolution and the Transfers, these being made in 2016.

28. The Cause provides various suggested legal analyses of the above facts in general, to plead that they thus found potential claims on the part of BHL, against Mr Abbas for breach of fiduciary duty as alleged, and against SHEF as a constructive trustee, or on the grounds of unjust enrichment, or knowing receipt, or for the rescission of the Transfers and restitution of the benefits thereby obtained.

29. Advocate Horsbrugh-Porter, appearing for the BHL, accepts, and indeed asserts, in argument, that it is the claim for breach of duty against Mr Abbas which is the principal and central claim in the action, and that the claims against SHEF are really "*parasitic*" on that claim or perhaps, to put it more prettily, they are ancillary and consequential. It did seem to me, though, that at times he suggested that the claim against SHEF, if analysed as unjust enrichment or as a claim in restitution, might be regarded as capable of having independent existence.

Subsequent history

30. The present dispute emerged as follows. In early 2021, Dr Habib apparently emailed his three elder children from Karachi to say that he had had a fall and banged his head, but was now recovered. However, on 11 February 2021 Dr Hasan Tharani, another director of BHP, wrote to Ben warning him that Dr Habib's health was not good, his physical and mental state was deteriorating and he was suffering amnesia, and recommending that Ben should visit his father "*earliest*". Understandably concerned, the three children flew out to Karachi arriving there in late March, having had to deal with travel difficulties and comply with the quarantine and suchlike restrictions which applied because of the Covid pandemic.

31. There is much disagreement in the accounts of the situation given by the respective witnesses on each side of the dispute. I need to give an outline of this, but that is only in order to

demonstrate the context of the present application. What follows is, therefore, a general outline only, as the detail of such matters is not important at present.

32. Ben says the children then discovered that Dr Habib was in a pitiful state, with a raging urinary tract infection, his faculties apparently failing, and that his welfare had been very neglected. Dr Afaq was roundly blamed for his neglected state. The children therefore took over care for him, nursed him back to health in Pakistan, and subsequently, after some months, brought him back to the UK, where he could be looked after properly and where he now resides, with Ben. Whilst in Karachi, they discovered how Dr Afaq in particular (but also Mr Abbas) had taken advantage of Dr Habib, and syphoned off the greater part of his assets for their own advantage through SHEF, and, in the case of Dr Afaq directly to herself, as claimed in the Cause. The children had to resort to litigation to restrain the sale by SHEF of the extremely valuable BHP Shares which was going to go ahead. An application was launched for the children to be appointed as Dr Habib's guardian, but this was not proceeded with (it seems to have been dismissed) when Dr Habib recovered his faculties. Other litigation, asserting Dr Habib's true ownership of BHP, and SHEF, and seeking delivery of the title deeds to his house, and valuable motor cars, and control over funds in his bank accounts were subsequently pursued against appropriate persons and entities in his name and with his consent and approval, in Pakistan, in November 2021. Further proceedings relating to property in Texas, and in particular the return of US$3.4 Mn said to have been misappropriated by Dr Afaq, were commenced in Texas in March 2022, although these have apparently stalled, after the Texas Court held that Dr Habib and Dr Afaq were divorced.

33. The children paint Dr Afaq as an avaricious and calculating woman, without feelings for Dr Habib's welfare or best interests but pursuing her own financial gain, and with whom Mr Abbas has thrown in his lot.

34. On the other side of the story, Dr Afaq rejects all the accusations leveled at her by the children (as does Mr Abbas), and says that Dr Habib, with whom she had had a close business and affectionate personal relationship for some 30 years, was an independent man, who was mentally strong and knew his own mind, and who, after his stroke, was being well looked after, physically, by a cohort of carers and domestic staff. This cohort did not include her - she was working in her various responsible positions with BHP, SHEF and the University, indeed as Dr Habib knew and wanted her to – but she was visiting each day, and Dr Habib, whilst not in first class health after suffering a stroke, was not being neglected. His care had been complicated and restricted by his fear of catching Covid if he attended hospital. When his adult children arrived, however, there was a turning point, as they sought to push in and interfere as regards Dr Habib's physical care, and to take charge of his financial affairs, in their own interests, clashing with Mr Abbas, who had helped Dr Habib run his affairs, in doing so. They prevented her and her daughter from seeing Dr Habib and when, during their visit, she herself had a stroke and was ill for some days, they apparently told Dr Habib that she had died. She says that they have poisoned his mind against her, and that they have since conducted a campaign of litigation (but so far unsuccessfully) against her and others involved with BHP and SHEF, to seek to undo Dr Habib's philanthropic generosity, and his generosity to her, in pursuit of their own financial interests. Indeed, the litigation which is currently being conducted nominally in his name is in practice being conducted by the children, and particularly Amina, for their own ends; she does not believe that making these claims is genuinely Dr Habib's wish.

35. Importantly as regards this case, Dr Afaq alleges, (and in this she is supported by several other witnesses) that at the time of the gift of the Shares to SHEF in 2016, and indeed in the following years at least up to the time of his stroke, Dr Habib was a strongly independent spirit, who knew exactly what he wanted and what he was trying to achieve with his philanthropic projects, and that there was no question of her, or anyone else, being able to exercise, or having exercised, undue influence over him to induce the making of the gift of the Shares. What has happened is that the children, disappointed of their expectations of a substantial fortune from their father,

have now themselves sought to take over his life and affairs for their own financial benefit. This action is just another step in their campaign.

Procedural history of this Action and Application

36. Turning to the events giving rise directly to this action, in March 2022, an application was made to this Court to restore BHL to the Companies Register, obviously for the purpose of enabling this action to be brought. It was restored on 25th March 2022. Although it was Dr Habib who had been the 100% beneficial shareholder of BHL when it was struck of the Register voluntarily in 2016, it was the three children who became the registered shareholders of BHL upon its restoration, each of Ben and Adam taking 33 shares and Amina taking 34. Exactly how this came about has not been disclosed, nor investigated. The three children also became the directors of BHL.

37. As mentioned at the start of this judgment, leave to serve the Cause outside the jurisdiction of this Court was granted, *ex parte*, by the Deputy Bailiff on 17 May 2022. That application was supported by the first affidavit of Ben Habib dated 12 May 2022.

38. The application to set aside service was made by the two prospective Defendants on 22 October 2022. It was supported by affidavits from Mr Abbas, Dr Afaq, a Mr Ebrahim, (the senior partner of the firm of lawyers and legal consultants who had acted for BHP since 1998, and for SHEF since 2007, and more recently for various of its executives embroiled in the Pakistani litigation already referred to, and who had had many dealings with Dr Habib over the relevant periods), and a Mr Valiaani (Chief Executive of the financial advisers to SHEF at the time of the proposed sale of BHP shares in 2020, who also had then had dealings with Dr Habib). There was also an expert report going to the conduct and process of civil litigation in Pakistan, from a Mr Muneer Malik, a Senior Advocate in Pakistan of more than 40 years' experience and who was the Attorney-General of Pakistan from June 2013 – January 2014.

39. The Plaintiff filed evidence in response, being a second affidavit of Ben Habib, an affidavit of a Ms Katy Longan of Ogiers, the Plaintiff's advocates, (who had asked questions of Dr Habib in an internet interview, and reduced his answers to a statement for him to confirm), an affidavit of Dr Habib confirming such answers, an affidavit of a Mr Pirazda, (Senior Partner of the firm of Pakistani lawyers who had been instructed to act on behalf of Dr Habib in the recent legal proceedings brought by him in Pakistan, and who had therefore dealt with him at such time), and an expert report going to the conduct and process of civil litigation in Pakistan from a Mr Makhdoom Khan, a Senior Advocate in Pakistan of more than 40 years' experience and who was the Attorney-General of Pakistan from 2001 – 2007.

40. Shortly before the hearing of this Application, on 19 April 2023, the Defendants served and filed further evidence in response to the Plaintiff's evidence, being second affidavits from Dr Afaq and Mr Ebrahim, and first affidavits from Dr Tharani and Mr Amin (who have been mentioned above).

41. The Plaintiff objected to the admission of this evidence, but also served two further affidavits itself, in further response, being a third affidavit of Ben and a first affidavit of Amina, each dated 5 May 2023. As the Plaintiff wished to refer to this further evidence itself, (the affidavit of Ben exhibiting bank documents claimed to support the relationship of trust and confidence between Dr Habib and Mr Abbas, and the affidavit of Amina wishing to produce documentary evidence as to the issue of Dr Habib's physical and mental state in March/April 2021), any issue about the Defendants' belatedly producing evidence for this Application hearing was not pursued.

Legal framework

42. Leave to serve proceedings out of the jurisdiction of the Royal Court is governed by rule 8 of the Royal Court Civil Rules 2007 ("**the RCCR**"). Rule 8 (1) provides the Court's power to give such leave. Rule 8 (2) then reads

> *"(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:-*
>
> *(a) is properly justiciable before the Court, and*
>
> *(b) it is a proper one for service out of the jurisdiction.".*

43. The rules give no further guidance as to what is meant by "*proper*", a concept which underlies both limbs of the test for leave to be granted. As a result, and as usual, the Guernsey Court has looked to the corresponding provisions governing the same subject matter in the English Civil Procedure Rules ("**the CPR**"), and the authorities decided under those rules, to assist in determining when it is appropriate to give leave for service out of the jurisdiction of Guernsey. The relevant CPR rule is r 6.36 but it is in fact only a Practice Direction (PD 6B at Paragraph 3.1) which deals with this topic.

44. The leading Guernsey authority on this matter is now *Tchenguiz v Akers and Hamedani* (2015) Judgment 33/2015 (CA). At [66] the Court of Appeal there said:

> *"66… 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 Investment CJSC v Kyrgyz Mobil Tel Ltd [2011] UKPC 7, [2012] 1 WLR 1804, in particular in paragraph 71 of the judgment. 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 CPR 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:*
>
> *67.1 that there is a serious issue to be tried on the facts (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; and*
>
> *67.2 that 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); and*
>
> *67.3 that Guernsey is in the circumstances of the case clearly and distinctly the appropriate forum; and*
>
> *67.4 that in the circumstances the Court should exercise its discretion (given by Rule 8(1) of the RCCR) to allow service out*."

The parties are agreed that the above, four-stage, test is the appropriate one for the Court to apply in this case.

45. The first two tests are threshold tests, reflecting the requirements of RCCR r 8 (2) (a). The second two tests are the tests for making the actual final decision, reflecting RCCR r 8 (2) (b). The first two tests are as to whether the court has jurisdiction, the second two are as to whether or how it should exercise it.

46. The parties are also agreed, as already mentioned, that the burden lies on the Plaintiff to satisfy the court that the relevant test is met in each respect. I will therefore consider each limb of the test in turn, although recognising that, as the overall process is the unitary one of applying RCCR r 8 (2), the stages are not necessarily to be viewed in isolation, and considerations brought to the fore at one stage may also be relevant for another: cf the approach of McMahon B in *Qudos Insurance AS (in bankruptcy) v Prinstad Limited (in voluntary liquidation)* [2021] GRC 090, at [49] – [50].

47. Before doing so, though, I feel I need to make one point. Both Advocates have argued this case with much reference to the "gateways" laid down in the English procedural law mentioned above, under one of which a case in favour of service out of the jurisdiction has to be made out (by the Plaintiff) - although, to be fair, Advocate Dawes was really obliged to do so, in order to respond to Advocate Horsbrugh-Porter. Whilst Advocate Dawes submitted that the correct starting point was RCCR r 8 (1) and (2), although, in accordance with common practice, the Court would look to CPR PD 6B whilst applying a "holistic" approach to RCCR r 8, Advocate Horsbrugh-Porter submitted expressly that "*The legal principles governing service out of the jurisdiction in England apply*" (although then, in fact, citing the *Tchenguiz* case, above).

48. Lest this latter submission shows a common misconception at the Guernsey Bar, I emphasise that it is just not correct. It is the legal principles which govern service out of the jurisdiction *in Guernsey* which apply.

49. The citation from *Tchenguiz v Akerman* above makes that quite clear, in two places. The first is the warning in [66] that the *Kyrgyz Mobil* case, there being considered and generally approved, concerned service out of the jurisdiction under Manx law, where the rules of court relating to that process resembled the English (and Jersey) rules of court, but that the Guernsey rules were not the same - and the difference is that the English type rules require the claim to fit a factual situation of a specified description from amongst a list of such (the "gateways"), whereas the Guernsey rule does not. The Guernsey rule merely poses the requirement of the claim being "*properly justiciable in Guernsey"* (and the court then also thinking it a "*proper*" case to authorise service out of the jurisdiction.)

50. The second is in relation to the second limb of the four-stage test, where the Court of Appeal says, expressly, that in deciding whether a case is "properly justiciable" in Guernsey, the court may "*if it thinks fit*" (emphasis added) draw assistance from the approach taken by courts in the neighbouring jurisdictions under their own rules, albeit those contain prescriptive "gateways", unlike the Guernsey rule. Thus, the Court of Appeal is saying that it is entirely within the discretion of the Guernsey Court to decide what assistance, indeed if any, it may derive from considering cases from England (or the Isle of Man or Jersey), when applying the Guernsey rule.

51. With the difference in the wording of the rules, that assistance is necessarily at a high level. The English provisions and authorities provide examples of situations which are deemed (or have been held) to qualify, or not to qualify - but under different rules which are, in their structure, more prescriptive than the rule applicable in Guernsey. Moreover, the English rules on service out of the jurisdiction have been enacted piecemeal and in a much more complex context, where international treaties and other matters have affected the position, making it unnecessary, in many cases, for permission to serve out being needed. Indeed, CPR r 6.36 and PD 6B para 3.1 are, specifically, the residue of general law in England, requiring to be resorted

to only if previous rules of Part 6, authorising service out of the jurisdiction on other specific grounds, are not available.

52. It is often the case that, in Guernsey, procedural issues arise where there is little or no authority in Guernsey cases. It is then natural and permissible to look to authorities in similar neighbouring jurisdictions for an indication of relevant considerations, and even of a likely reasonable outcome. It is, of course, likely that courts of justice in jurisdictions with similar values and principles, will come to similar conclusions in like situations. However, that emphatically does not mean that the Guernsey Court simply treats the situation as being that "the English principles apply" equating that with applying CPR PD 6B para 3.1 *mutatis mutandis*.

53. The error of this proposition is illustrated in the present case. The English Practice Direction PD 6B was amended in October 2022, between the time when leave to serve out was obtained from the Deputy Bailiff in this case and the time of this renewed hearing. The amendment added another "gateway" - the "fiduciary duty gateway", - to the previous list of gateway situations within at least one of which an English case has to fit, in order to qualify for service out of the jurisdiction if this is not authorised under any other specific statutory power. This change in the English rules prompted a whole new section of submissions by Advocate Horsbrugh-Porter on this application, regarding the applicability of this supposed new regime – but the Guernsey rule, and thus the principles applicable in Guernsey, had not changed at all between these dates. Obviously, a change in an English rule could not change the correct outcome of an application in Guernsey. This just shows that the English principles do not themselves "apply" in Guernsey, and the English rules and authorities do no more than provide examples of what would happen in a different jurisdiction. The Guernsey Court may (or may not) find these helpful, but, on any basis, those examples do not apply as rules imposing boundaries on the Guernsey Court's decisions.

54. What can be said about the English "gateway" provisions is that, as the English rules are of a more prescriptive form than the Guernsey rule, if a case can comfortably be brought within the terms of an English "gateway" then it is likely to be within the general purview of the Guernsey rule. That is not the same thing, however, as saying that a claim must be brought within one of the English "gateway" provisions in order for leave to be given for service out, or that the English rules "apply" in Guernsey. The fact that even the English provisions are evolving (as their recent amendment indicates) goes to demonstrate that the appropriate general judgment of whether the case is "*properly justiciable*" in Guernsey under the Guernsey rule is independent of them.

55. The vice of paying too close reference to the English rules as if they applied in Guernsey is that it leads to lengthy technical arguments of analysis and construction, in order to invoke one of the English "gateways" at a stage in the application where these are simply unnecessary. The question of "properly justiciable in Guernsey" can be far more simply and appropriately dealt with if it is recognised the Guernsey rule enables, and indeed invites, a more flexible, broad brush, common sense approach, as a matter of impression, rather than a technical, and very often awkward and contorted approach, to try and argue that a claim fits into one of the English gateways.

56. I will deal with this further, below, but for the present, I emphasise (as I similarly did recently in another context in *Re Joannou & Paraskevaides (Overseas) Ltd (in liquidation), Bowles and ors v Joannou and ors 2022 (Guernsey Judgment GRC 072 at [23])* that: **I am not applying CPR r 6.36 and PD6B para 3.1; I am applying RCCR r 8 (2).** I now proceed to do so.

(1) Is there a serious issue to be tried?

57. This is a threshold test. The reason for imposing this initial test is that it is not reasonable that defendants who are not within the jurisdiction of the court should be troubled with having to answer proceedings which do not disclose a reasonable cause of action against them, or which would not survive a defendant's application for summary judgment because of a demonstrable lack of substance in the claim being advanced. However, the test being only that the prospects for success of the claim should be better than "fanciful", the bar is not a high one: see *Carvill America Inc v Camperdown UK Ltd* [2005] 2 Lloyds Rep 457 at [24]. Where there is more than one defendant the claim must pass this hurdle against each of them separately: *Popat v Popat* (2015) Royal Court 32/2015. (As regards other *dicta* in this judgment, I note that this decision was handed down before the *Tchenguiz* decision, and the guidance cited above.)

Plaintiff's submissions

58. Advocate Horsbrugh-Porter several times stressed, that the central claim in this case is a claim for breach of fiduciary duty made by a Guernsey company (BHL) against one of its directors, and that the other claims are consequential on this. He submits, urging that one must look at the actual particulars of the claim made, that the Plaintiff easily surmounts the low threshold for demonstrating a real, as opposed to fanciful, prospect of success for its claims. He stresses that, for present purposes, one must assume that the facts pleaded will be proved, and thus assume the truth of them. So long as the pleaded facts disclose a sufficiently viable cause of action on the "better than fanciful" test, this hurdle is surmounted.

59. As regards the (central) claim against Mr Abbas, ("**the Breach Claim**") be submits that a gratuitous transfer of property by a commercial holding company

> "*involves the exercise of the directors' powers for an improper purpose*".

He then relies on *Eclairs Group Ltd v JKX Oil & Gas plc* [2015 UKSC 71, (not itself, however, a "gratuitous transfer" case) for the proposition that such an exercise of the directors' powers is void, and cannot be ratified by the shareholders under the *Re Duomatic* principle. This principle (see *Re Duomatic Ltd* [1969] 2 Ch 365) is that where shareholders could bind the company by their votes on a resolution at a company general meeting, they can also do so by their unanimous agreement, ratification or consent to such a course, outside such a meeting. (In effect, they can, by their unanimous actions waive the requirement of the formality of a resolution: *EIC Services v Phipps* 2003 BCC 931 at [121]-[122].)

60. As regards the claims against SHEF, he submits that the Constructive Trust claim and the Knowing Receipt claim made against SHEF are legally reliant on the Breach Claim, and therefore pass the threshold test in conjunction with it. He submits that the Unjust Enrichment claim against SHEF is similarly dependent on the Breach Claim, but also, as I understood him, that it passes the threshold test independently. This is seemingly on the basis that the asserted unjust benefit to SHEF was procured by the undue influence of Dr Afaq and/or Mr Abbas on Dr Habib (or BHL), which therefore undermines the validity of the Resolution (although this would, it seems to me, probably have to be, rather, the validity of the Transfers, as the relevant dispositive instruments). This extended proposition thus seems to arise from focussing on the effect of the situation (enrichment), rather than the means by which it was achieved (breach of duty).

61. He submits that there is ample evidence to demonstrate a real prospect of successfully establishing the necessary undue influence to support any of the above claims, lying in the evidence of a relationship of trust and confidence, as pleaded, between Dr Habib and Dr Afaq and/or Mr Abbas (as the case might be), and the remarkably large scale of the gift of the Shares. As to Dr Afaq, the necessary relationship is alleged to rest on the (accepted, I think) evidence of their lengthy emotional and physical relationship, and her involvement in Dr Habib's wealth, assets and financial affairs, and her control of his care. As to Mr Abbas, the alleged relationship

is asserted on the basis of his apparent involvement in looking after Dr Habib's financial affairs for him at times, and in particular is reinforced by the lately introduced evidence of bank account opening documentation, obtained from the Habib Metropolitan Bank, (no connection), in other proceedings, which show that, on various dates between 2011 and 2018, Dr Habib opened five bank accounts there, with Mr Abbas named as his "contact person", and being variously described, on four of them, as "brother", "manager", "colleague" and even "son", thus suggesting (it is submitted) such a relationship.

62. On the authority of *O'Sullivan v Management Agency Ltd* [1985] QB 428 Advocate Horsbrugh-Porter submits that a gift does not have to be made to the ascendant party him- or herself for the equitable relief to be obtainable. He also submits, on the authority of *Okpabi v Royal Dutch Shell [2021] UKSC 3,* that, as this is not a case "*where allegations of fact are demonstrably untrue or unsupportable*", it was inappropriate for the Defendants to dispute the facts alleged in the Cause through evidence of their own as they have done, and that their doing so has simply gone to demonstrate that there is a seriously triable issue: see *Okpabi* (above) at [22].

Defendants' submissions

63. For the prospective Defendants Advocate Dawes submits that there is no serious issue to be tried on the facts, because the Shares were transferred voluntarily, with no undue influence exercised on Dr Habib, because all the disclosed circumstances support this position, and there is simply no evidence to the contrary that has been produced.

64. He relies on Dr Habib's 100% shareholding in BHL at the time of the impugned gift, and submits that Advocate Horsbrugh-Porter's proposition that, as a matter of law, the Resolution could not be ratified by the part played by Dr Habib in passing and subsequently implementing it, is just wrong; it misunderstands the "proper purpose" doctrine of company law, by failing to distinguish between acts which are not within the powers of directors, and acts which are not within the powers of the company.

65. The shareholders cannot "ratify" the latter, because the company, which is their embodiment, cannot do an *ultra vires* act (eg paying dividends out of capital), at all. An act which is *ultra vires* the company cannot be made *intra vires* by a purported "ratification*": Rolled Steel Ltd v British Steel Corporation* [1986] 1 Ch 246 at 296E. Where, however, it is the former, and the act is something which the company could do but which is outside the directors' powers, the shareholders can ratify the act by their unanimous agreement or approval, under the *Duomatic* principle. Giving away the company's property comes in the latter class. It might not be seen as being in the best interests of the company (ie the general body of shareholders) to do so, but disposing of the company's property for no consideration is still an act which the company itself has legal power to do. Therefore, the shareholders can ratify it if they choose. Here, the involvement of the 100% shareholder (Dr Habib) in the passing of the Resolution, and, indeed, in the subsequent acts done to give legal effect to the gift of the Shares to SHEF, is perfectly adequate to ratify those actions, whether or not they would otherwise have been open to challenge as a breach of the directors' duties.

66. He also points out that Advocate Horsbrugh-Porter's submission that if Mr Abbas had not supported the Resolution, the gift of the shares could not have been authorised at all (and therefore could not be ratified, or should be declared invalid) because the Resolution could not have been passed, is also factually wrong. As the Company's Chairman, Dr Habib had a casting vote on the Board, which consisted of two Directors, at least at the relevant meeting. Therefore, if he supported the Resolution, it would inevitably be passed even if Mr Abbas had objected. It follows from this that Mr Abbas' actions in voting in favour of the Resolution caused no loss to the Company, on any basis, so there could be no viable claim against him for damages or compensation.

67. In response to Advocate Horsbrugh-Porter's submission that, as a company whose objects were investment as a commercial holding company, BHL had no power to indulge in philanthropy, and thus no power to give away its assets at all, he points out that there is no express restriction to this effect in BHL's Memorandum of Association, and he cites ss 113 and 114 of the Companies Law 2008, which provide, respectively, that

> "*unless a company's memorandum expressly limits its objects, its objects are unrestricted"* (s 113),

and that the validity of an act done by a company

> "*shall not be called into question on the ground of lack of capacity by reason of anything contained in or omitted from …. the company's memorandum or articles …*" (s 114).

68. He therefore submits that there is and was no restriction on BHL's powers to deal with its assets imposed by its objects, and any allegation that the Resolution was invalid in point of law must, in all the above circumstances, inevitably fail.

69. This leaves the Plaintiff's case resting entirely on the proposition that Dr Habib's apparent consent to, and indeed implementation of, the Resolution to make the gift, as long ago as October 2016, was not effective but was and is liable to be set aside for undue influence, as asserted in the Cause.

70. As to this, Advocate Dawes submits that the materials before the court show, in effect, that such a case is so flimsy that it does not pass the "more than fanciful" threshold bar, low though this may be.

71. He points out, first, that with there being no assertion, still less evidence, of *actual* undue influence, such a proposition depends entirely on the principles of *presumed* undue influence. This is said to arise from the combination of a claimed relationship of trust and confidence (between Dr Habib and Dr Afaq and/or Mr Abbas) coupled with the making of a hugely disadvantageous (to himself) gift by Dr Habib, to the alleged benefit of Dr Afaq and/or Mr Abbas, although even this is only indirectly.

72. Advocate Dawes' submission is that the evidence provided on behalf of BHL simply goes nowhere near establishing the necessary combination of a relationship of trust and confidence and the remarkable making of an extraordinarily large and disadvantageous gift, with sufficient cogency to found an arguable case that the gift can only have been the product of undue influence. It is this combination which is the basis of the doctrine of presumed undue influence, and which then shifts the burden on to the alleged influencer to prove that the disposition was in fact the product of full, free and informed wish of the disponor - in other words that it was in fact the spontaneous and willing act of the disponor, made independently from any undue influence of the alleged influencer. The Cause and the evidence, he submits, simply do not get there.

73. Advocate Dawes submits that there is no assertion, nor evidence, of any weakness in Dr Habib's mental state or fortitude prior to his fall or stroke in early 2021, and its aftermath, and the only actual evidence, even though all from the documents and witnesses on the Defendants' side - in fact supports quite the opposite view. Whilst Dr Habib now, apparently, says that he supports these proceedings to nullify or revoke the gift of the Shares, the evidence is plain that he concurred in the operation and effects of the gift as being valid and intended, for more than five years after it was made. The gift was not concealed, but was perfectly open, and it is submitted that Dr Habib's lack of action for over 5 ½ years is more consistent with his approbation of the gift but lack of close contact from his children for many years, than with the existence or operation of any undue influence exercised on him by others. Dr Habib's

supposed current attitude has conspicuously coincided only with the arrival of the children on the scene and their taking over his affairs, and Advocate Dawes suggests that some of the demonstrated circumstances of this, (such as apparently fluctuating, and *prima facie* inconsistent, medical opinions - from a Dr Moore - about Dr Habib's mental capacity, Dr Habib's having provided the email answers to questions used to make his affidavit "*with the help of*" Ben, legal proceedings in Dr Habib's name being signed by Amina as his attorney, and the children's taking over for themselves Dr Habib's former shareholding in BHL) raise questions about his full and free wishes at the present time. It is also pointed out that Dr Habib never mentioned the supposed undue influence exerted upon him in either the application to restore BHL to the Register in 2022, or in the proceedings brought in his name in Pakistan in 2021; his complaints there were of alleged misappropriation of assets from SHEF, and not from himself, and even, in one case, an allegation of forgery.

74. In effect, Advocate Dawes submits that the case put forward on behalf of BHL, that Mr Abbas cannot invoke Dr Habib's actions as ratifying BHL's gift of the shares because such actions were only procured through the undue influence of himself, or of Dr Afaq (but to Mr Abbas' knowledge, it would have to be alleged) is so flimsy, and so at odds with the weight of all the evidence, that its prospects of success are so slim as, indeed, to be fanciful.

75. Insofar as it is accepted that the Constructive Trust claim and the Knowing Receipt claim and the Unjust Enrichment claim against SHEF depend on (because they are consequential upon) the Breach Claim, those claims too must therefore fail for being no better than fanciful. Insofar as any may be capable of being formulated apparently independently of the Breach Claim, it is actually still dependent on the flimsy and fanciful allegations of undue influence and it fails to surmount the necessary bar of disclosing a real triable issue.

Discussion and decision

76. Advocate Horsbrugh-Porter stresses that the Court must look at the facts pleaded and decide whether a properly triable issue is disclosed on the assumption that those facts will be proved to be true. That, however, goes only to the question whether the claim discloses a reasonable cause of action.

77. In my judgment Advocate Dawes is correct that the Court is not rigidly obliged to treat facts as true simply because they are asserted in the claim, and it is permissible to form a view as to whether, on the evidence then before the Court, such assertions do hold a sufficiently reasonable prospect of being proved that their truth should, indeed, be assumed for the purposes of an application such as the present. However, the hurdle facing a Defendant who asserts that such a positive view cannot be formed is extremely high, even though the burden of satisfying the Court that service out of the jurisdiction should be permitted rests ultimately on the Plaintiff. This is, first, because the evidence at a preliminary hearing such as this is necessarily limited, and the Court will not be drawn into conducting a mini-trial on the basis of it, and, second, because, in any event, the hurdle which the Plaintiff has to surmount is only the very low hurdle of demonstrating that the claim it has made stands more than a merely fanciful prospect of success.

78. Nonetheless Advocate Dawes invites me to set aside service of these proceedings outside the Guernsey jurisdiction on the grounds the Cause and the other materials before the court show that the Cause discloses no properly triable issue, ie no issue with a real, as opposed to fanciful, prospect of success, in all the circumstances which either are, or must be, accepted.

79. I remind myself (because it is rather easy to get diverted from this point, given the focus of the arguments and evidence) that the claim on which Advocate Horsbrugh-Porter relies as the "central" claim in this action, and effectively as justifying the Guernsey Court taking jurisdiction to try the case, is a claim that Mr Abbas breached his fiduciary duties as a director

of a Guernsey registered company (BHL), thus giving BHL a cause of action to recover (in effect) damages against Mr Abbas. I will consider this first.

80. To succeed in demonstrating a properly triable issue, the Plaintiff must necessarily defeat the Defendants' proposition that any such breach of duty was effectively negatived and its validity implicitly ratified, by Dr Habib's actions, as the 100% shareholder of BHL, in joining in the Resolution, subsequently participating in effecting the gift of the Shares and later still, acting consistently with his endorsing the effectiveness of that gift, for some years. I have recorded the two bases on which the Plaintiff seeks to do this, one a point of law, and one a mixed point of fact and law.

81. As to the first, I reject the Plaintiff's submission that such ratification was not possible in point of law. I unhesitatingly accept Advocate Dawes' arguments of law above (see [64] – [68]). *Prima facie* Dr Habib's concurrence in the Resolution and the making of the gift of the Shares by BHL to SHEF would be quite sufficient to negate or ratify any breach of duty by Mr Abbas (which I accept is in any event not admitted) as alleged in the Cause, and to validate the gift as an effective disposition by BHL.

82. As to the second, I also have very considerable sympathy with Advocate Dawes' further proposition, that, considering the terms of the Cause and the sum of the surrounding evidence disclosed to the Court, the Plaintiff cannot satisfy the Court that it stands any real prospect of proving that Dr Habib's effecting or concurring in the gift of the Shares to SHEF was procured by the undue influence of either Dr Afaq or Mr Abbas.

83. Undue influence is a complex and nuanced area of law. The leading case in English law is *Royal Bank of Scotland plc v Etridge (No 2)* [2002] 2 AC 773.

84. The Cause has been pleaded, and Advocate Horsbrugh-Porter addressed me on the footing that the English principles apply. The doctrines of English law are, of course, doctrines of equity and, as such would not be included within the *coutûme* which is the foundation of Guernsey law, but it was decided in *Hitchins and ors v Lloyds TSB Offshore Trust Co Ltd* [2011-12 GLR 336] that the Guernsey Courts would follow the Jersey Courts in holding that the law of undue influence in Guernsey was similar to English law, so I am satisfied that that approach is justified.

85. I have one further reservation, however, in that it does not seem to me to be a foregone and obvious conclusion that it is Guernsey law which would be applicable to the issue of undue influence, at all. All the facts and circumstances, going to the question whether effective undue influence, ie involving a relationship of "ascendancy" (see *Hitchins*), of either Dr Afaq or Mr Abbas over Dr Habib, had been established, took place in Pakistan, and in the context and ethos of Pakistani culture. I think it would be very well arguable that any question whether undue influence should be taken to have vitiated Dr Habib's apparent consent to the impugned transaction should be judged by Pakistani law, and I have no idea if or how far this might differ from the development of such doctrines in English law. However, I will assume, for present purposes, that it would not do so to any material extent. I therefore test the matter by considering the English law principles, as, indeed, both Advocates invoked, themselves.

86. An account of these, sufficient for present purposes, and illustrating the complexity and refinement of the law in this area, is to be found in Snell's ***Equity*** 33rd Ed, and in particular paras 8-021 – 8-036.

87. The Plaintiff's pleaded Cause in this case invokes the doctrine of presumed undue influence, in order to defeat the Defendants' proposition that Dr Habib, as BHL's sole shareholder, validly participated in or ratified, the Resolution and gift of the Shares, thus defeating the Plaintiff's claim completely. The doctrine of presumed undue influence requires proof of two elements.

The first is a "*relationship of influence*". This is a better description than the more frequently used "relationship of trust and confidence" - see *Snell (supra)* at 8-023 - because it is the abuse of "influence" which is the foundation of the doctrine, and whilst "trust and confidence" may give rise to influence, the two concepts are not perfectly coincidental. The second is, coupled with such relationship of influence, a transaction which "*calls for explanation*" (ibid), in the sense of an unusual or suspicious transaction which therefore demands evidence that it was the product of the genuine and spontaneous, free will of the donor, the logic being that in the absence of such proven satisfactory explanation, the conclusion must be that the transaction is only explicable as having been the product of *undue* (this is important) influence by the ascendant party in that relationship.

88. In English law, some specific relationships give rise to a presumption of influence in themselves, without more. The relationship of husband and wife is not one of these (*Etridge)* and we are not concerned with any such recognised specific relationship here. Outside those specific categories, it is necessary to prove that the particular relationship was one of "influence" as a matter of fact, but this is very fact sensitive. It is not lightly assumed. Even closeness or mutual trust between parties will not, by itself, suffice: *Thomson v Foy*. [2009] EWHC 1076 (Ch) at [103]; there must be something more.

89. Similarly, whether a transaction "calls for explanation" in the required sense is highly fact-sensitive to the particular situation. Whilst it must be shown that the transaction

> "*cannot be readily accounted for by the ordinary motives of ordinary persons in that situation*" (*National Westminster Bank plc v Morgan* [1985] AC 686 at 704),

this is not a proposition of general objective overview, but is assessed on the basis of the particular facts. Thus, the individual facts and circumstances of the allegedly influenced party, his likely wishes, motives, and suchlike, are very material.

90. Taking all this into account, I consider, first, the allegations of presumed undue influence against Mr Abbas, because the central claim is against him. I have very grave doubts as to whether the situation pleaded, even as enlarged in the affidavit evidence, discloses any sufficient "relationship of influence" exercised by Mr Abbas over Dr Habib, in 2016 (the relevant time), at all. It seems, at most to be a relationship between colleagues, with the natural trust that such would easily give rise to, but hardly becoming elevated to "influence". The inconsistent descriptions of Mr Abbas' relationship with Dr Habib in the various account opening forms may be bizarre, mysterious and unexplained, but they do not seem to me to prove anything at this stage, certainly in the absence of explanation, even, as to how they came to be completed. Furthermore, the impugned transaction seems quite reasonable, and readily explicable, in the context of the other, objective, evidence of Dr Habib's involvement in and pursuit of his philanthropic wish to provide education for young people in Pakistan, as being likely to have been the product of his own free will, even it did amount to a disposition of the major part of his wealth. There is no suggestion or evidence that making the gift precipitated him into immediate or prospective straitened circumstances.

91. As regards Dr Afaq, there are more grounds for concluding that the Plaintiff stands some prospect of establishing that there was a relationship of "influence" between her and Dr Habib, but given that mere influence between persons in a close relationship is to be expected and is not proscribed, that it is only the exercise of *undue* influence (ie, the abuse of such influence) which prompts the intervention of the court, and that the other evidence as to Dr Habib's being of full capacity and a decisive and forceful personality at the relevant time is cogent, the prospect of the Plaintiff's establishing a case of undue influence cannot, in my estimation, be perceived to be at all strong. There also remains, as with Mr Abbas, the point that the required "explanation" for the impugned transaction seems readily clear and plausible.

92. I accept that the present case is apparently supported by Dr Habib, although the genuineness of this current attitude has been brought into question by the Defendants and, it seems to me, not without grounds. I give some weight to the 5 ½ years during which Dr Habib apparently approved and supported the effect of the gift of the Shares to SHEF, at a time when there is no evidence of mental infirmity on his part. It seems to me that this is certainly, in the circumstances, some evidence that he did freely approve and desire the gift of the Shares, even after having had considerable time to reconsider it. However, in view of the point which could be made, that any overbearing influence by Dr Afaq or Mr Abbas (assuming it were proved in the first place) might be expected to have continued during this period, it could fairly be said that Dr Habib would apparently not have been emancipated from such undue influence until the intervention of his children. As an argument, therefore, this point cannot be taken very far.

93. In summary, I agree with Advocate Dawes that the claim for breach of duty has no prospect of success if, in fact, Mr Abbas was acting at the instance of his fellow director, who was the beneficial owner of the Shares, acting of his own free will. I have found myself very, very close to accepting Advocate Dawes' further submission that there has been no cogent evidence advanced (as opposed to mere assertion), that Dr Habib was, *at the relevant time* (October 2016) acting, in relation to the Shares, under the improper influence, of Mr Abbas or of Dr Afaq, as alleged in the Cause, proof of this being necessary, therefore, to maintain the viability of the claim(s).

94. However, as mentioned, cases of undue influence are very fact-specific, and this is only a preliminary interlocutory hearing, necessarily decided on limited evidence. Because of this, and because of the complex interaction of that issue with the other issues which will become material to the case (in particular, for example, issues of knowledge or notice of any such undue influence to other parties, and how this might affect the availability of relief) I have concluded that I cannot be satisfied that the prospects of success for the Plaintiff's case are quite so low as to be "fanciful", weak though I think they are.

95. Having concluded that it would be necessary to determine the issue of undue influence (or not) in order to determine the issue of whether there was an operative breach of Mr Abbas's duty as a Director of BHL, I do not consider it proportionate for me to decide here – if indeed I am urged to – whether any of the claims made against SHEF are formulated so as to have an existence independently of that breach of duty claim. Advocate Dawes says that, in practical terms, they are there only for enforcement purposes, but I really do not need to decide that point, at any rate at this stage. In whatever way they are formulated, they are clearly consequential on the same matters as would be deciding factors in the Breach Claim.

96. The upshot is that I will not set aside service of these proceedings *in limine* on the ground that they disclose no triable issues(s). However, I record that if I were to allow them to proceed, I would require this to be on the basis that the Cause was amended to delete the claim that any breach of duty by Mr Abbas in passing the Resolution and authorising the Transfers of the Shares was incapable in law of being ratified by the actions of Dr Habib. I regard that plea as unarguable.

(2) Is the case "properly justiciable" in the Royal Court of Guernsey?

97. I hope I can deal with this quite shortly, because, in my judgment, it is unhelpful and disproportionate to devote the amount of time and refinement of argument to this particular topic which the parties have in fact devoted to it here because of the Plaintiff's apparent assumption that the necessary course is to apply, *mutatis mutandis*, the "gateway" qualifications laid down in CPR r 6.36 and PD 6B para 3.1 to the claims - and in fact to each claim, in accordance with the English law approach. This has led to submission and counter-submission on the wording of several of the English gateways.

98. This test in Guernsey is, however, a second threshold test, merely paving the way, as a qualifying test, for the Court to move on to the far more important and decisive test at stage 3. The Court simply decides, at this stage, whether there is reasonable justification for the Court's *potentially* accepting jurisdiction to try what has already been decided to be a triable issue, despite the fact that doing so will require serving the proceedings on persons outside the Court's jurisdiction. The justification for doing so therefore has to be that there is some fact or circumstance about the claim which provides a sufficiently real and significant connection with Guernsey and its jurisdiction, so that it would not be "exorbitant" for the Court to assume the power to deal with it.

99. The English "gateways" about which so much argument has revolved all lay down sets of particular circumstances, or features, about potential claims which can be invoked to justify service out of the English jurisdiction, and which have therefore been stipulated by Practice Direction (by power of the Master of the Rolls, in consultation with the English Civil Procedure Rules Committee) to provide just such a sufficient connection with England and Wales. They are, however, written at an extremely granular level, in relation to particular types of claim and in quite refined and academic detail. There are apparently 25 separate paragraphs, in PD 6B para 3.1, but with extra paragraphs having been inserted over time there are actually 38 different "gateway" descriptions. Some are inter-dependent. The problem with this kind of prescriptive approach is that it imposes rigid limitations which then cannot be circumvented if a case emerges which does not fit literally within the words of the provisions, but which common sense says ought to do so. This is illustrated by the provisions which it has been found necessary or desirable to insert later, as limits in the gateways were recognised - such as provisions to cover those who aid or abet matters falling within a described substantive gateway claim, or claims for declaratory relief relating to such matters, or simply "missing" claims, such as the recent insertion of a "fiduciary duty" gateway. Such a remedy can only be provided after the event, by amending the gateway provisions themselves. Where, as in Guernsey, the court has a more flexible rule, such extension could be made on the spot, to cater for any worthy newly emergent case, if required.

100. The important thing, in my judgment, is therefore to identify, rather, the considerations which underlie these 38 specific illustrations. A review of the English gateway provisions shows that there are common threads, which demonstrate that certain features of claims are viewed as providing the necessary real and significant link with the English jurisdiction. These can therefore sensibly be viewed as illustrating a general principle of sufficient connection. They are matters such as that

    - the disputed rights of the parties are governed by English law,
    - that the physical subject matter of the action is situated within the English jurisdiction,
    - if it concerns a contract, that the contract was made within the jurisdiction, or is governed by English law,
    - that the acts or matters complained of took place within, or at least partly within, the English jurisdiction,
    - that the loss claimed to have been suffered was suffered within the English jurisdiction,
    - that the prospective defendant is a necessary and proper party to a claim being pursued against a party within the jurisdiction,
    - that the claim arises out of the same or closely connected facts as another claim which fulfils another gateway requirements.

    This is not an exhaustive analysis of the English gateways, but, in my judgment, these threads clearly illustrate the principle behind the gateways, and the general basis, therefore, (ie that of sufficiently real and significant connection with the relevant jurisdiction either directly or procedurally) on which the Guernsey Court should be prepared to contemplate taking jurisdiction to try the relevant claim under this second stage test of meeting RCCR r 8 (2) (a),

namely "*Is the claim properly justiciable in Guernsey?*". This is, thus, the assistance which I "think fit" to derive from the English rules and authorities.

Plaintiff's submissions

101. As regards the argument in the present case, Advocate Horsbrugh-Porter rests the Plaintiff's case firmly on the fact that its allegedly central claim is that of breach of duty by a director of a Guernsey company. It therefore concerns the affairs of a Guernsey company, the proper adjudication of which is *par excellence* a matter of Guernsey law. In order to bring this claim within one or more of the English gateways (as he perceives he is obliged to do) he submits that it can be brought into the "contractual" gateway, ((PD 6B para 3.1 (6)(c)), on the grounds that a company's memorandum and articles constitutes a contract between it and its members, on the basis of which the director takes up office, and the claim is therefore "*in respect of*" that contract (following the words of gateway paragraph); it does not say that the potential defendant has to have been a party to the relevant contract. This submission was accepted by the Deputy Bailiff, at the initial hearing on 17 May 2022.

102. Advocate Horsbrugh-Porter submits that, as was stated in the *Carlyle* case (*supra*) at [28] persons who undertake to be directors of Guernsey companies must reasonably expect that they may therefore be obliged to have to answer for their actions as such in litigation in Guernsey.

103. He also submits that this claim comes within the terms of the new "fiduciary duty" gateway (para 3.1 (15B)), refuting an anticipated argument that, as this application, although a fresh hearing, is concerned to decide if the permission should have been granted at the time of the original *ex parte* hearing, it might be suggested that this "gateway" could not now be invoked.

104. He seeks to bring the claim, also, within the "tortious" gateway (para 3.1 (9)).

105. He submits that the further claims, against the Second Defendant, SHEF, (variously characterised as the Constructive Trust claim, the Knowing Receipt claim, the Unjust Enrichment claim or even a Restitution claim) come within the English "constructive trustee" gateway (para 3.1 (15)) whether in its original or recently revised, form, or the "restitution" gateway (para 3.1 (16),) in each case on the basis of an assertion that the further claim, because it is based on the breach of fiduciary duty, would be governed by Guernsey law. He also relies, insofar as necessary on the "closely connected facts" gateway (para 3.1 (4A)) submitting that as long as one of the further claims is accepted as passing through an available gateway, the others will pass through that gateway by sufficient association.

Defendants' submissions

106. Advocate Dawes concedes, although in somewhat grudging terms, that the Breach Claim arguably passes the "contractual" gateway at PD 6B para 3.1 (6) (c), this being the gateway accepted by the Deputy Bailiff. However, he submits that it "should not" do so, on the grounds that the wider context of the otherwise complete lack of connection of any aspect of the matter with Guernsey "remains relevant". None of the acts complained of took place in Guernsey; the Resolution was passed in Karachi (a fact which was not clear to the Deputy Bailiff when she made her decision); Mr Abbas has never visited Guernsey; Dr Habib, the 100% shareholder of the Plaintiff is a Pakistani national and at all relevant times resident in Pakistan, again with no apparent connection to Guernsey. He submits that the further "contractual" gateway at PD 6B para 3.1 (7) is not made out, because any breach of contract took place in Pakistan, and the tortious gateway at PD 6B para 3.1 (9) is not made out because the damage was not sustained in Guernsey and again, none of the acts complained of occurred in Guernsey.

107. As regards the Constructive Trust claim, he submits that it does not pass the "constructive trust" gateway (at para 3.1 (15)) because neither the acts complained of nor the relevant assets are or

were within the jurisdiction; they were in Pakistan. It does not pass the "restitution" gateway (para 3.1 (16)) because, again, the assets are not within the jurisdiction and the enrichment was not obtained within the jurisdiction, but in Pakistan. The only basis on which this gateway could be invoked is therefore if the trust claim framed as a "restitution" claim were governed by Guernsey law, but he submits that this is only achieved by the questionable argument that a constructive trust claim takes its own proper law from the proper law of the Breach Claim itself, a proposition which he submits is without authority and is incorrect.

108. As regards the Knowing Receipt claim, he submits that it cannot just be called an "unjust enrichment" claim, because it is not such a claim; it is a restitution claim and, once again, the only potential argument that it passes the "restitution" gateway (at PD 6B para 3.1 (16)) is that it is governed by Guernsey law. This he submits, is even more obviously not the case than as regards the Constructive Trust claim, since the alleged knowing receipt took place in Pakistan, and relevant assets received - the Shares in a Pakistani company - were situated in Pakistan. He submits that the so-called Unjust Enrichment claim stands or falls with the Knowing Receipt claim as it is, in reality, the same claim; along with the Constructive Trust claim they are different sides of the same coin.

109. Finally, he submits that the "closely connected facts" gateway is not properly engaged, it being intended only for the common-sense purpose of enabling all claims between parties to be tried together in a case where a claim which obviously passes through one gateway is made, and other claims, resting on similar facts, are advanced between the same parties.

110. He also, as a general point, submits that the Court should be wary of taking jurisdiction over proprietary and tracing claims in respect of property in Pakistan and claims for rescission of a transfer of shares in Pakistani companies, for fear of taking "exorbitant" jurisdiction.

Discussion and decision

111. My account of the arguments above, even though intended to be short, illustrates the convoluted and academic arguments which can arise over the application of the English "gateway" requirements, and which become extremely arid. This is because, as Advocate Dawes' submissions illustrate, they tend, in any event, to be overtaken by the considerations which arise at the next stage of the four-stage test. This stage is only a threshold stage.

112. As regards the facts in the present case, as the claim has been formulated, I accept that the claim against Mr Abbas, the First Defendant, passes the initial test of being properly justiciable in Guernsey. This is for the simple reason that it concerns the duties and the actions of a director of a Guernsey company as such, which are clearly a matter governed by Guernsey law. That fact provides, quite clearly in my judgment, a sufficiently real and substantial link between that claim and the jurisdiction of Guernsey for the claim to be properly justiciable here. Advocate Dawes reluctantly admits as much.

113. It will be gathered that I do not think it is (or should be) necessary to go through the contortions of trying to classify such a claim as passing a "contractual" gateway, which is highly artificial in this case, although, if necessary, I would accept the argument that it does.

114. Advocate Dawes' next submission, that this claim "should not" surmount the contractual gateway because all the other surrounding circumstances have no connection at all with Guernsey seems to me to be beside the point, here. Those facts come into play later, but they do not affect the primary consideration here, which is, simply, does the claim show a sufficiently real and significant connection with Guernsey and its jurisdiction for it to be appropriate for the Royal Court to be prepared, *prima facie*, to accept that it could reasonably try it - whether that connection be demonstrated by the mechanical process of showing compliance with one of the English gateways, or simply be perceived as a matter of common-sense impression.

115. As regards the further claims (those made against SHEF, the Second Defendant) on analysis of the skeleton arguments the formal factors relied upon by Advocate Horsbrugh-Porter appear to be twofold.

116. The first argument is that these claims, particularly the Constructive Trust claim, are in effect claimed as consequential relief based upon the outcome sought to the Breach Claim, such that they get through the "closely connected facts" gateway.

117. This is an assertion of a factual connection which makes it *prima facie* reasonable for the Court to accept jurisdiction over such a claim. I accept this. It matters not, whether that connection is said to be established under a "closely connected facts" gateway, or just the pragmatic conclusion that, if the court is going to accept to try the issue of the validity of a director's consent because it relates to the proper conduct of the affairs of a Guernsey company, it will inevitably have to try the allegations which are said to vitiate that consent, (ie the undue influence) and if so, determining whether any and if so what relief might be granted if those allegations are made out does not stray materially outside the ambit of such determination.

118. The second argument relied upon by Advocate Horsbrugh-Porter as justification for the court's assuming jurisdiction over the further claims, here viewed independently (ie as claims in knowing receipt, or restitution, or unjust enrichment) is the assertion that they are governed by Guernsey Law. As a proposition of law relied upon as a free-standing justification for finding these claims to be sufficiently connected with Guernsey, I reject it, agreeing with Advocate Dawes. I have grave doubts as to whether the proper law of claims of knowing receipt, restitution, unjust enrichment (or even constructive trust, viewed independently), all of which depend on acts taking place entirely in Pakistan, could arguably be governed by Guernsey law. They have no connection with Guernsey or its jurisdiction other than that they have had the indirect and incidental effect of operating on the mind of a person who was the controlling shareholder of a Guernsey company. That is, in my judgment irrelevant in itself to the cause of action or issue.

119. I do not need to consider this point in any more detail, though, because I have held above that the Breach Claim does unambiguously qualify as a claim which is "properly justiciable" in Guernsey, and that, as the ultimate determination of that claim depends on the validity of the Plaintiff's case that the consent of Dr Habib was only procured by undue influence (by whichever accused person), which will, in itself, require consideration of the very same facts as are relied on to support the constructive trust, restitution, knowing assistance or unjust enrichment claims, I conclude that the whole claim passes the second stage test, and satisfies RCCR r 8 (2) (a).

120. However, in the end, none of this matters, because of the very firm conclusions I have reached on the remaining questions to which I now turn.

(3) In all the circumstances of the case, is Guernsey clearly and distinctly the most appropriate forum?

121. This third stage test is the essential test for determining if it is "proper", within the meaning of RCCR rule 8 (2) (b), for the Court to allow service of the proceedings on parties outside the jurisdiction of the Court. There are, clearly, only two contenders for the title of "most appropriate forum" in this case, and that is Guernsey or Pakistan.

Plaintiff's submissions

122. Advocate Horsbrugh-Porter submits that Guernsey is clearly and distinctly the most appropriate forum. He does so on the grounds, once again, that the central claim in the case is the claim of breach of duty by a director of a Guernsey company, and he relies on *Konamaneni v Rolls Royce (India)* Ltd [2002] 1 WLR 1269 at [55], and leading textbooks, to the effect that, in cases

concerned with the management of companies, the courts of the place of incorporation are likely, indeed highly likely, to be the appropriate forum, for being best suited to give decisions on matters of the control and management of such a company.

123. He submits, secondly, that as regards "the claims" it will be principles of Guernsey law which will have to be applied, and, he also submits that these are difficult points of law – a second reason why Guernsey is the most appropriate forum. He cites *VTB Capital plc v Nutritek International Corporation* [2013] 2 AC 337 in support of this proposition.

124. He submits that whilst the actual place of commission of the impugned acts, or the site of any unjust enrichment, can be a starting point for consideration of the appropriate forum, they are not determinative, that other factors here point in favour of Guernsey, and that they outweigh any impact from those considerations of location. Apart from the factors which he submits are central, and therefore of decisive weight, mentioned earlier above, he relies also on the fact that the directors and shareholders of BHL, and Dr Habib, reside in the United Kingdom. He submits, based on his submissions as to the expert evidence, that it is apparent that proceedings would be completed far more quickly in Guernsey than in Pakistan, and that Dr Habib is an elderly and frail man. He also submits that there has been "no difficulty" in bringing evidence from Dr Afaq, Mr Abbas, Mr Ebrahim, Mr Valiaani and Mr Malik into the proceedings on this application, and that, these days, evidence can easily be taken by video-link, thus reducing the weight of any alleged practical disadvantage of a hearing in Guernsey as contrasted with Pakistan.

125. He suggests that the requirements for expert evidence would be less in Guernsey than in Pakistan, as the latter jurisdiction would require evidence of Guernsey law. (The strength of this proposition depends somewhat, of course, on whether his previous proposition that the "further claims" are properly governed by Guernsey law is correct, and I have held that to be very questionable.)

126. He dismisses the existence of the other proceedings in Pakistan, which I have briefly referred to, as being of no moment because they do not (he submits) actually deal with any of the issues arising in this case, and because they were urgent "cordon keeping" proceedings, taken shortly after the children realised how Dr Habib had been overreached, and as emergency measures. Indeed, when the proceedings were commenced in 2021, BHL did not exist, being at that time struck off the Companies Register, so it could not have commenced any action in Pakistan.

127. He also submits that, on the evidence, this Court should conclude that there would likely be such delays in getting the case tried in Pakistan, in contrast to Guernsey, that this itself favours this Court's considering itself the most appropriate forum. However, in my judgment, (and following the approach approved *Lungowe v Vedanta Resources Ltd.* [2020] AC 1045 at [88], although that was a case in which other, statutory, conditions for permitting service out of the English jurisdiction were being considered), that is a separate proposition which is of more relevance to the fourth question which falls for determination, and I will consider it under that heading; I am at the moment considering the elements relevant to where the issues in the case are best tried in principle and as a matter of the practical conduct of the litigation.

Defendants' submissions

128. Advocate Dawes submits that Guernsey is not only not "clearly and distinctly" the most appropriate forum for the trial of this matter, but it is in fact clearly and distinctly not the most appropriate forum. He cites Mance JSC, in the *VTB* case at [18] that

> "*The ultimate over-arching principle is that stated in The Spiliada and, if a court is not satisfied at the end of the day that England is clearly the appropriate forum, then permission to serve out must be refused or set aside*".

He also points out from the same case, that the role of the judge is

> "*not … to exercise a discretion, but rather to reach an evaluative judgment upon whether, in the light of … the …points pressed upon him by each side, England was clearly the more appropriate forum"* Wilson JSC at [156]

and that

> *"the underlying principle is that the task of the court is to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice*." (Lord Clarke at [190].

129. He relies on a list of points which, he says, show that Pakistan is the more appropriate forum and Guernsey is far less so:

- BHL is merely a holding company, and its status as a Guernsey company is virtually fortuitous;
- None of the individuals concerned in the litigation has any connection with Guernsey,
- None of the material factual events occurred in Guernsey, whether the actions to do with the making of the gift of the Shares, or the acts which are impugned as giving rise to the undue influence; they all occurred in Pakistan,
- Both the Defendants are Pakistani and Pakistani resident
- The material witnesses are all either Pakistani or Pakistani resident,
- The property with which the claims are concerned are shares in a substantial Pakistani resident company.

130. He submits that insofar as any Guernsey law may be material in the matter, it would be company law points, as to which Pakistani law would be likely to be much the same (with Pakistan having its legal heritage in English law), or so similar that this would pose no difficulty to a Pakistani court's being asked to apply such points. Any differences could be dealt with by expert evidence. The connection with Guernsey company law could not justify, in his submission, transporting what is essentially a Pakistani case to Guernsey.

131. Drawing attention to the fact that in the *VTB* case (above) the Supreme Court declined to set aside the service of proceedings out of the English jurisdiction *despite* holding that the courts below had been wrong to find that Russian law was the proper governing law of the alleged torts (it being in fact English law), he submits that, just as in that case, the key issues in this litigation are going to be factual issues, and not legal ones, and those are so closely connected with Pakistan that they are plainly more appropriate to be tried in that jurisdiction.

132. He suggests that the children, who would seem to be the current beneficial owners of BHL are, in reality, the true claimants in Guernsey, but that they have already brought several sets of proceedings in Pakistan, seeking remedies in respect of the Shares and even mentioning BHL's supposed claims on them, which are in fact more extensive than the Guernsey proceedings, and to which BHL though not a party, could quite easily become joined as one. No good reason has been advanced for the Plaintiff's not joining in the Pakistani proceedings in the first place or seeking to be joined in them later.

<u>Discussion and decision</u>

133. I have reached the very firm conclusion that Guernsey is not the appropriate forum for the trial of this action, still less is it "clearly and distinctly" the appropriate forum, as is required. For that reason alone, following the dictum of Manse JSC in the *VTB* case, cited above (see [127]) I should set aside the order previously granted for there to be service out of the jurisdiction. In my

judgment it is clearly and distinctly Pakistan which is the appropriate forum for trial of the issues in this case, not Guernsey.

134. I accept all Advocate Dawes' points mentioned above, which demonstrate a very clear and strong connection with Pakistan.

135. Advocate Horsbrugh-Porter's central and strongest point, which he has stressed repeatedly, is the fact that BHL is a Guernsey company, and its claim is therefore in relation to the duties of a director of a Guernsey company, governed by Guernsey law. However, I regard this as a very slender link with Guernsey in practice, for two reasons.

136. The first is the fact that, as I accept, the connection with Guernsey is almost accidental; it plainly mattered little to the incorporators of BHL where the company should be incorporated. Guernsey was just a convenient off-shore jurisdiction at the time. The second is the fact that the only issue of law which would depend clearly and solely on Guernsey law is the issue which I have already ruled discloses no triable issue, namely the legal validity of any "ratification" of the (here assumed) breach of director's duty by Mr Abbas.

137. Advocate Horsbrugh-Porter seeks to argue that many other features of the case would be governed by Guernsey law, in his attempts to strengthen the Guernsey connection but, as I have said, I have grave doubts as to whether these can be correct. In any event, I do not find them to outweigh the features of the case which provide, in my judgment, a far stronger and more real connection with Pakistan, such as to make that forum overwhelmingly the appropriate forum for the trial of this case. In my judgment any issues of Guernsey law are also likely to be relatively simple points and certainly not complex ones, such as Advocate Horsbrugh-Porter merely asserts.

138. I accept that Dr Habib, although Pakistani himself, is no longer resident in Pakistan, but I cannot set much weight on that, because that change was effected either of his own volition, or because of the will of the children, and can therefore have little call on being given consideration as regards the appropriate forum for this trial. Indeed, in my judgment, it is appropriate to give greater weight, in the context of convenience, to the residence of defendants, who, after all, are being summonsed to the court, whereas the plaintiff goes there as a matter of choice. I would not, though, treat this last as a crucial factor, if there were other significantly weighty considerations in the other direction. I judge, though, that there are not.

139. In my judgment, the convenience of the majority of relevant witnesses, especially those who are effectively Defendants (Mr Abbas, and, in practice, Dr Afaq) clearly favours Pakistan as the appropriate forum. Indeed, I take the view that this also favours the court. In practice the availability of video link connections is no satisfactory substitute for witnesses being present in person and should not be treated as meaning that the convenience of witnesses can be readily dismissed as a minimal consideration.

140. I also find the fact that there are already proceedings on foot in Pakistan, instigated by those in control of the Plaintiff, to be relevant. Advocate Horsbrugh-Porter seeks to dismiss their importance on the basis of their being taken hurriedly, as an emergency measure, and not really being duplicative of the claims in this action (and not displacing his primary submission as to the weight to be attached to the fact that this action is framed as a claim of breach of duty by a director of a Guernsey company). Advocate Dawes submits that, in reality, the Pakistani proceedings do sufficiently relate to the issues in this action, focusing on the allegations of undue influence, and insofar as they do not, they are sufficiently connected with such issues that the relevant parties, in particular BHL, could easily be joined in them, if necessary. He submits, in effect, that the change of direction by those in control of BHL from Pakistan to Guernsey is indicative of illegitimate forum shopping.

141. I broadly accept this. I do not need to discuss the detail of the Pakistan proceedings or resolve the dispute between the parties as to the true ambit and nature of the claims which have been made in them. The weight I attach to them is really the general point that it has already been determined by those in control of the Plaintiff that Pakistan is an appropriate forum for determining legal disputes which clearly relate, very closely, to the essential matter which has been put in issue in these proceedings, namely the undue influence point. However, this factor is, again, not determinative of my decision, which I base fairly and squarely on the scope of these proceedings, and the jurisdiction with which they have the closest and most real connection.

142. In my judgment, this is, undoubtedly, Pakistan. In fact, and crucially, to my mind, once it is accepted (as it must be) that the proposition that Dr Habib validly endorsed or ratified the Resolution to transfer the Shares to SHEF is a complete answer in law to the case and claims against Mr Abbas, and that the only matter which can displace this is the success of the claims of undue influence made against him and/or Dr Afaq, it becomes quite apparent that the "central" issues in the case are not issues of Guernsey company law or even Guernsey law, but rest entirely on the question whether any such claim can be established in fact, and under the appropriate law. All the facts relating to that issue are connected with Pakistan and only Pakistan, and certainly not Guernsey. The relevant law is also, in all probability, Pakistani law and not Guernsey law, and even if it were Guernsey law, the huge dependency of that issue on the facts would still, in my judgment, suggest that Pakistan was the more appropriate forum. It would not bring the balance of the situation back to an evaluation that Guernsey ever could be "clearly and distinctly" the more appropriate forum.

143. In fact, throughout this application, I have found it strange and artificial that those who appear to be the real protagonists in the dispute which has arisen between the two sides are not, actually, parties to this action. Dr Afaq, and her actions, are absolutely central to determining the question whether anything nefarious or untoward actually happened with regard to the Shares, and Dr Habib's fortune. Similarly, it has felt unreal that Dr Habib himself, the person who is actually complaining that he was overreached, is not a party to these proceedings.

144. Stepping back, the real dispute in this case is a dispute as to the true ownership of the BHP Shares, between, on the one hand, the children and Dr Habib (although his true wishes are somewhat in question), and, on the other hand, Dr Afaq (principally), together with Mr Abbas and the others involved with SHEF who are associated with her. This impression, that the real dispute is an inter-personal, quasi-family dispute has only been reinforced by the burgeoning evidence adduced in this Application, as this has, inevitably, become drawn into accusations and counter-accusations as to the conduct of persons in the opposite "camp", alleged to support each side's primary position. The correct forum for deciding the merits of that underlying dispute and their consequences, to my mind, is clearly and distinctly Pakistan – it is certainly not Guernsey.

(4) In the circumstances should the Court exercise its discretion (given by Rule 8(1) of the RCCR) to allow service out?

145. The relationship of this question (4) to the previous question (3), found in the citation from the *Tchenguiz* case (see above at [44], it is the word "*and*") is a little strange. It is placed as if it were a further, *additional*, requirement to the finding already made, under the third question, that Guernsey *is* clearly and distinctly the appropriate forum for the trial of the case. On this basis, there is either some further element required in addition – but it is unclear what that could be – or the fourth test envisages that, notwithstanding the previous positive finding that the Court's own jurisdiction is "clearly and distinctly" the appropriate forum, there might be a negative reason why the Court might, notwithstanding that finding, conclude that it was not "proper" within the meaning of RCCR r 8 (2)(b) for the court to exercise its discretion to allow service out.

146. What the *Tchenguiz* formulation of the four-stage test does not seem, on its own actual wording, to contemplate is that the fourth test provides a reason for the Court to exercise its discretion to allow service out, despite having just found that its own jurisdiction was *not* "clearly and distinctly" the most appropriate forum for the case. However, that is the way in which such a test has been interpreted in the English jurisdiction (see *Lungowe* (above) at [88]). It is also a logical progression, and it is the way in which Advocate Horsbrugh-Porter seeks to persuade me to interpret it if I were not otherwise with him on the question of Guernsey being the most appropriate forum in principle - which I am not.

147. In other words, this fourth test, it is argued, can provide a final over-arching reason why the Court should revise its judgment about the most appropriate forum looking at the case itself, because of extraneous matters, usually (therefore) going to some major deficiency in the court or legal system which would otherwise naturally have been "clearly and distinctly" the more appropriate forum, and which ought to change that perception.

148. The factor prayed in aid in this case as constituting a "*real risk that substantial justice would not be obtainable in [Pakistan]*" (see *Lungowe*, above), as submitted by the Plaintiff, started as being issues with the rule of law, corruption, and lack of due process in Pakistan, as well as alleged extensive and unreasonable delays in the administration of justice under the Pakistani legal system. This allegation was initially supported in the first affidavit of Ben Habib by reference to international research and reports, and press articles.

149. In the event, the allegations of corruption (etc) were not proceeded with and were withdrawn and the argument on this question proceeded only on the basis that there were monumental delays in getting court proceedings dealt with in Pakistan, and that these were so great that this Court could not come to the conclusion that leaving the Plaintiff to bring proceedings in Pakistan would be consistent with getting the issues properly tried "*in the interests of all the parties and the ends of justice*". It was therefore submitted that this factor should induce this Court to allow the action to proceed in Guernsey, where such justice could and would be achieved and obtained.

Plaintiff's submissions

150. In advancing his contention, that the Court should assume jurisdiction in this case because of the "*real risk*" that justice would be so long delayed as not to be obtainable in Pakistan, Advocate Horsbrugh-Porter accepts that any such submission can only succeed if demonstrated by positive and cogent evidence: see *Owners of Las Mercedes v Owners of the Abidin Daver* [1984] AC 398 and *Dornoch Ltd v Mauritius Union Assurance Co Ltd* [2005] EWHC 1887. He relies on the residue of the hearsay evidence exhibited to Ben Habib's first affidavit, but further, also, on the evidence of his expert witness, Mr Khan. This latter consisted largely of statistical reports on the rate of disposals of court cases, and included not merely the suggested length of time it would take to get a case heard at first instance (put by Mr Khan at about 10 years), but also the length of time it would take, in Mt Khan's opinion, for further proceedings, up to the conclusion of any appeal to the Supreme Court, which he put at 20 – 24 years.

151. Advocate Horsbrugh-Porter also relied on the current state of the proceedings brought by the children and in the name of Dr Habib in Pakistan, as reinforcing the submission of likely inordinate delay, suggesting that these were bogged down with nothing happening, allegedly for no good reason. In one set of proceedings (brought by the children) this had been since 2nd November 2021 and in the other (brought as a company list case) since March 2022.

Defendants' submissions

152. On behalf of the Defendants, Advocate Dawes submitted that Mr Khan's evidence was very exaggerated, that his methodology of drawing conclusions from statistics was highly questionable, that the evidence of research and reports in fact demonstrated that it was in the

inferior courts that delays were rampant, and that the wealthy (in which bracket he suggested Dr Habib and the children would fall) did not have such trouble, especially if one looked at the evidence for disposal of cases involving ex-patriates, which showed these being disposed of in one or two years.

153. He relied on the evidence of Mr Malik, which he submitted was patently more reasonable and reliable in its conclusions. This was to the effect that there were recognised ways of fast-tracking proceedings which could be invoked, particularly in view of Dr Habib's age, and that, with reasonable co-operation between the parties, the case could be concluded, as to all stages including appeals, within 7-9 years. This was well comparable with the time it would take to pursue proceedings in Guernsey, together with the additional required time which would then be needed for enforcement proceedings in Pakistan.

154. Advocate Dawes submitted that the state of the litigation instituted by the children in Pakistan could not be viewed as indicative of delays in Pakistani proceedings, because that was a matter which would be influenced by their own will to progress the proceedings, and he submitted that this was likely to have been influenced by their decision to move their pursuit of their disputes to Guernsey, in March 2022.

155. He also submitted that it lay rather strangely in the mouths of the children to submit that the administration of the judicial system in Pakistan was so grossly failing that it risked depriving BHL of justice, when they had themselves thought it perfectly reliable for bringing the several sets of proceedings which they had done in late 2021, which concerned many of the present facts. He submitted that the supposed explanation that this was forced on them because of the urgent need for supposedly emergency or temporary relief did not stand examination.

Discussion and Decision

156. In my judgment it is not fruitful, proportionate, or even really possible, on an interlocutory hearing such as this, to go into a detailed evaluation of expert evidence, necessarily produced on paper. This contention has to be evaluated at a high level. As a matter of general impression, however, the Plaintiff's evidence does not convince me that there is a "real risk" (which is the test) that BHL - or, indeed, Dr Habib himself - would be denied substantial justice if obliged to seek to vindicate the disputed claims in these proceedings in the courts of Pakistan.

157. I prefer Advocate Dawes' submissions on the cogency of the expert evidence. I do not find Mr Khan's statistical evidence and his conclusions and opinions persuasive; I would prefer Mr Malik's evidence. Even with both experts agreeing that a so-called "fast track" procedure would not be available to BHL in Pakistan, because it would only be available to natural persons, (and in fact, as the claims are really centred, now, on the undue influence issue, I would have thought it quite possible to frame them with the alleged victim of such undue influence as plaintiff), I am still not persuaded that there is any real risk that shortcomings of delay in the Pakistan court system could prevent BHL from obtaining substantial justice in Pakistan.

158. I find it of some persuasive weight that the children and Dr Habib have, indeed, thought it appropriate to bring proceedings in Pakistan, proceedings which do seem to me to rest on many of the underlying matters in dispute in this Cause, even though, I accept, that this may have been, to a degree, forced upon them as being the only way to achieve urgently some of the results which they were seeking. I would comment, though, for what it is worth, that on my reading of the papers relating to the proceedings in Pakistan, produced in the evidence in this matter, the court system has seemed to me to be working decisively and efficiently.

159. I therefore reject the submission that there is cogent evidence demonstrating that the likelihood of inordinate delays afflicting proceedings brought in Pakistan is so great or so extreme as pose a real risk that substantial justice would not be obtainable for BHL (or, perhaps more accurately,

Dr Habib and the children) in that jurisdiction. Any such possibility is certainly not serious enough to outweigh the very firm view I have come to, that Pakistan is very clearly and distinctly the appropriate forum for the trial of the disputes raised in this Cause, and that Guernsey is not. I am quite satisfied, therefore that such a consideration should not cause me to revise my earlier decision.

Miscellaneous

160. Before summarising my views and giving my final conclusion, I should mention one or two miscellaneous pints.

161. First, where I have not mentioned every point of argument put to me by the Advocates, it can be assumed that I have preferred Advocate Dawes' submissions to those of Advocate Horsbrugh-Porter.

162. Second, Advocate Dawes made detailed submissions with regard to alleged inconsistencies in the allegations made in the proceedings brought by the children or Dr Habib in Pakistan, and in Texas, and whether submissions as to exactly who were or were not parties to various claims made in those proceedings, and the characterisation of the claims there made, were accurate. Most of those submissions went, really, to the credibility of the Plaintiff's claim rather than to the tests of direct procedural relevance to this Application, and I have therefore not found it necessary to deal with them or make findings about them.

163. Third, Advocate Dawes made submissions that the Plaintiff (perhaps more accurately, its witness Ben Habib) had failed to make full and frank disclosure to the Deputy Bailiff on the application made in May 2022. The submission was that Ben Habib had not disclosed the gift of shares to SHEF which he had himself made, although Ben's reply to this was that having signed only a blank transfer, he had not known to whom those shares were being transferred. There were criticisms that the exact status of the Pakistani proceedings had not been disclosed, and in particular that one action in the High Court of Sindh (No 1084/21) actually sought declarations that the transfer of the Shares to SHEF had been illegal and void and therefore should be cancelled, thus overlapping, it was suggested, the very claims in this action, already before they were made. It was submitted that the intention, apparently, to withdraw the Texas proceedings was not disclosed at the 17 May 2022 hearing although this was done only six days later. Neither, it was said, was there disclosed another order in the High Court of the Sindh in action 2686/21, in which the proposition that Dr Habib was lacking capacity was rejected, and nor was the affidavit sworn by Dr Habib in support of the restoration of BHL to the Companies Register disclosed, in which he did not allege (it is suggested, significantly) either Mr Abbas' claimed breach of fiduciary duty, or make any allegation that undue influence was exercised upon him.

164. The allegations are not accepted by the Plaintiff (or the children) as necessarily factually accurate, nor as justified criticisms, of the disclosure made to the Deputy Bailiff, and Advocate Dawes did not seek to argue that his criticisms amounted to such a serious failure to give full and frank disclosure that the Plaintiff's application to serve process out of the jurisdiction should be dismissed *in limine* for breach of that golden rule. Instead, he drew those matters to the Court's attention simply as flaws in the evidence, which might have affected the Deputy Bailiff's exercise of her discretion.

165. I have not had to investigate or consider those above matters in any depth, because they are not relevant to any of the primary findings on which my decision rests. I therefore say no more about them.

Summary conclusions and decision

166. In summary, therefore I find that

(1) The action discloses - but only just - a triable issue or issues;

(2) Such triable issue(s), bringing into question matters of the validity of the acts of directors/shareholders of a Guernsey company and hence of the company itself, have a sufficiently real and significant link with Guernsey to be properly justiciable before this Court; the requirement of RCCR r 8 (2) (a) is therefore met.

However,

(3) Guernsey is emphatically not "clearly and distinctly" the most appropriate forum for such issues to be tried; that forum is Pakistan, and

(4) There is no other matter, such as cogently demonstrated inordinate delays in proceedings in Pakistan, which satisfies me that this Court ought, nonetheless, to think it proper to take jurisdiction to try those issues.

167. The requirement of RCCR r 8 (2) (b) is therefore not met. This is not a proper case for service out of the jurisdiction of the Royal Court and, in consequence I will set aside the order made by the Deputy Bailiff on 17 May 2022.

168. I will also order that the costs of this application (the Defendants' set aside application) be paid by the Plaintiff to the Defendants on the recoverable basis (to be taxed if not agreed), unless either party wishes to submit that this is not the appropriate costs order in the circumstances. If so, that party should make the necessary application to the Court, serving it on the other party, within 7 days of the date on which this judgment is formally handed down, and in that case the foregoing costs order will be void.

Her Hon Hazel Marshall KC, Lt Bailiff

12th June, 2023