



Applications for leave to serve out the jurisdiction of Guernsey under Rule 9(b) of RCCR

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On 5 May 2021, a judgment was handed down by the Royal Court of Guernsey in the matter of *Gupta and Gupta v D.S.O Limited et al* dismissing an interlocutory application to set aside an order dated 11 December 2020 granting an application for leave to serve proceedings on respondents who reside outside of the jurisdiction of Guernsey. The proceedings to be served on the respondents, who reside in India and the USA respectively, consisted of an application based on unfair prejudice under section 349 and 350 of the Companies (Guernsey) Law, 2008. The order granting leave to serve out was upheld and specifically the Court found that service was permissible pursuant to rule 9(b) of the Royal Court Civil Rules, 2007 (RCCR) which provides that service may be permitted "in some other manner" (meaning other than in accordance with the ordinary rules for service).

The judgment serves as a useful reminder of the types of exceptional circumstances under rule 9(b) in which service may be permitted outside the jurisdiction by alternative means, other than in accordance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters 1965 (the **Convention**).

The Convention is an international agreement between various countries which facilitates the service of legal proceedings in civil or commercial matters on a respondent/defendant in a different jurisdiction where their address is known. There are 88 contracting states which have ratified the Convention, including the USA, India and the UK (and Guernsey by extension). The default position under articles 2 to 6 of the Convention is that each contracting state is required to designate a central authority which serves as the official channel of transmission of documents for service from abroad.

Article 10 of the Convention serves as a caveat that unless the contracting state objects, legal proceedings may also be served directly by postal channels. The US has not objected to article 10 of the Convention and therefore legal proceedings from abroad may be served on US residents by post, including registered post and courier. India, on the other hand, has objected to article 10 and therefore legal proceedings must be served on persons resident in India through The Ministry of

Law and Justice, which is India's designated central authority under the Convention.

The respondents declined to provide addresses for service of the unfair prejudice application in Guernsey and the applicants made the application for leave to serve on the respondents in India and USA by registered courier, registered post and by email and not through the mechanism provided in the Convention. The respondents challenged the leave granted to serve the proceedings on the respondent residing in India on the basis, inter alia, that service in India was not effected through the Convention when it should have been. One of the issues in question was whether the applicants sufficiently complied with rule 9 of the RCCR by establishing exceptional circumstances in order to justify departure from service under the Convention.

In the 2012 Guernsey judgment of *Cobra Business Ventures Ltd v Greenfield Capital Ltd* (Judgment 27/2012, noted in the Guernsey Law Reports 2011-12 volume), the Royal Court held that although service by alternative means is to be exercised cautiously, the RCCR are more flexible than the English Civil Procedure Rules, especially when service can take very long periods of time and litigation can be prejudiced. The reasons that the Royal Court was satisfied that service not in accordance with the Convention could be permitted included:

- the lifestyles of the defendants are transient, involving extensive travel and owning homes in more than one place;
- service by alternative means was likely to be the most effective and efficient means of bringing the proceedings to the attention of the defendants; and
- there was a need, in the interests of the respondents themselves, for service to be carried out as expeditiously as possible as these were unfair prejudice proceedings and not ordinary civil proceedings.

In the March 2021 English case of *GHS Global Hospitality Ltd v Beale* [2021] EWHC 488 (Ch) which is persuasive in Guernsey, it was held that mere delay of itself does not justify an order for service by alternative means other than the Convention. Even during a global pandemic, the court decided that permission for alternative service under the English procedural rules may only be granted if it can be shown that the administration of justice would be affected. While circumstances of the pandemic are exceptional, its impact on service was not seen to be exceptional, as the most that could be said was that there was uncertainty.

More recently in the *Gupta* case in Guernsey, the Deputy Bailiff held that the following exceptional circumstances justified departure from service under the Convention under rule 9(b) of the RCCR:

- the urgency surrounding the ongoing unfair prejudice which the applicants would face if the proceedings were not served on the respondents without delay;
- the length of the delay involved in service under the Convention, taking up to 14 months pre-Covid restrictions (on which evidence had been provided) without even taking into account the

impact of the pandemic;

- good service had been achieved on the other parties and the respondent in India obviously had notice of the proceedings;
- the failure to progress the application could render the purpose of the application largely nugatory;
- the respondent resident in India is also resident in Malta, creating a risk that service through the Convention would not necessarily lead to the proceedings coming to his attention promptly;
- historically, the respondent resident in India was willing to receive notices by email under the Articles of Incorporation of the company which was the subject of the unfair prejudice proceedings; and
- the respondent resident in India had also previously advised that he would provide details of his Guernsey lawyers, including for the service of proceedings, which never occurred.

Service through the Convention is known to be extremely slow and has caused severe delays, especially in India. This is a concern to litigants in matters involving foreign defendants and it is not always feasible and may be highly prejudicial to be forced to serve legal proceedings through the Convention. Where a signatory to the Convention has objected to article 10 and requires service through its central authority, it may be a strategic decision by a defendant in foreign proceedings to challenge leave granted to serve proceedings by methods which do not comply with the Convention. However, in Guernsey, where exceptional circumstances are present, this may be relied upon to circumvent the strict requirements of the Convention. Although the bar to meet the requirements under rule 9(b) of the RCCR is high, there is no exhaustive list of exceptional circumstances and the Royal Court has a wide discretion depending on the facts of the case.

Ogier represented the successful party in these proceedings.

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