



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

CAUSE NO: FSD 51 OF 2022 (IKJ)

IN THE MATTER OF THE COMPANIES ACT (2022 REVISION)

AND IN THE MATTER OF BRIDGE GLOBAL ABSOLUTE RETURN FUND SPC

IN CHAMBERS

Appearances: Mr Adam Crane, Baker and Partners (Cayman) Limited, for the
Petitioner

Before: The Hon. Justice Kawaley

Heard: On the papers

Date of Decision: 4 April 2022

Draft Reasons Circulated: 5 May 2022

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HEADNOTE

Winding-up petition-substituted service-closure of registered office-service via email sent to sole director's email address-Companies Act (2022 Revision) sections 50, 70-Companies Winding Up Rules Order 1 rule (4)(1)-Grand Court Rules Order 65 rule 4, Order 11 rule 1(2)

REASONS FOR DECISION

Introduction

1. The Petitioner, Brazen Sky Limited (in official liquidation) (a British Virgin Islands company), seeks to wind-up the Company as a creditor on just and equitable grounds under section 92(e) or alternatively as a creditor under section 92(d) of the Companies Act (2022 Revision). Having presented the Petition on or about March 11, 2022, directions were ordered on March 21, 2022



for service on the Company's registered office in the usual manner. When the Petitioner's attorneys attempted to effect service, they discovered that the Company's registered office (as at around the date of the presentation of the Petition) was now closed.

2. By a letter application dated March 30, 2022 supported by evidence and legal submissions, which I agreed could appropriately be dealt with on the papers, the Petitioner applied for an Order that:

- “1. *The Petitioner shall have leave to serve the Directions Order dated 21 March 2022, the ex parte Summons for Direction dated 11 March 2022, Winding Up Petition dated 11 March 2022, First Affidavit of Helen Janes sworn on 11 March 2022 and its exhibit HJ-1, First Affidavit of Angela Barkhouse sworn on 23 February 2022 and its exhibit AB-1, First Affidavit of George Kimberley Leck sworn on 23 February 2022 and its exhibit GKL-1, and draft Winding Up Order (the **Documents**) upon the Company by sending copies thereof to Nick McDonald (also known as Nicholas William McDonald), the sole director of the Company, by email to the following three email addresses more particularly described in the First Affidavit of Nicosia Lawson...*
2. *The Email Addresses shall constitute a valid address for service on the Company in these Proceedings unless and until an alternative address for service is provided to the Petitioner by the Company in writing.”*

3. I granted this relief by Order dated April 4, 2022 and now give reasons for this decision.

Legal jurisdiction to order substituted service of a winding-up petition on a company

The statutory rules

4. The Petitioner's counsel did not identify any local judicial authority for ordering substituted service on a company but identified a clear statutory basis for doing so. Firstly, the Companies Act sets out the ordinary service rule as follows:

“Service of notices on company

70. *Any writ, notice, order or other document required to be served upon the company may be served by leaving the same, or sending it through the post in a prepaid letter, addressed to the company at its registered office.”*



5. Section 70 permits service of legal process on a company by, *inter alia*, “leaving the same...at its registered office”. The Companies Winding Up Rules Order 1 rule 4 provides as follows:

“(1) *Every petition, summons, order or other document required to be served by these Rules, shall be served in accordance with GCR Orders 10 and 65, unless some other method of service is expressly required or permitted by these Rules. Where any such petition, summons, order or other document is required to be served out of the jurisdiction then GCR O. 11 shall apply to these Rules.*”

6. GCR Order 65 rule 3 creates a special rule of ordinary service for bodies corporate which are not registered under the Companies Act, but creates no special service rule for companies which are registered under the Companies Act. This doubtless because section 70 of that Act prescribes through primary legislation the way in which both originating process and other Court documents may be served on a company registered under the Act. A company which carries on business without a registered office in these Islands is liable to a penalty of \$10 per day (section 50(1)). Accordingly, the most significant service rules for registered companies are those set out under GCR Order 65 rule 4 to deal with the situation when ordinary service cannot be carried out.

7. Grand Court Rules Order 65 rule 4 provides as follows:

“(1) *If, in the case of any document which by virtue of any provision of these Rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order for substituted service of that document.*

(2) *An application for an order for substituted service may be made by an affidavit stating the facts on which the application is founded.*

(3) *Substituted service of a document, in relation to which an order is made under this rule, is effected by taking such steps as the Court may direct to bring the document to the notice of the person to be served.”*

8. GCR Order 11 rule 1(2) provides:

“(2) *Service of a writ out of the jurisdiction is permissible without the leave of the Court if every claim made in the action begun by the writ is one*



which by virtue of a Law or these Rules the Court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction of the Court or that the wrongful act, neglect or default giving rise to the claim did not take place within the jurisdiction, including, for the avoidance of doubt, applications made pursuant to sections 48, 63, 64, 67, 68, 72, 103 or 104 of the Trusts Act (as amended and revised) or Order 85.”

Findings: no leave was required to serve the Petition out of the jurisdiction

9. Mr Crane submitted that although “*Mr McDonald resides out of the jurisdiction, the Petitioner is of the view that pursuant to GCR O. 11 r. 1(2) leave to serve out of the jurisdiction is unnecessary.*” I agreed that leave to serve out was not required, but not that Order 11 rule 1(2) was the reason why leave was not required.

10. Order 11 rule 1 in my judgment requires leave to serve a party to proceedings commenced within this Court’s jurisdiction outside the jurisdiction of this Court. While the practical significance of the leave filter may have diluted impact in today’s ‘global village’, the rule emanates from ancient public international law norms of territorial sovereignty. These norms (special treaty arrangements apart) give rise to the need for restraint by one sovereign in carrying out official acts within the domain of another sovereign. Central to the idea of service out of the jurisdiction is that a document issued by the local Court, embodying a command to appear which bears the imprimatur of the local sovereign is being served in a foreign territory. Hence, one of the most formal means of service abroad is service through diplomatic channels.

11. However, Order 11 rule 1 is simply not engaged where:
 - (a) the person to be formally served (such as a locally incorporated company) is resident within the jurisdiction of this Court; and

 - (b) the person to be ‘served’ abroad is not being served at all in the strict sense, but is merely being notified of the proceedings as an overseas agent of the locally resident respondent to the proceedings.



12. For those reasons I accepted that no leave to serve out was required under GCR Order 11 rule 1(1).

Findings: the scope of the discretion to direct substituted service in place of personal service

13. Mr Crane firstly referred to a leading English authority which has been applied by the Cayman Islands courts. In *Abela and others-v-Baadarani* [2013] 4 All ER 119 (UKSC), Lord Clarke stated as follows:

“37. *Service has a number of purposes but the most important is to my mind to ensure that the contents of the document served, here the claim form, is communicated to the defendant. In Olafsson v Gissurarson (No 2) [2008] EWCA Civ 152, [2008] 1 WLR 2016, para 55 I said, in a not dissimilar context, that ‘... the whole purpose of service is to inform the defendant of the contents of the claim form and the nature of the claimant’s case: see eg Barclays Bank of Swaziland Ltd v Hahn [1989] 1 WLR 506, 509 per Lord Brightman, and the definition of ‘service’ in the glossary to the CPR, which describes it as ‘steps required to bring documents used in court proceedings to a person’s attention...’ I adhere to that view.*”

14. In *Bush-v Baines, Taylor and Attorney General* [2016 CILR (2) 274] at 317, Mangatal J held that: “*The purpose of service of proceedings is to bring the proceedings to the notice of a defendant. It is not about playing technical games...*” In *China Shanshui Cement Group Limited*, FSD 161 of 2018 (NSJ), Judgment dated January 27, 2021 (unreported), Segal J (at paragraph 67) held that in *Bush-v-Baines*:

“...Mangatal J held that in interpreting and applying GCR O.65, r.4 the Court was required to have regard to the overriding objective, which required that the Court seeks to deal with the case before it justly, expeditiously and economically...”

15. Order 65 rule 4(1) pivotally provides that substituted service may be ordered where personal service is “*impracticable for any reason*”. The Petitioner’s counsel referred the Court to two further persuasive authorities on the corresponding English rule which were apposite. First, in *Paragon Group Limited-v-Burnell* [1991]2 WLR 854, Lloyd LJ (as he then was) opined (at page 861):



“The question for decision is very short and very simple. Was it or was it not impracticable for any reason to serve the document in the manner prescribed. If it was practicable, we are not concerned with the consequences. If it was not practicable, then there was a discretion to order substituted service.

However wide a meaning one gives to ‘practicable’, the question remains whether it was practicable to serve by one of the prescribed methods. If it was, then the condition set out in O.65 r.4 has not been satisfied. Service is practicable for the purpose of the rule, if, judged practically, service could be effected by one of the prescribed methods.”

16. Second, Mr Crane referred to the following extracts from the commentary on the English Order 65 rule 4 (from which our own GCR Order 65 rule 4 is derived):

“The terms of this rule are of a very wide application, and give a very wide discretion...mere technicalities have been disregarded...Substituted service may take the form of service by letter, advertisement, or otherwise, as may seem just...”

Findings: the legal requirements for substituted service were met because the Company had no registered office and no known local officers or other representatives

17. The Petitioner filed evidence from one of its attorneys in support of its application for substituted service which established that:
- (a) when attempts were made to serve the Petition by leaving it at the registered office on March 21, 2022 it was discovered that there no longer was an operative registered office;
 - (b) the Company has no other known local representatives and/or presence;
 - (c) the Company appeared to have (or to have had based a 2014 Prospectus) a sole director and Chief Operating Officer believed to be currently resident in Hong Kong and employed by a prominent global firm, and whose email address had been identified.
18. I was satisfied that substituted service should be granted because it was clearly impracticable to serve the Petition ordinarily by leaving it at the Company’s registered office because no registered office existed. I was also satisfied that the crucial question which arose were the same



issues Segal J identified in *China Shanshui Cement Group Limited*: “will service by email to [Mr Nicholas McDonald] be reasonably likely to bring the documents to the notice of [the Company]?” On balance I felt able to answer this question in the affirmative.

19. It seemed inherently likely that the sole director and COO of the Company in 2014, even if he no longer held those offices, would be able to ensure that the Petition and supporting documents were brought to the attention of those now involved in controlling the Company. In any event, the statutory requirement to maintain a registered office combined with the user-friendly service of process provisions (Companies Act, sections 50, 70) are designed to ensure that legal proceedings can be served on registered companies within the jurisdiction in an expeditious and economical manner. The Petitioner ought not to be put to undue time and expense seeking to identify a means to service its Petition against a Company which appears to have closed its registered office post-Petition as delaying tactic. Although the timing of the closure of said office could simply be a pure coincidence, the Petition alleges that the Company’s registration as a mutual fund was cancelled by the Cayman Islands Monetary Authority on the grounds that, *inter alia*, it was being managed by unfit persons. As Justice Mangatal noted somewhat acidly in *Bush-v Baines, Taylor and Attorney General* [2016 CILR (2) 274] at 317-318:

“...The purpose of service of proceedings is to bring the proceedings to the notice of a defendant. It is not about playing technical games... The overriding objective requires that I seek to give effect to dealing with this case justly, expeditiously and economically in interpreting the meaning of O.65, r.4...”

Summary

20. For the above reasons on April 4, 2022, I granted the Petitioners’ substituted service application.

THE HON. JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT