IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

FSD CAUSE NO. 299 OF 2021 (DDJ)

IN THE MATTER OF THE COMPANIES ACT (2021 REVISION) (AS AMENDED)

AND IN THE MATTER OF ORIENT TM PARENT LIMITED

BETWEEN:

(1) JOY UNION HOLDINGS LIMITED
(2) CHARMING CHINA LIMITED

PETITIONERS

AND

ORIENT TM PARENT LIMITED

RESPONDENT

Appearances: Spencer Vickers, Tonicia Williams and Sean-Anna Thompson of Conyers, Dill & Pearman LLP on behalf of the Petitioners
Tom Lowe QC, Moesha Ramsay-Howell and Jessica Williams of Harneys on behalf of Orient TM Ruibo Limited
Jennifer Colegate and Annalisa Shibli of Collas Crill on behalf of the Respondent

Before: The Hon. Justice David Doyle

Heard: 27 July 2022

Ex Tempore Judgment Delivered: 27 July 2022

Draft transcript of Ex Tempore Judgment Circulated: 8 August 2022

Transcript of Ex Tempore Judgment Approved: 12 August 2022

HEADNOTE

Dismissal of application for substituted service

JUDGMENT

1. I now turn to the application for substituted service. Again I have considered the skeleton argument of Spencer Vickers and Sean-Anna Thompson of Conyers who appear for the Petitioners.

2. I note the position in respect of the service of winding up petitions. Order 3 rule 11 (3) (b) of the Companies Winding Up Rules, 2018 ("CWR") provides that every contributory's petition shall be served immediately after "having been presented/issued" upon "every

member of the company whom the petitioner has named or intends to name as a respondent to the petition, who may be served out of the jurisdiction without leave of the court."

3. CWR Order 1 rule 4 (1) provides that every "petition, summons, order or other document required to be served by these Rules, shall be served in accordance with Orders 10 and 65 of the Grand Court Rules ("GCR"), 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 Order 11 shall apply to these Rules."

4. The Petitioners also refer to Order 65 rule 4 (1) of the Grand Court Rules which provides:

> "If in the case of any document which is 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."

5. I recently reviewed some of the relevant law on substituted service in my judgment in *MaplesFS Limited* (FSD 231 of 2021 (DDJ), Unreported 14 July 2022) which went on-line shortly after it was delivered (with Conyers for the Second Defendant).

6. The summons for directions, at the instigation and with the consent of the Petitioners and Orient TM Ruibo Limited and Orient TM Parent Limited was on 11 March 2022 adjourned to 10am Thursday 22 September 2022.

7. The Second Affirmation of Wang Haibing ("Mr. Wang") dated 21 July 2022 is filed in support of the Petitioners' application for substituted service on Dongzheng Ruibo (Shanghai) Investment Center (Limited Partnership) ("Dongzheng Ruibo") based in the PRC.

8. He refers to apparent difficulties with service of documents in the PRC under the Hague Service Convention and the various adjournments (by consent) of the directions' hearing originally scheduled to be heard on 25 November 2021 and now due to be heard on 22 September 2022. The various adjournments were at the instigation and with the consent of the parties.

9. Reference is made to a letter from Harneys to Conyers on 19 November 2021 stating, amongst other things:

   (1) Dongzheng Ruibo received letters emailed by Conyers to Dongzheng Ruibo (which had been emailed to Mr. Chen Bo, Mr. Feng and Mr. Zhao Li);

   (2) Harneys act for Orient TM Ruibo and Dongzheng Ruibo in relation to these proceedings but neither of them consider that they have been properly served with the winding up documents;

   (3) Harneys do not have instructions to accept service of documents on behalf of Dongzheng Ruibo.

10. The evidence in respect of service via the Hague Service Convention is unsatisfactory.

11. It appears on the evidence that a formal request with the relevant local authority on the Cayman Islands was not made until 9 March 2022, nearly 5 months after the date of the winding up petition. It was on 9 March 2022 that Conyers provided the Clerk of the Court with the Winding Up documents to be served on Dongzheng Ruibo by way of the Hague Service Convention. Mr. Vickers tries to explain away the delay by indicating that attempts were being made to obtain agreement as to service. Mr. Vickers has today directed my attention to a letter from Harneys to Conyers dated 24 January 2022:

> "It appears, therefore, that no effort has been made by your client to effect service out under the Hague Convention on Dongzheng Ruibo."

12. Conyers state that by the latest update, 20 July 2022, the Assistant to the Clerk of the Court confirmed that she had not received any notice regarding the service.

13. Mr Wang makes vague and generalised references at paragraph 53 of his Second Affirmation to delays and litigation prejudice:

> "the difficulties with effecting service by the Hague Convention, which may be further delayed by the COVID-19 pandemic (and the ongoing lockdowns within the PRC) and given the litigation prejudice that the Petitioners may now suffer by further delays…"

14. There is no formal evidence as to how long it may take to effect service. I note from the letter dated 21 February 2022 from Conyers to Collas Crill and Harneys the following appears:

> "We have been instructed by the Petitioners to serve the Petition and Summons (and other documents filed in the Proceedings) in accordance with the Hague Convention. The Central Authority for the PRC under the Hague Convention (the International Legal Cooperation Centre ("ILCC"), Ministry of Justice of China) currently advises that the time for execution of a request for service is "*Around 6 months*"."

It has only been approximately 5 months since the Petitioners put the formal request to the appropriate authority.

15. 5 months cannot be described as a delay of "exceptional length incompatible with the due administration of justice." It is well established that mere delay or the desire for speed are not sufficient to justify substituted service.

16. Moreover, the evidence of litigation prejudice is unsatisfactory. In his Second Affirmation in support of the application for substituted service Mr. Wang, without putting any meat on the bare bones, makes a fleeting mention of "litigation prejudice" at paragraph 53 and adds "(as set out in my Third Affirmation which will be filed contemporaneously with this Affirmation)". It is almost as if the author of the draft Second Affirmation got stuck on this question and felt unable to adequately summarise the litigation prejudice in this case so thought "Oh we will just rely on the other affirmation, see what we can come up with and just throw that into the judge's lap and let him try and work it out himself."

17. I should not have to cross-reference to discover the litigation prejudice and even when I do I can see no "Litigation Prejudice" heading in that 23 page Third Affirmation. Mr. Vickers in his skeleton argument filed on Monday, simply refers to the litigation prejudice as the delay in serving Dongzheng Ruibo (paragraph 28a. ii of the skeleton argument). At paragraph 28d of the skeleton it is stated: "The Petitioners submit that they will suffer litigation prejudice by ongoing delay" and various generalised concerns are reiterated. On his feet today Mr. Vickers has added litigation prejudice as continuing exclusion from the management of the Company, and now, following the Arbitral Award an impending change in the Company's structure which will remove value and prejudice the Petitioners.

18. Although GCR Order 11 rule 5(2) is the first authority in the Petitioners' authorities bundle, I cannot see reference to it in the Petitioners' skeleton argument. I note there is no expert evidence before the court confirming that the substituted service suggested does not contravene the law of the PRC. Mr Vickers says that expert evidence is not needed in this case. I note that at paragraph 61 of his Second Affirmation Mr. Wang (who is not stated

to be a lawyer and is not an independent expert) says that "the Petitioners understand that service on a PRC entity by email to a law firm in the Cayman Islands is not prohibited or restricted by the PRC Civil Procedure Law." If that were valid expert evidence (which of course it is not) it may partially cover paragraph 1 (a) of the draft order, although I note it is limited to "PRC Civil Procedure Law". I also note the reference made by Mr. Vickers at paragraph 28c of the skeleton argument to Segal J's judgment in *China Shanshui Cement Group Limited* (FSD 161 of 2018 (NSJ) Unreported 27 January 2021) at paragraph 66(e) that the evidence in that case (which included expert evidence) showed that "service by email to Maples in the Cayman Islands will not be contrary to Taiwanese or PRC law and that service by email on Ms. Doris Wu (an officer of the Company and of ACC) will not be contrary to Taiwanese law."

19. Mr. Vickers today, part way through his submissions, referred the court to and handed up a copy of *Gol Linhas Aereas SA v MatlinPatterson Global Opportunities Partners (Cayman) II LP & Others* [2022] UKPC 21 a judgment of the Privy Council given on 19 May 2022. At paragraph 46 the following sentence appears:

> "It is not necessary in every case to adduce expert evidence of foreign law."

Much of course depends on the precise circumstances of each case and the context in which the issues arise.

20. I have not been addressed as to whether GCR Order 5(2) is applicable in winding up proceedings. I note the CWR Order 1 rule 4 (1) and I also note CWR Order 3 rule 11(3)(b) but have not been addressed on their interplay. There is no up-to-date expert evidence before this court in these proceedings in respect of the position of the PRC and the Hague Service Convention or in respect of the potential impact of the COVID 19 pandemic

although I note the following extract brought to my attention by Mr. Vickers in a letter from Harneys to Conyers on 19 November 2021:

> "As matters presently stand we do not consider there is any basis for an order for substituted service. Indeed, we understand from PRC counsel (without waiver of privilege) that foreign proceedings continue to be served through the Hague Convention in the PRC, this year, despite the COVID-19 pandemic."

I note also the reference to "*Around 6 months*" in the letter I have previously referred to from Conyers to Collas Crill and Harneys dated 21 February 2022.

21. I am not persuaded that as at today's date that there is evidence before me to the effect that the delay in effecting service via the Hague Service Convention in this case is presently so excessive as to be incompatible with the due administration of justice.

22. Moreover, there is inadequate evidence before me of litigation prejudice that would justify the court today making an order for substituted service.

23. I therefore dismiss the summons for substituted service for the reasons I have stated.

THE HON. JUSTICE DAVID DOYLE
JUDGE OF THE GRAND COURT