Case No 563

IN THE COURT OF APPEAL (CIVIL DIVISION), GUERNSEY

ON APPEAL FROM THE ROYAL COURT OF GUERNSEY (ORDINARY DIVISION), CIVIL ACTION 2136

CIVIL DIVISION APPEAL No. 563

IN THE MATTER OF SECTION 29 OF THE LIMITED PARTNERSHIPS (GUERNSEY) LAW 1995

AND IN THE MATTER OF CRGF LP

BETWEEN:

CRGF GP LIMITED

Appellant / Applicant

and

FONDS RUSNANO CAPITAL SA

Respondent / Respondent

MATTHEWS JA:

INTRODUCTION

1. This is the judgment of the court. There are two matters before the court on this appeal. The first is an application by the appellant for an order relating to the service on the respondent of the notice of appeal, the appellant's written case and other appeal papers. In effect, the appellant seeks a declaration that such service was valid. The second is the substantive appeal itself. A complication in this case is that the respondent (the successful plaintiff in the court below) now has no Guernsey representation and has taken no part in this appeal, though it was represented before the Royal Court. This raises an issue about access to the court, which will also be addressed.

THE PRELIMINARY APPLICATION

Procedure

2. The preliminary application raises the issue whether the means adopted by the appellant to serve the notice of appeal and other relevant documents on the respondent were effective under Guernsey law. It was made by notice dated 16 August 2023. On 21 August 2023, Montgomery JA made an order under rule 20 of the Court of Appeal (Civil Division)(Guernsey) Rules 1964, directing that service of the application be served on the respondent by several particular means. On 1 September 2023 Chloe Gill, of the appellant's current advocates (Ogier (Guernsey) LLP), made an affidavit deposing to service of the application in accordance with that order.

Background

3. The claim was originally begun by the respondent on 3 April 2018. The respondent sought the dissolution of a Guernsey limited partnership called CRGF LP ("the partnership"), in which the respondent was the sole limited partner and the appellant was the sole general partner. The respondent also sought the rescission of the partnership agreement on the ground of misrepresentation.

4. The court directed that the claim should be recast so that the rescission claim came first. The trial of the matter took place in June 2019. However, it was not until 27 April 2021 that the Royal Court (consisting of the Bailiff, and Jurats Hodgetts, Mortimer and Wyatt) handed down its judgment. The court dismissed the claim for rescission of the agreement on the facts, but allowed the claim for the dissolution of the partnership on the "just and equitable" ground in section 29 of the Limited Partnerships (Guernsey) Law 1995.

5. After further argument in September 2021, two supplementary judgements were subsequently handed down, on 27 and 28 June 2022 respectively. We will have to return to these later. The notice of appeal is dated 27 July 2022. It seeks to appeal against aspects of the order made by the Royal Court on 28 June 2022 (which dealt with the supplementary matters and costs). There is no appeal against the order dissolving the partnership. By Act of Court dated 28 May 2021, Timothy Le Cornu was appointed its liquidator, although he was enjoined not to realise or distribute the partnership's assets without further order.

6. The respondent was represented by Guernsey advocates (Walkers) both at the trial and at the hearing in September 2021. However, in March 2022 those advocates ceased to act for the respondent, apparently on the basis that recently implemented international sanctions, following the Russian invasion of the Ukraine, meant that they could no longer act. It appears that the respondent, a body incorporated under Luxembourg law with a registered address in Luxembourg, is ultimately beneficially owned by the Russian state, as part of its national investment in nanotechnology.

7. Walkers' offices in St Peter Port had been the *élection de domicile* of the respondent up until then. Their letter to the court of March 2022 suggested that the court could contact the respondent by email at the email address of a lady called Olga Bochkova, who had been called by the respondent as a witness at trial. The affidavit evidence of the appellant in support of the application is to the effect that Ms Bochkova's affidavits described her as a representative of the respondent, and that in her oral evidence she said she worked for RN Consulting, within the "Rusnano" group, with the title "Head of Legal". The relevant pages from the affidavits and trial transcripts are exhibited, and bear this out. Ms Bochkova also corresponded with the court on behalf of the respondent after Walkers ceased to act. The email address domain name was "rnconsulting.lu" (a Luxembourg domain name).

8. However, the appellant's evidence is also that there is no evidence of any change to the respondent's *élection de domicile* under the procedural rules. The order of the Royal Court of 28 June 2022 provided that any notice of appeal be lodged by 27 July 2022. The appellant's then advocates (Appleby) prepared the notice of appeal, and it was served by HM Deputy

Sergeant at Walkers' offices on 27 July 2022. Appleby also sent the notice of appeal by email to Ms Bochkova, and she responded (from the same address) acknowledging receipt.

9. On 3 August 2022 Walkers informed the court by email that they were unable to forward the notice of appeal to the respondent "in the current climate/circumstances", but suggested that the court might do so. The email does not however explain what legal impediment there was to Walkers' sending the notice by email to Ms Bochkova which would not also apply to the court. It also appears that the court confirmed that no notice of change had been received from the respondent, and that the Bailiff had ruled that the respondent's *élection de domicile* had not changed.

10. Directions for the appeal were given by this court on 5 October 2022. On 19 October 2022 Ms Bochkova wrote on behalf of the respondent to say that, the previous day, it had filed an application with the Office of Financial Sanctions Implementation at the UK Treasury for confirmation that it was not controlled by a designated person or, in the event that that Office deemed that the respondent was controlled by a designated person, for a licence to be issued to allow it to pay reasonable professional legal fees to, amongst others, new Guernsey counsel in relation to the appeal. A similar application was also being filed with the relevant Guernsey authorities. We understand that no further communication on this subject has been received from the respondent. We do not know whether the applications for licences were pursued or, if so, what their outcome was.

11. On 14 April 2023 an email was sent to the court from someone called Stanislav Borodaev, who was styled "Director, Legal department, Managing company Rusnano LLC", with a postal address in Moscow, Russia. Mr Borodaev said he was writing on behalf of the respondent, and that he was "an in house lawyer within the Rusnano group of Companies, and [had] taken over the oversight of this matter from Ms Bochkova". He went on to ask on behalf of the respondent that the email be treated as a Respondent's Notice pursuant to rule 5 of the Court of Appeal (Civil Division)(Guernsey) Rules 1964. He informed the court that the respondent was still in the process of appointing new Guernsey lawyers, and asked that any future correspondence in relation to the proceedings be addressed to him until such new lawyers were appointed.

12. According to a company search carried out by the appellant's advocates, the respondent has only one director or director equivalent, who is Maxim Sakharov, and whose given address is the same as that of Mr Borodaev, that is, in Moscow.

The potential defect

13. The potential defect in service of the Notice of Appeal arises from the fact that there are two distinct sets of civil procedural rules, one for the Royal Court and one for the Court of Appeal (Civil Division). But the rules in relation to service are not the same. In the Royal Court, the respondent was the plaintiff. Rule 12 of the Royal Court Rules 2007 provides as follows:

> "12. (1) The cause shall state the plaintiff's élection de domicile.

(2) If at any time the Court is satisfied that service cannot be effected at the domicile elected by the plaintiff it may, on the application supported by affidavit of any defendant to the action, order that the action be dismissed.
(3) The Court may at any time order the plaintiff to make an élection de domicile or to amend the élection de domicile made by him.
(4) The plaintiff may at any time change the élection de domicile made by him; but the change is not effective until written notice thereof is given to the Greffier and to all other parties to the action.
(5) The plaintiff's élection de domicile, or any amendment or change made thereto under paragraphs (3) or (4), shall remain valid until the action is terminated (whether by final execution of the judgment or otherwise)."

14. In accordance with this rule, the respondent's amended pleading stated its address for service to be the offices of Walkers. But the *élection de domicile* thus made applied only for the purposes of the proceedings before the Royal Court, because the 2007 Rules governing such election apply only to such proceedings. Proceedings before the Court of Appeal, Civil Division, are instead governed by the Court of Appeal (Civil Division)(Guernsey) Rules 1964.

15. Rules 2(4) and 18 to 20 of these rules provide as follows:

"2. (4) A notice of appeal shall be served upon all parties to the proceedings in the court below who are directly affected by the appeal; and subject to the provisions of Rule 11 of these Rules it shall not be necessary to serve the notice on parties not so affected.

[…]

18. (1) The appellant shall, as soon as may be after service of the notice of appeal, furnish to the Registrar and to every person on whom the notice of appeal has been served, an address within the Island of Guernsey which he elects as his address for the service on him of any notice or other document and in the event of the appellant failing to comply with the provisions of this paragraph within the time limited for the setting down of the appeal under Rule 4 of these Rules then, until such time as he complies with the provisions of this paragraph, his address for service on him of any notice or other document shall be the office of Her Majesty's Sergeant in Guernsey.

(2) A respondent shall, as soon as may be after service of the notice of appeal on him, furnish to the Registrar and to the appellant an address for service within the Island of Guernsey which he elects as his address for the service on him of any notice or other document and in the event of a respondent failing to comply with the provisions of this paragraph within the fourteen days next following the service on him of the notice of appeal, then, until such time as he complies with the provisions of this paragraph, his address for service on him of any notice or other document shall be the office of Her Majesty's Sergeant in Guernsey.

19. (1) Subject to the provisions of the next succeeding Rule and unless the Court or a judge thereof otherwise directs, every notice or other document which is required to be served on any person by or under these Rules shall be served –

(a) in the Island of Guernsey, by Her Majesty's Sergeant,

(b) in the Island of Alderney, by the [Alderney Greffier],

(c) in the Island of Sark, by the Prévôt of Sark,

and shall be served personally on that person, except in the case where that person has an address for service in the Island of Guernsey in pursuance of the provisions of the last preceding Rule, in which case the notice or other document may be served on that person by leaving it at his address for service.

20. (1) If, in the case where any person on whom any notice or other document is required to be served by or under these Rules has not an address for service in the Island of Guernsey in pursuance of the provisions of Rule 18 of these Rules, it appears –

(a) where the notice or other document relates to any application intended to be made to the presiding judge of any court below, to the presiding judge of that court,

(b) in any other case, to the Court or a judge thereof,

that it is impracticable for any reason to serve the notice or other document personally on that person,

the Court, the judge of the Court or the presiding judge of the court below, as the case may be, may, upon application being made ex parte in that behalf, make an order for substituted service of the notice or other document.

(2) An application under paragraph (1) of this Rule shall specify the kind of substituted service desired and shall be accompanied by an affidavit staring the facts on which the application is founded.

(3) Substituted service of any notice or other document in relation to which an order has been made under this Rule shall be effected by taking such steps as the Court or a judge thereof, or the presiding judge of the court below, as the case may be, may direct to bring the notice or other document to the notice of the person to be served."

16. At the hearing on 12 September 2023, we heard the appellant's application. After a brief retirement, the court announced that it would accede to it, but give its reasons in writing. Those reasons now follow.

Discussion

17. It is clear from rule 19 that, in the Court of Appeal, Civil Division, the default rule is that a document required to be served must be served *personally on the person*, and (depending on which island of the Bailiwick the defendant/respondent is in) *by the appropriate court officer*. Since the appropriate court officer's participation is required, and since he or she has no jurisdiction to act outside the Bailiwick, we cannot ascribe to the legislator the intention to provide *under this rule* for the possibility of service outside the Bailiwick, perhaps in foreign countries, otherwise than in accordance with the Hague Convention on the Service Abroad of Judicial and Extra-territorial Documents in Civil and Commercial Matters.

18. However, this default rule is made subject to three exceptions. The first and second exceptions are (i) substituted service under rule 20, and (ii) contrary direction by the court. The third exception is "the case where that person has an address for service in the Island of Guernsey in pursuance of the provisions of the last preceding Rule [*ie* rule 18], in which case the notice or other document may be served on that person by leaving it at his address for service."

19. In the present case, at the time of purported service by the appellant's lawyers, the court had given no contrary direction, and neither had an order for substituted service been made. Thirdly, the respondent did not then have an address for service *under rule 18*, because that address is given to the court by the party who *has been served* with the notice of appeal. *Ex hypothesi*, therefore, that cannot be done before service of the notice of appeal has been effected. That left personal service.

20. The expression "personally on the person", or even "personal service", is not defined by the 1964 Rules. It *is* defined in the (English) Civil Procedure Rules, rule 6.5(3), which relevantly provides:

> "A claim form is served personally on –
> (a) an individual by leaving it with that individual;
> (b) a company or other corporation by leaving it with a person holding a senior position within the company or corporation …"

(Rule 6.22(3) provides that this rule applies also to documents other than a claim form.)

21. The expression is also defined in the (Jersey) Royal Court Rules 2004, rules 5/7 and 5/8:

> "5/7 Personal service: how effected
> Personal service of a document is effected by leaving it with the person to be served or, in the case of an order of justice, by leaving a copy thereof with the person to be served and, if so requested by the person to be served at the time when it is left, showing him or her the original.
>
> 5/8 Personal service on body corporate
> Personal service of a document on a body corporate may, in cases where provision is not otherwise made by any enactment, be effected by serving it in accordance with Rule 5/7 on any Director, Manager, Secretary or other similar officer thereof, or by leaving it at or delivering it to the registered office of the body."

These rules themselves appear to be based on the former English rules about personal service in RSC Order 65, rules 2 and 3.

22. In Guernsey, the Royal Court Civil Rules 2007 deal with the matter in a different way, by rules 2 and 3, which relevantly provide as follows:

> "2. Service within the jurisdiction of a document on an individual shall be effected by the Sergeant -

(a) à personne,
(b) à domicile,
(c) where, in the action to which the document relates, the individual has made an élection de domicile in accordance with Rule 12 or 15, by leaving the document there, or
(d) where an élection de domicile has been made in any document –
(i) upon which the action is founded, or
(ii) which relates to the action or to the subject-matter thereof,
being a document to which the individual was a party, by leaving the document there.
3. (1) Service within the jurisdiction of a document on a body corporate shall be effected by the Sergeant -
(a) by leaving the document at the registered office in the Island of the body corporate,
(b) where the body corporate has no such registered office but carries on business in the Island, by leaving the document at any place of business in the Island of the body corporate, or
(c) in accordance with Rules 2(c) or (d), as if the references therein to the individual were references to the body corporate. …"

23. We were told by Advocate Warrilow that "service à personne" means personal service, though Guernsey's rules (unlike those of Jersey and of England and Wales) do not explain what this concept actually involves. It is not necessary for us to determine what may constitute personal service for the purposes of rule 19. It suffices to say that service on a legal representative of the person upon whom service must be effected is not sufficient.

24. In the present case the respondent had no office or place of business in the Island. On the other hand, it *had* made an élection de domicile for the Royal Court proceedings. HM Deputy Sergeant did nothing other than leave the documents at Walkers' offices. There was no attempt at personal service of the Notice of Appeal by any court officer at any other place, whether in or out of the Bailiwick. For the Deputy Sergeant to leave the documents at Walkers' offices would undoubtedly have been good service for the purposes of the Royal Court proceedings. But we are not now concerned with those.

25. Because there are separate free-standing rules for service which apply to appeal proceedings, valid service of a document for the purpose of the Royal Court proceedings (under the 2007 Rules) cannot be taken automatically to constitute good service for the purposes of the appeal. Unlike, say, England and Wales, where the CPR apply to both the High Court and the Court of Appeal, Civil Division (and indeed also the County Court), the Guernsey legislator has chosen to provide two different procedural codes, each with their own (different) provisions about service. It is also impossible to say that leaving the documents at Walkers' offices amounted to service "personally on" the respondent itself, within rule 19. Accordingly, service of the notice of appeal was never effected on the respondent in accordance with the 1964 Rules.

Remedy

26. The next question is therefore whether this court can, and, if so, should, regularise the position. The appellant submits that it can do this, pointing to the words in rule 19, "unless the Court or a judge thereof otherwise directs". It says that there is nothing in these words to restrict them to a direction given *before* the act or acts said to amount to service has or have taken place. So, a direction can equally be given afterwards.

27. The only authority to which we were referred was *Cobra Business Ventures Ltd v Green Field Capital Ltd* 2011-12 GLR Note 27. There, the petitioners in an unfair prejudice claim obtained leave to serve the petition out of the jurisdiction on the respondents. The third and fourth respondents challenged that leave. McMahon DB ultimately ordered that one of them be served by post to its BVI address and that the other be served by service on its existing Guernsey advocates. At one point, the court considered the possibility that it might validate service retrospectively by reference to what had already been done. McMahon DB noted that this was possible in England by virtue of an express provision in CPR rule 6.15(2).

28. He then continued:

> "59. Reverting to the CPR, rule 6.15, I also accept that a provision equivalent to paragraph (2) does not feature in the 2007 Rules. Accordingly, I do not think it would be open to this Court to regard something done previously as retrospectively being good service. In Guernsey, where service cannot be effected in one of the ways prescribed, or has not been accepted voluntarily, leave to effect service needs to be sought. Such leave is a pre-condition to then effecting service in accordance with the Court's order."

29. Two things are, however, to be noted about this statement. First, that statement was not part of the *ratio* of the decision. It was *obiter*. Second, the court was there concerned with a different set of rules, that is, the Royal Court Civil Rules, which are cast in different terms. In our judgment, the *dictum* in *Cobra* is irrelevant to the question we have to decide, and is not binding on us anyway.

30. We accept the submission of the appellant that there is nothing in the words "unless the Court or a judge thereof otherwise directs" to restrict them to a direction given *before* the act or acts said to amount to service has or have taken place. Obviously, any decision to make such a direction will be highly fact sensitive. It will need good reasons to make an order which has retrospective effect.

31. In addition, the court must bear in mind that it would have been possible to serve the respondent using the Hague Service Convention, as Luxembourg is a party to that convention. In *Société Générale SA v Goldas Kuyumculuk Sanayi Ithalat Ihracat AS* [2019] 1 WLR 346, the Court of Appeal had to consider the possibility of ordering service of originating process by an alternative means, under CPR rule 6.15, in a case where service under the Hague Convention was also available.

32. Longmore LJ (with whom Macur and Simon LJJ agreed) cited with approval the statement of Stanley Burnton LJ (with whom Wilson LJ and Rix LJ agreed) in *Cecil v Bayat* [2011] 1 WLR 386, that

> "65. In modern times, outside the context of the European Union [this was of course a pre-Brexit case], the most important source of the consent of states to service of foreign process within their territory is to be found in the Hague Convention (in relation to the state parties to it) and in bilateral conventions on this matter. Because service out of the jurisdiction without the consent of the state in which service is to be effected is an interference with the sovereignty of that state, service on a party to the Hague Convention by an alternative method under CPR r 6.15 should be regarded as exceptional, to be permitted in special circumstances only.
>
> 66. It follows, in my judgment, that while the fact that proceedings served by an alternative method will come to the attention of a defendant more speedily than proceedings served under the Hague Convention is a relevant consideration when deciding whether to make an order under CPR r 6.15, it is general not a sufficient reason for an order for service by an alternative method."

33. This case, like others to which we were referred, such as *BNP Paribas SA v OJSC "Russian Machines"* [2012] EWHC 1023 (Comm), concerned originating process. In the latter case, Teare J was asked to validate service retrospectively under CPR rule 6.15. He said:

> "17. In the present case the nature of the relief sought against the defendants is an anti-suit injunction designed to protect an arbitration taking place in London between the Claimant and the First Defendant. In such a case there is a particular need for the trial to be heard promptly. If service can only take place via the Hague Convention there is a risk, on the evidence now before the court, that it may not take place in sufficient time to enable the trial against all defendants to take place in December 2012. …
>
> 18. In principle I consider that such considerations are capable of amounting to 'good reason' to make a retrospective declaration of good service. I do not consider that such an approach is inconsistent with the guidance of the Court of Appeal in *Cecil v Bayat.* The considerations to which I have referred are 'facts relating to the proceedings' of a type recognised by Stanley Burnton LJ in paragraph 68 of his judgment as justifying an order under CPR 6.15. They are also considerations resulting from a long period of delay in service which Rix LJ recognised might require flexibility where litigation could be prejudiced."

34. Should the court here make an order with retrospective effect under rule 19? First of all, this is not originating process. The parties have fought out the proceedings at first instance, and what is now at stake is an appeal. Moreover, the respondent initiated the process in the first place, by choosing to bring the action here. So the considerations are different.

35. Second, there can be no doubt that the respondent is, and since the beginning has been, well aware of this appeal. The Notice of Appeal was sent by email to Ms Bochkova, who had held herself out, and had been held out during the trial by the respondent, as authorised to act on its behalf. She indeed acknowledged receipt of the notice, and thereafter corresponded with the court about the appeal without challenge, implying acceptance that the notice had been validly served. Subsequently, so did Mr Borodaev. An order was made by consent on 1 November 2022, which recited the service of the notice.

36. Both Ms Bochkova and Mr Borodaev entered into sophisticated correspondence with the court, showing an appreciation of what was happening. On 14 April 2023, Mr Borodaev indeed purported to file a Respondent's Notice. And, on 16 June 2023, Mr Borodaev emailed the court to ask for a stay of the appeal. As a result of the order of 21 August 2023, the present application (to regularise the position) has also been brought to the attention of the respondent. Accordingly, there would be no prejudice to the respondent in regularising the position, and declaring that the steps already taken amounted to valid service of the notice, the case and the other relevant documents.

37. Moreover, if the court declined to validate service retrospectively, the consequence would be to adjourn the hearing of the appeal, causing financial and other prejudice to the appellant, as well as wasting valuable judicial resources and meaning that other parties who might have been heard sooner cannot now be so heard. The original judgment of the Royal Court was handed down nearly two years after the cause was tried. The supplementary judgment was handed down nine months after the supplementary hearing. We have not enquired into the reasons for the delay. It was however a relevant factor for this court to consider in deciding that it was in the interests of justice for the appeal hearing to proceed timeously.

38. Of course, the court has well in mind that the respondent has no current Guernsey legal representation. But the lack of representation is not the consequence of any failure to serve the respondent in accordance with the rules. For example, the appellant might have applied, before lodging the Notice of Appeal, for an order for substituted service. Then the notice would have been correctly served, but the respondent would still have been without representation. The one did not cause the other.

39. In the result, therefore, the court will direct that the steps taken to bring the Notice of Appeal to the respondent's attention are to be treated for the purposes of rule 19 as valid service under that rule.

40. In passing, we note the existence of a possible alternative route to the same conclusion. It may be that, notwithstanding the observations of the Bailiff *in Cobra,* the Royal Court does have an inherent jurisdiction to make its process effective, which could extend to regularising defective service in a case such as the present. If that is so, then by virtue of section 14(2) of the Court of Appeal (Guernsey) Law 1964 this court would have the same power for all the purposes of and incidental to the hearing and determination of the appeal. However, this alternative route was not argued, and we reach no conclusion upon it.

ARTICLE 6 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

41. At the hearing the court considered the impact of article 6 of the European Convention on Human Rights on the questions of legal representation at and participation in the appeal by the respondent. As already stated, although the respondent was represented at the trial before the Royal Court, it was neither present nor represented at the hearing of the appeal. We have already set out what we know of the circumstances in which its advocates ceased to act. Article 6 of the Convention (right to a fair trial) has been interpreted as including the right of access to a court.

42. Although, as we have explained, representatives of the Respondents have been in communication with the Court we do not know why they are not represented in the appeal. The email from Ms Bochkova dated 19 October 2022 to the court made clear that the respondent was actively seeking such a replacement, and indeed had identified a Guernsey advocate willing in principle to act and it also made clear that the respondent had applied for a licence from the relevant regulatory authorities to be able to instruct and pay that advocate to represent the respondent on this appeal.

43. At the hearing, we were told by Advocate Warrilow that in England and Wales a general licence had been granted for the purposes of legal representation in May 2023, and that therefore an applicant to the relevant Guernsey authorities could reasonably expect to be granted a licence in Guernsey, although it was not automatic. But we had no further information from the respondent on the fate of their application or why they were unrepresented.

44. There could be any one of a number of reasons, or combination of reasons. These include a desire not to spend further resources on this litigation, a perception that the issues at stake on the appeal do not matter, or do not matter enough, conflicts of interest among suitably qualified members of the Guernsey bar, international sanctions, and difficulty or delay in obtaining appropriate licences. The court simply does not know.

45. In *PJSC National Trust Bank v Mints* [2023] EWHC 118 (Comm), a number of banks sued defendants for substantial damages in respect of alleged conspiracies between some of the defendants and representatives of the banks to enter into uncommercial transactions with them or their vehicles. Certain of the defendants became subject to sanctions following the Russian invasion of the Ukraine, and thus became unable to finance the litigation brought against them. They sought a stay of the proceedings, and a release from the undertakings which had been given in connection with worldwide freezing orders obtained against them.

46. Cockerill J held as a matter of statutory construction that the relevant sanctions legislation did not in fact prohibit the defendants from financing the litigation in which they were involved. She said:

> "134. Ultimately despite the breadth of the wording, and despite the Parliamentary intent to allow a certain degree of curtailment of some rights which the Defendants rely upon, I conclude that the requisite level of clarity in intent to derogate from the fundamental right of access to the court for determination of rights outside designation is not demonstrated."

47. In addition, the judge held that there were a number of other matters which reinforced the construction conclusion. One of these was the availability of specific and general licences to carry out transactions which otherwise might be caught by the sanctions legislation.

48. The conclusions to which the judge came meant that she did not need to consider whether the defendants' rights under article 6 were also infringed. Nevertheless, she said this:

> "156. To the extent that it did arise I was not persuaded that it added anything material to the strength of the Claimants' arguments. As the Defendants pointed

> out, the English courts have repeatedly explained that Article 6 does not confer any greater protection or access to a court than the equivalent common law principle considered above. Further the Strasbourg Court has consistently said that it does not confer any absolute right of access to the court. Member States are entitled to restrict the right, provided the restriction pursues a legitimate aim, is proportionate and does not impair the very essence of the right in question. This is not a case where there is authority sowing [*sic*] a more expansive approach in the courts of the EU. On the contrary in *RT France*, Case T-125/22 (CJEU, 27 July 2022) the review of the Russia sanctions endorsed as proportionate some derogation from at least one fundamental right."

49. In Guernsey, the sanctions regime, as we understand it, provides for a licence to be obtained so that a litigant otherwise subject to sanctions can be represented and the observations of Cockerill J would support the view that such a regime would not involve a breach of Article 6 provided at least that lawyers either are available, or could be required to make themselves available, to undertake such work. As already stated, however, we have been given no basis for concluding that the non-representation of the respondent is attributable to difficulties with the sanctions regime rather than for some other reason.

50. In the circumstances, we are satisfied on the material before us that hearing the case in the absence of the respondent on this appeal does not infringe the respondent's undoubted right to access to a court.

THE SUBSTANTIVE APPEAL

The matters challenged on appeal

51. The second matter is the substantive appeal itself. As already stated, this is not against the order dissolving the partnership. That is not challenged. Instead, the appeal deals with three aspects of the supplementary and costs order made by the Royal Court on 28 June 2022. The order reads as follows:

> "IT IS HEREBY ORDERED THAT:
>
> 1. It is declared that the Defendant is entitled under the Limited Partnership Agreement dated 3 December 2015 to (i) fees of US$2,312,962.50 plus (ii) such endemic expenses as the liquidator of CRGF LP may properly determine having regard to the guidance contained in paragraph 74 and 75 of the Courts supplemental judgment dated 27 June 2022 (such sum being the "Defendant's Entitlement").
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> 2. The liquidator of CRGF LP shall accord the Defendant priority in the liquidation in respect of the Defendant's Entitlement.
>
> 3. Upon the Defendant's Entitlement being crystallised as a liquidated son, the Defendant shall within 14 days pay to the liquidator of CRGF LP an amount equal to the difference between US$4,389,842.40 and the Defendant's Entitlement.
>
> 4. The Defendant shall pay to the Plaintiff costs in an amount to be assessed (if not agreed) on the recoverable basis as 25% of the Plaintiff's costs of these proceedings.

5. The Plaintiff's application for an interim payment on account of costs and its application to join Pavel Erochkine [who we understand to be the beneficial owner of the appellant] for the purposes of claiming costs against him are adjourned to a hearing which the Plaintiff has liberty to fix on a date convenient to both parties.

6. The parties have liberty to apply.

7. The time for serving a notice of appeal against any of the judgements and orders made since 27 April 2021 is extended until 27 July 2022."

52. The three aspects challenged are: (1) the limit under paragraph 1 on the appellant's entitlement under the partnership agreement to fees of US$2,312,962.50; (2) the obligation in paragraph 3 on the appellant to pay an amount still to be calculated to the liquidator of the limited partnership; and (3) the obligation in paragraph 4 on the appellant to pay 25% of the respondent's recoverable costs of the proceedings. Essentially, this appeal is about fees said to be due to the appellant as the general partner under the partnership, bearing in mind that the partnership agreement was not set aside by the Royal Court (as the respondent had sought).

53. The reasons for the decisions in aspects (1) and (2) were given in the supplemental judgment of 27 June 2022. That is a judgment not only of the Bailiff, but also of the jurats who sat with him in the main trial. Further evidence was received, and further findings of fact were made by the jurats for the purposes of this judgment. The reasons for the decision in aspect (3) were given in the supplemental judgment of 28 June 2022. That is the judgment of the Bailiff alone, since it relates only to costs (Royal Court of Guernsey (Miscellaneous Reform Provisions) Law 1950, s 6(2)(a)).

The law

54. The Limited Partnerships (Guernsey) Law 1995 relevantly provides as follows:

> **"29.** (1) The Royal Court may order the dissolution of a limited partnership on the application of any partner or creditor thereof or on the application of the Committee or Commission if in its opinion –
>
> (a) it is not reasonably practicable to carry on the partnership's business in conformity with the partnership agreement,
>
> (b) the partnership is insolvent,
>
> (c) without prejudice to the generality of paragraph (b), the following conditions are satisfied –
>
> (i) the partnership is indebted to a creditor in a sum exceeding £750 or such other sum as may be prescribed,
>
> (ii) the creditor has, by Her Majesty's Sergeant, served a signification on the partnership demanding payment of the debt, and
>
> (iii) the partnership does not, within a period of 21 days immediately following the date of service of that demand, pay the debt or give security for it to the creditor's satisfaction,

(d) there has been, in relation to the partnership, a failure to comply with any provision of an order of the Royal Court under section 5(4),

(e) the partnership is being conducted in a manner which is –

(i) oppressive to any of the limited partners or prejudicial to their interests as limited partners, or

(ii) calculated to affect prejudicially the carrying on of the partnership business,

(f) the limited partners are not being given all information relating to the affairs of the partnership which they might reasonably expect,

(g) the affairs of the partnership are being conducted in such a way as to defraud creditors (whether of the partnership or of any other person) or in an unlawful manner,

(h) there has been persistent default by the partnership or by any general partner thereof in complying with the requirements or conditions imposed by or under this Law, any regulation made under it or the Control of Borrowing Ordinance,

(i) persons connected with the formation or management of the partnership have, in connection therewith, been guilty of fraud, misfeasance, breach of fiduciary duty or other misconduct in relation to the partnership or any partner thereof, or

(j) it is just and equitable to do so.

(2) Upon the making of an order under subsection (1) for the dissolution of a limited partnership or at any time thereafter, the Royal Court may make such other orders in relation to the dissolution as it thinks fit, including one for the appointment of one or more liquidators to wind up the partnership's affairs and distribute its assets.

30. (1) Upon the dissolution of a limited partnership its affairs shall, unless a liquidator has been appointed by the Royal Court under section 29(2) or under subsection (3), be wound up by the general partners.

(2) Upon the dissolution of a limited partnership no limited partner may, except in accordance with the provisions of sections 21 and 32 –

(a) withdraw any part of his contribution, or

(b) otherwise claim as a creditor of the partnership.

(3) Upon the dissolution of a limited partnership or at any time thereafter, the Royal Court may, on the application of any partner or assignee thereof or any creditor, make such orders in relation to the dissolution as it thinks fit, including one for the appointment of one or more liquidators to wind up the partnership's affairs and distribute its assets.

(4) On the appointment of a liquidator (whether under this section or under section 29) all powers of the general partners cease; and a person who purports to exercise any power of a general partner at a time when, pursuant to this subsection, those powers have ceased shall be guilty of an offence.

(5) Upon the dissolution of a limited partnership the partnership shall cease to carry on business except to the extent necessary for its beneficial winding up; and where in relation to a partnership there is a contravention of this subsection, the partnership and each general partner thereof shall be guilty of an offence.

(6) All expenses properly incurred in the dissolution of a limited partnership, including the liquidator's remuneration, are payable from the partnership's assets in priority to all other debts.

(7) Upon the dissolution of a limited partnership, notwithstanding the fact that (pursuant to subsection (8)(c) below) the certificate of registration has ceased to be valid, the persons winding up the partnership's affairs, in the name of and for and on behalf of the partnership –

(a) may, to the extent necessary for the beneficial winding up of the partnership, prosecute, defend or settle any civil or criminal action,

(b) shall dispose of the partnership's property and realise its assets, and

(c) shall, in accordance with the provisions of section 32 –

(i) discharge the partnership's debts, and

(ii) distribute to the partners any remaining assets of the partnership,

the whole without prejudice to the personal liability of the partners.

(8) Upon the dissolution of a limited partnership –

(a) notice of the fact shall, within a period of seven days beginning on the date of dissolution, be filed with the Greffier and published in La Gazette Officielle,

(b) the Greffier shall, as soon as is reasonably practicable, delete the inscription relating to the partnership from the Register, and

(c) the partnership's certificate of registration shall cease to be valid.

(9) Where there is a contravention of any provision of subsection (8)(a) in relation to a limited partnership, the general partners thereof –

(a) shall each be guilty of an offence, and

(b) shall each continue to incur liability as if they were the general partners of a limited partnership which had not been dissolved.

(10) The dissolution of a limited partnership shall be deemed to take place upon the earlier of the following –

(a) the date of the occurrence of the event upon which, under the provisions of this Law, the partnership is dissolved, or

(b) the date of the order of the Royal Court under section 29(1) for its dissolution.

(11) As soon as a limited partnership's affairs are fully wound up, the persons who conducted the winding up shall –

(a) prepare an account of the winding up, giving details of the conduct thereof and the disposal of the partnership's property, and stating whether or not any state of affairs described in section 31 has come to their attention, and

(b) provide all partners with a copy of the said account.

(12) The persons conducting the winding up of a limited partnership may seek the Court's directions as to any matter arising in relation to the winding up; and upon such an application the Court may make such order as it thinks fit.

[…]

32. Upon the dissolution of a limited partnership, the assets shall be distributed in the following order –

(a) firstly, to creditors other than partners, to the extent otherwise permitted by law, in satisfaction of partnership debts,
(b) secondly, to limited partners who are creditors and who are not also general partners, to the extent otherwise permitted by law, in satisfaction of partnership debts other than debts described in paragraph (c),
(c) finally, subject to the provisions of the partnership agreement, to partners as follows –

(i) firstly, to limited partners for the return of their contributions or, where appropriate, for the release of their obligations to make contributions,
(ii) secondly, to limited partners for their share of the profits on their contributions,
(iii) thirdly, to general partners other than for capital and profits,
(iv) fourthly, to general partners in respect of capital,
(v) finally, to general partners in respect of profits."

Relevant partnership documents

The limited partnership agreement

55. The limited partnership agreement between the parties relevantly provides as follows:

"1. DEFINITIONS

[…]

"Commitment" means with respect to any Partner, the amount set forth opposite the name of such Partner on the LP Register; the Commitment of each Partner shall comprise an amount to be subscribed as capital.

"Contribution" means, with respect to any Partner, monies paid to the Partnership in respect of such Partner's Commitment.

[…]

2 GENERAL RULES

[…]

2.1.2 The name, address (and mailing address, if different) and Commitment of each Partner shall be listed on a register to be maintained by the General Partner at the registered office (the "LP Register"). The General Partner shall update the LP Register from time to time as necessary …

[…]

3. COMMITMENTS AND CONTRIBUTIONS

3.1 The General Partner shall not be obliged to make a Commitment.

3.2 Each Limited Partner shall be required to make an initial Commitment.

3.3 Pursuant to this Agreement, the Limited Partner agreed to make an initial Commitment to the Partnership in an amount being equal to the Euro equivalent of [RMB900,000,000.00] from time to time. It is acknowledged by the Limited Partner but the determination of the Commitment and Remaining Commitment in euros is not fixed and may be assessed by the General Partner on such occasions and for such purposes as the General Partner shall determine in its absolute discretion and by reference to such rate of exchange as the General Partner may in its absolute discretion considers appropriate.

3.4 The Initial Commitment shall be split into two tranches, comprising an initial tranche of the Euro equivalent of [RMB300,000,000.00] and a secondary draft of the Euro equivalent of [RMB600,000,000.00] to be calculated by reference to such rate of exchange as the General Partner may in its absolute discretion considers appropriate.

[…]

3.10 Except as otherwise expressly provided in this Agreement, no Limited Partner shall have the right to withdraw or to demand repayment of its Commitment from the Partnership or to receive any distribution or return of, or interest on, its Contribution.

[…]

6. EXECUTIVE AFFAIRS OF THE PARTNERSHIP

[…]

6.7 In consideration of the management services provided by the General Partner, the Partnership shall pay to the General Partner a fee (the “Management Fee”) in the sum of 2.5% of Total Commitments Per annum, payable quarterly in advance. Management Fees shall continue to accrue and be payable until the completion of the winding up of the Partnership in accordance with clause 11.4.

6.8 In addition to the Management Fee, an initial set up fee equal to 1% of the total Commitment of each admitted Limited Partner and a placement fee equal to 2% of the total Commitment of each admitted Limited Partner shall become due and payable by each Limited Partner upon its admission as a limited partner to the Partnership. Such initial setup and placement agent fees shall be deducted from the Limited Partner’s initial Contribution, however such amounts shall not form a part of the Limited Partner’s Commitment and the Limited Partners Remaining Commitment shall not be reduced by reference to such amounts. The initial setup fee and placement agent fee payable to the General Partner for its own benefit and which may be retained or paid to such third parties as the General Partner may determine.

[…]

10. DISTRIBUTIONS

10.1 Except as otherwise provided herein, distribution shall be paid in the Fund Currency and made to the Partners in proportion to their Commitments. The General Partner shall distribute proceeds derived from investments in a timely manner. Notwithstanding anything to the contrary contained in this Agreement, the Partnership, and the General Partner on behalf of the Partnership, shall not be required to make a distribution to any Partner on account of its interest in the Partnership if such distribution would render the Partnership insolvent or violate the Law or other applicable law. The General Partner may make distributions *in specie*, in its absolute discretion.

[…]

11. DISSOLUTION AND WINDING UP OF THE PARTNERSHIP

11.1 Upon the occurrence of any of the following events (an “event of dissolution That”), the Partnership shall be dissolved and the General Partner shall notify the Registrar Of the Dissolution in Accordance with the Law.

[…]

11.1.5 the making by the Royal Court in Guernsey of an order for dissolution of the Partnership under section 29 of the Law.

[…]

11.2 Following the dissolution of the Partnership pursuant to clause 11.1, no further business shall be conducted except for such actions as shall be necessary for the beneficial winding up of the affairs of the Partnership. The General Partner (or any duly elected liquidator or other duly designated representative) shall use all commercially reasonable efforts to liquidate all of the Partnership assets in an orderly manner and apply the proceeds of such liquidation as set forth in clause 11.3.

11.3 After satisfying all current and future obligations of the Partnership to creditors in the manner described in the Law and all costs of the winding up, the remaining proceeds, if any, plus any remaining assets of the Partnership shall be distributed, firstly, for payment of outstanding fees of the General Partner and then in accordance with the provisions of clause 10.

11.4 Upon the completion of the winding up of the Partnership, including the payment of the final distribution (if any), the General Partner (or such liquidator or other representative) shall prepare an account of the winding up in the manner described in the Law and provide a copy of the aforesaid account to the Partners and the provisions of this Agreement shall remain in full force and effect until such time.

[…]

17. SUPPLEMENTARY PROVISIONS

[…]

17.3 Every term and provision of this Agreement is intended to be severable. If any term or provision hereof is illegal or invalid for any reason whatsoever, such term or provision shall be enforced to the maximum extent permitted by law and, in any event, such illegality or invalidity shall not affect the validity of the remainder of the Agreement.

[…]"

The Subscription Agreement

56. The Subscription Agreement was signed on the same date as the limited partnership agreement. It contains the following statements:

"Subscription Commitment

(a) The Subscriber hereby irrevocably subscribes for an interest and agrees to contribute in cash to the capital of the Limited Partnership the amount set forth as the Subscriber's Capital Commitment on the Signature Page of this Subscription Agreement …

[…]

(d) The Subscriber hereby undertakes to pay to the Limited Partnership The Capital Commitment for the interest which had hereby subscribes, in respect of which such application may be accepted, in instalments upon issuance of a Drawdown Notice by the General Partner to the Subscriber in accordance with the provisions of the Partnership Agreement.

[…]

SIGNATURE PAGE

[…]

Executed:

Dated 11 November 2015

TOTAL AMOUNT OF CAPITAL COMMITMENT

RMB900,000,000.00

INITIAL CAPITAL COMMITMENT

RMB300,000,000.00

SUBSEQUENT CAPITAL COMMITMENT

RMB600,000,000.00

[Signature] Irina Rapoport

Signed for and on behalf of Fonds Rusnano Capital SA"

The limited partner register

57. The register of limited partners contains the following single entry:

Name and address	Occupation Nationality	Appointed	Resigned
Limited partner			
Fonds Rusnano Capital SA		01-Oct-2015	
5, rue du Klem	Date of Birth –12-Aug-2010		
L-1857 Luxembourg	Ownership – 100%		
Luxembourg"			

Relevant background facts

58. Notwithstanding the terms of the partnership agreement, none of the initial setup and placement fees have ever been paid to the appellant as general partner. Some management fees have however been paid, in six separate payments, totalling US$4,389,842.40. The last payment was made on 10 January 2020, and exhausted the funds in the partnership account. According to the appellant, if fees are calculated by reference to a commitment of RMB 900 million, those initial setup and placement fees would total RMB 27 million, or about US$3.8 million. In addition, and also according to the appellant, the accrued management fees would amount to RMB 170,600,000, or about US$23.9 million (of which US$4,389,842.40 has been paid).

59. However, the appellant as general partner issued only two formal drawdown requests to the respondent, both in 2016, for a total amount of US$25,005,000. They were both paid. Out of that sum the appellant bought 523,189 preference shares in Xiaojiu Kuaji Inc, a company which ultimately owns a ride-hailing business in China similar to Uber. These constitute the sole asset of the limited partnership. They have diminished in value since purchase, and are now worth about US$7 million. The relationship between the parties soured, and on 30 August 2017 the appellant emailed the respondent with a suggestion that the partnership be dissolved. This was not agreed. And thereafter litigation ensued between the parties.

The main judgment below

60. In its original judgment the Royal Court recorded (at [308]) that the Bailiff had directed the jurats that section 29(2) of the 1995 Law gave the court a broad discretion as to the orders it might make ancillary to the dissolution of the limited partnership. The jurats decided (at [311]) that it would be unjust for fees to be paid to the appellant before any return to the respondent. They considered that clause 11.3 of the partnership agreement was a departure from section 32 of the Law, and so it should be disregarded, so that the appellant would benefit from fees only if there was a surplus after the respondent had been paid out its entitlement under section 32(c)(i) and (ii). Alternatively (at [312]) the appellant's entitlement to fees should be suspended from at least June 2019. In the event, the court (at [316]) was

> "persuaded, subject to any further representations, that any provision under which the [appellant] would be entitled to be paid accrued management fees should be severed from the [partnership agreement] with effect from a suitable date, but in any event no later than June 2019".

The reference to provisions being "severed" appears to be one to the purported exercise of the power contained in paragraph 17.3 of the partnership agreement.

61. This conclusion led to a further hearing, on consequential matters, which took place on 16 and 17 September 2021. At that hearing, amongst other things, the appellant sought to persuade the court to reconsider the views it had expressed on the appellant's right to fees in the original judgment. The judgment on consequential matters, including the question of fees, was reserved, and not handed down until 27 June 2022, some nine months later.

The supplementary judgment

The Bailiff's directions

62. In the supplementary judgment, the Bailiff accepted that, by virtue of clause 11.3 of the partnership agreement, the appellant's outstanding fees would take priority over any return to the respondent. However, the Bailiff also pointed out that, under the terms of the partnership agreement, the fees due to the appellant were to be calculated by reference to the respondent's "Commitment", which (according to the definition in the partnership agreement) was to be stated in the limited partner register. Here, the limited partner register contained no such statement of the *amount* of the Commitment. (As set out above, it simply stated "Ownership – 100%".) Accordingly (at [38]),

> "If the Jurats preferred to give to the [partnership agreement] a strict construction, it would necessarily follow that any fee calculated by reference to Commitment would be a percentage of zero…"

63. The Bailiff went on (at [40]) to direct the jurats

> "that it was a matter for their determination on the facts as to whether the amount of Commitment should be zero or some other amount".

In giving that direction the Bailiff had regard to the submissions on behalf of the respondent about (i) the breadth of the discretion under section 29(2) of the 1995 Law, and (ii) the similarity to the wording in section 350 of the Companies (Guernsey) Law 2008 dealing with the remedy that might be given in respect of complaints of conduct unfairly prejudicial to company shareholders.

64. After further discussion of the "unfair prejudice" jurisdiction, the directions in paragraph 308 of the original judgment about the effect of section 29(2) of the 1995 Law were repeated (at [46]), though the Bailiff reminded the jurats that they could not reach an outcome which was inconsistent with the terms of that Law. However, the terms of the partnership agreement could be

> "tailored in order to ensure that the outcome is not an unconscionable one, in the sense of producing something that is inequitable".

65. The Bailiff also directed the jurats (at [53]) that the words "invalid for any reason whatsoever" in clause 17.3 of the partnership agreement (dealing with severance of provisions which were illegal or otherwise invalid)

> "show that it would be feasible when considering an equitable outcome to disregard any provision where the Jurats consider that that is the appropriate course to take. In other words [clause 17.3] was referred to, and continues to be referred to, not as a means in law severing any provision, but rather as an example of how even the [partnership agreement] envisaged that severance was a possibility. As such, this was a further reason, and not the only reason, by which the Jurats could, as they wish, overlook the strict letter of the law as found in the [partnership agreement]".

66. The Bailiff reminded the jurats (at [54])

> "that the so-called 'blue pencil' test 'is a very limited jurisdiction and … It should not be used … as an attempt to rewrite a contract'. He repeated the direction given previously that the power in section 29(2) of the [1995] Law did not give the jurats carte blanche to disregard what the parties had agreed unless they were satisfied that those terms would produce an inequitable outcome."

67. Ultimately, the Bailiff directed the jurats (at [58]) that,

> "If they considered it appropriate to do so, they could decide what amount was the [respondent]'s Commitment and they could also decide whether there was a point in time after which the Management Fee payable under clause 6.7 would stop being claimable by the [appellant]."

In relation to that "cut-off" date, the jurats were directed (at [59]) that this fell within the broad discretion available pursuant to section 29(2) of the 1995 Law.

The jurats' findings

68. The jurats held (at [65]) that it would be unfair if the appellant's failure to record any Commitment in the limited partner register meant that it would be unable to receive any fees. But they were satisfied that it would be inequitable to use the figure of RMB900 million for the purpose of calculating the fees that should be receivable by the appellant. They were instead satisfied (at [66]) that the initial set up and placement fees under clause 6.8 should be calculated by reference to what was actually contributed to the limited partnership by the respondent, that is, US$25,005,000. This gave a total figure of US$750,150.

69. They were further satisfied (at [67]) that the amount actually contributed by the respondent should be the basis on which to calculate the management fees payable under clause 6.7. They said it would be perverse to use a different amount for each type of fees. Moreover, they said (at [68]) that in circumstances where the partnership was prohibited from operating as it had been envisaged it would, it would be wrong to hold the parties to this part of their bargain, as this would create a windfall for the appellant.

70. The jurats found (at [69]-[70]) that the management fee should be calculated from the date of the respondent's admission as a limited partner on 3 December 2015 until 26 March 2018, the date on which an injunction was granted in the BVI. They also found (at [74]-[75]) that the appellant was entitled to be indemnified for certain expenses, yet to be quantified by the liquidator. Their conclusion was that the appellant was entitled to fees under clause 6.7 and 6.8 totalling US$2,312,962.50. However, the appellant had already withdrawn the larger amount of US$4,389,842.40 and so the difference between those two figures was repayable to the liquidator less any expenses for which the appellant was entitled to be indemnified.

Conclusion

71. In relation therefore to the first and second aspects challenged (the limit on the appellant's entitlement under the partnership agreement, and obligation to repay), the Royal Court ultimately held as follows:

> "81. For the reasons given, the Court has rejected the primary cases of both parties. The Defendant is, in the Jurats' judgment, entitled to receive more from the assets of the limited partnership than just those expenses to which the indemnity in clause 13 of the LPA [limited partnership agreement] attaches. Equally, the Defendant is not entitled to receive fees calculated by reference to a Commitment of RMB900 million on the basis that, in the circumstances in which this limited partnership operated, that would be inequitable as between the partners. Accordingly, the focus for their decision-making has been on where, in between those two extremes, the entitlement of the Defendant should sit. They have determined that the entitlement of the Defendant was to receive the initial setup fee and the placement fee and also Management Fees for the period 3 December 2015 to 26 March 2018 in accordance with clause 6.7 and 6.8 of the LPA, but calculated by reference to the actual total Contribution made by the Plaintiff to the limited partnership of US$25,005,000. The aggregate of all those fees is US$2,312,962.50. In addition, the Jurats agree that the Defendant is entitled to receive those expenses to which its indemnity under clause

13 attaches and has indicated how it considers the liquidator might approach those issues. On the basis that the amount already withdrawn from the limited partnership's assets at Banque Havilland of US$4,389,842.40 will inevitably exceed the total to which the Jurats find the Defendant is entitled, the Court orders the Defendant to repay into an account to be specified by the liquidator the difference between the total entitlement and what has already been withdrawn. In the alternative, it would make a declaration that that amount, once it has been calculated, forms part of the assets of the limited partnership to which the liquidator can have recourse when winding up its affairs."

Introduction to the appeal

72. There are no provisions in the Court of Appeal (Guernsey) Law 1961 or Court of Appeal (Civil Division) (Guernsey) Rules 1964 which lay down the test to be applied by the Court of Appeal in deciding whether to allow an appeal. But the decided cases show that the appellate court will allow an appeal only where it is satisfied that the decision below was wrong, or at least where the decision-making process was unjust because of irregularity. However, the court will not overturn a finding of fact unless it is satisfied that the decision was wrong and there was no evidence which could have supported it. In relation to appeals against the exercise of a discretion, or the exercise of an evaluative judgment, this court will only intervene if the court below has erred in law, or if it has failed to take into account a material factor or taken into account an immaterial factor, or if it has reached a decision which is plainly wrong (*ie* one that is irrational, in the sense that no reasonable decision-maker could have reached it).

73. In relation to the decisions made by the Royal Court on the question of the appellant's fees, the appellant takes two main points. First, it submits that the Bailiff was wrong to direct the jurats that, on a strict construction of the partnership agreement, the appellant's fees should be calculated as percentages of zero, because no amount was "set forth" against the respondent's name on the limited partner register. Moreover, even if that were correct, the respondent was estopped from advancing that contention. Secondly, it says that the Bailiff was wrong to direct the jurats that section 29(2) of the 1995 Law permitted the court to modify the terms of the partnership agreement for the purpose of determining the distribution of assets.

Construction of the partnership agreement

74. The first of these problems is one of interpretation, arising from inconsistency between different contractual documents. Clause 1 of the agreement states that "Commitment" "means with respect to any Partner, the amount set forth opposite the name of such Partner on the LP Register; the Commitment of each Partner shall comprise an amount to be subscribed as capital". Whilst the first part of that definition defines "Commitment" by reference to the amount set out in the LP Register, the second part defines substantively what the Commitment is.

75. The "amount to be subscribed as capital" can be identified from other provisions in the agreement. Clause 3 not only stipulates that the respondent has an obligation to contribute an Initial Commitment (3.2) but then goes on to specify the amount (3.3), which is to be

divided into two tranches, each in a specified amount (3.4). Moreover, the Subscription Agreement, signed on behalf of the respondent, makes clear that the respondent is committed to paying the Initial Commitment, and states the amount (which is the same as in clause 3.3). Both documents disclose that the "amount to be subscribed as capital" is RMB 900 million.

76. The difficulty is that the limited partner register does not set out any amount against the respondent's name. It simply says "Ownership – 100%". Something has gone wrong. It may be that, when the appellant (who had the obligation under the agreement, but not under any statutory or regulatory rule, to maintain the limited partner register) entered against the respondent's name the words "Ownership – 100%", it meant simply to say that the respondent had a Commitment of one hundred per cent of the total Commitments shown elsewhere in the documents. It does not matter. The question of interpretation is whether the absence of a figure in the LP Register means that the "Commitment" is zero, even though the "amount to be subscribed as capital" can readily be identified from other provisions of the agreement, and indeed from the contemporaneous Subscription Agreement.

77. In English law, the interpretation of a written document is a question of law and not a question of fact: see *Carmichael v National Power plc* [1999] 1 WLR 2042, 2048-49, per Lord Hoffmann. There Lord Hoffmann pointed out that, although the rule had arisen for historical pragmatic reasons, because typically jurors could not read or write, it had been maintained thereafter as essential to the development of English commercial law, on the basis that commercial documents should be construed by judges rather than jurors.

78. In Guernsey law, the Bailiff (or deputy) is the sole judge of law, and, where they sit, the jurats are the judges of fact: Royal Court of Guernsey (Miscellaneous Reform Provisions) Law 1950, s 6(2)(a); Royal Court Reform (Guernsey) Law 2008, s 13. So it is important to know whether construction of documents is a matter of law or of fact. In *Lovering v Atkinson Ferbrache Richardson Advocates* 2017 GLR Note 14, a claim was brought against advocates in professional negligence in respect of an alleged defect in the title to a residential property which the plaintiffs purchased. It was necessary for the court to construe the conveyancing documents, and in particular a plan referred to in them.

79. The plaintiffs argued that

> "71. … the construction of the 1968 Conveyance is a question of law that falls to be determined by the Deputy Bailiff in favour of the Plaintiffs and there is nothing thereafter for the Jurats to resolve on this issue."

80. The defendants disagreed:

> "72. The Defendants submit that this contention represents a fundamental misunderstanding of the status to be afforded to plans referred to in conveyances. The true position is that, even without being explicit about the issue, the plan is always for the purposes of identification only unless there is express reference to it governing any matter, eg, one or more of the boundaries of the parcel of the land which is the subject of the conveyance. … Rather than it being a question of law for

resolution by a judge, the Court's task is to find where the line represented by the boundary marks ran … ”

81. McMahon DB said:

> “74. The principles that apply when construing documents are reasonably well settled. … There is nothing special arising from the fact that the Court is required to construe a conveyance and so the Deputy Bailiff has had regard to the way these principles apply when construing the conveyances in issue in this case.

82. Ultimately, the Royal Court dismissed the claim. The plaintiffs appealed to the Court of Appeal, which allowed the appeal: 2018 GLR Note 5. But this court, although it cited the paragraphs referred to above, did not deal with the respective roles of the judge and jurats in relation to interpretation of documents. However, the majority of the Judicial Committee of the Privy Council, to which the defendants unsuccessfully appealed, did have something to say.

83. Lord Hodge (with whom Lord Kitchin and Lord Sales agreed) said (2020 GLR 130):

> “14. … The Deputy Bailiff’s conclusion (para 81) was that the proper construction of each of the relevant conveyances is ‘that the boundary with Laitte Revel, owned by Mr and Mrs Le Lacheur was fixed by reference to the physical characteristics of where the boundary marks were located and not solely by measurement as shown on the annexed plan’.
>
> 15. As a result of that conclusion, the question was seen as a question of fact: where were the boundary markers placed on the ground in 1960? …
>
> […]
>
> 17. The Jurats, as the masters of the facts, concluded that the driveway as constructed would have followed the alignment marked out by boundary marks in 1960, following the natural contours of the land and, having regard to the topography, as close as possible to the Brehaut field. The Jurats held that the boundary marks would not have been laid out in accordance with the boundaries shown on plan 2842 and concluded that Mr and Mrs Lovering had failed to prove their case that the land on which La Roche Douvre was built was enclavé.”

84. From this case it is clear that the construction of a written document is a matter of law for the Bailiff (or deputy), but that the true construction as so held may require the finding of facts (here, the position in 1960 of the boundary markers) by the jurats.

Principles of interpretation

85. In *Midland Resources Holdings Ltd v Prodefin Trading Ltd* 2017 GLR 304, the court had to construe the articles of association of a company. On an appeal from the decision of the Royal Court, Anderson JA said:

"14. It was common ground before us that the principles applicable to the construction of the Articles of Association of a Guernsey company are in material respects the same as those set out in the context of the construction of a lease by Lord Neuberger (with whom Lord Sumption, Lord Hughes and Lord Hodge agreed) in *Arnold v Britton* [2015] UKSC 36; [2015] AC 1619. Lord Neuberger summarised those principles at para 15:

> 'When interpreting a written contract, the court is concerned to identify the intention of the parties by reference to "what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean", to quote Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] AC 1101, para 14. And it does so by focussing on the meaning of the relevant words … in their documentary, factual and commercial context. That meaning has to be assessed in the light of (i) the natural and ordinary meaning of the clause, (ii) any other relevant provisions of the lease, (iii) the overall purpose of the clause and the lease, (iv) the facts and circumstances known or assumed by the parties at the time that the document was executed, and (v) commercial common sense, but (vi) disregarding subjective evidence of any party's intentions."

He went on to make seven further observations, which it is not necessary to set out here.

15. A suggestion that the approach set out in *Arnold v Britton* involved a recalibration of the earlier guidance given in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 was dismissed by a unanimous Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24; [2017] 2 WLR 1095. As Lord Hodge emphasised, the construction of a contract is a 'unitary exercise': '[O]nce one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each'.(para 12).

16. The principles applicable in Jersey have been described as consistent with those developed by the Supreme Court in *Rainy Sky* and in *Arnold v Britton*: see *Trilogy Management Limited v YT Charitable Foundation (International) Limited* [2012] JCA 152, paras 38-39 and (with specific reference to Articles of Association) 41; *Parish of St Helier v Minister for Infrastructure* [2017] JCA 027, paras 12-13. It was not suggested to us that there are any material differences between the principles of construction set out by the higher courts of the United Kingdom and those applicable in Guernsey, and we proceed on the basis that those principles are the same."

Discussion

86. The “strict construction” of the definition in clause 1 coupled with the entry in the limited partner register discussed by the Bailiff in the Royal Court does not take account of the other provisions of the contractual documents, and does not make any business sense. It gives primacy to a document not signed by the respondent, and makes redundant not only clauses 3.2, 3.3 and 3.4 of the partnership agreement (signed by the respondent), but also the express statements in the subscription agreement (also signed by the respondent, and in evidence before, but not referred to by, the court below).

87. It leaves the appellant with zero entitlement to fees under paragraphs 6.7 and 6.8, which plainly was not the parties’ intention. The appellant was not entering into this arrangement for philanthropic or altruistic reasons. Moreover, although it was not mentioned in the court below, it *also* means that the respondent would have no entitlement to receive any Distributions under paragraph 10, or on a liquidation to recover any of its subscribed capital under paragraph 11. That simply could not have been intended. This was a commercial investment, not a gift.

88. It is clear from the limited partnership agreement itself and the subscription agreement that the respondent was agreeing to provide a total Commitment of RMB 900 million, and no one could have been misled by the entry in the limited partner register, which (after all) did not specify a different (or any) figure. The respondent cannot complain that it did not agree to provide such a Commitment. There is no doubt that the “amount to be subscribed as capital”, to use the phrase in the definition of “Commitment” was RMB 900 million.

89. The parties clearly intended the provisions which use the word “Commitment” – such as the provision for calculating the appellant’s entitlement to fees and the provision under which the respondent receives distributions – to have practical content, and to have content by reference to the “amount to be subscribed as capital” to use the phrase in the definition. That amount can readily be identified from the contract documents as a whole.

90. It is true that the appellant had the obligation to keep the register updated, and can be said to be responsible for the failure to identify any commitment figure (although in fact it outsourced the administration to a third party). But the existence of the updating obligation cannot affect the true construction of the documents. Nor, in our view, should it be allowed to defeat what was the obvious contractual intention of the parties when they used the word “Commitment” in various contexts in the agreement.

91. The conclusion must be that, as a matter of law, the true construction of the documents, taken as a whole, is that the Commitment for the purposes of the partnership agreement, was to provide a sum of RMB 900 million in accordance with the terms of that agreement. Those terms include terms relating to the calculation of the entitlement of the appellant to fees. It follows that the directions which the Bailiff gave to the Jurats on the interpretation of the contract were erroneous. The Royal Court was wrong in the conclusions it came to in paragraphs 1 and 3 of the Act of Court dated 28 June 2022, and the appeal must be allowed on this point.

92. In these circumstances, the argument based on estoppel does not arise, and there is no need to address it.

Section 29(2) of the 1995 Law

The Bailiff's directions

93. The second point in this appeal relates to the meaning and effect of section 29(2) of the 1995 Law, the terms of which have already been set out above. In the original judgment, the Bailiff directed the jurats that the power under this provision must be exercised judicially, and (at [308]) that

> "The manner of exercising the discretion available cannot override any express provision in the LP Law, which will always govern the manner in which a winding up has to be conducted for the reason that this is what the legislator has provided".

94. The appellant does not challenge this. But it does challenge the further direction that, by virtue of the powers of section 29(2) the terms of the partnership agreement could be

> "tailored in order to ensure that the outcome is not an unconscionable one, in the sense of producing something that is inequitable,"

and that, if the jurats

> "considered it appropriate to do so, they could decide what amount was the [respondent]'s Commitment and they could also decide whether there was a point in time after which the Management Fee payable under clause 6.7 would stop being claimable".

95. The appellant submits that these powers cannot be used to override the express statutory provision in section 32(c) of the 1995 Law which accords primacy to the terms of the partnership agreement.

Discussion

96. In its supplementary judgment (at [41]-[45]), the Royal Court drew a comparison with the court's powers on an unfair prejudice claim under the Companies (Guernsey) Law. We do not consider that this was an apt analogy. The legislation is in different terms. More fundamentally, the unfair prejudice provisions in the companies legislation provide a *remedy* to those shareholders who prove that they have been the subject of conduct unfairly prejudicial to their interests by other shareholders: see *eg Grace v Biagioli* [2005] EWCA Civ 1222, [73]. No one who joins a company bargains to be unfairly prejudiced by fellow shareholders. The right not to be unfairly prejudiced is conferred by statute, and cannot be taken away by contract.

97. By contrast, section 29(2) of the 1995 Law does not confer a remedy for any wrong. Instead it provides for the court to be able to fashion orders which vindicate the pre-existing rights of the parties on the dissolution of the partnership. Those pre-existing rights are reflected in (for example) section 32, providing for the order in which the assets of the partnership shall be distributed. First, at (a), there are outside creditors, who have the rights which they had

under the general law. It is unthinkable that section 29(2) should confer a power to take away those rights, yet the Royal Court's approach did not distinguish them from the other rights referred to.

98. Second, at (b), there are limited partners who are creditors (but not also general partners). They too have rights under the general law, although the legislator has chosen to subordinate their interests to those of the outside creditors, no doubt to give the latter greater comfort in doing business with the partnership. Finally, at (c), there are the interests of limited partners in respect of their contributions or profits on those contributions, and (in that order) the interests of general partners. However, and importantly, this final provision is expressly "subject to the provisions of the partnership agreement".

99. Any provision of the partnership agreement which is at variance with the order of priority contained in section 32(c) has the effect of altering that order of priority. This is not however by virtue of the mere contract, important though that is. It is by virtue of *the words of the statute itself*, which in effect gives to the parties to the agreement the ability to stipulate their own rights and obligations as between themselves for what happens on a dissolution. It is a strong example of the maxim "*La convention fait la loi des parties*", which plays such an important role in the customary laws of both bailiwicks of the Channel Islands: *Incat Equatorial Guinea Ltd v Luba Freeport Ltd* 2010 JLR 287, [21]-[22]; *Smith v Carey Olsen* 2020 GRC 62, [23].

100. It is unthinkable that section 29 in the form that it is written should be able to take away those rights. In *Cavendish Square Holding BV v Makdessi* [2016] AC 1172, SC, Lord Neuberger and Lord Sumption said:

> 13. … Leaving aside challenges going to the reality of consent, such as those based on fraud, duress or undue influence, the courts do not review the fairness of men's bargains either at law or in equity. … "

101. Nor do the courts take away property rights. For example, Farwell J in *In re Walker* [1901] 1 Ch 879, 885, said:

> "I decline to accept any suggestion that the court has an inherent jurisdiction to alter a man's will because it thinks it beneficial. It seems to me that is quite impossible."

102. Again, in *Chapman v Chapman* [1953] Ch 218, where trustees of certain trust funds sought a variation of the trusts for the benefit of the minor and unborn beneficiaries (who could not express their own agreement), the majority of the Court of Appeal expressed itself in the following terms, approved by the House of Lords ([1954] AC 429):

> "The general rule ... is that the court will give effect, as it requires the trustees themselves to do, to the intentions of a settlor as expressed in the trust instrument, and has not arrogated to itself any overriding power to disregard or re-write the trusts … "

103. So, in order for the court to have power to alter or remove established contractual or property rights, there would need to be clear statutory authority giving the court that power.

(Hence the enactment of the Variation of Trusts Act 1958, to solve the *Chapman* problem.) But, as Lord Hoffmann put it in *R v Home Secretary, ex p Simms* [2000] 2 AC 115, 131,

> "Fundamental rights cannot be overridden by general or unambiguous words."

104. Given the importance of contractual and property rights, statutory authority to alter or remove those rights must demonstrate a clear and unambiguous intention on the part of the legislature to allow such alteration or removal. There is no such clarity of intention to be found in section 29(2). On the contrary, section 29 is a perfectly intelligible and sensible provision to deal with the administration of the liquidation of the partnership. The powers it confers are administrative, and are not concerned with altering substantive rights. The Bailiff's construction gives no weight to the important phrase "in relation to the dissolution".

105. In discussing the purported analogy of unfair prejudice remedies to section 29(2), the court below in its supplementary judgment referred to *dicta* of Lord Wilberforce in *Ebrahimi v Westbourne Galleries Ltd* [1973] AC 360, in the context of the "just and equitable" winding-up of a company. Lord Wilberforce said this (at 379):

> "The 'just and equitable' provision does not, as the respondents suggest, entitle one party to disregard the obligation he assumes by entering a company, nor the court to dispense him from it. It does, as equity always does, enable the court to subject the exercise of legal rights to equitable considerations; considerations, that is, of a personal character arising between one individual and another, which may make it unjust, or inequitable, to insist on legal rights, or to exercise them in a particular way."

In the present case, the Royal Court has fallen into error in concentrating on the second sentence, whilst ignoring the first.

106. Guernsey's attraction as a financial centre is based in large part on *stability* and *predictability*. If overseas investors are to be persuaded to entrust their wealth to Guernsey structures operating according to agreed programmes, then, in the absence of a vitiating element (*eg* fraud) or other wrongdoing or clear statutory authority in pursuit of a legitimate legislative aim, those agreements should be upheld rather than rewritten by the court.

107. It follows that section 29(2) of the 1995 Law does not have the effect that the Bailiff directed the jurats that it did have. The Royal Court had no power to rewrite the bargain between the partners. The appeal must therefore be allowed on this point also.

108. In these circumstances it is not necessary for us to consider what we would have done if, on the basis that we have found in favour of the appellant on the construction of the partnership agreement, we had found against the appellant on the question of the effect of section 29(2).

109. For the sake of completeness, we add this in relation to paragraph 17.3 of the partnership agreement, on which the Bailiff directed the jurats, and on which they appear to have relied. This clause is a common form of provision inserted in commercial agreements to make clear that, if any part of the agreement should fail for any reason, the rest remains

valid and enforceable. It saves the agreement from being treated as an entire agreement, in which the whole stands or falls together. It was not thereby intended to confer a power on the court to disregard any provision which it thought unfair. The Bailiff's direction that it showed that "it would be feasible when considering an equitable outcome to disregard any provision where the Jurats consider that that is the appropriate course to take" was accordingly a misdirection.

DISPOSITION

110. The appeal is allowed.

POSTSCRIPT

111. After the draft of this judgment had been finalised, but before it was handed down, the court received an email (dated 14 September 2023, at 17:23) from the email address of Stanislav Borodaev. It is written in the first person, though it refers to Mr Borodaev in the third person, and, although it ends with the phrase "Kind regards", no name appears following those words. Nevertheless, we infer that it comes from Mr Borodaev.

112. It says that Mr Borodaev has never had

> "any power of attorney or any statutory or contractual authority, like an employment agreement, to represent Fonds Rusnano Capital SA. The Respondent of the particular case is Fonds Rusnano Capital SA which has the director, legal address and all other attributes (email of the director, secretarial company and etc)."

It goes on to say that the emails to Mr Borodaev

> "do not constitute any facts regarding notifications, services or any other procedural issues".

113. We asked Advocate Warrilow if she wished to make any comments on this email. Those comments were substantively to the effect that (i) Mr Borodaev had told the court that he was "an in house lawyer within the Rusnano group of Companies [who had] taken over the oversight of the matter from Ms Bochkova", and that he was employed by "Management Company RUSNANO LLC" with an address in Moscow, and that (ii) sending documents by email to Mr Borodaev was only an additional step to ensure that they came to the respondent's attention.

114. In this judgment, we have not held that emails to Mr Borodaev constituted service on the respondent within the procedural rules. What we have decided is that such emails are part of the factual matrix in which we have decided to make a direction "otherwise" under rule 19(1) of the 1964 Rules. It is therefore unnecessary to say any more about this email.