EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2014/0033

BETWEEN:

AMERINVEST INTERNATIONAL FORESTRY GROUP COMPANY LIMITED
Appellant

and

KWOK KA YIK
Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE	Chief Justice
The Hon. Mr. Davidson Kelvin Baptiste	Justice of Appeal
The Hon. Mr. Mario Michel	Justice of Appeal

On written submissions:

Mr. Paul B. Dennis, QC and Ms. Akilah Anderson for the Appellant

---

2015: March 4.

Interlocutory appeal – Permission to serve claim out of jurisdiction – Rule 7.3(7) of the Civil Procedure Rules 2000 – Whether the learned judge erred in finding that there was no dispute about the ownership of the company – Whether the learned judge wrongly concluded that BVI was not the appropriate forum for adjudication

The appellant ("the Company") was incorporated under the laws of the Virgin Islands ("BVI") on 24th February 2007. The Company's first directors were said to be a Mr. Sing Wang ("Mr. Wang") and the respondent, Ms. Kwok Ka Yik ("Ms. Kwok"). The Company asserts that at a meeting of its board of directors, comprising Mr. Wang and Ms. Kwok, held on 2nd March 2007, a resolution was passed accepting Ms. Kwok's resignation as a director.

The Company wholly owns subsidiaries in Hong Kong ("the Hong Kong Subsidiaries") and between 2011 and 2013, the Hong Kong Subsidiaries submitted various documents to the Hong Kong Companies Registry for filing. These documents appeared to have been signed by Mr. Wang on behalf of the Company as sole shareholder of the Hong Kong Subsidiaries. The Hong Kong Companies Registration Officer ("the CRO") refused to accept and register the documents because of various representations of entitlement

made by Ms. Kwok in relation to the Hong Kong Subsidiaries and corporate shareholders of the Company. This was despite the response by the Hong Kong Subsidiaries disputing Ms. Kwok's allegations. They asserted that there was no dispute as to the ownership of the Company, but only a dispute as to the ownership of Loyal Seas Limited ("Loyal Seas"), one of the shareholders of the Company which they contend does not affect the beneficial ownership of the Company or Mr. Wang's authority to sign as a director on its behalf. The CRO was not persuaded by the Hong Kong Subsidiaries' assertions and the Hong Kong Subsidiaries subsequently appealed to the Hong Kong Special Administrative Region Court of First Instance ("the Hong Kong SAR") against the CRO's refusal to register the documents.

On 29th August 2014, on an application by the Hong Kong Subsidiaries, the Hong Kong SAR adjourned the hearing of the appeal to a date on or before 15th December 2014 to allow for proceedings to be commenced in the BVI court. The Company filed a claim[1] in the BVI High Court on 24th October 2014 naming Ms. Kwok as the defendant and sought various declarations and other relief. Ms. Kwok, the only named defendant, is resident out of the jurisdiction, apparently in Hong Kong. Accordingly, permission to serve out of the jurisdiction is required.

The Company made an ex parte application pursuant to rule 7.3(7) of the Civil Procedure Rules 2000 for permission to serve the claim form on Ms. Kwok out of the jurisdiction. The learned judge in the court below found that there was no dispute in the BVI in this jurisdiction about the Company's membership or the constitution of its board and accordingly refused the application. The Company, being dissatisfied with the decision, sought and obtained leave to appeal.

Held: dismissing the appeal and ordering that the appellant bears the costs of the appeal, that:

1. It is trite law that in appeals from the exercise of a judge's discretion, an appellate court should not interfere with a decision of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court. In this appeal, the learned judge correctly applied the relevant principles and took into account relevant matters and left out of account irrelevant matters in reaching his decision. Consequently, there was no basis upon which the Court could disturb the learned judge's decision.

   Nilon Ltd and another v Royal Westminster Investments SA and others [2015] UKPC 2 applied.

2. On an application for service out of the jurisdiction, three requirements have to be satisfied. First, the claimant must satisfy the court that in relation to the foreign

[1] The claim was filed by the Company and not the Hong Kong Subsidiaries.

defendant, there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. Second, the claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. Good arguable case in this context connotes that one side has a much better argument than the other. Third, the claimant must satisfy the court that in all the circumstances the forum which is being seised is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service out of the jurisdiction.

Nilon Ltd and another v Royal Westminster Investments SA and others [2015] UKPC 2 applied; **AK Investment CJSC and others v Krygyz Mobil Tel Ltd and others** [2011] UKPC 7 applied.

3. The fact that the CRO elected of her own volition to characterize the allegations made by Ms. Kwok as a dispute as to the ownership and directorship of the Company did not thereby render it such. Ms. Kwok's allegations of an entitlement related to the Hong Kong Subsidiaries and in respect of ownership and directorships in the shareholder companies of the Company. There was no assertion made by her to being a shareholder of the Company. Accordingly, the learned judge rightly found that there was no serious issue to be tried as it related to the constitution of the membership and directorship of the Company as the Company knows who are its members and directors. In the circumstances, it would be a waste of time and resources to declare by way of preemptive measure on behalf of the Company that which the Company already knows and which has not been effectively challenged so as to afford some sort of pre-determination or shield in the event that a challenge was mounted.

4. The real issue in this matter is the CRO's refusal to register the documents related to the Hong Kong Subsidiaries. The learned judge was alive as to this issue rather than the perceived issue on which the case was being sought to be made. He was not satisfied that a genuine dispute had arisen, whether within or without the jurisdiction, in relation to the composition of the Company's members and or directors. Accordingly, the learned judge was right to conclude that any questions about registrability and changes to the boards or registered agents of Hong Kong SAR companies is something exclusively within the jurisdiction of the courts of the Hong Kong SAR.

5. The view that matters concerning the organization and administration of a company are generally treated as matters ideally suited to be determined in the location in which the company is incorporated, should not be taken out of context. In this appeal these issues did not arise as the real issue is the propriety of the Hong Kong CRO's refusal to register documents relating to the Company's Hong Kong Subsidiaries. Consequently, the learned judge rightly found that it had not been shown that there was any issue relating to the constitution, administration or control of the Company which engaged the gateway provided by CPR 7.3(7) for service out of the jurisdiction.

Rule 7.3(7) of the **Civil Procedure Rules 2000** applied; **Nilon Ltd and another v Royal Westminster Investments SA and others** [2015] UKPC 2 applied; **AK Investment CJSC and others v Krygyz Mobil Tel Ltd and others** [2011] UKPC 7 applied; **Royal Westminster Investments SA et al v Nilon Limited et al** BVIHCMABP2010/0034 and BVIHCMAP2011/0001 (consolidated) (delivered 16th January 2012, unreported) distinguished.

JUDGMENT

[1] **PEREIRA CJ**: This is an appeal ex parte, which arises from an ex parte application by the appellant ("the Company") for permission to serve a claim form out of the jurisdiction ("the Serve out Application") on one Ms. Kwok Ka Yik ("Ms. Kwok"), the named respondent. The Serve out Application is said to be made pursuant to rule 7.3(7) of the **Civil Procedure Rules 2000** ("CPR 2000") which states that:

> "*Claims about companies*
>
> (7) A claim form may be served out of the jurisdiction if the subject matter of the claim relates to –
>
> (a) the constitution, administration, management or conduct of the affairs; or
>
> (b) the ownership or control of a company incorporated within the jurisdiction."

The judge in the court below, Bannister J, refused to grant permission to serve out. The Company being dissatisfied has, with the leave of the Court, appealed.

The Background

[2] The Serve out Application was brought and fell to be considered against the following background as set out by the Company:

(a) The Company was incorporated under the laws of the BVI on 24th February 2007. The Company's first directors were said to be a Mr. Sing Wang ("Mr. Wang") and Ms. Kwok. On its incorporation it issued one (1) share to a company called Wang Strategic Capital Partnership Limited ("WSCP").

(b) At a meeting of the Company's board of directors (comprising Mr. Wang and Ms. Kwok) held on 2nd March 2007, a resolution was passed accepting Ms. Kwok's resignation as a director.

(c) On 22nd October 2007, the Company issued an additional 12,765 shares distributed amongst three (3) companies: WSCP, Loyal Seas Limited ("Loyal Seas") and Fulltech Holdings Limited ("Fulltech"). WSCP sold all its shares to another company called Lunar Forestry Holdings Limited ("Lunar").

(d) The Company's shareholders (Lunar, Loyal Seas and Fulltech) agreed upon the directorship of the company: 4 on behalf of Lunar, 2 on behalf of Loyal Seas and 1 on behalf of Fulltech. Mr. Wang, it appears, was re-appointed as a director of the company on behalf of Lunar.

(e) The Company wholly owns subsidiaries in Hong Kong ("the Hong Kong Subsidiaries"). The Hong Kong Subsidiaries, between 2011 and 2013, submitted various documents (notifications of change of secretary and directors, special resolutions, annual returns and notification of change of address of registered office) to the Hong Kong Companies Registry for filing. These documents appear to have been signed by Mr. Wang on behalf of the Company as sole shareholder of the Hong Kong Subsidiaries. The Hong Kong Companies Registration Officer ("CRO") refused to accept and register the documents because of various representations made by Ms. Kwok to the effect that:

    (i) she is the sole shareholder and sole director of Loyal Seas;

    (ii) Loyal Seas is entitled to appoint 2 directors to the board of the Company;

    (iii) she is the owner of WSCP;

    (iv) she had not resigned as a director of the Company but was unlawfully removed; and

(v) the certificate of incumbency showing the shareholders and directors of the Company as well as that showing the shareholding and directorship of Loyal Seas were false documents.

This is despite the response by the Hong Kong Subsidiaries disputing Ms. Kwok's allegations in which they asserted that there was no dispute as to the ownership of the Company, but a dispute only as to the ownership of Loyal Seas, one of the shareholders of the Company which they say does not affect the beneficial ownership of the Company or Mr. Wang's authority to sign as a director on its behalf.

(f) The CRO was not persuaded and the Hong Kong Subsidiaries appealed the CRO's refusal to register the documents to the Hong Kong Special Administrative Region Court of First Instance ("the Hong Kong SAR").

(g) On the application of the Hong Kong Subsidiaries, the Hong Kong SAR, on 29th August 2014, adjourned the hearing of the appeal to a date on or before 15th December 2014, it is said, to allow proceedings to be commenced in the BVI court.

(h) The Company[2] filed a claim form in the BVI High Court on 24th October 2014 naming Ms. Kwok as the defendant, in which declarations were sought to the effect that:

(i) Loyal Seas, Lunar and Fulltech are its shareholders;

(ii) Mr. Wang has always been a director of the Company;

(iii) Ms. Kwok is not a director of the Company.

Further, the Company sought:

(i) injunctive relief against Ms. Kwok in effect restraining her from holding herself out as a shareholder and a director of the

[2] Not the Hong Kong Subsidiaries

Company or from otherwise making representations to third parties to this effect; and

(ii) an order (if necessary) for the rectification of the register of members and directors of the Company.

(i) Ms. Kwok being the only named defendant is resident out of the jurisdiction and is apparently resident in Hong Kong. Accordingly, permission to serve out of the jurisdiction is required.

The Basis for Service Out

[3] The Company's primary argument for service out, in seeking to utilize the gateway provided by CPR 7.3(7), is that the subject matter of the claim relates to: (a) the constitution, administration, management or conduct of the affairs and (b) the ownership or control of a company incorporated in the Virgin Islands. The Company argued in essence that they are entitled to declaratory relief essentially as to the constitution of its membership and its directorship because of the various allegations made by Ms. Kwok to the CRO in Hong Kong and various other third parties, suggesting that she has an interest or sole interest in one or two of the shareholders of the Company and that she was illegally removed as a director of the Company.

The Judge's Ruling

[4] In a short oral judgment delivered on 27th November 2014,[3] the learned judge concluded that there was no issue in this jurisdiction about the Company's membership or the constitution of its board. He opined at page 6 of the transcript of the proceedings[4] as follows:

> "As the affidavit in support of this application, and the excellent skeleton argument show, the Company knows perfectly well who are its members and its directors. No one has come forward here to challenge that understanding. It must be a simple matter of the company law of the

[3] Following the hearing of the Serve out Application the day prior.
[4] Record of appeal p. 587.

> Hong Kong SAR to determine whether its companies' registration officer was right to reject the filings, and if she was, what steps need to be taken to remedy … whatever defect the Hong Kong Court decides entitled her to do so. If it turns out to require a blow by blow battle in this jurisdiction to establish who owns the Company's members, which I very much doubt, or whether Ms. Kwok is a director of the Company, which I also very much doubt, then the landscape will have changed, and matters may need to be reconsidered. As things stand at present, however, I am not prepared to allow litigation in this forum in order to resolve by the back door an issue which is appropriately to be resolved in the Courts of a friendly foreign jurisdiction …"

The Appeal

[5] The Company has raised some seven grounds of appeal in respect of which it says the learned judge erred in the exercise of his discretion. In summary the Company says that the learned judge erred:

(1) in finding that there was no dispute about the ownership of the Company having regard to the averments in the statement of claim and the evidence placed before him;

(2) In finding that the intended defendant[5] had made no challenge to the Company's composition as to its membership or board of directors **in the BVI** and thus erroneously concluded that there was no serious issue to be tried in BVI;

(3) in failing to consider that (a) even if the challenge was only taking place abroad, such consideration is immaterial to the question whether there is a serious issue to be tried in this jurisdiction and (b) that requiring an active challenge to first be launched in this jurisdiction, creates an artificial and unreasonable restriction on the Company's access to relief to which the Company would be entitled in this jurisdiction;

(4) in finding that the BVI court was being asked to resolve disputes about the registrability of changes related to the Hong Kong Subsidiaries, when he

[5] Ms. Kwok, the named respondent.

was being asked to simply adjudicate upon the narrow dispute relating to the membership and directorship of the Company – a BVI entity;

(5) based on the above findings, in concluding that the BVI was not the appropriate forum for resolving the dispute;

(6) in failing to consider that the nature of the dispute disclosed on the pleadings placed the matter within the ambit of CPR 7.3(7).

The principles

[6] Before addressing the complaints made by the Company, this is a convenient point at which to be reminded of the general principles by which an appellate court is guided when being asked to disturb the exercise of a lower court's discretion in the application of the well-established principles to be applied on permission to serve out. The principles were recently restated by the Privy Council in **Nilon Ltd and another v Royal Westminster Investments SA and others**[6] an appeal emanating from the Commercial Division in the Virgin Islands which also involved an application for permission to serve out, albeit by engaging a different gateway under CPR 7.3 to that being engaged here. At paragraph 16, Lord Collins, delivering the judgment of the Board, with considerable brevity, put it this way:

> "It is … trite law that in appeals from the exercise of a discretion an appellate court should not interfere with a decision of a lower court which has applied the correct principles and which has taken into account matters which should be taken into account and left out of account matters which are irrelevant, unless the appellate court is satisfied that the decision is so plainly wrong that it must be regarded as outside the generous ambit of the discretion which has been entrusted to the court."

[7] Further the applicable principles to be applied in relation to service out of the jurisdiction are aptly captured in the case of **AK Investment CJSC and others v Krygyz Mobil Tel Ltd and others**.[7] These principles were also restated in **Nilon**

[6] [2015] UKPC 2.
[7] [2011] UKPC 7 at para 71 (Lord Collins).

at paragraph 13 in the following terms:

> "On an application for service out of the jurisdiction, three requirements have to be satisfied. First, the Claimant must satisfy the court that in relation to the foreign Defendant there is a serious issue to be tried on the merits, ie a substantial question of fact or law, or both. Second, the Claimant must satisfy the court that there is a good arguable case that the claim falls within one or more classes of case in which permission to serve out may be given. In this context "good arguable case" connotes that one side has a much better argument than the other. Third, the Claimant must satisfy the court that in all the circumstances the forum which is being seised (here the BVI) is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction."

No Dispute about the Ownership of the Company

[8] The Company says that there was a clear indication in the statement of claim that the proceedings commenced in BVI were in order to settle a dispute about the Company's ownership and directorship as raised by Ms. Kwok. It points to Ms. Kwok's assertions contained in various emails and attachments to the same and communications by Ms. Kwok with the CRO in which it says Ms. Kwok has claimed an entitlement to the shareholding of the Company and the right to appoint directors to its board and that she is a director of the Company, notwithstanding the Company's register of members and register of directors which do not support such claims, and of the fact that she has challenged directly with the CRO the certificate of incumbency of the Company suggesting that it is a false document. This, the Company says, is a clear challenge to the composition and control of the Company. The Company says that the refusal of the CRO to comply with the Company's instructions to register the documents was the precipitating event for the Company's recourse to the BVI. It refers to the averment contained at paragraph 8 of the statement of claim[8] which says:

> "The CR Officer refused to register the documents submitted by the Hong Kong [Subsidiaries] on the basis that they would not be accepted for filing until the alleged dispute regarding the shareholding and directorship of AIFGCL, [the Company], the sole shareholder (directly or indirectly) of

[8] Record of appeal p. 20.

these companies, is resolved by the parties or by a Court."

Discussion

[9] When the exhibits and documents are perused, as well as the position taken by the CRO, what becomes clear is that Ms. Kwok's allegations of an entitlement relates to the Hong Kong Subsidiaries and allegations of entitlement in respect of ownership and directorships in the shareholder companies of the Company. There is no assertion made by her to being a shareholder of the Company. While it is correct that Ms. Kwok has also asserted to the CRO and other persons that she was unlawfully removed as a director of the Company, there is nothing to suggest that she has done anything more than make allegations. Regrettably, Ms. Kwok has succeeded in having the CRO treat her assertions as one giving rise to a perceived dispute regarding the shareholding and directorship of the Company which indisputably is the sole shareholder of the Hong Kong Subsidiaries, warranting the CRO to refuse registration of the documents relating to the Hong Kong Subsidiaries while in the same breath claiming not to be the adjudicator in relation to such a dispute if indeed there is a dispute at all. The Hong Kong Subsidiaries in their letter of 29th November 2013 to the CRO made plain that there is no dispute as to the ownership or directorship of the Company. The fact that the CRO has elected of her own volition to characterize the allegations made by Ms. Kwok as a dispute as to the ownership and directorship of the Company does not thereby render it such. The appropriate course then seems to be that which was taken by appealing to the Hong Kong SAR to correct the CRO's view (if her view was erroneous) as it relates to the filing of the documents in respect of the Hong Kong Subsidiaries. In my view the learned judge was quite right to hold that there was no serious issue to be tried as it relates to the constitution of the membership and directorship of the Company, as the Company knows full well who are its members and directors. The fact that the CRO in Hong Kong perceives such a dispute, for whatever may be her reasons for so perceiving, does not thereby convert what is clearly not in dispute as between the intended parties hereto into a dispute. I agree with the leaned judge that it will simply be a waste of time and resources to declare by way of preemptive measure on behalf of the

Company that which the Company already knows and which has not effectively been challenged or so as to afford some sort of predetermination or shield in the event that a challenge was to be mounted. It was well within reason for the learned judge to find as he did based on the pleaded case and the evidence that there was no serious issue to be tried in relation to the declarations sought. I would dismiss this ground of appeal.

Whether the Challenge Must Be One Taking Place in BVI

[10] The complaint made in grounds 2 and 3 above mentioned, relates to the learned judge's finding[9] that 'there is no issue in **this jurisdiction** about the Company's membership or the constitution of its board' and having stated that the Company knows perfectly well who are its members and its directors, his further statement that 'no one has come forward **here** to challenge that understanding.'[10] **(My emphasis)**.

[11] The Company contends that the learned judge erroneously took the view that because Ms. Kwok had not challenged the Company's membership and directorship **in BVI**, there was no issue to be tried in BVI. It relies on Ms. Kwok's representations made to the CRO and others that the certificate of incumbency of the Company issued by its registered agent in BVI is false. On this basis it says that this constitutes, in a very real sense, a challenge within the jurisdiction of the membership and directorship of the Company and it matters not that Ms. Kwok had not launched proceedings in BVI to challenge the position contended for by the Company. The Company further says that even if the learned judge was correct in viewing the challenge to the Company's membership and directorship as only taking place abroad, this would be irrelevant to the question of whether there is a serious issue to be tried in the BVI. In essence, the Company complains that this constriction seemingly imposed by the learned judge is unwarranted in

[9] Transcript of chamber proceedings (Thursday, 27th November 2014), p. 5, line 25 to p. 6, line 1; Record of appeal pp. 586 to 587.
[10] Transcript of chamber proceedings (Thursday, 27th November 2014), p. 6, lines 6 to 7; Record of appeal p. 587.

circumstances where a BVI Company considers it requires relief in the jurisdiction of its incorporation.

Discussion

[12] Notwithstanding the skillful arguments put forward by counsel, I consider the criticisms made of the learned judge in relation to this aspect of the matter to be unfair. Firstly, there is no finding by the learned judge or indeed any statement in his decision from which it may be reasonably inferred that he was satisfied that there was a dispute as to the ownership and directorship of the Company. Even though the judge may have stated the lack of a challenge by Ms. Kwok by reference to the BVI, I am satisfied on reading the entirety of his oral decision that he was not satisfied that a genuine dispute had arisen, whether within or without the jurisdiction, relating to the composition of the Company's members and/or its directors. Having set out the background, albeit briefly, to the proceedings and the actions which precipitated it, he opined as follows:[11]

> "I cannot see, for my part, what the registrability of particulars submitted by certain Hong Kong SAR registered companies has to do with a dispute, to the extent there is a dispute at all, about the Constitution of the board of its hundred percent parent company, still less with the ownership of the company's corporate shareholders."

To my mind this clearly shows that the learned judge was quite alive to what in effect was the real issue rather than the perceived issue on which the case was being sought to be made. The real issue is the CRO's refusal to register the documents related to the Hong Kong Subsidiaries. Her refusal in turn appears to be based on a perceived issue on her part relating to the ownership and directorship of the Company. The CRO's conclusion, it seems, was informed by the assertions made to her by Ms. Kwok concerning her ownership or directorships in various of the Hong Kong Subsidiaries and various of the corporate members of the Company. However, as I stated earlier, the CRO's notion of where the dispute actually lies despite what was pointed out by the

[11] Transcript of chamber proceedings (Thursday, 27th November 2014), p. 4, lines 20 – 25 to p. 5, line 1; Record of appeal pp. 585 to 586.

Company itself – in respect of various corporate members of the Company – does not elevate it to a challenge in the sense in which this term is understood in the context of these proceedings, or indeed to a dispute relating to the membership or directorship of the Company.

[13] There is no allegation or assertion by the Company that Ms. Kwok has made a claim as against the Company either in this jurisdiction or any other, or has otherwise directly challenged the constitution and/or ownership and control of the Company. It appears to remain simply at the level of representations made by Ms. Kwok to various persons either in Hong Kong or elsewhere. Simply on this basis, it appears that she was able to persuade the CRO to act upon her allegations notwithstanding the certificates of incumbency produced to the CRO. It is these actions which the Company says is adversely affecting its ability to conduct its business overseas and which entitles it to the declarations sought, notwithstanding the fact that there is no doubt on the part of the Company as to the constitution of its members and directors. In my view the learned judge was right to conclude that any question about registrability and changes to the boards or registered agents of Hong Kong SAR companies is something exclusively within the jurisdiction of the courts of the Hong Kong SAR.

Disputes about the Registrability of Changes Related to the Hong Kong Subsidiaries

[14] Having arrived at the conclusions in paragraphs 14 and 15 above, the complaint stated as ground 4 above is sufficiently addressed. Suffice it to say however that the learned judge was perfectly entitled to evaluate the nature of the case before him and to determine what the real issue before him was. He was not duty bound to accept what the Company said was the issue if the pleaded case and the evidence in support, properly assessed, led to a different view.

Forum Conveniens and the Ambit of CPR 7.3(7)

[15] The Company says that because the learned judge came to an erroneous conclusion as to the nature of the dispute or the dispute which was placed before him, he wrongly concluded that the BVI was not the appropriate forum for adjudicating the dispute and failed to consider that the dispute was one concerning the shareholding and directorship of the Company and thus fell squarely within the ambit of CPR 7.3(7). The Company relies on the statement of Bennett JA [Ag.] in the **Nilon** case at the intermediate appellate level[12] where he endorsed what the learned judge had himself stated in the proceedings at first instance.[13] This statement in effect says that matters concerning the organization and administration of a company are generally treated as matters ideally suited to be determined in the location in which the company is incorporated. The learned judge remarked[14] that 'if foreigners incorporate companies here, they must expect to have to come here to litigate disputes going to the membership and administration of such companies'. Thus the Company argues that the presumption is that BVI is the appropriate forum for the claim to be heard and thus the fact that the relevant parties who may be called as witnesses are outside the jurisdiction or that the Company's business is outside of the BVI are not factors sufficient to displace the BVI as the natural and appropriate forum for the adjudication of the dispute.

[16] The Privy Council in **Nilon** however, cautioned against taking this statement out of context.[15] In **Nilon**, the Board found that the issues there were not about the organization or administration, or the internal management of a company. The Board concluded that they were about the terms of an alleged contract to which it is not suggested Nilon Ltd was a party. Here, can the issue be said to be about the constitution, administration or internal management of the Company? I think

[12] Royal Westminster Investments SA et al v Nilon Limited et al BVIHCMAP2010/0034 and BVIHCMAP2011/0001 (consolidated) (delivered 16th January 2012, unreported).
[13] Royal Westminster Investments SA et al v Nilon Limited et al BVIHCM201/0039 (delivered 21st October 2010, unreported).
[14] Royal Westminster Investments SA et al v Nilon Limited et al BVIHCM201/0039 (delivered 21st October 2010, unreported) at para. 34.
[15] At para. 60.

not. The real issue is the propriety of the Hong Kong CRO's refusal to register documents relating to the Company's Hong Kong Subsidiaries. Merely because the basis provided by the CRO for her decision suggests some perceived dispute about the membership and directorship of the 100 % parent Company of the Hong Kong Subsidiaries, does not thereby bring about a dispute concerning the membership or directorship of the Company. Steps have already been commenced by the Hong Kong Subsidiaries challenging the CRO's decision to reject the documents.

[17] It is of no moment that the hearing of the appeal to the Hong Kong SAR was adjourned, the Company says, at the request of the Hong Kong Subsidiaries for the purpose presumably of its parent bringing proceedings in BVI claiming that a dispute has arisen concerning the membership and directorship of the parent Company. As the learned judge found, and in my view rightly, there has not been shown any issue relating to the constitution, administration or control of the Company which engages the gateway provided by CPR 7.3(7) for service out. As the learned judge opined,[16] it would be a complete waste of time and stretched resources to engage in a pointless exercise of jurisdiction for the purpose of resolving what he described as:[17]

> "this rather surprising impasse by bringing Ms. Kwok before it and examining the entire corporate history of the Company from its incorporation in 2007 to present day in order, it is hoped that … a decision will be reached that will settle the concerns of the Hong Kong SAR of its registration officer and enable the changes which had been made to the boards and the registered agents of the Hong Kong subsidiaries to be accepted for registration."

I respectfully agree. The issue is clearly one best suited for the Hong Kong Courts. I am accordingly not persuaded that such declaratory relief will assist the Hong Kong CRO more than the Honk Kong Courts. Such declaratory orders from the BVI court would not be binding on her.

---

[16] Transcript of chamber proceedings (Thursday, 27th November 2014), p. 5, lines 23 to 24; Record of appeal p. 586.

[17] Transcript of chamber proceedings (Thursday, 27th November 2014), p. 5, lines 9 to 22; Record of appeal p. 586.

[18] It may very well be that at some point were Ms. Kwok to make good her claims as to ownership of some of the corporate members of the Company that a challenge to the membership or directorship of the Company may arise. However, as matters presently stand it cannot be said that the membership or directorship of the Company is in dispute or under challenge by Ms. Kwok.

Conclusion

[19] For the reasons given I am not persuaded that the learned judge wrongly exercised his discretion in refusing permission to serve out of the jurisdiction, or that sufficiently probative reasons have been advanced warranting this Court's interference in that exercise. Accordingly, I would dismiss this appeal and order that the appellant bears the costs thereof.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Davidson Kelvin Baptiste
Justice of Appeal

I concur.

Mario Michel
Justice of Appeal