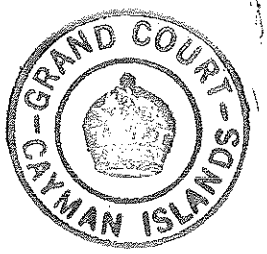

IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION

CAUSE NO: FSD 96 OF 2011 (PCJ)
(Originally Cause No: 329 of 2008)

In Chambers
Before the Hon. Justice Peter Cresswell
26 April 2013

BETWEEN:

CIGNA WORLDWIDE INSURANCE COMPANY (BY AND THROUGH ITS COURT APPOINTED RECEIVER, JOSIE SENESIE AND IN RESPECT OF THE ASSETS, UNDERTAKINGS AND AFFAIRS OF ITS LICENSED LIBERIAN BRANCH AND BUSINESS)

Plaintiff

AND

ACE LIMITED

Defendant

Appearances: Lord Goldsmith PC, QC instructed by and with Mr. Colin McKie and Mr. Adam Huckle of Maples and Calder on behalf of the Defendant

Mr. Ben Hubble QC instructed by and with Mr Nicholas Dunne of Walkers on behalf of Mr Martin S. Kenney and CC International Limited

Mr. Richard de Lacy QC and Mr. William Jones of Ogier on behalf of Echemus Group L.P. and Echemus Investment Management Ltd. and Mr. James Little

RULING

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1 LEAVE GRANTED TO SERVE THE COSTS SUMMONS OUT OF THE JURISDICTION

On 17 April 2012 at an ex parte application, the Defendant (ACE) was granted permission to serve the Costs Summons out of the jurisdiction on five costs parties:

- Echemus Group L.P.;
- Echemus Investment Management Ltd.;
- Mr Martin S. Kenney (Mr Kenney);
- CC International Limited (CCI); and
- Mr. James Little (Mr Little).

2 THE SUMMONSES BEFORE THE COURT

There are 2 Summonses before the court.

First, a Summons dated 24 January 2013 whereby the Defendant applies for leave to amend its Summons dated 10 April 2012 to delete 2 costs parties (including Mr Little) and to make clear that costs are sought on the indemnity alternatively standard basis.

Second, a Summons dated 5 April 2013 by two applicants only (Mr. Kenney and CCI) for an order that the order of the court made ex parte on 18 April 2012 granting leave to serve the Defendant's Summons dated 10 April 2012 on the applicants out of the jurisdiction be set aside.

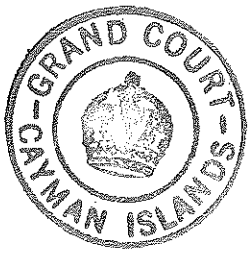
3. THE APPLICATION IN A NUTSHELL

Mr Kenney and CCI contend that:

- The court had and has no jurisdiction to order service of the Costs Summons against Mr Kenney and CCI because the court has no jurisdiction under GCR Order 11 to order service of a Costs Summons out of the jurisdiction with the aim of securing third party costs orders;

- alternatively, even if the court had or has jurisdiction, it ought in the particular circumstances to have declined and to decline to order service of the Costs Summons out of the jurisdiction against Mr Kenney and CCI.

It should be noted that Echemus Group LP and Echemus Investment Management Ltd have accepted that they have been validly joined and served and are subject to the jurisdiction of the court. In relation to the jurisdiction to order service out of the Costs Summons, Mr Kenney and CCI are in exactly the same position as Echemus Group LP and Echemus Investment Management Ltd.



4 THE JUDGMENT DATED 27 JANUARY 2012

I refer to my Judgment herein dated 27 January 2012 for

- the Dramatis Personae;
- the description of and history of the Cayman Islands proceedings and the proceedings in the United States;
- the application for security for costs;
- the application for a stay; and
- what I set out under the heading "An order that the Plaintiff identify the persons who are funding these proceedings".

5 THE DEFAULT JUDGMENT OF 27 FEBRUARY 2012

On 27 February 2012 upon the court being satisfied that the Plaintiff had failed to provide security for the Defendant's costs pursuant to paragraph 4 of the Order of 27 January 2012

the Plaintiff's Amended Writ of Summons dated 10 July 2008 was struck out and judgment was entered for the Defendant. The Plaintiff was ordered to bear the Defendant's costs of the proceedings (not otherwise provided for by the Order), to be taxed on the standard basis, if not agreed.

6 THE SUBMISSIONS ON BEHALF OF THE DEFENDANT

Lord Goldsmith PC, QC's submissions on behalf of the Defendant (ACE) were as follows:-

> This is not the trial of the substantive application to make Mr Kenney and CCI (or any other party) liable for costs. This is a summary process (see Lord Templeman in Spiliada Maritime Corp v Cansulex Ltd [1987] 1AC 460 at 465 F). Many of the questions raised by Mr Kenney and CCI are not for now.

The Defendant refers to and relies on the following:

(i) In the judgment of 27 January 2012 the whole issue of the identity and liability of those funding and directing the litigation was a key issue. At page 29 it was said "there is material before the court... which would justify the conclusion that the Plaintiff is a nominal plaintiff". The question of liability of non or third parties to meet the costs obligation was canvassed in detail.

(ii) The material before the court specifically referred to the position of Mr Kenney – see for example Mr Hawthorne's second affidavit.

(iii) The history of attempts to identify the investors behind CCI even when ordered to do so in the EDPA action (see Mr Hawthorne's third affidavit paras 21 ff) including abandoning the AJA claim in this court and defaulting in the EDPA (see Mr Hawthorne's sixth affidavit para 8).

As to the role of Mr Kenney, the Defendant refers to and relies on the evidence including in particular:-

(a) The whole of the sixth affidavit of Mr Hawthorne. At paragraph 21 reference is made to an e-mail of 26 March 2010 which states that Mr Kenney would be investing $2 million in Echemus.

(b) The whole of the seventh affidavit of Mr Hawthorne. Mr Kenney devised the plan with Mr Lohman to enforce the judgments and devised the plan to attempt to proceed against ACE under its indemnity obligations. He "procured" the appointment of the Liberian Receiver because ACE could not be sued directly. The plan was devised long before the Receiver was appointed and before Mr Senesie recognised the Liberian judgments in order to get access to the court by the device of acting through a local insolvency office holder. It involved very unusual arrangements with a public official. The litigation here was instigated as part of this scheme. The Receiver was just a straw man "and... a conduit for funds". Mr Kenney arranged for the creation of CCI. He arranged funding. He "invested" himself through Blue Hawk Investments Limited.

As to the role of CCI, the Defendant refers to and relies on the whole of the evidence summarised at paras 49 and 50 of Mr Hawthorne's seventh affidavit.

The court is not functus officio.

Mr Kenney and CCI have delayed excessively in making the application to discharge and should be disentitled to set aside.

Grand Cayman is plainly the most suitable forum, if not the only forum, where the question of liability in respect of a Cayman order for costs in relation to a Cayman action deliberately instigated in Cayman and controlled and funded (in part) by Mr Kenney can be determined. In any event the court will be determining the liability of the Echemus parties. Mr Kenney and CCI have in effect submitted to the jurisdiction.

Masri v Consolidated Contractors Int (UK) Ltd (No 4) [2010] 1 AC 90

The decision in *Masri* was that CPR Part 71 on its true construction did not apply to the examination of officers abroad (see Lord Mance at paragraphs 26, 37 and 39). The discussion of

the *Ikarian Reefer* (No. 2) [2000] 1 WLR 603 was merely "supportive" of that conclusion (see paragraph 27), but principally the case was about the absence of an explicit power to serve out an order under CPR Part 71 (see paragraph 37). The observations of Lord Mance are therefore *obiter dicta.*

Masri is not authority for the proposition that leave to serve out of the jurisdiction on a non-party for a costs order is allowed if, and only if, the non-party is the *alter ego* of the actual party. It would be an unjust result if a non-party within the jurisdiction were liable for costs under the wide ambit of *Dymocks Franchise Systems (NSW) Pty Ltd v Todd, and others (Costs)* [2004] 1 WLR 2807 (*"Dymocks"*), but a non-party out of the jurisdiction who has conducted himself in precisely the same way would escape liability because the applicant was unable to show that he was the *alter ego* of the named party. Notwithstanding this, if the category were limited to *alter ego,* the Defendant satisfies this test.

As to what is meant by the term *alter ego* in the context of an application for a non-party costs order, Lord Mance explains at paragraph 33 of *Masri* that an *alter ego* is an entity who had *"instigated, controlled and financed"* proceedings. He goes on to say that *"In such circumstances it may be legitimate to assimilate the party and non-party, and to treat any means of service available also against the former as available against the latter.* As Waller LJ put it in the *Ikarian Reefer* (No. 2) at 613E, *"if what is alleged.... is that the non-party in reality brought the main proceedings, the English court has jurisdiction to decide whether there has in effect been a submission to the jurisdiction by the non-party".* Even on this narrow view, CCI and Mr Kenney fall within that concept.

The Defendant proceeds on the basis of three approaches: (i) a narrow approach; (ii) an intermediate approach; and (iii) a broader approach.

The Narrow Approach

The court has jurisdiction if the case can be brought within what Lord Mance says in paragraph 33 of *Masri,* i.e. if it is *"legitimate to assimilate the party and the non-party".*

On any view of what this means, CCI and Mr Kenney fall within it. The Defendant relies on:-

(a) The evidence before the court.

(b) The finding at page 29 of the Judgment dated 27 January 2012 that *"there is material before the court that would justify the conclusion that the Plaintiff is a nominal plaintiff"* i.e. one who is *"suing for the benefit of some other person"*. This indicates that proceedings are in fact being brought for the benefit of the people behind the Receiver, i.e. at least CCI and Mr Kenney.

(c) This case involves purchasing the cause of action.

(d) The Receiver has assigned his interest in the judgment to CCI.

(e) The Receiver only keeps a fee (1.25%).

In effect Mr Kenney and CCI have chosen to come to this court through hiding behind a receiver who also has complete protection against adverse costs. It is very easy to say that they have submitted to the jurisdiction – they have in fact chosen it. They can also be said to be the *alter ego* of the Plaintiff. In interpreting these words it is legitimate to see if someone has submitted to the jurisdiction. Someone who procures or assists the bringing of proceedings by A in England and Wales (equally Cayman) can be said to be their *alter ego* in this sense.

The Intermediate Approach

Lord Mance's conclusion at paragraph 33 of *Masri* that the court has jurisdiction to allow service out on a non-party where it is *"legitimate to assimilate the party and the non-party"* must logically extend to include *"the real party"* to the litigation as described by Lord Brown in *Dymocks*. *Dymocks* is one of the leading cases regarding the liability of third party funders. There is authority supporting the proposition that, where the factors making a non-party liable for costs are satisfied, the court has the discretion to conclude that the non-party has submitted to the court's jurisdiction. In the *Ikarian Reefer* (No. 2) counsel went as far as to submit that the very nature of a non-party costs order was such that, if made, it would involve deciding that the relevant party had in effect submitted to the jurisdiction.

The present case falls within Lord Brown's words in *Dymocks* (pages 2815 and 2816, paragraphs F to A), including:

> *"The non party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation".*

CCI and Mr Kenney are *"the real party"* to this dispute. This is itself equivalent to submitting to the jurisdiction (as to which see Waller LJ in *Ikarian Reefer* (No. 2) quoted with approval in *Masri).* The Defendant relies on (a) to (e) above under the heading "the Narrow Approach".

The Broader Approach

The House of Lords in *Masri* were not saying that there could not be service out of a costs summons on a non-party – still less that it could only be by commencement of a new action. Their concern was the proposition that it could be done without leave. (See paragraph 34 of Lord Mance's speech in *Masri).* The crux is the need for leave. The Defendant accepts that the leave should be by analogy with the grounds for service out under GCR O.11 Rule 1 whether you are concerned with GCR O.11 Rule 9(1) or 9(2). Mr Kenney and CCI are necessary or proper parties within GCR O.11 Rule 1(1)(c) to the continuing dispute about the liability and enforcement of costs. There is a matter in dispute, namely payment and enforcement of costs – indeed, it is a question of liability for costs (i.e. who is going to be liable for costs) as well as one over the quantum of those costs.

7 THE SUBMISSIONS ON BEHALF OF MR KENNEY AND CCI

Mr Hubble QC's submissions on behalf of Mr Kenney and CCI were as follows.

The key issues as they emerged in the hearing are:

(1) Timing of the Summons to set aside: whether Mr Kenney and/or CCI are prevented from applying to set aside the court's Order dated 18 April 2012, by any delay in the issue of their Summons to set aside, dated 5 April 2013.

(2) The *Masri* test: in the light of Lord Mance's Opinion in *Masri*, what is the correct test to be applied in order for jurisdiction to be established to enable this court to grant leave to serve a Costs Summons against a non-party out of the jurisdiction?

(3) Whether the *Masri* test is met on the evidence before the court.

As to the timing of the Summons to set aside, Mr Kenney and CCI are entitled to pursue the Summons as they have complied with the GCR. The Defendant has known from the outset that jurisdiction was challenged. The delay arose from the fact that the Defendant, apparently intent on seeking further evidence via the US proceedings, itself took no steps to list the Costs Summons for directions.

The *Masri* Test

There is no jurisdiction to issue a Costs Summons against a non-party under GCR O.11 Rule 1(1)(c) as the Costs Summons is not a Writ of Summons. Order 11 Rule 1 only applies to the service of a Writ. No Writ was served on Mr Kenney or CCI. The Writ which commenced the underlying proceedings was issued by the Plaintiff (i.e. the Receiver) and has been struck out. ACE does not get as far as Order 11 Rule 1 (1) (c) because it does not get past the introductory wording to Order 11 Rule 1 itself. A Costs Summons is not a Writ (nor is it an Originating Summons). The Court of Appeal in *VTB Capital PLC v Malofeev and Others* [2011 (2) CILR 420] made it clear that Order 11 Rule 1 would only apply to a Writ which pursues a cause of action. In any event, Mr Kenney and CCI are not necessary or proper parties to the Receiver's cause of action against ACE (even if that cause of action remained extant, which it does not). The above points are reinforced by a consideration of the requirements of Order 11 Rule 4 which cannot be met in terms of a Costs Summons against a non-party.

There is no jurisdiction to issue a Costs Summons against a non-party under Order 11 Rule 9(1). Order 11 Rule 9(1) extends the provisions of Order 11 Rule 1 to an Originating Summons, Notice of Motion or Petition; but a Costs Summons is not an Originating Summons, Notice of Motion or Petition, so Order 11 Rule 9(1) does not apply.

The above conclusions are reinforced by the fact that both in England & Wales and in Hong Kong specific provision has been added to the equivalent of Order 11 Rule 1 to deal with the position of applications for costs against non-parties.

There is a very limited jurisdiction to grant leave to serve a Costs Summons against a non-party under Order 11 Rule 9(2) where the non-party is the alter ego of the Plaintiff and the court is satisfied that it is legitimate to assimilate the Plaintiff and the non-party so as to treat any means of service available against the Plaintiff as also available against the non-party: see Lord Mance in *Masri* at paragraph 33. Lord Mance said that (i) generally, Rule 9(2) only applies to service of documents on parties to the action, but (ii) there is a very limited exception where the non-party is the alter ego to, and so can be treated as assimilated with, the party itself.

As to the ambit of the *Masri* test in paragraph 33, Lord Mance identifies *the Ikarian Reefer* (No 2) as a special case because Mr Comninos was the alter ego of the claimant company (ie the one-ship company scenario). *"In such circumstances"* (i.e. where the non-party is the alter ego of the claimant) it "*may*" be legitimate to assimilate the party and non-party; thus to be the alter ego is the threshold criterion. Where that is the case, the means of service available against the party are also available against the alter ego.

This limited jurisdiction arises only where (i) the non-party can be said to be the claimant's alter ego and (ii) it is appropriate to assimilate the parties and to treat the non-party as if he was the party for service purposes. This must be the limit of the jurisdiction, otherwise Lord Mance would not have gone on, in paragraph 36, to approve Tomlinson J's conclusion that CPR 6.30(2) (the successor to Rule 9(2)) is "*concerned with documents requiring to be served on parties to the proceedings*". It would not be right to widen Lord Mance's exception to either (i) a general discretion to decide that a non-party should be "assimilated" with a party and/or (ii) the "*real*

party" ground identified by Lord Brown in *Dymocks* at paragraph 25(c). To do so would be to blur the distinction between the very limited jurisdiction which Lord Mance identifies in paragraph 33 of *Masri* as to service and the wider discretion that the court has to order costs against a non-party.

Whether the *Masri* test is met on the evidence

The *Masri* test is not met on the evidence because it cannot be said that Mr Kenney and/or CCI are the alter egos of the Plaintiff, nor can it be said that there is a good arguable case to such effect. ACE's application to serve out in April 2012 was not put on the basis that Mr Kenney and/or CCI were the Plaintiff's alter ego.

Alter ego means "*a person's secondary or alternative personality*" (the Oxford English Dictionary) or "*a corporation used by an individual in conducting personal business*" (Black's Law Dictionary). Both these definitions strongly echo Lord Mance's example, namely the one-ship company with a sole director/shareholder.

Neither Mr Kenney nor CCI can be said to be the Receiver's "alter ego". The Liberian Creditors took 55% of the ordinary shares in CCI and in addition the Liberian Creditors have held a seat on the board of directors of CCI, together with one representative director of the funders and an independent director.

Similarly if (contrary to the above) the court was minded to apply a wider *Masri* test where parties can be treated as "assimilated" or where the non-party can be regarded as "the real party", then the above factors also mean that Mr Kenney and/or CCI should not be assimilated with the Plaintiff or treated as "the real party". Even if it was to be proved that Mr Kenney was the architect of and driving force behind the litigation plan that does not make him "the real party". It just means that he was the lawyer doing his best for his client. Nor does the fact that he had a small (less than 1%) indirect interest in the fruits of the underlying claim make him "the real party". Similarly, to be the funding vehicle for a variety of interests (the Liberian Creditors and investors) does not make CCI "the real party" either.

In light of *Masri*, in the absence of specific provision within the rules such as now exists in England & Wales and Hong Kong, the only limited jurisdiction that exists to grant leave to serve a Costs Summons against a non-party out of the jurisdiction is where that non-party can properly be said to be the Plaintiff's alter ego.

Neither Mr Kenney nor CCI can be said to be the Plaintiff's alter ego (or, for that matter, "the real party"). That being so, the court's ex parte Order dated 18 April 2012 should be set aside.

8 ANALYSIS AND CONCLUSIONS

Applications for permission to serve a foreign defendant out of the jurisdiction

On an application for permission to serve a foreign defendant out of the jurisdiction, the applicant has to satisfy three requirements: *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1994] 1 AC 438, 453-457. First, the applicant must satisfy the court that in relation to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial question of fact or law, or both. The current practice in England is that this is the same test as for resisting summary judgment, namely whether there is a real (as opposed to a fanciful) prospect of success: e.g. *Carvill America Inc v Camperdown UK Ltd* [2005] EWCA Civ 645. Second, the applicant 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: see *Canada Trust Co v Stolzenberg* (No 2) [1998] 1 WLR 547, 555-7 per Waller LJ, affd [2002] 1 AC 1; *Bols Distilleries BV v Superior Yacht Services* [2006] UKPC 45. Third, the applicant must satisfy the court that in all the circumstances the Cayman Islands is clearly or distinctly the appropriate forum for the trial of the dispute, and that in all the circumstances the Grand Court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. (See Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Limited and Others* [2011] UKPC 7).

Application for, and grant of, leave to serve writ out of jurisdiction

Order 11 Rule 4 provides:-

(1) An application for the grant of leave under rule 1(1) must be supported by an affidavit stating –

(a) the grounds on which the application is made;
(b) that in the deponent's belief the plaintiff has a good cause of action;
(c) in what place or country the defendant is, or probably may be found;
(d) where the application is made under rule 1(1)(c), the grounds for the deponent's belief that there is between the plaintiff and the person on whom a writ has been served a real issue which the plaintiff may reasonably ask the Court to try; and
(e) if service is not to be effected personally the method or methods of service which are in accordance with the law of the country in which service is to be effected.

(2) No such leave shall be granted unless it shall be made sufficiently to appear to the Court that the case is a proper one for service out of the jurisdiction under this Order.

(3) An order granting leave to serve a writ out of the jurisdiction under rule 1 must limit a time within which the defendant to be served must acknowledge service.

Service of originating summons, petition, notice of motion, etc. O 11 r 9

Order 11 Rule 9 provides:-

(1) Subject to Order 73, rule 5, and Order 102, rule 16, rule 1 of this Order shall apply to the service out of the jurisdiction of an originating summons, notice of motion or petition as it applies to the service of a writ.

(2) Service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the Court, but leave shall not be

required for such service in any proceedings in which the writ, originating summons, motion or petition may by these Rules or under any Law be served without leave.

(3) Rule 4(1) and (2) shall, so far as applicable, apply in relation to an application for the grant of leave under this rule as they apply in relation to an application for the grant of leave under rule 1.

(4) An order under this rule granting leave to serve an originating summons out of the jurisdiction must limit a time within which the defendant to be served with the summons must acknowledge service.

(5) Rules 5, 6 and 8 shall apply in relation to any document in respect of which leave to serve out of the jurisdiction has been granted under this rule as they apply in relation to a writ.

Principal cases in which service of writ out of jurisdiction is permissible

Order 11 Rule 1 provides:-

(1) Provided that the writ does not contain any claim mentioned in Order 75, rule 1(3) service of a writ out of the jurisdiction is permissible with the leave of the Court if in the action begun by the writ.....

(c) the claim is brought against a person who has been or will be duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;...

Costs orders against non-parties

Section 24 of the Judicature Law (2007 Revision) permits a costs order to be made against a non-party. It provides:-

24. (1) Subject to the provisions of this or any other Law and to rules of court, the costs of and incidental to all civil proceedings in-

(a) the Court of Appeal; and

(b) the Grand Court,

shall be in the discretion of the relevant court.

(2) Without prejudice to any general power to make rules of court, such rules may make provisions for regulating matters relating to the costs of those proceedings including, in particular, the entitlement to costs, the taxation of costs, the powers of taxing officers and the powers of judges to review decisions of taxing officers.

(3) The court shall have full power to determine by whom and to what extent the costs are to be paid.

Section 24(3) is in identical terms to Section 51(3) of the Supreme Court Act 1981 which was considered by the Court of Appeal in *Ikarian Reefer* (No. 2).

Costs orders against non-parties - the principles to be derived from the English and Commonwealth authorities.

The Privy Council in *Dymocks* (Lord Brown of Eaton-under-Heywood) has set out the principles to be derived from the English and Commonwealth authorities:

"(1) Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order. It must be recognised that this is inevitably to some extent a fact-specific jurisdiction and that there will often be a number of different considerations in play, some militating in favour of an order, some against.

(2) Generally speaking the discretion will not be exercised against "pure funders", described in paragraph 40 of Hamilton v Al Fayed (No 2) [2003] QB 1175, 1194 as

"those with no personal interest in the litigation, who do not stand to benefit from it, are not funding it as a matter of business, and in no way seek to control its course".

In their case the court's usual approach is to give priority to the public interest in the funded party getting access to justice over that of the successful unfunded party recovering his costs and so not having to bear the expense of vindicating his rights.

(3) Where, however, the non-party not merely funds the proceedings but substantially also controls or at any rate is to benefit from them, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs. The non-party in these cases is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes. He himself is "the real party" to the litigation, a concept repeatedly invoked throughout the jurisprudence - see, for example... Millett L.J.'s judgment in Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 W.L.R. 1613. Consistently with this approach, Phillips L.J described the non-party underwriters in TGA Chapman Ltd v Christopher [1998] 1 W.L.R. 12, 22 as "the defendants in all but name". Nor, indeed, is it necessary that the non-party be "the only real party" to the litigation in the sense explained in the Knight case, provided that he is "a real party in ... very important and critical respects"; see Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation (2001) 179 A.L.R. 406... Some reflection of this concept of "the real party" is to be found in CPR r. 25.13 (2) (f) which allows a security for costs order to be made where "the claimant is acting as a nominal claimant".

(4) Perhaps the most difficult cases are those in which non-parties fund receivers or liquidators (or, indeed, financially insecure companies generally) in litigation designed to advance the funder's own financial interests."

I refer to Civil Procedure volume 1 2013 for the cases referred to in the note to CPR 48.2 (pages 1522 to 1532) including in particular (but without limitation) *Globe Equities Ltd v Globe Legal Services Ltd* [1999] B.L.R. 232, CA in which the decision in *Symphony Group v Hodgson* [1993] 4 All ER 143, CA and other cases are analysed and the cases referred to at page 1527 and following under the heading "Litigation Funding" where *Dymocks* has been considered and applied.

Costs orders against non-parties where the non-party is outside the jurisdiction

The *Ikarian Reefer* (No. 2)

In the *Ikarian Reefer* (No. 2) [2000] 1 WLR 603 the Court of Appeal held that where it was alleged that a non-party domiciled outside the jurisdiction was the alter ego of a party to civil proceedings pending in the English court, the English court had jurisdiction under section 51 of the Supreme Court Act 1981 to decide whether that non-party had such a connection with the proceedings that he should pay the costs. The appropriate procedure, under the Rules of the Supreme Court in force at the material time, would have been for the defendant to issue a summons in the action, supported by an affidavit stating the grounds of the application in accordance with R.S.C. Ord. 11, r. 9(5), and obtain leave to serve the summons outside the jurisdiction under R.S.C. Ord. 11, r. 9(4). There were no grounds for attacking the judge's exercise of his discretion to grant retrospective leave for service out of the jurisdiction.

Lord Justice Waller said at page 611B:-

"What, however, it is necessary to stress in this context is that where the court is exercising its power under section 51 of the Act of 1981 it is doing so in the context of substantive proceedings in which the court does have jurisdiction. The exercise of the power to order costs to be paid by a party not named is an order made in those proceedings and it will only be exercised on the basis of a substantial connection with those proceedings by a non-party..."

Lord Justice Waller continued at page 613E:-

"...if an order were made by the English court, and once the question of enforcement was an issue, the question might arise as to whether a court other than the English court would recognise that jurisdiction. That is not in issue at this stage. But, if the English court were to find on the issue arising under section 51 that Mr Comninos was effectively the alter ego of the plaintiff and that proper notice had been given to Mr Comninos that that issue was to be decided

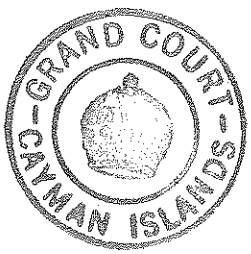
by the English court, then the judgment may well be one that would be recognised in other Convention countries by virtue of article 26 of the Brussels Convention....

In summary, in any event, it is in my view convenient to approach this case first as if no Convention point arose, that is, on the basis that Mr Comninos was resident and domiciled outside all Convention countries..."

Position in a non-Brussels Convention case

As will by now be apparent, it seems to me that the English court does have jurisdiction to decide in relation to a non-party resident outside the jurisdiction whether they should be liable for costs under section 51 of the Act of 1981. It seems to me that it must be open to a party to serve a notice on someone outside the jurisdiction which in effect says:... "We have issued a summons in the action and we are going to contend you have had such a connection with proceedings within the jurisdiction and, more clearly still, that it is actually you that brought the action and that you have submitted to the jurisdiction, and we are going to seek an order for costs against you on that basis."

It furthermore seems to me that procedurally the appropriate course under the old rules was to issue a summons in the action. That summons would be served on the plaintiff in the action and would also be served on Mr Comninos outside the jurisdiction. It would not on any view be material to look at Ord. 11, r 1. Order 11, r 9(4) would apply and as it seems to me leave to serve that summons out of the jurisdiction should have been obtained. In this assumed situation under the old rules, I do not myself see that an originating summons effectively commencing fresh proceedings would have been the appropriate course and thus Ord. 11, r 9(1) would not be material. Despite the dictum of Phillips L.J. in Murphy v Young & Co's Brewery plc [1997] 1 W.L.R. 1591, I prefer the approach of Sir Robert Gatehouse in Seismik Securitik AG v Sphere Drake Insurance plc (unreported), 3 February 1998...



In relation to obtaining leave, Ord. 11, r. 9(5) is relevant. It provides:

> *"Rule 4(1), (2) and (3) shall, so far as applicable, apply in relation to an application for the grant of leave under this rule as they apply in relation to an application for the grant of leave under rule 1."*

In my view the words "so far as applicable" do not render it unnecessary to swear an affidavit... Those words allow good sense to dictate the contents of the affidavit. As it seems to me they provide a requirement to make it clear in the affidavit what the grounds are for the application, that in the deponent's belief the applicant for the order has a good claim to have costs paid by the non-party, and the place where the person to be served with the summons can be found. In other words the affidavit, in much the same way as one relating to rule 1(1), makes out the basis on which the non-party is being sued for costs and the basis on which it is contended that it is right that the English court should take jurisdiction.

Civil Procedure Rules 1998, rule 48.2(1)

It is convenient to mention the procedure under the new Civil Procedure Rules 1998 at this juncture. I share the judge's anxiety as to whether there may not be a lacuna in the rules where rule 48.2(1) is to apply in relation to a non-party outside the jurisdiction. It is not in fact clear to me whether the appropriate course under the Rules is to issue an application for the joinder of a non-party and serve that application only on the other named parties, and then serve the amended proceedings in some way on the non-party, or whether the application to join should be served on the non-party. I incline to the latter view, in which event, so far as that application is concerned, Ord. 11, r 9(4) and (5) would apply as I have indicated they should apply to a summons under the procedure applicable before the Rules came into effect. I also incline to the view that at present there must be an inherent power to give leave to join a party and to give leave to serve that party out of the jurisdiction once the hearing of the application to join has resulted in an order for joinder. But the matter was not fully argued before us and it would certainly be of assistance, as the judge indicated, to clarify the matter by a specific provision in Order 11."

Lord Justice Waller summarised his conclusion at page 617B as follows:-

(i) *"The English court has jurisdiction over a party not domiciled within the jurisdiction to decide whether that party has had such a connection with proceedings pending in the English court that he should pay the costs although he was not named as a party. A fortiori, if the connection alleged is that a non-party was the alter ego of a party, the English court has jurisdiction to decide that question and decide whether the non-party has in effect submitted to the English jurisdiction.*

(ii) *If the non-party is domiciled in a Convention country, the Brussels Convention does not prevent the English court exercising the section 51 jurisdiction either because to make a section 51 application in subsisting proceedings does not involve "suing" the non-party as that term is used in the Convention or because, if it does, the non-party is being sued as a third-party to those proceedings under article 6(2). Again, if the allegation is that the non-party is the alter ego of a party who has sued and brought proceedings, the position is clearer still in that the non-party is not only not being sued but (if the allegation is made out) has submitted to the jurisdiction.*

(iii) *Mr Comninos is not being sued in relation to an insurance matter and thus has no right to the benefit under article 11.*

(iv) *Leave to serve out of the jurisdiction the summons relating to section 51 was required but the judge's retrospective granting of leave should be upheld."*

Masri

In *Masri v Consolidated Contractors International (UK) Ltd and others* (No 4) [2009] UKHL 43 the judgment creditor obtained judgment in English proceedings against among others a foreign company which had submitted to the jurisdiction by defending the proceedings. The company, which was incorporated in Lebanon and domiciled in Greece, failed to meet the judgment debt. The judgment creditor obtained without notice an order under CPR r 71.2 for K, an officer of the company domiciled in Greece, to be examined in England in respect of the company's foreign assets. K applied for the order to be set aside on the principal grounds that CPR r 71.2 did not apply to an officer of a foreign judgment debtor in respect of its assets abroad and that any order

for the taking of evidence was regulated by European Community law. The master granted the application and set aside the order for want of jurisdiction. The Court of Appeal allowed the judgment creditor's appeal, holding that Community law did not displace CPR r 71.2, that its wording was sufficient to include the order against K and that it was no breach of international law or comity for the order to be made.

On K's appeal the House of Lords held that whether and to what extent the presumption against extraterritoriality applied in relation to foreigners outside the jurisdiction depended on who was within the legislative grasp or intendment of the particular provision: that Parliament, when enacting section 1 of the Civil Procedure Act 1997 under which the Civil Procedure Rules were made, was to be taken as understanding and endorsing the manner in which the rule-making power in respect of extraterritorial jurisdiction has been exercised over the years and as permitting the extension of the English courts' jurisdiction over persons abroad so as to cover new causes of action and situations; and that the rule-making power conferred by section 1 of the 1997 Act was wide enough, in principle, to permit the rule-making authority to enact rules relating to the examination of an officer abroad of a company against which judgment had been given within the jurisdiction. But it was held, allowing the appeal, that, since a corporate judgment debtor had a separate legal personality from its officers and was not to be equated with them and since the officers might have information about its affairs but had not submitted to the jurisdiction, a corporate judgment debtor was in a different position from an individual judgment debtor outside the jurisdiction against whom an order for examination might be made under CPR r 71.2 and served abroad under CPR Pt 6. Although there was a close connection between the subject matter of an action against a corporate judgment debtor and its officer, CPR Pt 71 was connected with obtaining information in aid of the enforcement of a private judgment in private civil litigation. In such proceedings, in contrast to proceedings where the public interest required an officer's public examination, parties were not entitled to ask the court to summon witnesses from abroad to provide full information. Since the historical origin of CPR Pt 71 concerning the examination of officers of a corporate judgment debtor and the extreme informality of its operation indicated a purely domestic focus, and since CPR rr 6.20(9) and 6.30(2) did not, properly construed, enable service out of the jurisdiction of an order under CPR Pt 71 which had been made against a non-party, CPR r 71.2 did not permit an order for examination to be made

against an officer who was outside the jurisdiction. Accordingly, the order made against K would be set aside.

In his opinion Lord Mance identified the issues before the House as follows:-

(1) "whether the language of CPR r 71.2 purports to confer power to order examination of a foreign director of a foreign company, (2) whether it purports to confer power to order such examination in respect of foreign assets, (3) whether, if it does, it is ultra vires the rule-making power, (4) whether, if it does, there is any basis under CPR Pt 6 for service upon Mr Khoury out of the jurisdiction in Greece, and (5) whether, if there is, the English courts should none the less give "primacy" or priority to use of the Evidence Regulation, before contemplating such domestic means."

(Paragraph 9)

At paragraph 26 he concluded that CPR Pt 71 does not contemplate an application and order in relation to an officer outside the jurisdiction.

Lord Mance then turned to consider service out of the jurisdiction. He said (paragraph 27) that his conclusion as to CPR Pt 71 was "reinforced" by a consideration of the position relating to service. He then turned to consider CPR r 6.30 (2). CPR r 6.30(2) provides:

"Unless paragraph (3) applies, where the permission of the court is required for a claim form to be served out of the jurisdiction the permission of the court must also be obtained for service out of the jurisdiction of any other document to be served in the proceedings".

At para 28 and following Lord Mance said:

"28. The primary purpose of CPR r 6.30(2) is, on any view, to require leave for service out of the jurisdiction on a defendant to proceedings of documents requiring to be served during such proceedings on such defendant, where the original claim form required such leave. It is an

understandable provision. By inference, it indicates that if the claim form did not require leave for service out of the jurisdiction, then ancillary documents requiring to be served on the defendant during the proceedings do not require such leave. The Court of Appeal interpreted CPR r 6.30(2) as having a second and much wider effect, that of enabling any non-party on whom it might be appropriate to serve any document during the course of proceedings to be served, with leave if the proceedings against the original defendant required leave for service out, without leave if they did not.

29. The wider interpretation put by the Court of Appeal on CPR r 6.30(2) leads to a surprising result. In a case where service of the original proceedings took place abroad with leave using one of the gateways in CPR r 6.20, there would be an open discretion to grant leave for service out of the jurisdiction of any ancillary document on a non-party. Still more surprisingly, if the original proceedings did not require leave to serve out (eg because the defendant was domiciled in a Brussels Regulating state), a non-party could be served abroad (on the face of it in any country in the world) without leave.

30. The Court of Appeal relied upon two cases under Ord. 11, r 9 of the previous Rules, which read, as amended:

"(1) Rule 1 of this Order shall apply to the service out of the jurisdiction of an originating summons, notice of motion or petition as it applies to service of a writ..."
"(4) Service out of the jurisdiction of any summons, notice or order issued, given or made in any proceedings is permissible with the leave of the court, but leave shall not be required for such service in any proceedings in which the writ, originating summons, motion or petition may by these rules or under any Act be served out of the jurisdiction without leave." (Emphasis added)

Union Bank of Finland Ltd v Lelakis [1997] 1 WLR 590… does not help on the present issue.

"31 The second case is The Ikarian Refeer (No 2), ...where the Court of Appeal was concerned that there might be a lacuna in the rules in relation to a non-party whom the successful

defendant sought to hold liable for costs ordered against the unsuccessful claimant company. However, the court considered, first, that Ord 11, r 9(4) enable leave to be given for service of an application for such costs on Mr Comninos, and opined, second, that there must anyway be an inherent power to give leave to join a non-party and serve him out of the jurisdiction.

32 The latter proposition is at odds with the generally understood position accepted by the court in the Lelakis case... It has long been established that service out of the jurisdiction requires express authorisation either by statue or in the Rules. Thus, in In re Aktiebolaget Robertsfors and La Société Anonyme des Papeteries de l'Aa [1910] 2 KB 727, where the Court of Appeal had to construe Ord XI, r 8A made in 1909 to extend the power to serve out to summonses, orders or notices, the court held that this power was only exercisable in situations where service out of a writ was permissible under Ord XI, r 8 and so did not cover a summons to set aside an arbitration award. There was no suggestion that the heads of Ord XI, r 8 were anything other than exclusive. Ord 11, r 9(1) which replaced Ord XI, r 8A confirmed the exclusive nature of the heads of jurisdiction to serve out provided by Ord 11, r 1.

33 As to the former proposition, The Ikarian Reefer (No 2) [2000] 1 WLR 603 may be viewed as a special case, since Mr Comninos was the alter ego of the claimant company whose proceedings he had instigated, controlled and financed. In such circumstances it may be legitimate to assimilate the party and non-party, and to treat any means of service available against the former as available also against the latter. As Waller LJ put it [2000] 1 WLR 603, 613E,

> *"if what is alleged... is that the non-party in reality brought the main proceedings, the English court has jurisdiction to decide whether there has in effect been a submission to the jurisdiction by the non-party".*

Nothing equivalent can be or is alleged in respect of Mr Khoury in the present case, and Waller LJ's statement was by way of coda to the primary basis on which the Court of Appeal held that there was jurisdiction to serve out on a non-party. That involved reliance upon the Court of Appeal's previous decision in Mansour v Mansour [1989] 1 FLR 418.

34 Waller LJ noted that Donaldson MR in Mansour had been addressing a version of Ord 11, r 9(4), which omitted the words "out of the jurisdiction" which I have italicised in quoting its language above. In fact Donaldson MR was in error in omitting those words. Waller LJ, believing that they had been added subsequent to Mansour, said [2000] 1 WLR 603, 613 that

> *"With the insertion of those words it is not possible to argue that, simply because the action was started by a writ where service of the same could be made without leave, any summons in the action which is to be served on a person outside the jurisdiction can be served without leave."*

But he continued by finding in Donaldson MR's reasoning support for "the view that, where there is an action pending before the English court, then a summons in that action can be served on a person domiciled and resident outside the jurisdiction", whether or not he or she was already a party. Bearing in mind that the proceedings in The Ikarian Reefer (No 2) [2000] 1 WLR 603 were brought by writ served on insurers within the jurisdiction by Mr Comninos's shipowning company, I find it difficult to discern the distinction between the proposition rejected and the proposition accepted in these two sentences. Leaving aside situations where the non-party is the alter ego of a party to existing litigation, any suggestion that any non-party can be served without leave under CPR r 6.30(2) with any ancillary summons issued by either party in any proceedings properly brought and served within the jurisdiction clearly cannot be right. It is not without interest that the Rule Committee, following The Ikarian Reefer (No 2) concluded that the rules should be supplemented by adding CPR r 6.20(17) in order expressly to permit service out of a claim for an order for costs against a non-party...

36 The scope of CPR r 6.30(2) has been comprehensively reviewed by Tomlinson J in Vitol SA v Capri Marine Ltd [2009] Bus LR 271, in a context paralleling the present – service on an officer resident in Greece of an order for his examination under CPR Pt 71. Tomlinson J held that CPR r 6.30(2) was concerned with documents requiring to be served on parties to the proceedings. The Court of Appeal in the present case disagreed and thought that CPR Pt 71 was not "naturally limited" in this way. In my opinion, Tomlinson J was right, and I agree with his

clear reasons (including those he gave for distinguishing The Ikarian Reefer (No 2) [2000] 1 WLR 603) and his conclusion.

37 Although there may have been lacunae in the Victorian rules regarding service out of the jurisdiction, the continuing absence in the modern rules of any provision enabling service out of an order under CPR Pt 71 is both consistent with and in my opinion supportive of the view that CPR Pt 71 was not contemplated, any more than its differently worded predecessors were, as applying to officers outside the jurisdiction."

Analysis

I analyse the position as follows.

1. The jurisdiction to make costs orders against non-parties under section 24 of the Judicature Law (2007 Revision) and the principles to be derived from the English and Commonwealth authorities are set out above.

The note to CPR 48.2 in Civil Procedure volume 1 2013 (pages 1522 to 1532) and the cases there cited show how important the jurisdiction to make costs orders against non-parties is today and the many different circumstances in which the jurisdiction is exercised.

2. The correct procedure where a plaintiff or defendant seeks a costs order against a non-party is to issue a summons in the action for an order pursuant to section 24 of the Judicature Law (2007 Revision) that the non-party pay the costs and to apply to add the non-party as a party to the proceedings for the purposes of costs only. (See Lord Justice Waller in *The Ikarian Reefer* (No 2) at pages 614 and 615).

3. On an application for permission to serve a foreign person out of the jurisdiction the applicant has to satisfy the three requirements set out above. It is elementary that the applicant has to satisfy the court in relation to the first requirement that there is a serious issue to be tried

and in relation to the second requirement that there is a good arguable case (in both cases as set out above). It is important to emphasise that the court is not engaged in a trial.

4. Has the Defendant satisfied the first requirement in relation to Mr Kenney and CCI?

In my opinion there is a serious issue to be tried as to whether a costs order should be made against both Mr Kenney and CCI under section 24, with a real prospect of success, for the following reasons:-

(i) I refer to and have taken into account the totality of the evidence before the court (including the first affidavit of Mr Kenney). The history of the litigation in the United States and Liberia is by any standards extraordinary. There are many respects in which there is a serious issue as to whether what has happened is beyond conventional Litigation Funding.

(ii) I refer to my judgment dated 27 January 2012 including (without limitation) the finding at page 29:

> "If, contrary to the above, there was not jurisdiction under GCR O.23, r.1(1)(a) to order security, there is material before the court (referred to above) which would justify the conclusion that the Plaintiff is a nominal plaintiff."

A nominal plaintiff is a plaintiff (not being a plaintiff who is suing in a representative capacity) who is suing for the benefit of some other person or persons and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so. (GCR O. 23 rule 1(1)(b)).

Further I draw attention to the formulation used to describe the Plaintiff and refer to my observations at page 17 of my earlier judgment under Leave to Amend (i).

(iii) There are serious issues to be tried as to whether Mr Kenney's funding and control of the litigation in this court was as summarised by Mr Hawthorne (at paragraphs 47 and 48 of his seventh affidavit):-

> *"47... Mr Kenney has controlled for a decade the efforts to enforce the Liberian Judgments, which culminated in the suit in the Cayman Islands. Among other things:*
>
> *a) Mr Kenney devised a strategy for his clients, AJA and the G-22 (and later, CCI) to cause the Commissioner to issue proceedings on their behalf in the Cayman Islands.*
> *b) Mr Kenney was the central figure in executing this strategy. In so doing, Mr. Kenney and his clients controlled the Receiver's actions, placed limits on his ability to act, and required him to account to CCI for his decisions and expenditures. Mr. Kenney ensured that the Receiver was no more than a straw man, executing the plans of Mr Kenney and his clients.*
> *c) Mr Kenney's strategy also attempted to ensure that the actual litigant in the Grand Court, the Receiver, would be judgment-proof and unable to pay costs.*
> *d) Mr Kenney created CCI and brought in "Garrett" as an investor, funding the pursuit of the Liberian Judgments in the Cayman Islands. By structuring CCI to conceal "Garrett"'s identity, Mr Kenney again attempted to ensure that ACE would be unable to recover its costs in the event that Mr Kenney's clients did not prevail in the Grand Court.*
> *e) Mr Kenney created the Echemus entities and brought in more investors to allow the action to continue in the Cayman Islands when "Garrett"'s investment was exhausted. Mr Kenney's complete control over the litigation is demonstrated by the fact that Mr Little left it to Mr Kenney to negotiate the CCI investment on behalf of the Echemus Fund, even though Mr Kenney had formed and previously represented CCI, and even though Mr Kenney was purportedly representing the Receiver at the same time.*

f) Mr Kenney was the managing director and the largest shareholder of the Echemus Manager, which had management control over the Echemus Fund (both entities having been created by Mr Kenney), at the time that the Echemus Fund decided to respond to this court's order to post security for costs by ceasing to fund the Receiver, and redirecting its "ACE budget" elsewhere, thereby compelling the Receiver to default...

48. Mr Kenney has funded this litigation at many points and in many ways. The evidence obtained to date shows that:

a) In addition to earning fees throughout his representation of AJA, the G-22, CCI and the Receiver, Mr Kenney has a contingency interest in this litigation (see ...E-mail from James Little to Martin Kenney and John Bagalini, dated June 7, 2011... which states that the two lead law firms Kenney & Co. and Mr Lohman's law firm, were planning to reduce their success fee to 9% to accommodate additional funding).

b) Mr Kenney invested in the Liberian Claims in or about June 2010 through his interest in Bluehawk, which was a limited partner of the Echemus Fund...

c) Mr Kenney was until recently the majority shareholder of Echemus Manager, and hence stood additionally to gain on any recovery on the Liberian Claims through distributions from the Echemus Fund to Echemus Manager."

(iv) There are serious issues to be tried as to whether CCI's funding and control of the litigation in this court was as summarised by Mr Hawthorne (at paragraph 49 of his seventh affidavit):-

"49... CCI has been a principal funder of the effort to enforce the Liberian Judgments since its creation in 2005. It was the channel through which "Garrett"'s US$2.85 million investment was used to pay attorneys and finance the development and pursuit of the case in the Cayman Islands, long before the case was filed in the Grand Court in June 2008. Were it not for CCI's payments

to Mr Kenney and others, the action in the Grand Court would never have been brought."

(v) The issues referred to in (iii) and (iv) above should be seen in the context of and against the background of the conduct of and extraordinary history of the proceedings in the United States (EDPA and Delaware) and Liberia as described in the evidence.

(vi) There are serious issues as to the circumstances of what Lord Goldsmith described as a "very unusual agreement" between a public official and private parties as to how the official would execute his duties once appointed as receiver (see paragraphs 9 and following of Mr Hawthorne's seventh affidavit). Lord Goldsmith submitted that this case involves the purchase of a cause of action and asserted that the Receiver assigned his interest in the judgment to CCI, only keeping a fee (1.25%).

In his first affidavit Mr. Kenney disputes many of the Defendant's allegations but it is not appropriate to seek to resolve these issues in the course of this application.

In my opinion there is a serious issue to be tried as to whether a costs order should be made against both Mr Kenney and CCI under section 24, with a real prospect of success.

5. Has the Defendant satisfied the second requirement in relation to Mr Kenney and CCI? The second requirement is that the applicant 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.

For present purposes the question is has the Defendant satisfied the court that there is a good arguable case that the court has jurisdiction to grant permission to serve the Costs Summons out of the jurisdiction under GCR O 11 r 9(2) or alternatively under GCR O 11 r 1(1)(c)?

It is necessary first to consider what is the extent of the jurisdiction under GCR O 11 r 9(2). The competing submissions as to the extent of the jurisdiction under GCR O 11 r 9(2) are set out above.

The principle underlying the jurisdiction (so far as relevant) under GCR O 11 r 9(2) to be derived from *Masri* is that where a person (B) instigates, controls and finances proceedings brought in the name of A, there may be circumstances in which it is legitimate to assimilate the party A and the non-party B, and to treat any means of service available against A, as available also against B. This is so where B in reality brought the main proceedings and there has in effect been a submission to the jurisdiction by B. I derive this principle from paragraph 33 of Lord Mance's opinion. Although the expression alter ego may be used to describe B's relationship with A, I do not read Lord Mance in *Masri* as confining the use of GCR O 11 r 9(2) to the alter ego of a one ship Panamanian company. Lord Mance plainly regarded the type of case that would fall within the principle as narrow, but he was not concerned in *Masri* to examine the extent of the circumstances in which it might be legitimate to assimilate the party A and the non-party B, because an application for an order under CPR r 71.2 plainly did not fall within the principle or CPR r 6.30(2).

I do not accept Mr Hubble's submissions to the extent that he seeks to narrow the limited jurisdiction further by confining it to the case of an alter ego or the alter ego of a one ship Panamanian Company.

As to the relevant facts I repeat the matters set out under (i) to (vi) in paragraph 4 above.

In my opinion there is a good arguable case (a much better argument) that this case falls within the jurisdiction described above because there is a good arguable case that:-

(1) Mr Kenney and CCI instigated, controlled and financed these proceedings and that the circumstances are such that it is legitimate to assimilate Mr Kenney and CCI with the Plaintiff and to treat any means of service available against the Plaintiff as also available against Mr Kenney and CCI.

(2) Mr Kenney and CCI in reality brought these proceedings and there has in effect been a submission to the jurisdiction by Mr Kenney and CCI.

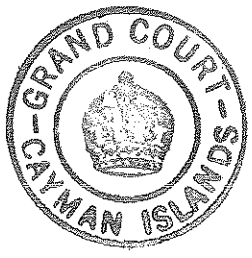
(3) If (contrary to my opinion) it is necessary to establish that Mr Kenney and CCI were the alter ego of the Plaintiff, the concept of alter ego is met in the present case because the Plaintiff was a nominal plaintiff.

In the light of my conclusions set out above it is unnecessary to consider Lord Goldsmith's alternative arguments as to the ambit of the court's power under GCR O 11 r 9(2) or alternatively under GCR O 11 r 1(1)(c).

6. As to the third requirement (the applicant must satisfy the court that in all the circumstances the Cayman Islands 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), it is in my opinion beyond argument that the Cayman Islands is clearly and distinctly the appropriate forum. In my opinion in all the circumstances described above the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

7. For the reasons set out above I will make an order as sought in the Defendant's Summons dated 24 January 2013 and I dismiss the Summons dated 5 April 2013 to set aside the order of 18 April 2012.

I add two footnotes to this Judgment.



The overriding objective

I refer to the overriding objective quoted in my earlier judgment including in particular 4.2(d). At issue is who should pay costs which amount to no more than about 870,000 US dollars on the standard basis. This dispute is probably already generating costs which are likely to exceed that figure. It is high time that this remaining dispute is resolved. If the remaining dispute cannot be

resolved through attorneys in the usual way, consideration should be given to using the services of a mediator.

The Rules Committee

In my opinion the Rules Committee should give urgent consideration to making an appropriate revision to the Grand Court Rules in order expressly to permit service out of a claim for costs against a non-party. It is highly desirable that this court should keep up with the relevant developments in England and Wales (CPR r. 6.20(17)) and other jurisdictions (such as Hong Kong).

DATED this 13th day of May 2013

Cresswell J

The Honourable Justice Cresswell
Judge of the Grand Court

GRAND COURT - CAYMAN ISLANDS