



1 IN THE GRAND COURT OF THE CAYMAN ISLANDS
2 FINANCIAL SERVICES DIVISION

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

5 In Chambers
6 Before the Hon. Justice Peter Cresswell
7 26 April 2013

8
9 BETWEEN:

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

14 Plaintiff

15 AND

16 ACE LIMITED

17 Defendant

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

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

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

25

26

RULING

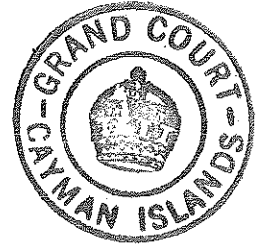
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5
6 1 **LEAVE GRANTED TO SERVE THE COSTS SUMMONS OUT OF**
7 **THE JURISDICTION**

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

- 10
11 - Echemus Group L.P.;
- 12 - Echemus Investment Management Ltd.;
- 13 - Mr Martin S. Kenney (Mr Kenney);
- 14 - CC International Limited (CCI); and
- 15 - Mr. James Little (Mr Little).
- 16

17 2 **THE SUMMONSES BEFORE THE COURT**

18 There are 2 Summonses before the court.

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

22
23 Second, a Summons dated 5 April 2013 by two applicants only (Mr. Kenney and CCI) for an
24 order that the order of the court made ex parte on 18 April 2012 granting leave to serve the
25 Defendant's Summons dated 10 April 2012 on the applicants out of the jurisdiction be set aside.

26

27 3. **THE APPLICATION IN A NUTSHELL**

28 Mr Kenney and CCI contend that:

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

5
6 - alternatively, even if the court had or has jurisdiction, it ought in the particular
7 circumstances to have declined and to decline to order service of the Costs Summons out
8 of the jurisdiction against Mr Kenney and CCI.

9
10 It should be noted that Echemus Group LP and Echemus Investment Management Ltd have
11 accepted that they have been validly joined and served and are subject to the jurisdiction of the
12 court. In relation to the jurisdiction to order service out of the Costs Summons, Mr Kenney and
13 CCI are in exactly the same position as Echemus Group LP and Echemus Investment
14 Management Ltd.

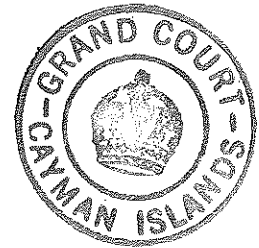
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16 **4 THE JUDGMENT DATED 27 JANUARY 2012**

17 I refer to my Judgment herein dated 27 January 2012 for

- 18 - the Dramatis Personae;
19 - the description of and history of the Cayman Islands proceedings and the proceedings in
20 the United States;
21 - the application for security for costs;
22 - the application for a stay; and
23 - what I set out under the heading “An order that the Plaintiff identify the persons who are
24 funding these proceedings”.

25
26 **5 THE DEFAULT JUDGMENT OF 27 FEBRUARY 2012**

27 On 27 February 2012 upon the court being satisfied that the Plaintiff had failed to provide
28 security for the Defendant’s costs pursuant to paragraph 4 of the Order of 27 January 2012
29



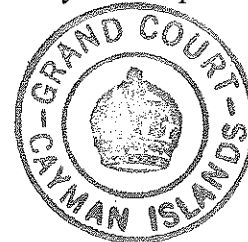
1 the Plaintiff's Amended Writ of Summons dated 10 July 2008 was struck out and
2 judgment was entered for the Defendant. The Plaintiff was ordered to bear the
3 Defendant's costs of the proceedings (not otherwise provided for by the Order), to be
4 taxed on the standard basis, if not agreed.
5

6 **6 THE SUBMISSIONS ON BEHALF OF THE DEFENDANT**

7 Lord Goldsmith PC, QC's submissions on behalf of the Defendant (ACE) were as follows:-
8

9 This is not the trial of the substantive application to make Mr Kenney and CCI (or any
10 other party) liable for costs. This is a summary process (see Lord Templeman in *Spiliada*
11 *Maritime Corp v Cansulex Ltd* [1987] 1AC 460 at 465 F). Many of the questions raised
12 by Mr Kenney and CCI are not for now.
13

14 The Defendant refers to and relies on the following:
15



- 16 (i) In the judgment of 27 January 2012 the whole issue of the identity and liability of
17 those funding and directing the litigation was a key issue. At page 29 it was said
18 "there is material before the court... which would justify the conclusion that the
19 Plaintiff is a nominal plaintiff". The question of liability of non or third parties to
20 meet the costs obligation was canvassed in detail.
21 (ii) The material before the court specifically referred to the position of Mr Kenney –
22 see for example Mr Hawthorne's second affidavit.
23 (iii) The history of attempts to identify the investors behind CCI even when ordered to
24 do so in the EDPA action (see Mr Hawthorne's third affidavit paras 21 ff)
25 including abandoning the AJA claim in this court and defaulting in the EDPA (see
26 Mr Hawthorne's sixth affidavit para 8).
27

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

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

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

15
16 As to the role of CCI, the Defendant refers to and relies on the whole of the evidence
17 summarised at paras 49 and 50 of Mr Hawthorne’s seventh affidavit.

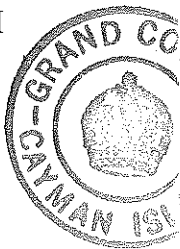
18
19 The court is not functus officio.

20
21 Mr Kenney and CCI have delayed excessively in making the application to discharge and should
22 be disentitled to set aside.

23
24 Grand Cayman is plainly the most suitable forum, if not the only forum, where the question of
25 liability in respect of a Cayman order for costs in relation to a Cayman action deliberately
26 instigated in Cayman and controlled and funded (in part) by Mr Kenney can be determined. In
27 any event the court will be determining the liability of the Echemus parties. Mr Kenney and CCI
28 have in effect submitted to the jurisdiction.

29
30 **Masri v Consolidated Contractors Int (UK) Ltd (No 4) [2010] 1 AC 90**

31
32 The decision in *Masri* was that CPR Part 71 on its true construction did not apply to the
33 examination of officers abroad (see Lord Mance at paragraphs 26, 37 and 39). The discussion of



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

5
6 *Masri* is not authority for the proposition that leave to serve out of the jurisdiction on a non-party
7 for a costs order is allowed if, and only if, the non-party is the *alter ego* of the actual party. It
8 would be an unjust result if a non-party within the jurisdiction were liable for costs under the
9 wide ambit of *Dymocks Franchise Systems (NSW) Pty Ltd v Todd, and others (Costs)* [2004] 1
10 WLR 2807 (“*Dymocks*”), but a non-party out of the jurisdiction who has conducted himself in
11 precisely the same way would escape liability because the applicant was unable to show that he
12 was the *alter ego* of the named party. Notwithstanding this, if the category were limited to *alter*
13 *ego*, the Defendant satisfies this test.

14
15 As to what is meant by the term *alter ego* in the context of an application for a non-party costs
16 order, Lord Mance explains at paragraph 33 of *Masri* that an *alter ego* is an entity who had
17 “*instigated, controlled and financed*” proceedings. He goes on to say that “*In such*
18 *circumstances it may be legitimate to assimilate the party and non-party, and to treat any means*
19 *of service available also against the former as available against the latter*. As Waller LJ put it
20 in the *Ikarian Reefer* (No. 2) at 613E, “*if what is alleged... is that the non-party in reality*
21 *brought the main proceedings, the English court has jurisdiction to decide whether there has in*
22 *effect been a submission to the jurisdiction by the non-party*”. Even on this narrow view, CCI
23 and Mr Kenney fall within that concept.

24
25 The Defendant proceeds on the basis of three approaches: (i) a narrow approach; (ii) an
26 intermediate approach; and (iii) a broader approach.

27 28 **The Narrow Approach**

29
30 The court has jurisdiction if the case can be brought within what Lord Mance says in paragraph
31 33 of *Masri*, i.e. if it is “*legitimate to assimilate the party and the non-party*”.



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

2
3 (a) The evidence before the court.

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

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

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

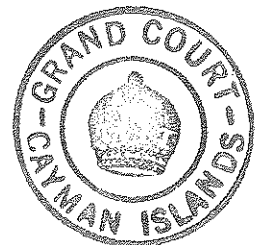
11 (e) The Receiver only keeps a fee (1.25%).
12

13 In effect Mr Kenney and CCI have chosen to come to this court through hiding behind a receiver
14 who also has complete protection against adverse costs. It is very easy to say that they have
15 submitted to the jurisdiction – they have in fact chosen it. They can also be said to be the *alter*
16 *ego* of the Plaintiff. In interpreting these words it is legitimate to see if someone has submitted
17 to the jurisdiction. Someone who procures or assists the bringing of proceedings by A in
18 England and Wales (equally Cayman) can be said to be their *alter ego* in this sense.
19

20 **The Intermediate Approach**

21

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



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

3
4 *“The non party in these cases is not so much facilitating access to justice by the party*
5 *funded as himself gaining access to justice for his own purposes. He himself is “the real*
6 *party” to the litigation”.*

7
8 CCI and Mr Kenney are *“the real party”* to this dispute. This is itself equivalent to submitting
9 to the jurisdiction (as to which see Waller LJ in *Ikarian Reefer* (No. 2) quoted with approval in
10 *Masri*). The Defendant relies on (a) to (e) above under the heading “the Narrow Approach”.

11
12 **The Broader Approach**

13
14 The House of Lords in *Masri* were not saying that there could not be service out of a costs
15 summons on a non-party – still less that it could only be by commencement of a new action.
16 Their concern was the proposition that it could be done without leave. (See paragraph 34 of
17 Lord Mance’s speech in *Masri*). The crux is the need for leave. The Defendant accepts that the
18 leave should be by analogy with the grounds for service out under GCR O.11 Rule 1 whether
19 you are concerned with GCR O.11 Rule 9(1) or 9(2). Mr Kenney and CCI are necessary or
20 proper parties within GCR O.11 Rule 1(1)(c) to the continuing dispute about the liability and
21 enforcement of costs. There is a matter in dispute, namely payment and enforcement of costs –
22 indeed, it is a question of liability for costs (i.e. who is going to be liable for costs) as well as one
23 over the quantum of those costs.

24

25 **7 THE SUBMISSIONS ON BEHALF OF MR KENNEY AND CCI**

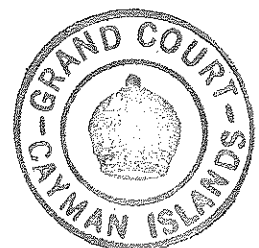
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27 Mr Hubble QC’s submissions on behalf of Mr Kenney and CCI were as follows.

28

29 The key issues as they emerged in the hearing are:

30



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

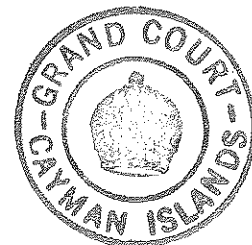
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5 (2) The *Masri* test: in the light of Lord Mance's Opinion in *Masri*, what is the correct test to
6 be applied in order for jurisdiction to be established to enable this court to grant leave to
7 serve a Costs Summons against a non-party out of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

8
9 (3) Whether the *Masri* test is met on the evidence before the court.

10
11 As to the timing of the Summons to set aside, Mr Kenney and CCI are entitled to pursue the
12 Summons as they have complied with the GCR. The Defendant has known from the outset that
13 jurisdiction was challenged. The delay arose from the fact that the Defendant, apparently intent
14 on seeking further evidence via the US proceedings, itself took no steps to list the Costs
15 Summons for directions.

16
17 **The *Masri* Test**

18
19 There is no jurisdiction to issue a Costs Summons against a non-party under GCR O.11 Rule
20 1(1)(c) as the Costs Summons is not a Writ of Summons. Order 11 Rule 1 only applies to the
21 service of a Writ. No Writ was served on Mr Kenney or CCI. The Writ which commenced the
22 underlying proceedings was issued by the Plaintiff (i.e. the Receiver) and has been struck out.
23 ACE does not get as far as Order 11 Rule 1 (1) (c) because it does not get past the introductory
24 wording to Order 11 Rule 1 itself. A Costs Summons is not a Writ (nor is it an Originating
25 Summons). The Court of Appeal in *VTB Capital PLC v Malofeev and Others* [2011 (2) CILR
26 420] made it clear that Order 11 Rule 1 would only apply to a Writ which pursues a cause of
27 action. In any event, Mr Kenney and CCI are not necessary or proper parties to the Receiver's
28 cause of action against ACE (even if that cause of action remained extant, which it does not).
29 The above points are reinforced by a consideration of the requirements of Order 11 Rule 4 which
30 cannot be met in terms of a Costs Summons against a non-party.



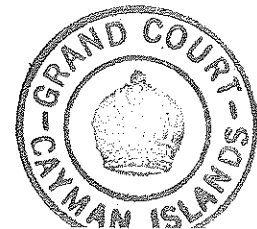
1 There is no jurisdiction to issue a Costs Summons against a non-party under Order 11 Rule 9(1).
2 Order 11 Rule 9(1) extends the provisions of Order 11 Rule 1 to an Originating Summons,
3 Notice of Motion or Petition; but a Costs Summons is not an Originating Summons, Notice of
4 Motion or Petition,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

5
6 The above conclusions are reinforced by the fact that both in England & Wales and in Hong
7 Kong specific provision has been added to the equivalent of Order 11 Rule 1 to deal with the
8 position of applications for costs against non-parties.

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

17
18 As to the ambit of the *Masri* test in paragraph 33, Lord Mance identifies *the Ikarian Reefer* (No
19 2) as a special case because Mr Comminos was the alter ego of the claimant company (ie the one-
20 ship company scenario). "*In such circumstances*" (i.e. where the non-party is the alter ego of the
21 claimant) it "*may*" be legitimate to assimilate the party and non-party; thus to be the alter ego is
22 the threshold criterion. Where that is the case, the means of service available against the party
23 are also available against the alter ego.

24
25 This limited jurisdiction arises only where (i) the non-party can be said to be the claimant's alter
26 ego and (ii) it is appropriate to assimilate the parties and to treat the non-party as if he was the
27 party for service purposes. This must be the limit of the jurisdiction, otherwise Lord Mance
28 would not have gone on, in paragraph 36, to approve Tomlinson J's conclusion that CPR 6.30(2)
29 (the successor to Rule 9(2)) is "*concerned with documents requiring to be served on parties to*
30 *the proceedings*". It would not be right to widen Lord Mance's exception to either (i) a general
31 discretion to decide that a non-party should be "assimilated" with a party and/or (ii) the "*real*



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

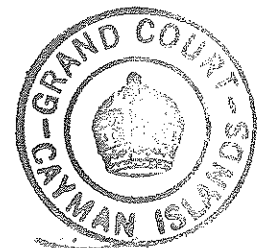
5
6 **Whether the *Masri* test is met on the evidence**

7
8 The *Masri* test is not met on the evidence because it cannot be said that Mr Kenney and/or CCI
9 are the alter egos of the Plaintiff, nor can it be said that there is a good arguable case to such
10 effect. ACE’s application to serve out in April 2012 was not put on the basis that Mr Kenney
11 and/or CCI were the Plaintiff’s alter ego.

12
13 Alter ego means “*a person’s secondary or alternative personality*” (the Oxford English
14 Dictionary) or “*a corporation used by an individual in conducting personal business*” (Black’s
15 Law Dictionary). Both these definitions strongly echo Lord Mance’s example, namely the one-
16 ship company with a sole director/shareholder.

17
18 Neither Mr Kenney nor CCI can be said to be the Receiver’s “alter ego”. The Liberian Creditors
19 took 55% of the ordinary shares in CCI and in addition the Liberian Creditors have held a seat on
20 the board of directors of CCI, together with one representative director of the funders and an
21 independent director.

22
23 Similarly if (contrary to the above) the court was minded to apply a wider *Masri* test where
24 parties can be treated as “assimilated” or where the non-party can be regarded as “the real party”,
25 then the above factors also mean that Mr Kenney and/or CCI should not be assimilated with the
26 Plaintiff or treated as “the real party”. Even if it was to be proved that Mr Kenney was the
27 architect of and driving force behind the litigation plan that does not make him “the real party”.
28 It just means that he was the lawyer doing his best for his client. Nor does the fact that he had a
29 small (less than 1%) indirect interest in the fruits of the underlying claim make him “the real
30 party”. Similarly, to be the funding vehicle for a variety of interests (the Liberian Creditors and
31 investors) does not make CCI “the real party” either.



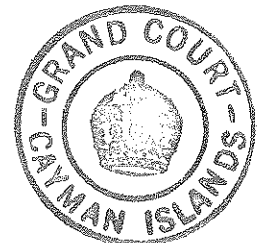
1 In light of *Masri*, in the absence of specific provision within the rules such as now exists in
2 England & Wales and Hong Kong, the only limited jurisdiction that exists to grant leave to serve
3 a Costs Summons against a non-party out of the jurisdiction is where that non-party can properly
4 be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

5
6 Neither Mr Kenney nor CCI can be said to be the Plaintiff's alter ego (or, for that matter, "the
7 real party"). That being so, the court's ex parte Order dated 18 April 2012 should be set aside.

8 ANALYSIS AND CONCLUSIONS

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

11
12 On an application for permission to serve a foreign defendant out of the jurisdiction, the
13 applicant has to satisfy three requirements: *Seaconsar Far East Ltd v Bank Markazi Jomhouri*
14 *Islami Iran* [1994] 1 AC 438, 453-457. First, the applicant must satisfy the court that in relation
15 to the foreign defendant there is a serious issue to be tried on the merits, i.e. a substantial
16 question of fact or law, or both. The current practice in England is that this is the same test as for
17 resisting summary judgment, namely whether there is a real (as opposed to a fanciful) prospect
18 of success: e.g. *Carvill America Inc v Camperdown UK Ltd* [2005] EWCA Civ 645. Second, the
19 applicant must satisfy the court that there is a good arguable case that the claim falls within one
20 or more classes of case in which permission to serve out may be given. In this context "good
21 arguable case" connotes that one side has a much better argument than the other: see *Canada*
22 *Trust Co v Stolzenberg (No 2)* [1998] 1 WLR 547, 555-7 per Waller LJ, affd [2002] 1 AC 1;
23 *Bols Distilleries BV v Superior Yacht Services* [2006] UKPC 45. Third, the applicant must
24 satisfy the court that in all the circumstances the Cayman Islands is clearly or distinctly the
25 appropriate forum for the trial of the dispute, and that in all the circumstances the Grand Court
26 ought to exercise its discretion to permit service of the proceedings out of the jurisdiction. (See
27 Lord Collins in *AK Investment CJSC v Kyrgyz Mobil Tel Limited and Others* [2011] UKPC 7).



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

2
3 Order 11 Rule 4 provides:-

4
5 (1) An application for the grant of leave under rule 1(1) must be supported by an affidavit
6 stating –

- 7
8 (a) the grounds on which the application is made;
- 9 (b) that in the deponent’s belief the plaintiff has a good cause of action;
- 10 (c) in what place or country the defendant is, or probably may be found;
- 11 (d) where the application is made under rule 1(1)(c), the grounds for the deponent’s
12 belief that there is between the plaintiff and the person on whom a writ has been
13 served a real issue which the plaintiff may reasonably ask the Court to try; and
- 14 (e) if service is not to be effected personally the method or methods of service which
15 are in accordance with the law of the country in which service is to be effected.

16
17 (2) No such leave shall be granted unless it shall be made sufficiently to appear to the
18 Court that the case is a proper one for service out of the jurisdiction under this Order.

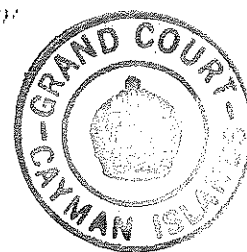
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20 (3) An order granting leave to serve a writ out of the jurisdiction under rule 1 must limit a
21 time within which the defendant to be served must acknowledge service.

22
23 **Service of originating summons, petition, notice of motion, etc. O 11 r 9**

24
25 Order 11 Rule 9 provides:-

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

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



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

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

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

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

12
13 **Principal cases in which service of writ out of jurisdiction is permissible**

14
15 Order 11 Rule 1 provides:-

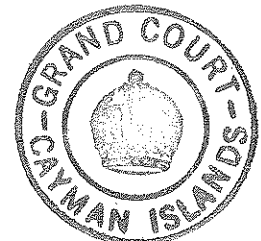
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17 (1) Provided that the writ does not contain any claim mentioned in Order 75, rule 1(3)
18 service of a writ out of the jurisdiction is permissible with the leave of the Court if in
19 the action begun by the writ.....

20
21 (c) the claim is brought against a person who has been or will be duly served within
22 or out of the jurisdiction and a person out of the jurisdiction is a necessary or
23 proper party thereto;...

24
25 **Costs orders against non-parties**

26
27 Section 24 of the Judicature Law (2007 Revision) permits a costs order to be made against a non-
28 party. It provides:-

29
30 24. (1) Subject to the provisions of this or any other Law and to rules of court, the
31 costs of and incidental to all civil proceedings in-



1 (a) the Court of Appeal; and
2 (b) the Grand Court,
3 shall be in the discretion of the relevant court.

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

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

10
11 Section 24(3) is in identical terms to Section 51(3) of the Supreme Court Act 1981 which was
12 considered by the Court of Appeal in *Ikarian Reefer* (No. 2).

13
14 **Costs orders against non-parties - the principles to be derived from the English and**
15 **Commonwealth authorities.**

16
17 The Privy Council in *Dymocks* (Lord Brown of Eaton-under-Heywood) has set out the principles
18 to be derived from the English and Commonwealth authorities:

19
20 *"(1) Although costs orders against non-parties are to be regarded as "exceptional",*
21 *exceptional in this context means no more than outside the ordinary run of cases where*
22 *parties pursue or defend claims for their own benefit and at their own expense. The*
23 *ultimate question in any such "exceptional" case is whether in all the circumstances it is*
24 *just to make the order. It must be recognised that this is inevitably to some extent a fact-*
25 *specific jurisdiction and that there will often be a number of different considerations in*
26 *play, some militating in favour of an order, some against.*

27
28 *(2) Generally speaking the discretion will not be exercised against "pure funders",*
29 *described in paragraph 40 of Hamilton v Al Fayed (No 2) [2003] QB 1175, 1194 as*
30 *"those with no personal interest in the litigation, who do not stand to benefit from*
31 *it, are not funding it as a matter of business, and in no way seek to control its*
32 *course".*

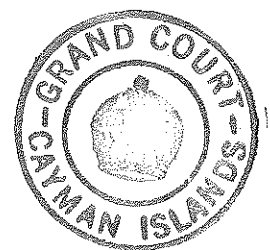


1 *In their case the court's usual approach is to give priority to the public interest in the*
2 *funded party getting access to justice over that of the successful unfunded party*
3 *recovering his costs and so not having to bear the expense of vindicating his rights.*

4
5 (3) *Where, however, the non-party not merely funds the proceedings but substantially*
6 *also controls or at any rate is to benefit from them, justice will ordinarily require that, if*
7 *the proceedings fail, he will pay the successful party's costs. The non-party in these cases*
8 *is not so much facilitating access to justice by the party funded as himself gaining access*
9 *to justice for his own purposes. He himself is "the real party" to the litigation, a concept*
10 *repeatedly invoked throughout the jurisprudence - see, for example... Millett L.J.'s*
11 *judgment in Metalloy Supplies Ltd v MA (UK) Ltd [1997] 1 W.L.R. 1613. Consistently*
12 *with this approach, Phillips L.J described the non-party underwriters in TGA Chapman*
13 *Ltd v Christopher [1998] 1 W.L.R. 12, 22 as "the defendants in all but name". Nor,*
14 *indeed, is it necessary that the non-party be "the only real party" to the litigation in the*
15 *sense explained in the Knight case, provided that he is "a real party in ... very important*
16 *and critical respects"; see Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner*
17 *of Taxation (2001) 179 A.L.R. 406... Some reflection of this concept of "the real party" is*
18 *to be found in CPR r. 25.13 (2) (f) which allows a security for costs order to be made*
19 *where "the claimant is acting as a nominal claimant".*

20
21 (4) *Perhaps the most difficult cases are those in which non-parties fund receivers or*
22 *liquidators (or, indeed, financially insecure companies generally) in litigation designed*
23 *to advance the funder's own financial interests."*

24
25 I refer to Civil Procedure volume 1 2013 for the cases referred to in the note to CPR 48.2 (pages
26 1522 to 1532) including in particular (but without limitation) *Globe Equities Ltd v Globe Legal*
27 *Services Ltd [1999] B.L.R. 232, CA* in which the decision in *Symphony Group v Hodgson [1993]*
28 *4 All ER 143, CA* and other cases are analysed and the cases referred to at page 1527 and
29 following under the heading "Litigation Funding" where *Dymocks* has been considered and
30 applied.



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

2
3 ***The Ikarian Reefer (No. 2)***

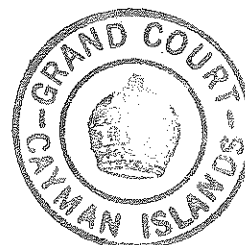
4
5 In the *Ikarian Reefer* (No. 2) [2000] 1 WLR 603 the Court of Appeal held that where it was
6 alleged that a non-party domiciled outside the jurisdiction was the alter ego of a party to civil
7 proceedings pending in the English court, the English court had jurisdiction under section 51 of
8 the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

15
16 Lord Justice Waller said at page 611B:-

17
18 *"What, however, it is necessary to stress in this context is that where the court is exercising its*
19 *power under section 51 of the Act of 1981 it is doing so in the context of substantive proceedings*
20 *in which the court does have jurisdiction. The exercise of the power to order costs to be paid by*
21 *a party not named is an order made in those proceedings and it will only be exercised on the*
22 *basis of a substantial connection with those proceedings by a non-party..."*

23
24 Lord Justice Waller continued at page 613E:-

25
26 *"...if an order were made by the English court, and once the question of enforcement was an*
27 *issue, the question might arise as to whether a court other than the English court would*
28 *recognise that jurisdiction. That is not in issue at this stage. But, if the English court were to*
29 *find on the issue arising under section 51 that Mr Comminos was effectively the alter ego of the*
30 *plaintiff and that proper notice had been given to Mr Comminos that that issue was to be decided*



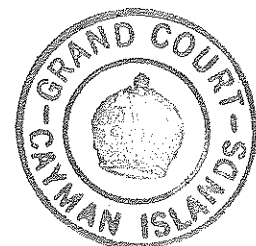
1 *by the English court, then the judgment may well be one that would be recognised in other*
2 *Convention countries by virtue of article 26 of the Brussels Convention...*

3
4 *In summary, in any event, it is in my view convenient to approach this case first as if no*
5 *Convention point arose, that is, on the basis that Mr Comminos was resident and domiciled*
6 *outside all Convention countries..."*

7
8 *Position in a non-Brussels Convention case*

9
10 *As will by now be apparent, it seems to me that the English court does have jurisdiction to decide*
11 *in relation to a non-party resident outside the jurisdiction whether they should be liable for costs*
12 *under section 51 of the Act of 1981. It seems to me that it must be open to a party to serve a*
13 *notice on someone outside the jurisdiction which in effect says: ... "We have issued a summons in*
14 *the action and we are going to contend you have had such a connection with proceedings within*
15 *the jurisdiction and, more clearly still, that it is actually you that brought the action and that you*
16 *have submitted to the jurisdiction, and we are going to seek an order for costs against you on*
17 *that basis."*

18
19 *It furthermore seems to me that procedurally the appropriate course under the old rules was to*
20 *issue a summons in the action. That summons would be served on the plaintiff in the action and*
21 *would also be served on Mr Comminos outside the jurisdiction. It would not on any view be*
22 *material to look at Ord. 11, r 1. Order 11, r 9(4) would apply and as it seems to me leave to*
23 *serve that summons out of the jurisdiction should have been obtained. In this assumed situation*
24 *under the old rules, I do not myself see that an originating summons effectively commencing*
25 *fresh proceedings would have been the appropriate course and thus Ord. 11, r 9(1) would not be*
26 *material. Despite the dictum of Phillips L.J. in *Murphy v Young & Co's Brewery plc* [1997] 1*
27 *W.L.R. 1591, I prefer the approach of Sir Robert Gatehouse in *Seismik Securitik AG v Sphere**
28 *Drake Insurance plc* (unreported), 3 February 1998...



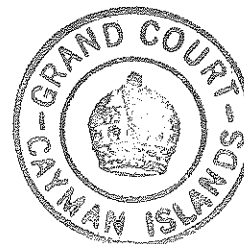
1 *In relation to obtaining leave, Ord. 11, r. 9(5) is relevant. It provides:*

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

6
7 *In my view the words “so far as applicable” do not render it unnecessary to swear an affidavit...*
8 *Those words allow good sense to dictate the contents of the affidavit. As it seems to me they*
9 *provide a requirement to make it clear in the affidavit what the grounds are for the application,*
10 *that in the deponent’s belief the applicant for the order has a good claim to have costs paid by*
11 *the non-party, and the place where the person to be served with the summons can be found. In*
12 *other words the affidavit, in much the same way as one relating to rule 1(1), makes out the basis*
13 *on which the non-party is being sued for costs and the basis on which it is contended that it is*
14 *right that the English court should take jurisdiction.*

15
16 *Civil Procedure Rules 1998, rule 48.2(1)*

17
18 *It is convenient to mention the procedure under the new Civil Procedure Rules 1998 at this*
19 *juncture. I share the judge’s anxiety as to whether there may not be a lacuna in the rules where*
20 *rule 48.2(1) is to apply in relation to a non-party outside the jurisdiction. It is not in fact clear to*
21 *me whether the appropriate course under the Rules is to issue an application for the joinder of a*
22 *non-party and serve that application only on the other named parties, and then serve the*
23 *amended proceedings in some way on the non-party, or whether the application to join should be*
24 *served on the non-party. I incline to the latter view, in which event, so far as that application is*
25 *concerned, Ord. 11, r 9(4) and (5) would apply as I have indicated they should apply to a*
26 *summons under the procedure applicable before the Rules came into effect. I also incline to the*
27 *view that at present there must be an inherent power to give leave to join a party and to give*
28 *leave to serve that party out of the jurisdiction once the hearing of the application to join has*
29 *resulted in an order for joinder. But the matter was not fully argued before us and it would*
30 *certainly be of assistance, as the judge indicated, to clarify the matter by a specific provision in*
31 *Order 11.”*



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

- 2
- 3 (i) *“The English court has jurisdiction over a party not domiciled within the jurisdiction to*
- 4 *decide whether that party has had such a connection with proceedings pending in the*
- 5 *English court that he should pay the costs although he was not named as a party. A*
- 6 *fortiori, if the connection alleged is that a non-party was the alter ego of a party, the*
- 7 *English court has jurisdiction to decide that question and decide whether the non-party*
- 8 *has in effect submitted to the English jurisdiction.*
- 9 (ii) *If the non-party is domiciled in a Convention country, the Brussels Convention does not*
- 10 *prevent the English court exercising the section 51 jurisdiction either because to make*
- 11 *a section 51 application in subsisting proceedings does not involve “suing” the non-*
- 12 *party as that term is used in the Convention or because, if it does, the non-party is*
- 13 *being sued as a third-party to those proceedings under article 6(2). Again, if the*
- 14 *allegation is that the non-party is the alter ego of a party who has sued and brought*
- 15 *proceedings, the position is clearer still in that the non-party is not only not being sued*
- 16 *but (if the allegation is made out) has submitted to the jurisdiction.*
- 17 (iii) *Mr Comminos is not being sued in relation to an insurance matter and thus has no right*
- 18 *to the benefit under article 11.*
- 19 (iv) *Leave to serve out of the jurisdiction the summons relating to section 51 was required*
- 20 *but the judge’s retrospective granting of leave should be upheld.”*
- 21

22 **Masri**

23

24 In *Masri v Consolidated Contractors International (UK) Ltd and others* (No 4) [2009] UKHL 43

25 the judgment creditor obtained judgment in English proceedings against among others a foreign

26 company which had submitted to the jurisdiction by defending the proceedings. The company,

27 which was incorporated in Lebanon and domiciled in Greece, failed to meet the judgment debt.

28 The judgment creditor obtained without notice an order under CPR r 71.2 for K, an officer of the

29 company domiciled in Greece, to be examined in England in respect of the company’s foreign

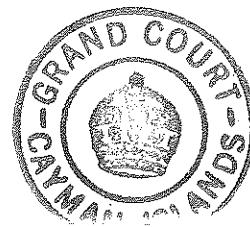
30 assets. K applied for the order to be set aside on the principal grounds that CPR r 71.2 did not

31 apply to an officer of a foreign judgment debtor in respect of its assets abroad and that any order



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

6
7 On K's appeal the House of Lords held that whether and to what extent the presumption against
8 extraterritoriality applied in relation to foreigners outside the jurisdiction depended on who was
9 within the legislative grasp or intendment of the particular provision: that Parliament, when
10 enacting section 1 of the Civil Procedure Act 1997 under which the Civil Procedure Rules were
11 made, was to be taken as understanding and endorsing the manner in which the rule-making
12 power in respect of extraterritorial jurisdiction has been exercised over the years and as
13 permitting the extension of the English courts' jurisdiction over persons abroad so as to cover
14 new causes of action and situations; and that the rule-making power conferred by section 1 of the
15 1997 Act was wide enough, in principle, to permit the rule-making authority to enact rules
16 relating to the examination of an officer abroad of a company against which judgment had been
17 given within the jurisdiction. But it was held, allowing the appeal, that, since a corporate
18 judgment debtor had a separate legal personality from its officers and was not to be equated with
19 them and since the officers might have information about its affairs but had not submitted to the
20 jurisdiction, a corporate judgment debtor was in a different position from an individual judgment
21 debtor outside the jurisdiction against whom an order for examination might be made under CPR
22 r 71.2 and served abroad under CPR Pt 6. Although there was a close connection between the
23 subject matter of an action against a corporate judgment debtor and its officer, CPR Pt 71 was
24 connected with obtaining information in aid of the enforcement of a private judgment in private
25 civil litigation. In such proceedings, in contrast to proceedings where the public interest required
26 an officer's public examination, parties were not entitled to ask the court to summon witnesses
27 from abroad to provide full information. Since the historical origin of CPR Pt 71 concerning the
28 examination of officers of a corporate judgment debtor and the extreme informality of its
29 operation indicated a purely domestic focus, and since CPR rr 6.20(9) and 6.30(2) did not,
30 properly construed, enable service out of the jurisdiction of an order under CPR Pt 71 which had
31 been made against a non-party, CPR r 71.2 did not permit an order for examination to be made



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

3

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

5

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

13

14 (Paragraph 9)

15

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

18

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

22

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

26

27 At para 28 and following Lord Mance said:

28

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



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

8
9 29. The wider interpretation put by the Court of Appeal on CPR r 6.30(2) leads to a surprising
10 result. In a case where service of the original proceedings took place abroad with leave using
11 one of the gateways in CPR r 6.20, there would be an open discretion to grant leave for service
12 out of the jurisdiction of any ancillary document on a non-party. Still more surprisingly, if the
13 original proceedings did not require leave to serve out (eg because the defendant was domiciled
14 in a Brussels Regulating state), a non-party could be served abroad (on the face of it in any
15 country in the world) without leave.

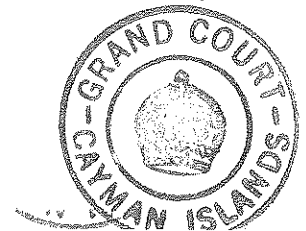
16
17 30. The Court of Appeal relied upon two cases under Ord. 11, r 9 of the previous Rules, which
18 read, as amended:

19
20 “(1) Rule 1 of this Order shall apply to the service out of the jurisdiction of an originating
21 summons, notice of motion or petition as it applies to service of a writ...”

22 “(4) Service out of the jurisdiction of any summons, notice or order issued, given or made in
23 any proceedings is permissible with the leave of the court, but leave shall not be required for
24 such service in any proceedings in which the writ, originating summons, motion or petition may
25 by these rules or under any Act be served out of the jurisdiction without leave.” (Emphasis
26 added)

27
28 *Union Bank of Finland Ltd v Lelakis* [1997] 1 WLR 590... does not help on the present issue.

29
30 “31 The second case is *The Ikarian Refeer (No 2)*, ...where the Court of Appeal was concerned
31 that there might be a lacuna in the rules in relation to a non-party whom the successful



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

5

6 32 The latter proposition is at odds with the generally understood position accepted by the
7 court in the *Lelakis* case... It has long been established that service out of the jurisdiction
8 requires express authorisation either by statute or in the Rules. Thus, in *In re Aktiebolaget*
9 *Robertfors and La Société Anonyme des Papeteries de l'Aa* [1910] 2 KB 727, where the Court
10 of Appeal had to construe Ord XI, r 8A made in 1909 to extend the power to serve out to
11 summonses, orders or notices, the court held that this power was only exercisable in situations
12 where service out of a writ was permissible under Ord XI, r 8 and so did not cover a summons to
13 set aside an arbitration award. There was no suggestion that the heads of Ord XI, r 8 were
14 anything other than exclusive. Ord 11, r 9(1) which replaced Ord XI, r 8A confirmed the
15 exclusive nature of the heads of jurisdiction to serve out provided by Ord 11, r 1.

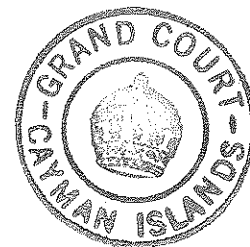
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17 33 As to the former proposition, *The Ikarian Reefer (No 2)* [2000] 1 WLR 603 may be viewed
18 as a special case, since Mr Comminos was the alter ego of the claimant company whose
19 proceedings he had instigated, controlled and financed. In such circumstances it may be
20 legitimate to assimilate the party and non-party, and to treat any means of service available
21 against the former as available also against the latter. As Waller LJ put it [2000] 1 WLR 603,
22 613E,

23 “if what is alleged... is that the non-party in reality brought the main proceedings, the
24 English court has jurisdiction to decide whether there has in effect been a submission to
25 the jurisdiction by the non-party”.

26

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

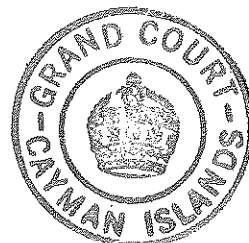


1 34 Waller LJ noted that Donaldson MR in *Mansour* had been addressing a version of Ord 11,
2 r 9(4), which omitted the words “out of the jurisdiction” which I have italicised in quoting its
3 language above. In fact Donaldson MR was in error in omitting those words. Waller LJ,
4 believing that they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

5
6 “With the insertion of those words it is not possible to argue that, simply because the
7 action was started by a writ where service of the same could be made without leave, any
8 summons in the action which is to be served on a person outside the jurisdiction can be
9 served without leave.”

10
11 But he continued by finding in Donaldson MR’s reasoning support for “the view that, where
12 there is an action pending before the English court, then a summons in that action can be served
13 on a person domiciled and resident outside the jurisdiction”, whether or not he or she was
14 already a party. Bearing in mind that the proceedings in *The Ikarian Reefer (No 2)* [2000] 1
15 WLR 603 were brought by writ served on insurers within the jurisdiction by Mr Comminos’s
16 shipowning company, I find it difficult to discern the distinction between the proposition rejected
17 and the proposition accepted in these two sentences. Leaving aside situations where the non-
18 party is the alter ego of a party to existing litigation, any suggestion that any non-party can be
19 served without leave under CPR r 6.30(2) with any ancillary summons issued by either party in
20 any proceedings properly brought and served within the jurisdiction clearly cannot be right. It
21 is not without interest that the Rule Committee, following *The Ikarian Reefer (No 2)* concluded
22 that the rules should be supplemented by adding CPR r 6.20(17) in order expressly to permit
23 service out of a claim for an order for costs against a non-party...

24
25 36 The scope of CPR r 6.30(2) has been comprehensively reviewed by Tomlinson J in *Vitol*
26 *SA v Capri Marine Ltd* [2009] Bus LR 271, in a context paralleling the present – service on an
27 officer resident in Greece of an order for his examination under CPR Pt 71. Tomlinson J held
28 that CPR r 6.30(2) was concerned with documents requiring to be served on parties to the
29 proceedings. The Court of Appeal in the present case disagreed and thought that CPR Pt 71 was
30 not “naturally limited” in this way. In my opinion, Tomlinson J was right, and I agree with his



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

3

4 37 Although there may have been lacunae in the Victorian rules regarding service out of the
5 jurisdiction, the continuing absence in the modern rules of any provision enabling service out of
6 an order under CPR Pt 71 is both consistent with and in my opinion supportive of the view that
7 CPR Pt 71 was not contemplated, any more than its differently worded predecessors were, as
8 applying to officers outside the jurisdiction.”

9

10 Analysis

11

12 I analyse the position as follows.

13

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

17

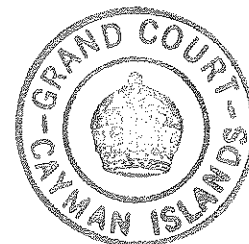
18 The note to CPR 48.2 in Civil Procedure volume 1 2013 (pages 1522 to 1532) and the cases
19 there cited show how important the jurisdiction to make costs orders against non-parties is today
20 and the many different circumstances in which the jurisdiction is exercised.

21

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

27

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



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

3
4 4. Has the Defendant satisfied the first requirement in relation to Mr Kenney and CCI?

5
6 In my opinion there is a serious issue to be tried as to whether a costs order should be made
7 against both Mr Kenney and CCI under section 24, with a real prospect of success, for the
8 following reasons:-

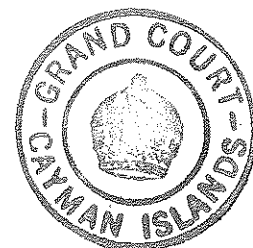
9
10 (i) I refer to and have taken into account the totality of the evidence before the court
11 (including the first affidavit of Mr Kenney). The history of the litigation in the
12 United States and Liberia is by any standards extraordinary. There are many respects
13 in which there is a serious issue as to whether what has happened is beyond
14 conventional Litigation Funding.

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

17
18 “If, contrary to the above, there was not jurisdiction under GCR O.23, r.1(1)(a) to
19 order security, there is material before the court (referred to above) which would
20 justify the conclusion that the Plaintiff is a nominal plaintiff.”

21
22 A nominal plaintiff is a plaintiff (not being a plaintiff who is suing in a
23 representative capacity) who is suing for the benefit of some other person or persons
24 and there is reason to believe that he will be unable to pay the costs of the defendant
25 if ordered to do so. (GCR O. 23 rule 1(1)(b)).

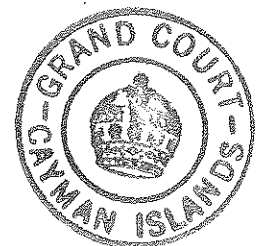
26
27 Further I draw attention to the formulation used to describe the Plaintiff and refer to
28 my observations at page 17 of my earlier judgment under Leave to Amend (i).



1 (iii) There are serious issues to be tried as to whether Mr Kenney's funding and control of
2 the litigation in this court was as summarised by Mr Hawthorne (at paragraphs 47 and
3 48 of his seventh affidavit):-
4

5 *"47... Mr Kenney has controlled for a decade the efforts to enforce the Liberian*
6 *Judgments, which culminated in the suit in the Cayman Islands. Among other*
7 *things:*

- 8
- 9 a) *Mr Kenney devised a strategy for his clients, AJA and the G-22 (and later,*
10 *CCI) to cause the Commissioner to issue proceedings on their behalf in the*
11 *Cayman Islands.*
- 12 b) *Mr Kenney was the central figure in executing this strategy. In so doing, Mr.*
13 *Kenney and his clients controlled the Receiver's actions, placed limits on his*
14 *ability to act, and required him to account to CCI for his decisions and*
15 *expenditures. Mr. Kenney ensured that the Receiver was no more than a*
16 *straw man, executing the plans of Mr Kenney and his clients.*
- 17 c) *Mr Kenney's strategy also attempted to ensure that the actual litigant in the*
18 *Grand Court, the Receiver, would be judgment-proof and unable to pay costs.*
- 19 d) *Mr Kenney created CCI and brought in "Garrett" as an investor, funding the*
20 *pursuit of the Liberian Judgments in the Cayman Islands. By structuring CCI*
21 *to conceal "Garrett"'s identity, Mr Kenney again attempted to ensure that*
22 *ACE would be unable to recover its costs in the event that Mr Kenney's clients*
23 *did not prevail in the Grand Court.*
- 24 e) *Mr Kenney created the Echemus entities and brought in more investors to*
25 *allow the action to continue in the Cayman Islands when "Garrett"'s*
26 *investment was exhausted. Mr Kenney's complete control over the litigation*
27 *is demonstrated by the fact that Mr Little left it to Mr Kenney to negotiate the*
28 *CCI investment on behalf of the Echemus Fund, even though Mr Kenney had*
29 *formed and previously represented CCI, and even though Mr Kenney was*
30 *purportedly representing the Receiver at the same time.*



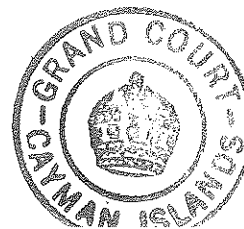
1 *f) Mr Kenney was the managing director and the largest shareholder of the*
2 *Echemus Manager, which had management control over the Echemus Fund*
3 *(both entities having been created by Mr Kenney), at the time that the*
4 *Echemus Fund decided to respond to this court's order to post security for*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

7
8 *48. Mr Kenney has funded this litigation at many points and in many ways. The*
9 *evidence obtained to date shows that:*

- 10
11 *a) In addition to earning fees throughout his representation of AJA, the G-22,*
12 *CCI and the Receiver, Mr Kenney has a contingency interest in this litigation*
13 *(see ...E-mail from James Little to Martin Kenney and John Bagalini, dated*
14 *June 7, 2011... which states that the two lead law firms Kenney & Co. and Mr*
15 *Lohman's law firm, were planning to reduce their success fee to 9% to*
16 *accommodate additional funding).*
17 *b) Mr Kenney invested in the Liberian Claims in or about June 2010 through his*
18 *interest in Bluehawk, which was a limited partner of the Echemus Fund...*
19 *c) Mr Kenney was until recently the majority shareholder of Echemus Manager,*
20 *and hence stood additionally to gain on any recovery on the Liberian Claims*
21 *through distributions from the Echemus Fund to Echemus Manager."*

22
23 (iv) There are serious issues to be tried as to whether CCI's funding and control of the
24 litigation in this court was as summarised by Mr Hawthorne (at paragraph 49 of his
25 seventh affidavit):-

26
27 *"49... CCI has been a principal funder of the effort to enforce the Liberian*
28 *Judgments since its creation in 2005. It was the channel through which*
29 *"Garrett"'s US\$2.85 million investment was used to pay attorneys and finance*
30 *the development and pursuit of the case in the Cayman Islands, long before the*
31 *case was filed in the Grand Court in June 2008. Were it not for CCI's payments*



1 *to Mr Kenney and others, the action in the Grand Court would never have been*
2 *brought.”*

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

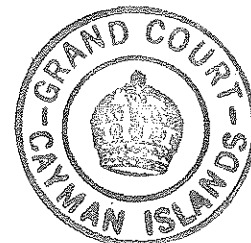
6
7 (vi) There are serious issues as to the circumstances of what Lord Goldsmith described as a
8 “very unusual agreement” between a public official and private parties as to how the
9 official would execute his duties once appointed as receiver (see paragraphs 9 and
10 following of Mr Hawthorne’s seventh affidavit). Lord Goldsmith submitted that this
11 case involves the purchase of a cause of action and asserted that the Receiver assigned
12 his interest in the judgment to CCI, only keeping a fee (1.25%).

13
14 In his first affidavit Mr. Kenney disputes many of the Defendant’s allegations but it is
15 not appropriate to seek to resolve these issues in the course of this application.

16
17 In my opinion there is a serious issue to be tried as to whether a costs order should be
18 made against both Mr Kenney and CCI under section 24, with a real prospect of
19 success.

20
21 5. Has the Defendant satisfied the second requirement in relation to Mr Kenney and CCI?
22 The second requirement is that the applicant must satisfy the court that there is a good arguable
23 case that the claim falls within one or more classes of case in which permission to serve out may
24 be given. In this context “good arguable case” connotes that one side has a much better
25 argument than the other.

26
27 For present purposes the question is has the Defendant satisfied the court that there is a good
28 arguable case that the court has jurisdiction to grant permission to serve the Costs Summons out
29 of the jurisdiction under GCR O 11 r 9(2) or alternatively under GCR O 11 r 1(1)(c)?



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

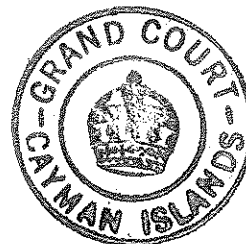
4
5 The principle underlying the jurisdiction (so far as relevant) under GCR O 11 r 9(2) to be derived
6 from *Masri* is that where a person (B) instigates, controls and finances proceedings brought in
7 the name of A, there may be circumstances in which it is legitimate to assimilate the party A and
8 the non-party B, and to treat any means of service available against A, as available also against
9 B. This is so where B in reality brought the main proceedings and there has in effect been a
10 submission to the jurisdiction by B. I derive this principle from paragraph 33 of Lord Mance's
11 opinion. Although the expression alter ego may be used to describe B's relationship with A, I do
12 not read Lord Mance in *Masri* as confining the use of GCR O 11 r 9(2) to the alter ego of a one
13 ship Panamanian company. Lord Mance plainly regarded the type of case that would fall within
14 the principle as narrow, but he was not concerned in *Masri* to examine the extent of the
15 circumstances in which it might be legitimate to assimilate the party A and the non-party B,
16 because an application for an order under CPR r 71.2 plainly did not fall within the principle or
17 CPR r 6.30(2).

18
19 I do not accept Mr Hubble's submissions to the extent that he seeks to narrow the limited
20 jurisdiction further by confining it to the case of an alter ego or the alter ego of a one ship
21 Panamanian Company.

22
23 As to the relevant facts I repeat the matters set out under (i) to (vi) in paragraph 4 above.

24
25 In my opinion there is a good arguable case (a much better argument) that this case falls within
26 the jurisdiction described above because there is a good arguable case that:-

27
28 (1) Mr Kenney and CCI instigated, controlled and financed these proceedings and that the
29 circumstances are such that it is legitimate to assimilate Mr Kenney and CCI with the
30 Plaintiff and to treat any means of service available against the Plaintiff as also available
31 against Mr Kenney and CCI.



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

3 (3) If (contrary to my opinion) it is necessary to establish that Mr Kenney and CCI were the
4 alter ego of the Plaintiff, the concept of alter ego is met in the present case because the
5 Plaintiff was a nominal plaintiff.
6

7 In the light of my conclusions set out above it is unnecessary to consider Lord Goldsmith's
8 alternative arguments as to the ambit of the court's power under GCR O 11 r 9(2) or alternatively
9 under GCR O 11 r 1(1)(c).
10

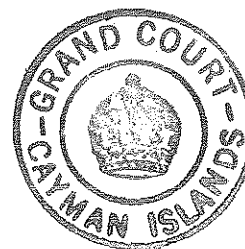
11 6. As to the third requirement (the applicant must satisfy the court that in all the
12 circumstances the Cayman Islands is clearly or distinctly the appropriate forum for the trial of
13 the dispute, and that in all the circumstances the court ought to exercise its discretion to permit
14 service of the proceedings out of the jurisdiction), it is in my opinion beyond argument that the
15 Cayman Islands is clearly and distinctly the appropriate forum. In my opinion in all the
16 circumstances described above the court ought to exercise its discretion to permit service of the
17 proceedings out of the jurisdiction.
18

19 7. For the reasons set out above I will make an order as sought in the Defendant's Summons
20 dated 24 January 2013 and I dismiss the Summons dated 5 April 2013 to set aside the order of 18
21 April 2012.
22

23 I add two footnotes to this Judgment.
24

25 **The overriding objective**
26

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



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

3

4 **The Rules Committee**

5

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

11

12 DATED this 13th day of May 2013

13

Creswell J
The Honourable Justice Creswell
Judge of the Grand Court

14

15

