**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS**
**CICA No 35 of 2013**

**BEFORE**

**The Rt Hon Sir John Chadwick, President**
**The Hon Elliott Mottley, Justice of Appeal**
**The Rt Hon Sir Anthony Campbell, Justice of Appeal**

**ON APPEAL FROM THE GRAND COURT OF THE CAYMAN ISLANDS**
**Financial Services Division**
**Justice Sir Peter Cresswell**
**(FSD No 96 of 2011 – PCJ)**

**BETWEEN**

**MARTIN S. KENNEY**

**CC INTERNATIONAL LIMITED**

**Appellants**

**-and-**

**ACE LIMITED**

**Respondent to Appeal**

**Mr Justin Fenwick QC** with **Mr Nicholas Dunne o**f Walkers for Martin S. Kenney and CC International Limited, the Appellants,
**Lord Goldsmith QC** with **Mr Adam Huckle** of Maples and Calder for Ace Limited, the Respondent to the Appeal

Hearing: 11 April 2014
Judgment: 6 May 2015

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**JUDGMENT**

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**Sir John Chadwick, President:**

1. This is an appeal from an order made on 26 April 2013 by Justice Sir Peter Cresswell on a summons dated 5 April 2013 issued by the appellants, Martin Kenney and CC International Limited, in proceedings brought by (or in the name of) CIGNA Worldwide Insurance Company ("CIGNA WW") against the respondent to the appeal, ACE Limited ("ACE"). The issue raised by the appeal is whether the judge

was wrong to take the view that the Rules of the Grand Court permitted service out of the jurisdiction of a summons seeking a non-party costs order against the appellants.

2. In order to explain the circumstances in which that issue arises in the present case, it is necessary that I describe the factual background to the proceedings brought by CIGNA WW against ACE and their procedural history. For that purpose I can draw on the much fuller account set out by the judge in an earlier judgment in these proceedings, dated 27 January 2012 (reported at 2012 (1) CILR 56); and on Agreed Case Memoranda filed, respectively, on 4 January 2012 and 10 September 2012.

*The background to these proceedings*

3. CIGNA WW is incorporated in Delaware. It was formerly registered to carry on insurance business in Liberia as a foreign corporation. It ceased writing policies in Liberia in or about June 1990 following the outbreak of civil war in that country.

4. In 1991, at a time when the Liberian courts were closed by reason of the civil war, Abi Jaoudi & Azar Trading Co Ltd ("AJA") commenced proceedings against CIGNA WW (Civil Action No 91-6785) in the United States District Court, Eastern District of Pennsylvania ("EDPA"), alleging that CIGNA WW was in breach of certain property and casualty insurance policies in denying coverage for damage to property in Liberia sustained during the civil war. The proceedings were defended by CIGNA WW on the grounds (*inter alia*) of war risk exclusion clauses in the policies. The EPDA upheld that defence; and its decision became final in the United States following dismissal by the U.S. Supreme Court in 1997 of AJA's petition for *certiorari*.

5. In 1998, following its defeat in the EPDA proceedings and the end of the civil war, AJA commenced proceedings in the Liberian courts, making the same allegations and the same claims as it had made in the EPDA proceedings. CIGNA WW sought dismissal of those proceedings on the grounds of *res judicata*. The Liberian court rejected that defence – holding that the EPDA judgment was not recognised in Liberia – and, in 2000, entered judgment for AJA in an amount exceeding US$65 million.

6. In 1999 further proceedings against CIGNA WW were commenced in the Liberian courts by others ("the G-22") claiming to be policy holders or creditors. The claims in those proceedings, also, were for losses sustained during the civil war. Those further

proceedings were consolidated in 2002; and judgment in an amount exceeding US$28 million was entered in favour of the G-22 claimants.

7. ACE is an insurance holding company. It was incorporated in the Cayman Islands in 1985. In January 1999 ACE entered into an acquisition agreement with CIGNA Corporation and CIGNA Holdings (together "the CIGNA parent companies") for the acquisition of certain assets and assumed liabilities of CIGNA WW, including "the assets, liabilities and obligations pertaining to [CIGNA WW's] run-off business in Liberia".

8. In or about April 2003 AJA instructed the appellant Martin Kenney ("Mr Kenney"), a solicitor advocate admitted in England and Wales and in the British Virgin Islands and the principal of Martin Kenney & Co, a British Virgin Islands firm, and Samuel Lohman ("Mr Lohman"), a lawyer licensed in Oregon, registered with the Geneva Bar Association and practising law in Switzerland with the Law Firm Lohman, to take steps to enforce the AJA Liberian judgment.

9. In April 2006 CIGNA WW and ACE received a letter from Mr Lohman demanding payment of both the AJA Liberian judgment and the G-22 Liberian judgments. In that letter Mr Lohman asserted that he was counsel to AJA and to two companies incorporated in Nevis, the appellant CCI International Limited ("CCI") and St Cleer LLC; to which (he said) the G-22 Liberian judgments had been assigned. The basis of the demand against ACE was that its obligations to indemnify the CIGNA parent companies under the 1999 acquisition agreement had the effect that ACE was directly liable to his clients in respect of their claims against CIGNA WW under the Liberian judgments.

10. In April 2007 the Liberian Civil Court appointed Josie Senesie ("Mr Senesie" or, where the context permits, "the Receiver"), a former Commissioner of Insurance for Liberia, as receiver over what was described as CIGNA WW's Liberian branch and business. Mr Senesie retired as Insurance Commissioner and was succeeded in that office – and, then (or subsequently, pursuant to an order of the Liberian court made in February 2009) as receiver of CIGNA WW's Liberian branch – by Foday Sesay ("Mr Sesay" or, again where the context permits, "the Receiver"). In August 2007, on the Receiver's motion, the Liberian court formally recognised the AJA Liberian judgment

and the G-22 Liberian judgment as the sole obligations of CIGNA WW's "Liberian branch".

*The proceedings in the Cayman Islands*

11. These proceedings were commenced in the Grand Court by the issue of a writ on 9 July 2008. The plaintiff named in the writ was "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)". ACE was named as the defendant. The claim in the writ, as issued, was for enforcement of the AJA Liberian judgment and the G-22 Liberian judgment; said to amount, in aggregate, to US$126,139,284.91 with interest thereon from 2 August 2007.

12. Shortly after the commencement of the proceedings, upon the application of ACE, the Grand Court approved the de-registration of ACE as a Cayman Islands company pursuant to section 226 of the Companies Law (2007 Revision); but such approval was on terms which included an undertaking that ACE's Swiss incorporated successor would "submit to the jurisdiction of the Grand Court such that the Swiss Successor will become the defendant herein."

13. The proceedings were stayed by an order (made by consent) dated 6 February 2009, pending final determination of an appeal from a decision (as to immunity and discovery) in contempt proceedings before the EPDA. In May 2011 the Receiver (by then, Mr Sesay) informed ACE that, following a ruling by the Court of Appeals for the Third Circuit in November 2010, the stay of these proceedings had been lifted. Shortly thereafter, on 26 May 2011, the Receiver filed (without leave) a re-amended Writ of Summons and an amended Statement of Claim in these proceedings. In the re-amended Writ and Amended Statement of Claim, the claim to enforce the AJA Liberian judgment was abandoned; so reducing the claim to the amount said to be due under the G-22 Liberian judgment (said to be in an amount of US$34,027,741.27).

14. The proceedings came before the judge in January 2012 on three summonses, each dated 5 December 2011, which had been issued on behalf of ACE. In a judgment dated 27 January 2012 the judge identified a number of issues which he needed to determine: (i) whether the plaintiff (CIGNA WW, acting by the Receiver in respect of

the assets of its Liberian branch) needed leave to amend its writ and statement of claim; (ii) whether the plaintiff had abandoned its claim in respect of the AJA Liberian judgment; (iii) whether the plaintiff should be required to give security for costs; (iv) whether there should be a further stay of the proceedings pending the outcome of the EPDA proceedings; (v) whether the plaintiff should be ordered to identify the persons who were funding the Cayman Islands proceedings; and (vi) what directions should be given for future case management.

15. In the events which have happened it is unnecessary to refer to the judge's decision on any of those issues – other than issue (iii), security of costs - in any detail; but, for completeness, I will mention that the judge held: on issue (i), that the plaintiff did need leave to amend both its writ and its statement of claim; on issue (ii), that he would make an order, by consent, that the plaintiff's claims arising out of or in connection with the AJA Liberian judgment were dismissed "with prejudice"; and that he ordered that the plaintiff pay ACE's costs of and occasioned by the plaintiff's AJA claims on the standard basis up to 21 May 2011 and on the indemnity basis thereafter; on issue (iv), that there be an expedited taxation of the order for costs following the abandonment of the AJA claim; that, subject thereto, there be a stay until the plaintiff had complied with the order for security for costs; and that, thereafter, the plaintiff must apply for leave to amend; on issue (v), that ACE would need to make a formal application for an order that the plaintiff identify the persons funding these proceedings; and, on issue (vi), that further case management directions be reserved for further consideration at a case management conference.

16. The judge was satisfied that the plaintiff should be ordered to give security for costs. By paragraph 4 of his order dated 27 January 2012 he ordered that security be given in the sum of US$850,000 within 28 days. By paragraph 5 of that order he directed that, in default of security being given within that time, the Amended Writ be struck out without further order; and that, upon production by ACE of evidence of the default, there be judgment for ACE without further order and an order that the plaintiff bear ACE's costs of the proceedings. I will return to the reasons which led the judge to conclude that this was an appropriate case to make an order that the plaintiff give security for costs later in this judgment.

17. The plaintiff (or the Receiver) failed to provide security for costs in accordance with paragraph 4 of the order dated 27 January 2012 within the time limited. Accordingly, by a default judgment dated 27 February 2012 it was ordered that the Amended Writ of Summons dated 10 July 2008 be struck out and that judgment be entered for ACE. It was further order that ACE's costs of the proceedings (so far as not otherwise provided for by the Order of 27 January 2012) be paid by the plaintiff, to be taxed on the standard basis if not agreed.

18. By summons issued on 10 April 2012 ("the Costs Summons") ACE applied for an order that the individuals and entities named therein be joined as parties to the proceedings for the purposes of paying, jointly and severally, the unsatisfied costs orders in (i) paragraph 2 of the Order dated 27 January 2012 (arising from the abandonment and dismissal of the AJA Liberian claim) and (ii) paragraph 2 of the default judgment dated 27 February 2012 (arising from the failure to provide the security for costs ordered in the January 2012 Order). The six named individuals and entities were: (i) Echemus Investment Management Ltd, a limited company incorporated in the British Virgin Islands; (ii) Echemus Group LP, a limited partnership established in the British Virgin Islands; (iii) Echemus International Ltd, a limited company incorporated in the British Virgin Islands; (iv) Mr Kenney, described as a Canadian national, resident in the British Virgin Islands; (v) CCI, a limited company incorporated in Nevis; and (vi) James Little, said to be a U.S. national, resident in the United States. Together they were described as "the Costs Parties".

19. The Costs Summons, as issued on 10 April 2012, did not seek permission to serve that summons on the Costs Parties out of the jurisdiction. But that summons was amended on 12 April 2012 and re-amended) on 16 April 2012 to seek that permission. On 17 April 2012 (as appears in the first recital to the order which the judge made on the following day) the judge heard *ex parte* an application made by ACE "by its Re-Amended Ex Parte Summons dated 16 April 2012 seeking permission to serve its Summons dated 10 April 2012 ('Costs Summons') out of the jurisdiction on [the six individuals and entities named in the Costs Summons] ('Costs Parties')".

20. On 18 April 2012 the judge made an order for service of the Costs Summons on five of the six named individuals and entities at addresses outside the jurisdiction. He made no order for service on Echemus International Ltd out of the jurisdiction – it can

be seen from the attendance note of the hearing on 17 April 2012 that an order in those terms had not been pursued – but gave liberty to re-apply. The Costs Summons was served on Echemus Investment Management Ltd, Echemus Group LP (together "Echemus") and Mr Kenney on 24 April 2012 in the British Virgin Islands and on CCI in Nevis on 25 April 2012.

21. On 24 January 2013 ACE issued a further summons, (i) seeking leave to amend its Costs Summons of 10 April 2012 and (ii) "to the extent that it is required", seeking permission to serve the Costs Summons as amended ("the Amended Summons") on Mr Kenney and CCI at addresses out of the jurisdiction. The amendments, for which leave to make in the Amended Summons was sought, were the removal of Echemus International Ltd and Mr Little from the list of individuals and entities (the Costs Parties) whom it was sought to have joined as parties to the proceedings for the purposes of paying the unsatisfied costs orders; and the addition of a claim that the costs of the proceedings be paid on the indemnity basis or in the alternative on the standard basis. As I have said, the decision to omit Echemus International Ltd from that list had been foreshadowed in April 2012. The decision not to pursue a non-party costs claim against Mr Little appears to have been taken shortly before the issue of the January 2013 summons and is referred to at paragraph 4 of an affidavit sworn by Mr Hawthorne on 22 January 2013 (his seventh affidavit).

22. On 5 April 2013 Mr Kenney and CCI applied by summons for an order that the order granting leave to serve the Costs Summons out of the jurisdiction, made *ex parte* on 18 April 2012, be set aside.

23. The summons of 24 January 2013 ("the January 2013 Summons") – by which ACE sought leave to amend its Costs Summons of 10 April 2012 – and the summons of 5 April 2013 ("the April 2013 Summons") – by which Mr Kenney and CCI sought an order setting aside the order of 18 April 2012 - came on for hearing before the judge on 26 April 2013. By the order which he made on that day, the judge gave the leave to amend the Costs Summons which had been sought by the January 2013 Summons; and dismissed the April 2013 Summons. At paragraph 3 of that order he directed that the two Echemus companies, Mr Kenney and CCI be added to these proceedings as defendants for the purposes of costs only. At paragraph 4 he directed (in response to paragraph 2 of the January 2013 Summons) that, permission to serve the Amended

Summons on Mr Kenney and on CCI not being required, service of any other documents on their Cayman Islands attorneys (Walkers) would be sufficient.

24. In the meantime, on 31 May 2012, the Court taxing officer had issued an Interim Costs Certificate in the amount of US$436,376.99 respect of the costs payable under the Order of 27 January 2012 and the default judgment dated 27 February 2012. A final costs certificate, in the additional amount of US$341,219.76 was issued on 26 July 2013. No costs have been paid by the plaintiff or by the Receiver. Accordingly, the aggregate amount of the costs payable under the orders of 27 January 2012 and 27 February 2012, and remaining unpaid, is US$777,596.75.

25. Before turning to the reasons which led the judge to make the order dated 26 April 2013 – from which Mr Kenney and CCI now appeal – it is convenient to examine, first, the basis upon which he had made the order for security for costs on 27 January 2012; and, second, the basis on which he had made the order on 18 April 2012 granting permission to serve the Costs Summons out of the jurisdiction

*The basis upon which the judge had made an order for security for costs on 27 January 2012*

26. In the course of his judgment of 27 January 2012 (2012 (1) CILR 55), the judge observed that the plaintiff (which, as I have said, was described as CIGNA WW, acting by the Receiver in respect of the assets of its Liberian branch) could properly be treated as a nominal plaintiff. It is necessary to appreciate the reasons which had led him to make that observation. It is also necessary to have in mind the observations which the judge made in response to ACE's application for an order that the plaintiff identify the persons who were funding these proceedings.

27. The judge had explained (at paragraph 13 of his judgment of 27 January 2012) that, by its summons dated 5 December 2011, ACE had sought an order that the plaintiff provide security for its costs up to and including the disposal of its summonses dated 30 September 2008 and 5 December 2011; and an order that the Receiver (then, Mr. Sesay) identify the persons who were funding him in these proceedings (including details of their residence or place of incorporation, as may be), so that any unsatisfied order for costs made against the plaintiff might be enforced against them. He explained, also, (at paragraph 14) that the affidavits dealing with that issue were (i)

the second affidavit of Donald Hawthorne, sworn on 22 November 2011, (ii) the third affidavit of Mr. Hawthorne, also sworn on 22 November 22nd, 2011, (iii) the first and second affidavits of Nicholas Dunne, each sworn on 28 December 2011, (iv) the fourth affidavit of Mr. Hawthorne, sworn on 6 January 2012 and (v) the first affidavit of Stephen Alexander, also sworn on 6 January 2012 and (v). He went on (at paragraphs 15 to 26) to summarise the submissions which had been made by on this issue by counsel for the applicant, ACE (which had included the submission that the plaintiff was a nominal plaintiff who is suing for the benefit of some other person); and (at paragraphs 27 and 28) the submissions which had been made by counsel for the plaintiff.

28. At paragraph 29 of his judgment of 27 January 2012, the judge reminded himself that the power to make an order for security for the costs of proceedings, in so far as conferred by GCR Order 23, rule 1, was exercisable on two grounds (a) that the plaintiff is ordinarily resident out of the jurisdiction; and (b) that the plaintiff (not being a plaintiff who is suing in a representative capacity) is a nominal plaintiff who is suing for the benefit of some other person and that there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so. At paragraphs 30 to 32, he referred to decisions of the Courts of England and Wales in relation to the application of the rule in the former Rules of the Supreme Court 1999 equivalent to GCR Order 23 rule 1(a); and concluded that:

> "32. In the present case, the claim is said to be brought by a Liberian receiver of the assets of what is said to be the (insolvent) Liberian branch of a company incorporated in Delaware. In my opinion, having regard to the principles set out above, there is jurisdiction to grant security for costs under O.23, r.1(1)(a) (and [counsel for the plaintiff] was right to concede this)."

29. The judge then turned to the position under GCR Order 23, rule 1(1)(b). He said this:

> "33 A nominal plaintiff is a plaintiff in name, but who in fact sues for the benefit of another—for example where the plaintiff has assigned or charged the whole fruits of the action to another (*Semler* v. *Murphy*). 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."

The material before the court to which the judge was referring in that paragraph (and to which, as he said, he had referred to earlier in his judgment of 27 January 2012)

was that which the judge had set out, when summarising the submissions of counsel for ACE . The judge had said this:

> "23 Lord Goldsmith referred to a number of documents in support of the application under GCR O.23, r.1(1)(b) (and the application for an order that Mr. Sesay identify the persons who are funding him in these proceedings). In a letter dated April 18th, 2006, from law firm Lohman to CIGNA WW and to the defendant ACE Ltd., Mr. Lohman wrote:
>
> > 'This firm acts on behalf of CC Intl. Ltd. ('CCI'), St. Cleer LLC (the 'trustee'), and Abi Jaoudi & Azar Trading Corp. of Monrovia, Liberia ('Abi Jaoudi'). Pursuant to certain agreements executed on January 21st, 2005 and January 28th, 2005 (collectively, the 'assignment agreements'), the 23 individuals and entities of Monrovia, Liberia listed at Schedule 'A' to this letter (collectively, the 'Liberian claim holders') assigned and conveyed good and clear title to the entirety of their rights to receive any and all proceeds realizable from various claims or judgments against CIGNA WW and CIGNA WW's successor, namely ACE Ltd., unto the trustee for CCI . . .
> >
> > **Notice and caution**
> >
> > It has recently come to our attention that certain members of the G-22, under the leadership of one Charles Ananaba of Delta Insurance Loss Adjusters, Inc. of Randall Street, Monrovia, Liberia may be seeking to breach the terms of the January 21st, 2005 assignment agreement and negotiate a settlement or compromise with you directly.
> >
> > The purpose of this letter is, in part, to put you on formal notice that, as a result of the terms of the assignment agreement dated January 21st, 2005, neither Mr. Ananaba nor any of the parties listed at Schedule 'A' hereto have the legal capacity to provide you with a valid receipt for any sums paid in satisfaction or compromise of either (a) the judgments specified herein; or (b) the payment out against any of the insurance claims which formed the underlying basis of such judgments. Our clients have instituted international arbitration proceedings in Geneva, Switzerland to, in part, obtain certain relief to protect their rights in respect of such judgments.
> >
> > Any settlement with the Liberian claimholders, or any of them, would have no effect in terms of satisfying either of these judgments in light of the assignment agreements in favour of CCI.
> >
> > We should be grateful if you would ensure that the appropriate manager within your respective organizations with responsibility for Liberian run-off claims is notified of the position. This will prevent you incurring further unnecessary liability.'
>
> 24 In Civil Action No. 91–6785 in the EDPA on June 6th, 2011, in non-party Samuel M. Lohman's 'Objections and responses to defendant's interrogatories,' in answer to an interrogatory—'identify all persons, natural or otherwise, who have, claim or assert any interest, legal or equitable, in, or who have, claim or assert a right to any part of recovery from, any claims of the

Abi Jaoudi & Azar Trading Corp. ('AJA') against CIGNA WW'—Mr. Lohman said:

> 'Without waiving the foregoing general and specific objections, Lohman states that the respondent receiver and acting Commissioner of Insurance of Liberia, Foday Sesay, has the right to pursue the indemnity enforcement action against ACE Ltd. . . . while CC Intl. Ltd. (CCI), a Nevis company . . . has the sole right to receive a dividend or distribution of the net proceeds of recovery (*e.g.* net of any outstanding legal or other costs), realized from the said indemnity enforcement action. In Liberia, an insolvency stay order is in place prohibiting any Liberian creditor of CIGNA WW from seeking to pursue any assets or litigation associated with CIGNA WW's Liberian branch and business. Only the receiver is now authorized by Liberian law to pursue the Liberian-related assets of CIGNA WW for recovery on the AJA or G-22 judgments or claims. However, the receiver has abandoned pursuit, with prejudice, of the AJA claim in the only action capable of seeking an effective award thereupon—the Cayman indemnity enforcement action against ACE Ltd. In addition, Martin Kenney & Co., Solicitors, a BVI law firm . . . and law firm Lohman, a *société simple* with an address [in] Geneva, have each represented the receiver as legal counsel in connection with the pending action in [the] Cayman Islands against ACE Ltd., and have a conditional contractual right to a legal fee represented by, in part, a portion of any recovery from such action as a part of the compensation due to each respective law firm for such services (the quantum of which being subject to all applicable rules governing the payment of such conditional fee).'

25 In the same action, Mr. Lohman's brief dated June 28th, 2011, in opposition to CIGNA WW's cross-motion to compel discovery, stated:

> 'CC Intl. Ltd. ('CCI') is a Nevis company, which was formed for the specific purpose of holding the right to receive any proceeds arising under the G-22 and AJA claims against CIGNA WW . . . all documents relating to the formation and operation of CCI (and its relationships with AJA, the G-22, and the receiver) were prepared in anticipation of insolvency enforcement litigation against CIGNA WW in Liberia and the indemnity enforcement litigation against ACE in the Cayman Islands.'

26 Lord Goldsmith also referred to redacted law firm Lohman legal bills, including in particular those dated May 1st, 2003 and March 1st, 2007 and to paras. 15–28 of Mr. Hawthorne's third affidavit."

30. At paragraphs 15 to 20 of his third affidavit – in a section of that affidavit headed "The Receiver's Litigation Expenses Are Being Funded by Unidentified Investors in Exchange for a Share in Any Amounts Recovered" - Mr Hawthorne (then counsel with the firm Debevoise & Plimpton LLP, attorneys for ACE both in these proceedings and in the EPDA proceedings) had said this:

"15. Based on my review of documents produced in discovery in the EPDA Action, I believe that the legal costs and other expenses incurred by Messrs Senesie and Sesay in this proceeding are being paid by as-yet-undetermined investors.

16. As discussed above, to date Messrs Senesie and Sesay have recovered no realizable assets. Despite this their lawyers have been paid for their work. One of their attorneys, Mr Samuel M Lohman, produced his time sheets in response to discovery requests in the EPDA Action. Those time sheets show payments received by Mr Lohman's firm but did not identify the source of the payments (see, for example, a Law Firm Lohman legal bill dated November 29 2010, showing a US$42,042.89 payment, page 13 of DWH-9).

17. On June 6 2011, Mr Lohman stated in sworn testimony in the EPDA Action that 'CC International Limited ['CCI'], a Nevis company . . . has the sole right to receive a dividend or distribution of the net proceeds of recovery . . . realized from the said indemnity and enforcement action' (see Non-Party Samuel M Lohman, Esquire's Objections and responses to Defendant's Interrogatories, dated June 6, 2011 ('Lohman Interrogatory Responses'). Response to Interrogatory No 1, page 54- 55 of DWH-9). Based on Mr Lohman's representation that CCI was 'formed for the specific purpose of holding the right to receive any proceeds arising under the . . . claims against CWW' (see Samuel M Lohman's Brief in Opposition to CWW's Cross-Motion to Compel Discovery, dated June 28, 2011, at 12, page 168 of DWH-9), and that no assets have yet been recovered, I believe that CCI is a shell company without substantial assets, formed for the purpose of receiving and distributing any recovery on various Liberian judgments against CWW.

18. Mr Lohman stated in sworn testimony that CCI paid Mr Lohman's legal fees for a period of time prior to April 24, 2007, the date on which the Liberian court appointed Mr Senesie as receiver for the Liberian 'branch' of CWW (see Lohman Interrogatory Responses, Response to Interrogatory No. 6, page 65 of DWH-9). Mr Lohman testified that, since that date, 'the Receiver' paid his legal fees, except that '. . . due to error, the invoices issued to that Receiver's account were misaddressed to CCI from April 24, 2007 and until November 3, 2007', thus providing further evidence of who was actually funding these litigation efforts all along.

19. In the EPDA Action, Mr Lohman provided a privilege log, identifying certain documents responsive to CWW's document requests that Mr Lohman refused to produce based on purported privileges (see Privilege Log, dated June 6, 2011 ('Lohman Privilege Log'), page 72-102 of DWH-9). One document described in this log is a Memorandum of Understanding dated February 22, 2007, between Mr Lohman and CCI. At that time the Liberian Minister for Justice and Attorney General had not yet applied to have Mr Senesie appointed as receiver, and Mr Senesie does not even purport to have accepted the claims owned by CCI as legitimate claims on the estate of CWW's

Liberian 'branch' until six months later, on or about August 22, 2007 (see Statement of Claim at paragraph 2.9). Mr Lohman's privilege log describes this Memorandum of Understanding as a 'Prospective Strategy With Respect to Funding and Implementation of International Insolvency Recovery Plan intended to Receiver Assets Linked to the Liberian Branch of CIGNA WW for the Benefit of its Estate (the 'Plan')' . . . (see Lohman Privilege Log at 1, page 72 of DWH-9). This description indicates that an agreement was in place, even before Mr Senesie's appointment as receiver, to have CCI fund Mr Senesie's efforts to bring suit against ACE. One can presume, based on the ordinary terms of litigation funding arrangements, that the shareholders of CCI have agreed to advance litigation expenses in return for a share of any eventual recovery.

20. Mr Lohman's privilege log contains many further entries reflecting the continued existence of this funding agreement between CCI and Mr Senesie, and its extension to the litigation activities currently undertaken by Mr Sesay. According to the sworn statement of Mr Crettol [Giles Crettol, described by Mr Hawthorne 'as a purported Swiss law expert retained by Mr Lohman to opine concerning the documents on the Lohman Privilege Log'], they include:

> 'A certain International Claims and Funding Agreement dated April 25, 2007, by and among the Law Firms [of Mr Lohman and Martin Kenney] and Mr Senesie as the Receiver, regarding the rights and obligations of the parties in connection with the funding and implementation of the Plan ('the ICEA') together with a certain First Amendment to International Claims and Funding Agreement dated July 1, 2010, by and among the Law Firms and Mr Sesay as successor [as] Receiver, regarding the confirmation and modification of the ICEA . . . .
>
> A certain Agreement dated November 1, 2009 . . . regarding potential distributions of dividends among shareholders of CCI.
>
> Various unanimous written consents of the shareholders of CCI with respect to corporate decisions affecting the funding and implementation of the Plan'.

(See the Crettol Decl, at 8 and 19, pages 119 and 112 of DWH-9 and also the Lohman Privilege Log, pages 72-102 of DWH-9)."

31. At paragraphs 59 to 62 of his judgment of 27 January 2012 the judge considered whether he should make an order that the plaintiff identify the persons who were funding these proceedings. He said this:

> "59 ACE seeks an order that Mr. Sesay identify the persons who are funding him in these proceedings (including details of their residence or place of incorporation, as may be), so that any unsatisfied order for costs made against Mr. Sesay may be enforced against them. Lord Goldsmith submits that this is an opportunistic claim brought for the benefit of shadowy people.

> 60 There is no formal application for such an order before the court. I make the following observations. It is the duty of parties to help the court to further the overriding objective. This duty includes Mr. Sesay and his legal advisers. A serious issue is raised by the defendant as to the nature, extent and legal effect of any assignment. I refer to the various statements on this subject quoted above.
>
> 61 In the course of the hearing, Mr. Dunne made oral submissions on what were said to be instructions, but in the end he recognized that what the court requires is full and accurate assistance as to the true position. I refer (by way of illustration) to the principles set out in *Snell's Equity*, 31st ed., chap. 3: 'Assignment of Choses in Action' (2005). Careful attention should be paid to the relevant principles when any draft amendment is formulated. The subject of third-party funding was considered in Sir Rupert Jackson's *Review of Civil Litigation Costs: Final Report*, Part II, chap. 11 (2009), where the judgment of Lord Phillips in *Arkin* v. *Borchard Lines Ltd.* ([2005] EWCA Civ 655, at paras. 39–43) is set out. I also refer to *Abraham* v. *Thompson* and *Dymocks Franchise Systems (NSW) Pty Ltd.* v. *Todd.* It is far from clear on the material before the court what the nature, extent and legal effect of any assignment in the present case is, and whether the related arrangements conform to third-party funding as referred to above, or take some different form.
>
> 62 I indicate that it would further the overriding objective if Walkers would take careful instructions when preparing the application for leave to re-amend/amend and write to Maples & Calder clarifying the position as to any assignment, and enclosing copies of all material documents (to the extent that the defendant is entitled to see the same). My purpose in giving this indication is to identify and narrow the issues and save time and cost.
>
> 63 If the defendant wishes (despite the order for security) to pursue an application as above, a formal application should be issued."

As I have explained, in the event, the plaintiff failed to comply with the order to provide security for costs; no application was made for leave to amend or re-amend the writ and statement of claim; and so Walkers appear (understandably, in those circumstances) to have taken the view that the judge's indication that they were under a duty to provide information as to the assignment of the fruits of the litigation (to which Mr Hawthorne had referred in his third affidavit) could be disregarded.

*The basis upon which the judge had made the order of 18 April 2012 granting permission to serve the Costs Summons out of the jurisdiction*

32. As I have said, the order of 18 April 2012 was made following an *ex parte* hearing on the previous day. The material which was before the judge at that hearing included the third affidavit of Mr Hawthorne (to which reference has already been made), his sixth affidavit, sworn on 10 April 2012 and the fourth affidavit of Mr Alexander, also sworn on 10 April 2012. The material before this Court includes no formal judgment

setting out the reasons why the judge made the order which he did; but the reasons can, I think, be found in the internal Hearing Attendance Note prepared by Maples and Calder shortly thereafter (on 4 May 2012); and in the affidavits which were before the judge.

33. In his fourth affidavit, after setting out the background to the litigation and the procedural history, Mr Alexander turned (at paragraphs 15 to 23) to address the circumstances which should lead to non-party costs orders being made against the Costs Parties (defined in the Costs Summons). At paragraph 15 he said this:

> "15. By the time of the hearing in the Grand Court on 16 and 17 January 2012 [the hearing which preceded the judgment of 27 January 2012], it was already clear that Mr Sesay was being funded by investors, but ACE had not yet been able to identify those investors (see the Third Affidavit of Donald Hawthorne dated 22 November 2011) ('Third Hawthorne Affidavit'), paragraph 15). Mr Hawthorne's firm Debevoise & Plimpton LLP had attempted to identify these investors by inquiries directed to the US attorneys representing Messrs Senesie, Sesay and Lohman, but without success (see paragraphs 21 to 28 of the Third Hawthorne Affidavit). However, the sworn testimony in the EPDA Action of one of Mr Sesay's attorneys, Mr Samuel Lohman, identified CCI as being involved in funding the proceedings (see paragraphs 16 to 20 of the Third Hawthorne Affidavit).
>
> 16 According to the evidence set out in paragraphs 24 to 33 of the Second Hawthorne Affidavit [also sworn by Mr Hawthorne on 22 November 2011] and in paragraphs 17 to 20 of the Third Hawthorne Affidavit:
>
> 16.1 CCI was formed in or about 2006 for the specific purpose of holding the right to receive any proceeds arising under the claims against CWW;
>
> 16.2 On 21 February 2007, Mr Senesie wrote to the Liberian Minister of Justice and Attorney General requesting that he be appointed as receiver for CWW's so-called 'Liberian branch';
>
> 16.3 On 22 February 2007, a Memorandum of Understanding was signed between Mr Kenney, Mr Lohman, CCI and Mr Senesie concerning the funding by CCI of Mr Senesie's efforts to pursue a claim against ACE to recover assets 'linked to the Liberian branch of [CWW]';
>
> 16.4 On 28 February 2008 [*sic*, but in error for 2007] the Minister of Justice filed a petition for an order appointing Mr Senesie as receiver of CWW's 'Liberian branch';
>
> 16.5 On 24 April 2007, the Liberian Court appointed Mr Senesie as receiver. CCI paid Mr Senesie's legal fees for, at least, a period prior to this date;

16.6 On 25 April 2007, a funding agreement was signed between CCI, Mr Senesie, and the law firms of Mr Lohman and Mr Kenney;

16.7 On 22 August 2007, at the request of Mr Senesie, the Liberian Court issued a Request for Judicial Assistance to the Grand Court, which asked the Grand Court to 'consider [Mr Senesie's] intended application in the Grand Court' for purposes of an action against ACE; and

16.8 On 9 July 2008, Mr Senesie issued the Writ of Summons in these proceedings.

17. It is therefore clear that CCI and Mr Kenney were involved in efforts to fund and facilitate a claim against ACE at least as early as February 2007 and before Mr Senesie had even been appointed as receiver.

18. More recently, ACE sought to identify the funders through a deposition from Mr Kirk Huddles in the EDPA Action. The Sixth Affidavit of Mr Hawthorne dated 10 April 2012 ('Sixth Hawthorne Affidavit') sets out the relevant history of the deposition of Mr Huddles and exhibits the transcript of Mr Huddles' deposition on 7 March 2012 ('Huddles Deposition') and the documents referred to by Mr Huddles during his deposition.

19. The evidence set out in paragraphs 10 to 21 of the Sixth Hawthorne Affidavit shows the following:

19.1 CCI was formed in or about 2006, prior to the commencement of these proceedings, to hold the right to receive any proceeds recovered in these proceedings, which would be distributed to its investors (apart from a 'small allotment' of shares that were owned by the original claimants) (Huddles Deposition, pages 19 to 20, 31, 69 and the prospectus thereto);

19.2 Prior to the commencement of these proceedings, an unidentified investor had invested approximately US$2.85 million into CCI for the purpose of pursuing this action. This investor [referred to as 'Garrett' in Mr Hawthorne's seventh affidavit sworn on 22 January 2013] was an individual close to Mr Kenney (Huddles Deposition, pages 23, 26, 51 and 70);

19.3 CCI funded the proceedings herein, and by 2010 had expended US$2.85 million in doing so.

19.4 In 2009, Mr Huddles was retained by an Echemus entity (it is not clear whether this was the Echemus Fund or the Echemus Manager) to assist in raising capital (Huddles Deposition, pages 14 to 15, 19-20, 26, 42);

19.5 At that time, Mr Kenney claimed that he had secured the right to finance and potentially act on behalf of litigants in respect of four claims in which Echemus would invest if it were able to raise capital. One of those claims was the claim brought by Mr Senesie in these proceedings (Huddles Deposition, page 20 and the prospectus exhibited thereto);

19.6 In 2010, the Echemus Fund invested in CCI, in an amount up to an additional US$3 million (Huddles Deposition, pages 28 and 68);

19.7 The principals of the Echemus Manager are Mr Kenney and Mr Little (Huddles Deposition, pages 10 and 32 to 33 and the business cards exhibited thereto). In addition to their positions as directors (and presumably shareholders) of the Echemus Manager, Mr Kenney and Mr Little have also invested in the Echemus Fund as limited partners (Huddles Deposition, pages 31 to 34).

20. Mr Huddles' confirmation of the role of CCI and the funding arrangements behind this litigation is consistent with the earlier evidence of Mr Lohman. There is no doubt that the Costs Parties funded these proceedings, in whole or in part, and that, had this funding not been provided, these proceedings are unlikely to have ever been brought. At page 68 of the Huddles Deposition the following exchange takes place:

'Q. And do you know how, how CC International or if you didn't deal with that name particularly, the investment vehicle that's discussed in Exhibit 1, came to have an interest in what we defined in the document request as the Liberian judgment?

A. My recollection is that it needed capital to be pursued . . .'

21. This Honourable Court has jurisdiction to make costs orders against non parties, including funders, in accordance with section 24(3) of the Judicature Law (2007 Revision). In the circumstances, the Costs Parties, who have availed themselves of the jurisdiction, should not be permitted to avoid liability for costs when unsuccessful."

34. At paragraph 24 of his fourth affidavit, Mr Alexander set out the basis upon which it was submitted that leave to serve the Costs Summons out of the jurisdiction should be granted. He said this:

"24. The Costs Parties are located outside the jurisdiction of this Honourable Court. ACE seeks leave to serve the Summons out of the jurisdiction in accordance with GCR O. 11, r. 9(2), which states:

'9(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 or petition may by these Rules or under any Law be served without leave.'"

He went on, at paragraphs 25 and 26, to explain how, and the addresses at which, it was proposed that service be effected. At paragraph 27 he set out the grounds upon which it was submitted that the Cayman Islands was clearly the most appropriate forum for resolution of the dispute. At paragraph 27.4 he said this:

" 27.4 . . . the Costs Parties have all, at various points between 2007 and 2012, funded and encouraged Mr Senesie and Mr Sesay to commence and prosecute these proceedings against ACE. Therefore, the Costs Parties should

be bound by Mr Senesie's and Mr Sesay's election as to jurisdiction and the costs consequences that result from that election. This Honourable Court should not allow the Costs Parties to choose the Cayman Islands as a jurisdiction to prosecute a claim when it suits them, but then to claim *forum non conveniens* when it no longer suits them."

35. Mr Hawthorne exhibited to his sixth affidavit, also sworn to 10 April 2012, the documents referred to by Mr Alexander in the passages of his fourth affidavit which I have just set out; in particular, he exhibited the Huddles Deposition. At paragraphs 12 and 13 of his sixth affidavit (in a section headed "Nature of Echemus' Business and Martin Kenney's Role") Mr Hawthorne said this:

> "12. Mr Huddles testified that, in 2009-2010, he was responsible for 'spearheading' the marketing and business development efforts for a new litigation funding enterprise called Echemus (Dep. 18, page 20 of DWH-14). Mr Huddles was 'part of a team that was out in the market raising capital for an investment fund' (Dep. 27, page 2 of DWH-14). His knowledge 'of how Echemus would work came directly from Martin Kenney and Jim Little' the co-founders and 'principals' of the business (Dep. 27, 33, pages 9, 35 of DWH-14)
>
> 13 Mr Huddles testified that Echemus was initially organized as a litigation fund to raise capital without any cases in the fund, but eventually decided that to attract capital, they need to establish 'a special purpose vehicle that had certain cases of Martin [Kenney]'s that were already being worked on (Dep. 20, page 22 of DWH-14). Mr Huddles testified that a portion of an 'Investor Presentation' entitled 'Liberian branch of CIGNA Worldwide Insurance Company (in liquidation) (CIGNA WW) v ACE Limited [Grand Court of the Cayman Islands]' described one of the four cases in which Echemus was considering investing. (Dep. 12, Ex 1, pages 14, 92-97 of DWH-14). Mr Huddles testified that he believed that Mr Kenney had 'secured' the right 'to finance and potentially act . . . as a litigator' on the four cases, including this case. Mr Huddles understood that Mr Kenney 'would be the architect . . . running the case from a legal perspective, with Echemus funding the pursuit' (Dep. 25-26, pages 27-28 of DWH-14), Mr Huddles testified that '[w]e were holding ourselves out to the market as having the opportunity to finance these cases [including the Cayman Island case] and more' (Dep.27, page 29 of DWH-14)."

36. At paragraph 14 of his sixth affidavit (in a section headed "Interests in Liberian Claims") Mr Hawthorne said this:

> "14 According to the Investor Presentation, the Abi Jaoudi and Azar Trading Corporation and a group of 22 other Liberian commercial enterprises ('the G-22') obtained judgments against CWW purportedly worth nearly $150 million ('the Liberian Claims'), and sought to enforce the judgments against ACE under ACE's indemnification agreement with CWW. . . . However, because the Liberian parties lacked the resources to pursue these claims, CCI, a Nevis-incorporated special-purpose vehicle 'was formed in the BVI in 2006

> to act as a special purpose vehicle to hold the right to payment under Abi Jaoudi's and the G-22's Liberian judgments. Thus, the right to receive 100% of the proceeds under the Abi Jaoudi and G-22 . . . judgments have been assigned to CCI. In turn, Abi Jaoudi and the G-22 own a small allotment of preferred shares and an allotment of ordinary shares in CCI (19-20, pages 92-93 of DWH-14).

After referring (at paragraph 15 of his sixth affidavit) to the investment of US$ 2.85 million in CCI in return for a portion of anticipated recoveries, "which sum had been spent"; Mr Hawthorne went on to say this:

> "16. The Investor Presentation states that 'Echemus plans to invest up to $3 million to buy up to a 30% interest' in CCI, and that this contribution would permit CCI 'to support the Receiver and his legal team to the case's conclusion' (19, 21, pages 92, 94 of DWH-14). The Presentation states that '[i]f the claim against ACE succeeds in the full amount, Echemus would be entitled to up to $42.7 million, plus reimbursement of $3 million in costs (total - $45.7 million) on a fully funded $3 million investment' (21, page 94 of DWH-14).
>
> 17. The Investor Presentation makes clear that the funds sought are intended to finance the Cayman Islands litigation. (22, page 95 of DWH-14). The presentation states that barring settlement, 'Echemus will need to fund the open prosecution of Liberian claims before the Grand Court of the Cayman Islands . . . including litigation over the quantum of security for costs . . . , posting the required security, trial preparation and two levels of appeal on the issue of the standing/recognition of the Receiver to sue ACE . . . , as well as preparation for a motion for summary judg[]ment against ACE . . . and summary trial preparation . . . for an appeal of the final judgment of the Cayman Court . . .' (23, page 96 of DWH-14). Among the 'key events' anticipated, the Investor Presentation lists '[s]ecurity for costs request in the Cayman Islands' and states as possible '[n]egative outcome' that '[i]f Receiver can't post security for costs, settlement offer will be much lower, or ACE may let Receiver's claim wallow' – apparently anticipating the possibility that, despite pursuing the claim with Echemus funding, the receiver would default rather than post security, as he has now done (23-24, pages 96-97 of DWH-14)"

37. At paragraph 21 of his sixth affidavit (in a section headed " Interests in Echemus") Mr Hawthorne referred to an email of 26 March 2010 in which it was said that Mr Kenney would be investing $2 million in Echemus. Earlier, at paragraph 15 in the same section, he had said that, according to Mr Huddles (DEP 32-34, pages 34-36 of DWH-14), Echemus' "principals", which included Mr Kenney, were investors in Echemus . At paragraph 22 he said this:

> "22. In sum, it is evident that CCI, Echemus, James Little and Martin Kenney (through their investment in Echemus funded the pursuit of the Liberian claims in the Grand Court with the expectation of profiting from their

> investment. In light of the receiver's refusal (and inability) to pay any of ACE's costs for defending this action, CCI, Echemus Fund, Echemus Manager, James Little and Martin Kenney (and perhaps others) should be held accountable for the costs incurred by ACE in responding to the case in this Court, which they funded. Accordingly, we respectfully request that Echemus Fund, Echemus Manager, Mr Little and Mr Kenney (*sic*) be joined as parties to the proceedings for the purposes of paying, jointly and severally, the unsatisfied costs orders in paragraph 2 of the Order dated 27 January 2012 and paragraph 2 of the default judgment of 27 February 2012."

For whatever reason – but, in my view, probably by oversight - the request made in the final sentence of that paragraph did not extend to CCI; but CCI was named in the Costs Summons as one of Costs Parties whom it was sought, by that summons, to join as parties to the proceedings.

38. The internal Hearing Attendance Note records that, at the outset of the hearing on 17 April 2012, the judge made the following observation:

> ". . . Well I should start by saying that I am grateful to Mr Alexander for reminding me of the Ikarian Reefer case. I find this directly in point in relation to the jurisdiction under O.11, r. 9(2). I was the judge on the first Ikarian Reefer case. The approach taken on this application by ACE is excellent. It is wise to double [bank] on the 'necessary and proper party' basis in the alternative. I am concerned that the decision to join non-parties will be hotly contested. It is important to ensure the Order is procedurally correct. There are quite a number of parties to serve."

And he went on to say this:

> "In the Ikarian Reefer the application was put in two ways. Walker J (*sic*) decided it one way but if he is wrong it will be on the necessary and proper party basis. This is the correct way to proceed. . . ."

The reference there to "Walker J" is likely to be an error by the note-taker. The lead judgment in the Court of Appeal (on appeal from Mr Justice Rix) in *Comninos v Prudential Assurance Ltd (The Ikarian Reefer (No. 2)* **[**1999] EWCA Civ 3019; [2000] 1WLR 603 was given by Lord Justice Waller; as Justice Sir Peter Cresswell may be taken to have been well aware. The judge added:

> "The requirement is to identify who funded the litigation. The key is who funded. You need to show funding or alternatively controlling?"

The judge was told by counsel that "for present purposes our application is just to join the individuals entities identified in the summons as parties". That was an accurate representation of the purpose of the Costs Summons as issued on 10 April 2012; but it was not an accurate representation of the Re-Amended Ex Parte Summons dated 16 April 2012, on which the judge made the order which he did on 18 April 2012. As

appears from the first recital to the Order of 18 April 2012, the application before the judge (made by the Re-Amended Ex Parte Summons dated 16 April 2012) was for permission to serve the Costs Summons (dated 10 April 2012) out of the jurisdiction on parties (the Costs Parties) named in the Costs Summons; and that was the Order that was made.

39. At a later stage of the hearing on 17 April 2012, the judge indicated that he wanted to turn his attention to the parties that were to be served and to "the . . . test in the Ikarian Reefer case". He observed that "they must be a funder or a controller". As recorded in the internal Hearing Attendance Note, Counsel's response was this:

> ". . . the relevant test is set out in the Ikarian Reefer (No. 2) case at page 43. The principles to be applied refer to the Symphony case [*Symphony Group Plc v Hodgson* [1994] QB 179, 191]. The categories of non-parties identified include those referred to at points 1 and 2 of the quote from *Symphony*, namely, those who have management and who have funded the action. We say this applies to Kenney, Little and CCI. Kenney was involved from the beginning. Little actively solicited funds. He is the business partner of Kenney. Little and Kenney are directors of the General Partner of Echemus Fund. When CCI ran out of money it looked to Echemus who would then be directing the litigation."

Following further discussion as to where and how the Costs Parties to be served the judge indicated that he would "make the order" against all but Echemus International.

40. As I have said, the order which the judge made on 18 April 2012 was an order to serve the Costs Summons dated 10 April 2012 on five of the six entities or individuals named in that summons at addresses out of the jurisdiction. When he said, at the conclusion of the hearing on 17 April 2012 that he would "make the order"; he must be understood to have been referring to the order to serve out which had been sought in the Re-Amended Ex Parte Summons dated 16 April 2012. The judge made no order, on 18 April 2012, for any of those named as Costs Parties in the Costs Summons to be joined as parties to the proceedings.

41. It is, if I may say so, less than clear from the Hearing Attendance Note whether the judge thought that the jurisdiction to give permission for service of the Costs Summons out of the jurisdiction which he was exercising on 18 April 2012 was that conferred by GCR Order 11, rule 9(2) – which I have already set out – or that conferred by GCR Order 11, rule 1(1)(c), which is in these terms:

> "1(1) Provided that the writ does not contain any claim mentioned in Order 75, rule 1(3) [which is not this case] 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 if duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto:
> . . ."

But the better view, as it seems to me, is that the judge thought he was exercising a jurisdiction to permit service out which was conferred by Order 11, rule 9(2); and that he took the view that rule 9(2) conferred such jurisdiction on the basis of the judgment of Lord Justice Waller (with whom the other members of the Court of Appeal agreed) in *The Ikarian Reefer (No. 2)* to which he had been referred in the course of counsel's submissions. As I have said, it is plain, from the fourth affidavit of Mr Alexander, that the application for leave to serve out of the jurisdiction was made under Order 11, rule 9(2). And, in any event, whatever may have been the judge's view as to the basis for jurisdiction when he made the order permitting service out in April 2012, there is no doubt that it was on the basis of jurisdiction under rule 9(2) that he subsequently upheld that order in April 2013.

*The Ikarian Reefer (No.2)*

42. It is convenient, therefore, to refer at this stage to the judgment of Lord Justice Waller in *The Ikarian Reefer (No. 2).* He began by stating the underlying facts:

> "The action was concerned with the claim by the plaintiffs, a Panamanian company, as owners of the M.V. Ikarian Reefer, to recover from her hull and machinery underwriters, represented for these purposes by Prudential, the lead underwriter. The claim was made on the basis that the Ikarian Reefer was a constructive total loss following grounding and a fire in April 1985. Prudential defended the claim on the ground that the vessel had been deliberately cast away by her owners. At the trial, Cresswell J gave judgment in favour of the owners [1993] 2 Lloyd's Rep. 68. In December 1994, following a hearing lasting 30 days in the Court of Appeal, Prudential's appeal was allowed. The Court of Appeal held that the vessel had been deliberately run aground and then deliberately set on fire on the authority of her owners, the plaintiffs: [1995] 1 Lloyd's Rep 455. Prudential were awarded their costs both on appeal and in the court below. The total costs for which Prudential has obtained certification amount to £2,771,072.81 to which a sum in excess of £1m in interest needs to be added. Prudential has recovered £1,175,000 of those costs by reason of awards of security for costs made prior to trial. Prudential claims a balance including interest in the sum of £2,680,215.87.
>
> On 15 December 1998 Prudential issued a summons in this action seeking an order pursuant to section 51 of the Supreme Court Act (the Act) that Mr

Comninos be liable personally to pay its costs. There is no issue that section 51 does permit such an order to be made against a non-party, see *Aiden Shipping Co. Ltd. v Interbulk Ltd.* (*The Vimeira*) [1986] A.C. 965."

43. Lord Justice Waller then set out the provisions of sections 51(1) and (3) of the Supreme Court Act 1981; the terms of which were enacted in this jurisdiction in sections 24(1) and (3) of the Judicature Law (2007 Revision). He went on:

> "The grounds on which the order is sought against Mr Comninos are set out in the seventh affidavit of Mr Jeremy Farr, a partner in Messrs Ince & Co, Prudential's solicitors, sworn on 14 December 1998. They are summarised by Rix J as follows:-
>
> > 'The owners were a typical one ship company whose only asset, the Ikarian Reefer, has been scuttled. The principals behind the owners were two brothers, Mr Constantine ('Costas') Comninos, against whom the summons has been issued, and his brother, Anthony. At the time the vessel was scuttled, they were both directors of the owning company, and Costas held 80% of its shares and Anthony held the other 20%. Subsequently, in November 1986 Anthony transferred his shares to Costas, who became the sole shareholder, and in June 1987 Anthony formally resigned as a director. In an affidavit in these proceedings dated 13 May 1992, by which time the bank to which the vessel had been mortgaged had been paid out, Costas referred to himself as having 'effectively the entire beneficial interest in the Ikarian Reefer and in the proceeds of this insurance.' Prudential draws the inference from these and other indications that Costas Comninos was involved in the direction of the action and that it was he who instituted, controlled and financed the litigation.'
>
> Prudential's summons of 15 December 1998 was served on Mr Comninos in Greece. No leave was obtained from the English court for that service. The only evidence before Rix J, so far as Greek law was concerned, indicated that that service was good service according to Greek law. On 12 January 1999 copies of the summons and of Mr Farr's affidavit were served on Messrs Clifford Chance, the plaintiff's solicitors, who acknowledged that service on 13 January 1999.
>
> Mr Comninos wished to challenge the jurisdiction of the English court. Agreement was given by Ince & Co, for Prudential, that such challenge would not itself be taken as a submission to the jurisdiction. It was in those circumstances that the matter came before Rix J on 12 July 1999. At the hearing on 12 July 1999 [Counsel] on behalf of Prudential, without notice to Mr Comninos, sought permission to add Mr Comninos as a party to the proceedings (for the purpose of costs only) and in that connection for permission to dispense with further service of the amended summons and with service of any amended writ.
>
> Rix J dismissed Mr Comninos' application challenging the court's jurisdiction. He held that leave should have been obtained for the service of the summons on Mr Comninos in Greece. He however held that that leave

could be given retrospectively, and gave such leave, and in the result Mr Comninos' challenge failed."

44. The Lord Justice then set out the submissions advanced on behalf of Mr Comninos; in which much reliance was placed on the provisions of the Brussels Convention (Greece being, of course, a Contracting State). But, in the alternative, it was said that:

> ". . . if the Brussels Convention did not apply, then the court had no inherent jurisdiction over someone not physically within the United Kingdom. He submitted that (in the absence of a submission to the jurisdiction) the English court could only have jurisdiction over someone outside the territorial jurisdiction of the English court where statute had provided that jurisdiction. He submitted that the only relevant statutory jurisdiction available to the English court in these circumstances was that provided by the rules of court made with statutory authority. Those rules are set out under Order 11 rule 1 and he submitted that Order 11 rule 1 simply did not cover a section 51 application against a non-party. . . ."

And he set out the submissions advanced on behalf of the underwriters:

> "(1) The application is made on the basis that Mr Comninos was the directing mind of the company that brought the proceedings and that thus he and the company were really one and the same. He [Counsel] submitted thus that the English court should have jurisdiction to decide that issue and that in reality the preliminary point on jurisdiction and the main point under section 51 merge one with the other. He submitted that if the issue is decided against Mr Comninos that will establish that Mr Comninos has in fact submitted to the jurisdiction by bringing the action through his company. . . . [T]he main thrust of [Counsel's] submission, that the hearing on the merits and the jurisdiction question are really intertwined, involves, as it seems to me in reality, a submission that if the section 51 proceedings were decided against Mr Comninos that decision would involve deciding that Mr Comninos had in effect submitted to the jurisdiction. [Counsel] submitted thus that procedurally all that was required for that issue to be placed before the English court was compliance with such rules of procedure as the English court had laid down for resolving the section 51 issue. He submitted that notice of the fact that the issue was to be raised by a summons in the action was all that was required. He relied on *Re Cliff* [1895] 2 Ch. 21. He submitted that Prudential had complied with their obligation to give notice by service of the summons in Greece without leave. In the alternative, so far as the appropriate procedure was concerned, he relied on Order 11 rule 9. Order 11 rule 9 provides:-
>
> > '(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'"

It can be seen that RSC Order 11, rule 9(4) was in the same terms as GCR Order 11, rule (2). Lord Justice Waller went on:

> "[Counsel] submitted that despite a dictum in *Murphy v Young & Co Brewery* [1997] 1 W.L.R. 1591 of Lord Justice Phillips to the contrary, an originating summons under the old rules [the Rules of the Supreme Court 1996] was not necessary in relation to an application under section 51. He submitted that the requirement to swear an affidavit under Order 11 rules 9(5) and 4(1) was inapplicable; or if it was applicable there was no requirement under Order 11 rule 9 to comply with (a) to (u) of Order 11 rule 1(1) in order to obtain leave to issue and serve a summons in an already existing action. Order 11 rule 9(5) allowed for sensible adaptation. In the final alternative, so far as the appropriate procedure relating to this first submission was concerned, [Counsel] submitted that if an originating summons was necessary and if thus service was only permissible with the leave of the court in the circumstances set out under Order 11 rule 1(1), then Prudential could satisfy the court that Mr Comninos was a necessary or proper party under Order 11 rule 1(1)(c). He suggested furthermore that the linguistic difficulty which might at first sight appear if an affidavit was required to be sworn in accordance with Order 11 rule 4 was concerned, should not constrain the court. He in any event suggested that retrospective leave should be given in relation to the service of the summons.
>
> (2) [Counsel] submitted in the alternative that even if he cannot rely on a submission to the jurisdiction, the issue under section 51 is still an issue which the English court has the jurisdiction to try in relation to a person outside the territorial jurisdiction of the court unless the circumstances are such that the United Kingdom by the Brussels Convention has agreed that the English court should not have jurisdiction. He submitted that Mr Comninos . . . had no right [under the Convention] to be proceeded against in Greece. He submitted that the procedure for deciding the section 51 issue was precisely that already discussed i.e. either notice to Mr Comninos without leave of the court or leave under Order 11 rule 9 or leave under Order 11 rule 1(1)(c)."

45. Lord Justice Waller accepted that enforcement of orders outside the United Kingdom in other countries would depend on the recognition by those other countries of the jurisdiction which the English court had purported to exercise. Those, he said, were important and fundamental points; and that was particularly so where the English court is seeking to bring before it someone who is prima facie not subject to the territorial jurisdiction of the English court. The court should be cautious in its approach to bringing persons outside the jurisdiction before it. But he went on:

> "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 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."

He reminded himself of the summary of the decisions relating to the award of costs against a non-party, in the judgment of Balcombe LJ in *Symphony Group Plc v Hodgson* [1994] Q.B. 179 at 191. And he went on to say this:

> "It seems to me important to distinguish between a situation in which there is no pending action but the English court is concerned to exercise jurisdiction over someone resident outside its territory, and a situation in which there is pending in the English court an action over which on any view the English court has jurisdiction. If, for example, a party to an English action were to commit a contempt of court by refusing to obey an order, the fact that that party was outside the jurisdiction would not prevent the court exercising its powers to commit the infringer for contempt. In *Mansour v Mansour* [1989] 1 F.L.R. 418 that very point was considered."

After setting out the facts in *Mansour*, he said this:

> "[The husband] took out a notice of motion for [the wife] to be committed to prison for contempt of court [for breach of a *Mareva* injunction]. The wife applied to set aside that notice on the basis that the English court did not have jurisdiction over her as a resident in Egypt. The application was refused and leave to appeal was sought. The Court of Appeal refused leave to appeal. The court held that it was very doubtful whether committal proceedings to enforce *Mareva* injunctions fell within Order 11 rule 1(1)(m) i.e. enforcement of judgments. The court further held that a notice of motion was not an originating process to which Order 11 rule 9(1) applied. It further held that rule 9(4), which was in slightly different terms to the rule quoted above, was concerned with summonses, notices and orders issued, given, or made in proceedings which are "in esse". Order 11 rule 9(4) in those days was in the following terms:-
>
> > 'Subject to Order 73, Rule 7, 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 without leave.'
>
> And following quotation of that provision Lord Donaldson in the judgment of the court, with which Neill LJ and Balcombe LJ agreed, said as follows:-
>
> > 'Clearly, if it had been necessary to serve the writ out of the jurisdiction, leave would have been required and could have been obtained. In fact, it was served within the jurisdiction, but that does not alter its character in the context of a defendant who is abroad. RSC Ord. 11, r.9(4) is dealing with summonses, notices and orders issued, given or made in any proceedings which are already in being, and it seems to me quite clear that a notice of a motion to be made in existing proceedings is within the paragraph. If the proceedings were such that leave to serve the writ was required, leave can be given to serve the summons, notice or order. If no leave to serve the writ was required, no leave is necessary to serve the summons, notice or order'

> The difference between sub-paragraph 4 as quoted by Lord Donaldson and the present sub-paragraph 4 relates to the insertion of the words at the end of (4) 'out of the jurisdiction'. With the insertion of those words it is not possible to argue that simply because this 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. However, the above paragraph in the judgment of Lord Donaldson still supports 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. I appreciate that in that case the party being served was a party to the proceedings. But that was not the basis of Lord Donaldson's reasoning and I venture to think that if a non-party committed a contempt of the English court the fact that that non-party was outside the jurisdiction physically would not prevent the English court having jurisdiction to proceed to commit for contempt. By analogy, as it seems to me, unless by some Convention the United Kingdom has agreed that its courts would not exercise a jurisdiction, the English court has jurisdiction to decide the issue whether a non-party has taken such steps in relation to an action, as should render that person liable to pay the costs of that action . Even more clearly, if what is alleged (as in this case) 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."

46. Lord Justice Waller took the view that it was convenient, first, to address the issues on the basis that non-party whom it was sought to make liable for the costs of the proceedings was not resident or domiciled in a Convention country (which, of course, is the present case). In doing so, he said this:

> "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. 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 Order 11 rule 1. Order 11 rule 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 Order 11 rule 9(1) would not be material. Despite the dictum of Phillips LJ in *Murphy v Young & Co's Brewery,* I prefer the

approach of Sir Robert Gatehouse in *Seismik Securitik AG v. Sphere Drake Insurance* (unreported) 3 February 1998. . . .

. . .

In relation to obtaining leave, Order 11 rule 9(5) is relevant. It provides as follows:-

> '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."

47. Lord Justice Waller summarised his conclusions (so far as material) in the following passage (*ibid*, 617B):

> "(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; . . ."

*Masri (No, 4)*

48. The judgments of the Court of Appeal in the *The Ikarian Reefer (No. 2)* were handed down in October 1999. Some ten years later, in July 2009, the House of Lords determined the appeal in *Masri v Consolidated Contractors International (UK) Ltd and others (No. 4)* [2009] UKHL 43; [2010] 1 AC 90. The principal speech (with which the other members of the House agreed) was delivered by Lord Mance. In the course of his speech (in a section headed "Service out of the jurisdiction") Lord Mance considered the decision in *The Ikarian Reefer (No. 2).* After explaining that the Court of Appeal (in *Masri (No.4)*) had relied on two cases under RSC Order 11, rule 9 - the first of which, *Union Bank of Finland Ltd v Lelakis* [1997] 1 WLR 590 did not help on the issue before the House - he said this (so far as material in the present context):

"[31] The second case is *The Ikarian Reefer (No 2)* [2000] 1 WLR 603, 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) enabled 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 [1997] 1 WLR 590, 593 h. It has long been established that service out of the jurisdiction requires express authorisation either by statute 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)* 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, 613 e, "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 Sir John 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 Sir John 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 Sir John 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)* 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."

There is nothing in the internal Hearing Attendance Note to suggest that Lord Mance's observations, in *Masri (No 4),* on the judgment of Lord Justice Waller in *The Ikarian Reefer (No. 2)* were brought to the attention of the judge at the *ex parte* hearing on 17 April 2012; as, plainly, they should have been.

*The evidence before the judge in April 2013*

49. It can be seen from the recitals to the Order of 26 April 2013 that the evidence before the judge at the hearing, in April 2013, of the January 2013 Summons and the April 2013 Summons included the third affidavit and the sixth affidavit of Mr Hawthorne (to both of which reference has already been made), his seventh affidavit, sworn on 22 January 2013 and the fourth affidavit of Mr Alexander (to which, again, reference has already been made). It also included the affidavit of Mr Kenney, sworn on 5 April 2013.

50. In the course of his judgment on the application made by Mr Kenney and CCI in the April Summons, the judge referred to (and set out) three paragraphs of Mr Hawthorne's seventh affidavit. It is convenient that I set out those paragraphs in this judgment. Mr Hawthorne had said this:

> "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 doing so, 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 control 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 of 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.

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."

*The judge's reasons for making the order of 26 April 2013*

51. The judge set out the reasons which led him to make the order of 26 April 2013 in a Ruling dated 13 May 2013 (the "May Ruling"). After describing the two summons which were before him, he explained, at section 3 of that Ruling ("The Application in a Nutshell"), that Mr Kenney and CCI contended, on the April Summons, (i) that the court had and has no jurisdiction to order service of the Costs Summons on them "because the court has no jurisdiction under GCR Order 11 to order service of a Cost Summons out of the jurisdiction with the aim of securing third party costs orders"; and (ii) that, in the alternative, even if the court had jurisdiction, it ought in the particular circumstances to have declined and to decline to order for service of the Costs Summons out of the jurisdiction against Mr Kenney and CCI. And he observed that the two Echemus companies, who (he said) were in exactly the same position as Mr Kenney and CCI in relation to the jurisdiction to order service of the Costs Summons out of the jurisdiction, had accepted that they had been validly joined and served and were subject to the jurisdiction of the court.

52. At sections 4 and 5 of the May Ruling the judge referred, respectively, to his judgment of 27 January 2012 and to the default judgment of 27 February 2012. In particular, at section 4 of that judgment, he explained that he had referred to his judgment of 27 January 2012 for (*inter alia*) the description of and history of these proceedings and the proceedings in the United States, the application for security for costs and for what he had said in relation to the application for an order that the plaintiff identify the persons who were funding the proceedings. At section 6 of the Ruling, he set out the submissions made to him on behalf of ACE; and, at section 7, he set out the submissions made on behalf of Mr Kenney and CCI. Section 8 of the May Ruling contains his analysis and conclusions.

53. The judge began his analysis in Section 8 by setting out his understanding of the general principles by reference to which applications for permission to serve a foreign defendant out of the jurisdiction were to be determined. He said this:

> "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 Jomohur 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 Stoltzenburg (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)."

The judge concluded that each of those requirements was met in the present case.

54. As to the first requirement, the judge was satisfied that there was a serious issue to be tried as to whether a costs order should be made against both Mr Kenney and CCI under section 24 of the Judicature Law (2007 Revision). He said that he had referred to and taken account of the totality of the evidence before the court (including the evidence adduced by Mr Kenney in the affidavit which he swore on 5 April 2013 in support of the April 2013 Summons). He observed that the history of the litigation in the United States and Liberia was "by any standards extraordinary"; and that there were many respects in which there was a serious issue "as to whether what has happened is beyond conventional Litigation Funding". In particular, he referred (i) to his observations, in his judgment of 27 January 2012, that there was material before the court which would justify the conclusion that the plaintiff (named as CIGNA WW by and through its Receiver and in respect of the assets of its Liberian branch) was a nominal plaintiff; (ii) to the evidence in paragraphs 47 and 48 of Mr Hawthorne's seventh affidavit as to Mr Kenney's funding and control of the litigation in this court; (iii) to the evidence in paragraph 49 of Mr Hawthorne's seventh affidavit as to CCI's funding and control of the litigation in this court; and (iv) to the evidence in paragraphs 9 and following of Mr Hawthorne's seventh affidavit as to the circumstances of what had been described on behalf of ACE as a "very unusual agreement" between a public official and private parties as to how that official (the Receiver) would execute his duties once appointed came to be made. He concluded:

> "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."

55. As to the second requirement, the judge was satisfied that there was a good arguable case – which he equated with "a much better argument" – that the case fell within the jurisdiction to serve out under GCR Order 11, rule 9(2). The rule, which he had set out earlier in section 8 of his Ruling, was in these terms:

> "9(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 or petition may by these Rules or under any Law be served without leave."

He pointed out that the scope of the equivalent rule (RSC Order 11 rule 9(4)), formerly applicable in England and Wales, had been considered by the Court of Appeal in *The Ikarian Reefer (No. 2 );* and that, in that case, Lord Justice Waller had said this, in a passage cited by the judge in his May Ruling (and to which I have already referred, earlier in this judgment):

> " . . . 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. 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'"

The judge referred to the speech of Lord Mance in *Masri (No. 4*. In particular, he cited paragraph 33 of that speech (to which I have referred earlier in this judgment), in which Lord Mance had said this:

> "[33] . . . *The Ikarian Reefer (No 2)* 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". . ."

The judge took the view that:

> "The principle underlying the jurisdiction (so far as relevant) under GCR O 11 r 9(2) to be derived from *Masri* is that when 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)."

The judge gave three reasons in support of his conclusion that there was a good arguable case that the second requirement was satisfied: (i) that Mr Kenney and CCI instigated, controlled and financed these proceedings and that the circumstances were such that it was legitimate to assimilate Mr Kenney and CCI with the plaintiff and treat any means of service available against the plaintiff as also available against Mr Kenney and CCI; (ii) that Mr Kenney and CCI in reality brought these proceedings and there had been in effect been a submission to the jurisdiction by Mr Kenney and CCI; and (iii) if (contrary to his opinion) it were necessary to establish that Mr Kenney and CCI were the *alter ego* of the plaintiff, the concept of *alter ego* was met in the present case because the plaintiff was a nominal plaintiff. Having reached that conclusion the judge did not find it necessary to consider the alternative arguments advanced by counsel on behalf of ACE as to the wider ambit of GCR Order 11 rule 9(2); or as to reliance on GCR Order 11 rule 1(1)(c).

56. As to the third requirement, the judge said that, in his opinion, it was beyond argument that the Cayman Islands was clearly and distinctly the appropriate forum; and that, in all the circumstances which he had described, the court ought to exercise its discretion to permit service of the proceedings out of the jurisdiction.

*The Grounds of Appeal*

57. Mr Kenney and CCI gave notice of appeal (dated 31 October 2013, but filed on 4 November 2013) from paragraphs 1, 2 and 3 (in so far as paragraph 3 applied to them) of the order made on 26 April 2013 (wrongly described in the notice as made on 26 April 2012). The notice included an appeal against an order that ACE's costs be paid by Mr Kenney and CCI; but the order of 26 April 2013 contains no order that they pay costs. The costs of the April 2013 hearing were reserved (paragraph 6).

58. The grounds upon which the appellants challenge the judge's decision to make the orders from which they appeal are set out in their Memorandum of Appeal dated 20 November 2013. In summary, it is said that the judge erred in the following respects: (i) he failed to consider whether there was a jurisdiction to serve a third party costs summons out of the jurisdiction on a non-party, in the absence of express provision in the Grand Court Rules; (ii) he failed to give any or any adequate reasons for his rejection of the appellants' submission that, in circumstances where there is no express provision in the Rules for service out of the jurisdiction on a third party for the purpose of making that party liable for costs, the jurisdiction is limited to cases where the third party is in fact the *alter ego* of the party liable for the costs; (iii) he should have interpreted and applied the judgment of Lord Mance in *Masri (No. 4)* as only permitting service of a costs summons out of the jurisdiction where the third party was the relevant party's *alter ego;* (iv) he misconstrued the concept of *alter ego* as that term is used in the context of jurisdiction to serve out of the jurisdiction on a third party; (v) he should have found that ACE had failed to establish a good arguable case that the appellants were the plaintiff's *alter egos*; (vi) he was wrong to conclude that there was a good arguable case (a) that the appellants instigated, controlled and financed the litigation, (b) that the appellants in reality brought these proceedings, (c) that the appellants had in effect submitted to the jurisdiction of the Grand Court of the Cayman Islands, (d) that the plaintiff was a nominal plaintiff, (e) that the appellants could be described as *alter egos* of the plaintiff because the plaintiff could be said to be a nominal plaintiff; (vii) that he was wrong to conclude that ACE had a "much better argument" that the case fell within the jurisdiction to order service out in circumstances where he declined to consider and address the grounds upon which the appellants disputed ACE's allegations; (viii) that the judge wrongly elided the issues (a) whether there might be jurisdiction to order costs against the appellants as third parties and (b) whether there was jurisdiction under the Rules to serve the Costs Summons out of the jurisdiction; and (ix) that the consequences of the judge's approach was that the issue of jurisdiction to serve the Costs Summons out on a third party effectively went by default.

59. Those grounds of appeal were refined in the skeleton argument dated 6 March 2014 which was filed on behalf of the appellants. It is said there that the principal issues for determination on the appeal are:

(1) Whether there is jurisdiction to permit service out of the jurisdiction pursuant to any of the provisions of GCR Order 11 of a summons on a non-party against whom an order for costs is sought following the conclusion of proceedings in the action in respect of which costs are pursued.

(2) Whether the exception identified by the House of Lords in *Masri (No. 4)* extends beyond a person who is the *alter ego* of the entity against whom costs are sought – in the sense that he is the controlling mind of a "one man company" or whether, to the contrary, it extends to any person who instigated, controlled or financed the litigation, as found by the judge.

(3) Whether there is a good arguable case that either of the appellants was the *alter ego* of the plaintiff for these purposes.

The appellants' submissions on each of those issues are set out in their skeleton argument; and were developed in oral argument at the hearing of the appeal.

*The Respondent's Notice*

60. On 4 December 2013 ACE filed a Respondent's Notice, in which it contended that the judge's order of 26 April 2012 (*sic*) should be upheld not only on the grounds which he gave in the May Ruling but also on further or additional grounds. Those further grounds may be summarised as follows:

(1) The judge ought to have held that the case was within the jurisdiction of the Grand Court on the ground (described as the "broader approach") that the court had jurisdiction to grant permission to serve the Costs Summons out of the jurisdiction under GCR Order 11, rule 9, and under or by analogy with GCR Order 11 rule 1(1)(c) on the basis that Mr Kenney and CCI were necessary and proper parties to the proceedings; in that (i) they instigated, funded and/or controlled the proceedings and, if located in the Cayman Islands, could have been joined as defendants for the purposes of satisfying the costs orders by the exercise of the court's jurisdiction under section 24(3) of the Judicature Law (2007 Revision); (ii) the claim against them is predicated upon related issues of law and fact that arose in respect of the plaintiff's liability for costs in the proceedings; and (iii) adding them as parties would ensure that there is a possibility that costs orders made by the court would be satisfied, whereas, if they were not added as parties, those costs orders would not be satisfied.

(2) In reaching his conclusion the judge ought to have held that the decision in *Masri (No. 4)* was no authority for the proposition - and should not be taken as requiring (at least in this jurisdiction) - that the court cannot give leave to serve a non-party out of the jurisdiction in circumstances where that non-party would be liable for costs under the principles in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd* [2004] UKPC 39 and other cases. It was said that it would be an unjust result for a non-party to be able to hide behind his own extra-territoriality to escape liability when he would have been liable if within the jurisdiction for exactly the same conduct and support of proceedings within the jurisdiction.

(3) Alternatively, it is said, the appellants are disentitled by their delay from challenging the Grand Court's assertion of jurisdiction over them in the proceedings; in that, having been aware of the order of 26 April 2012 (*sic*) and, having been served with the Costs Summons, they did not contest jurisdiction for approximately 12 months.

The two references in the Respondent's Notice to an order of 26 April 2012 are difficult to understand: there was no such order. The probability, I think, is that the first reference is intended to be to the order of 26 April 2013 (which was the order under appeal); and that the second reference is intended to be to the order of 18 April 2012 (which was the order giving permission to serve the Costs Summons out of the jurisdiction). The respondent's submissions in support of these further grounds are set out in its written submissions and were developed in oral argument at the hearing of the appeal.

*The submissions advanced on behalf of the appellants*

61. In their written and oral submissions the appellants contend (i) that the Grand Court Rules do not confer any power on the Court to grant leave to serve a third party costs summons out of the jurisdiction; and, in particular, have not been amended (as, it is said, have the Rules of Court in both England and Wales and Hong Kong) in order to confer such power; (ii) that the only circumstances in which the Grand Court has jurisdiction to order service of a third party costs summons out the jurisdiction are those identified by Lord Mance in *Masri (No.4) ;*and (iii) those circumstances do not exist in the present case.

62. In support of the first of those contentions it is said that the judge came to no firm conclusion; "instead concluding that the instant case fell within the boundaries of the principle in *Masri (No. 4)*. That conclusion, is said to be "plainly wrong in law". The judge, it is said, applied the wrong test.

63. It is accepted that, following the decision of the House of Lords in *Seaconstar*, in considering whether the jurisdiction of the court has been sufficiently established under one or more of the paragraphs of GCR Order 11, the standard of proof is that of the good arguable case. In respect of the merits of the applicant's claim against the party to be served, it is sufficient for the applicant to establish that there is a serious issue of fact or law to be tried. But, it is said, in deciding whether there is a good arguable case for leave to serve out, the court must be satisfied that the Applicant has a much better argument on the material available. In particular, on a set aside application, the court must consider the evidence provided by both sides; but without seeking to decide the issue on the balance of probabilities; C*anada Trust Co v Stolzenberg.* Reliance is placed on the observation of Lord Rodger of Earlsferry, in *Bols Distilleries BV v Superior Yacht Services* [2006] UKPC 45, [28]; [2007] 1 WLR 12, 22), that:

> "[28] The rule is that the court must be satisfied, or as satisfied as it can be having regard to the limitations which an interlocutory process imposes, that factors exist which allow the court to take jurisdiction. In practice, what amounts to a 'good arguable case' depends on what requires to be shown in any particular situation in order to establish jurisdiction."

and on the observation of Lord Collins, in *AK Investment CJSC v Kyrgyz Mobil Tel Limited and others* [2011] UKPC 7, [81]; [2012] 1 WLR 1804, that:

> "[81] A question of law can arise on an application in connection with service out of the jurisdiction, and, if the question of law goes to the existence of jurisdiction, the court will normally decide it, rather than treating it as a question of whether there is a good arguable case: *Hutton (EF) & Co (London) Ltd. v Mofarrij* [1989] 1 WLR 488, 495 (CA); *Chellaram v Chellaram (No 2)* [2002] EWHC 632 (Ch), [2002] 3 All ER 17, [136]."

Reference was made, also, to an observation of Justice Levers, sitting in the Grand Court in *Magnum Global Investments v Zuluf Europe LDC* 2004-05 CILR N-27 to the effect that, on an application for leave to serve out of the jurisdiction under GCR Order 11, any doubt about the construction of the relevant sub-paragraph in the rule is to be resolved in favour of the respondent.

64. It is submitted, further in support of the first of the appellant's contentions, that on a true analysis of the provisions of GCR Order 11, the judge ought to have found that:

(1) There is no jurisdiction to grant leave to serve a cost summons out of the jurisdiction against a non-party under Order 11 rule 1 (1)(c) because:

(a) Order 11 rule 1 only applies to the service of a writ or other originating process (which a cost summons is not); and

(b) as held found by this Court in *VTB Capital PLC v Malofeev and others* 2011 (2) CILR 420, the purpose of GCR O.11 r.1 is to authorise the extra-territorial service of a document which requires the recipient to submit to the adjudication of a claim based on a legal right advanced in an action commenced by that document (applying the decision of the Privy Council in *Mercedes Benz AG v Leiduck* [1996] AC 284) and no such claim is made against either CCI or Mr Kenney in these proceedings.

(2) There is no jurisdiction to grant leave to issue a costs summons out of the jurisdiction against a non-party under Order 11 rule 9(1); in that a costs summons is not within that sub-rule.

(3) There is no jurisdiction to grant leave to serve a costs summons out of the jurisdiction against a non-party under Order 11 rule 9(2): except where the non-party to be served is the *alter ego* of the plaintiff and so falls within the limited exception explained by Lord Mance in *Masri (No. 4)*.

(4) The court has a discretionary power to exercise *in personam* jurisdiction over persons out of the jurisdiction only in the circumstances specified in Order 11; as held or confirmed by Justice Andrew Jones QC sitting in the Grand Court in *Masri v Consolidated Contractors* 2011 (1) CILR 79.

(5) The lack of jurisdiction to serve a non-party out of the jurisdiction with a costs summons was recognised by the courts in England and Wales; and that perceived lacuna was filled by an amendment to Practice Direction 6B to CPR Part 6 (which conferred an express power to permit service out the jurisdiction of a claim for an order that the court exercises power under section 51 of the Senior Courts Act 1981 to make a costs order in favour of or against a person who was not a party to the proceedings in which those costs were incurred. No such amendment has been made to the Grand Court Rules; and so such jurisdiction does not exist (save under the limited '*alter ego*' exception).

65. In support of the second of their contentions, it is accepted on behalf of the appellants that, in *Masri (No. 4)*, the issue before the House of Lords was whether there was jurisdiction to grant permission to serve, out of the jurisdiction, an order for the examination of a judgment debtor. But, it is said, that in considering that question the House found it necessary, also, to examine the basis for the decision of the Court of Appeal in *The Ikarian Reefer (No.2)* that there was jurisdiction to serve a costs summons on a non-party out of the jurisdiction under RSC Order 11 rule 9(4); and the observation, in the judgment of Lord Justice Waller in that case, that, at in any event there must be an inherent jurisdiction to permit service out of the jurisdiction in such a case.

66. The appellants submit that the proposition that there was an inherent jurisdiction to serve a costs summons on a non-party out of the jurisdiction was rejected by the House of Lords on the grounds that service out of the jurisdiction required express authorisation either by statute or in the rules; as had been held in *Union Bank of Finland v Lelakis* (*supra*). Further, in that context, the appellants rely on the observations of Lord Mustill, delivering the Opinion of the Board in *Mercedes Benz v Leiduck* (*supra*), that:

> "The court has no power to make orders against persons outside its territorial jurisdiction unless authorised by statute; there is no inherent extra-territorial jurisdiction."

and the observation of Justice Jones, in the Grand Court, in *Masri v Consolidated Contractors* (*supra*), that:

> "This court has a discretionary power to exercise in personam jurisdiction over foreigners only in the circumstances specified in O.11 r.1(1)."

67. The appellants submit that the principle to be derived from the speech of Lord Mance in *Masri (No. 4)*is that, in the absence of an express power in the Grand Court Rules to grant leave to serve a costs summons on a non-party out of the jurisdiction, leave can only be granted (i) where the non-party is the *alter ego* of an existing party to the proceedings and (ii) it is legitimate to assimilate the non-party with the existing party by treating them as effectively the same person; and, by that means to treat any means of service available against the existing party as also being available against the non-party. Unless these two tests are met, it is said, GCR Order 11, rule 9(2) does not permit service out of the jurisdiction on non-parties.

68. In advancing that submission, the appellants place reliance on the observations of Lord Mance at paragraph 33 of his speech in *Masri (No. 4)* (which I have set out earlier in this judgment). It is submitted that those observations were made in circumstances in which Lord Mance was "faced with the apparent anomaly in *Ikarian Reefer (No.2),* whereby the Court appeared to proceed on the basis that an inherent jurisdiction existed". That, in my view, is to take paragraph 33 of his speech out of context. In that paragraph Lord Mance was addressing what he had identified as the first of two propositions in the judgment of Lord Justice Waller in *The Ikarian Reefer (No. 2)*; that jurisdiction to make an order for service of a cost summons out of the jurisdiction on a non-party existed under RSC Order 11, rule 9(4). Nevertheless, it is said that the rationale explained by Lord Mance was that service on a non-party is permissible within the bounds of those ordinary principles "where on a particular set of facts it is legitimate to treat party and third party as one and the same thing, the two having become assimilated"; that the word "assimilated" needs to be treated with care; and that it is necessary to consider precisely what the House of Lords intended by its use. In that context, reliance is placed on paragraph 34 of Lord Mance's speech (also set out earlier in this judgment).

69. In support of the third of their contentions – that the circumstances in which the Grand Court has jurisdiction to order service of a costs summons on a non-party out the jurisdiction (as identified by Lord Mance in *Masri (No. 4)*) did not exist in the present case – the appellants submit that the judge's approach to the assessment of the facts was flawed: in that he had concluded that Lord Mance did not intend to confine the jurisdiction under RSC Order 11, rule 9(4) to cases where the non-party out of the jurisdiction was the *alter ego* of an existing party to the proceedings. In those circumstances, it is said, the judge did not consider it necessary that the applicants should establish that the non-party was the *alter ego* of the party. It is said that the judge's conclusion on that issue "was plainly and fundamentally incorrect"; and that that conclusion led him to adopt two different tests: (i) whether it was legitimate to "assimilate" the appellants with the plaintiff (at page 31, line 28, of the May Ruling); and (ii) whether the appellants could be considered as the "real party" to the action (at page 32, lines 1 to 2, of the Ruling). It is said that both tests adopted by the judge were flawed.

70. The appellants submit that that the effect of the judge's flawed approach (in applying the first of the two tests which he is said to have adopted) was "to widen the narrow jurisdiction identified by Lord Mance into a general discretion to decide that a party was 'assimilated' without any consideration of what that actually means"; that the meaning of assimilate is 'to make like to', 'to be or become like' and 'to absorb and incorporate'; and that this was the meaning which Lord Mance had in mind when he stated that it might be legitimate to regard parties as being assimilated in the event that one was the *alter ego* of the other. In other words, it is said, "assimilation" is a consequence of the existence of an *alter ego* type situation, rather than a similar alternative to it. By ignoring the threshold requirement that the non-party be the *alter ego* of an existing party, the judge fell into error; in that he applied a test whereby a general alignment of interest was sufficient to amount to assimilation.

71. Further, the appellants submit that the effect of the judge's flawed approach (in applying the second of the two tests which the judge is said to have adopted; which, they suggest, was derived from the judgment of Lord Brown of Eaton-under-Heywood in *Dymocks Franchise Systems (NSW) Pty v Todd* [2004] UKPC 39; in which the circumstances in which a costs order can be made against a third party were summarised) was to create "a self-fulfilling jurisdiction to serve out". It is said that "where the same test is applied on both questions – jurisdiction to make a costs order against a non-party and jurisdiction to give permission to serve out - it follows that there will always be jurisdiction to serve out where the Court considers that there are prima facie grounds for making an order for payment"; and that that elision of the two questions "not only rides roughshod over both Lord Mance's analysis that *Ikarian Reefer* was a special case and the *Lelakis* position that service out requires express authority, but would of course mean that the amendments introduced to the rules in England and Wales (and indeed Hong Kong) to expressly permit service out of a third party costs summons were entirely pointless". In essence, it is said, the judge attempted to proceed on the basis of the inherent jurisdiction that - as was made clear in *Masri (No. 4)* and in the earlier cases of *Union Bank of Finland v Lelakis* and *Mercedes Benz v Leiduck* – did not exist.

72. As I have said, the appellants submit that the correct approach was to ask, first, whether they were the *alter egos* of the plaintiff in the original action; and, second, if

they were, was it legitimate to assimilate them for the purposes of service. It is said, further, that although the judge stated in his judgment that, had he considered it necessary to ask the first of those questions, he would have deemed both Mr Kenney and CCI to be the *alter egos* of the Plaintiff it was plain that, upon proper consideration, they were not. The appellants advance the following contentions in support of that submission:

(1) "*Alter ego*" means "a person's second self" (*per* the O.E.D.) or "a corporation used by an individual in conducting personal business" (*per* Black's Law Dictionary). Both these definitions accord with Lord Mance's example of a one-ship company with a sole director/shareholder. It is insufficient that parties simply unite in a common cause or have aligned interests.

(2) A person is only the *alter ego* of a party where he is the controlling mind of what is effectively a one man company of the sort considered in *Moore Stephens (a Firm) v Stone & Rolls Ltd* [2009] 1 AC 1391. That is a very narrow concept, important in cases of attribution, where the sole or sole effective shareholder and executive director can be equated with the company and in cases where the Court is invited to pierce the corporate veil. By way of example, the appellants referred to statements in *Gencor ACP Ltd v Dalby* [2000] 2 BCLC 734:

> "26. . . . In my view this is the type of case in which the Court ought to have no hesitation in regarding Burnstead simply as the alter ego through which Mr Dalby enjoyed the profit . . . . Burnstead is simply a creature company used for receiving profits for which equity holds Mr Dalby to be accountable to ACP. Its knowledge was in all respects the same as his knowledge. The introduction into the story of such a creature company is in my view, insufficient to prevent equity's eye from identifying it with Mr Dalby"

and in *Ben Hashem v Ali Shayif* [2008] EWHC 2380 (Fam):

> "197…This is merely a selection, albeit a selection which I think gives a fair reflection of the whole. It shows the husband being, as Miss Evans-Gordon put it 'heavily involved' and the 'dominant director' but it does not in my judgment show the Company to have been, or to be, the husband's alter ego, any more than it shows the other directors to have been his stooges or mere ciphers*"*

(3) The correct approach is that one party must in reality be the other party. Thus Mr Comninos was the alter ego of the Panamanian company, because the company was him, controlled entirely by him and used exclusively to pursue his interests; Jekyll is the *alter ego* of Hyde because they are different sides of the same

person. But the complete interchangeability of the two parties is the key: that is precisely why it is legitimate to regard service upon one as service on the other.

(4) The judge's analysis amounted to a finding that any person making a contribution to an enterprise can be said to be its *alter ego*, which is not the ordinary and natural meaning of the term. By implication it would follow, in this as in many other cases, that where there are a multitude of individuals or entities who control and/or contribute to the funding of a claim, such as members of an LLP, shareholders or directors of a limited company or others, each and every one of them is the *alter ego* of the company plaintiff so that, as opposed to a single Mr Hyde, it would have a number of clones to be treated identically.

(5) The concept of *alter ego* – in company law terms – involves piercing the corporate veil, which is only permitted in the most limited of circumstances. If the judge's approach were the correct approach to *alter ego*, the narrow doctrine as applied in cases such as *Moore Stephens v Stone & Rolls Ltd* would be vastly extended. Notably, until midway through the hearing in April 2013 no suggestion had been made on behalf of ACE that either Mr Kenney or CCI could be treated as the *alter ego* of the plaintiff: and that was not the basis upon which the *ex parte* application for leave to serve out was made.

(6) If the judge had directed himself correctly as to the meaning of "*alter ego*" it would have been clear that the evidence before him was insufficient to establish that either Mr Kenney or CCI were within that meaning. In particular:

(a) Neither Mr Kenney nor CCI can be said to be even remotely equivalent to the one-man company:

(i) the original Liberian judgment creditors took 55% of the ordinary shares in CCI;

(ii) the Liberian judgment creditors have held a seat on the board of directors of CCI, together with one representative director of the funders and an independent director;

(iii) Mr Kenney's role was that of an attorney doing his best for his client, with only a tiny minority stake in the litigation.

(b) It is not clear how the judge was able to conclude that the Plaintiff had two "*alter egos*", each of which was a distinct entity without common control. As a matter of logic and language, there can be only one *alter ego*.

(c) The judge relied upon a preliminary (and obiter) indication in his judgment of 27 January 2012 that "there was material before the Court which would justify the conclusion that the [Receiver] is a nominal plaintiff". This comment was made following a hearing in which neither Mr Kenney nor CCI were named as parties and during which no evidence had been submitted as to the relationship between the plaintiff, Mr Kenney and CCI. It is plain that there were a significant number of third parties with an interest in an outcome of the Receiver's action; as is the case in virtually any action brought by a Receiver. That fell far short of making those third parties the *alter ego* of the Receiver. In any event, the fact that the Receiver was considered a nominal plaintiff, even if correct, would not provide in itself the answer as to the question who was the "real" plaintiff. On a common sense basis, where creditors use an insolvency practitioner to bring claims in the name of their debtor against third parties, that does not make the insolvency practitioner who is receiver or liquidator into a nominal plaintiff but even if it did, the person for whose benefit the action is brought would be the creditors themselves, in this case the Liberian Creditors.

It is said that, ACE having failed to establish anything like a good arguable case that either Mr Kenney or CCI could properly be regarded as the *alter ego* of the plaintiff, the matter stops there: the threshold test described by Lord Mance is not met, there is no jurisdiction to order service out and thus no need to go on and consider the secondary question of assimilation.

73. Nevertheless, the appellants do go on to address what they describe as "the secondary question of assimilation. They submit that the judge's conclusions that they had "instigated, controlled and financed the proceedings", that they "in reality brought the proceedings" and that they were "the real party" were also manifestly flawed. In support of that submission they advance the following contentions:

(1) Even if it were to be proved that Mr Kenney was the architect of and driving force behind the litigation plan and the litigation strategy, that does not make him "the real party", it simply shows him to be a lawyer doing his best for his client.

(2) The fact that Mr Kenney had a small (less than 1%) indirect interest in the fruits of the underlying claim is plainly insufficient to make him "the real party".

(3) The decision of the Court of Appeal of England and Wales in *Flatman v Germany* [2013] EWCA Civ 278 is authority for the proposition that an attorney, acting on a contingency basis and/or the funding of disbursements, does not become subject to the jurisdiction to order costs against a non-party.

(4) The creation of a funding vehicle to represent a variety of interests (the Liberian judgment creditors and investors) does not make CCI "the real party".

(5) It is clear that not only does CCI represent a variety of interests, but the original judgment creditors retain a majority shareholding and a seat on the Board.

(6) There is an obvious inconsistency in ACE's case that Mr Kenney, CCI, Echemus Fund and Echemus Manager have all "controlled" the action. If anything, the variety of interests involved serves to demonstrate, first, that no one party has controlled matters; and, second, that it is impossible to regard any of the third parties as being the *alter ego* of the plaintiff.

74. The appellants advance the further submission that, not only did the judge approach his assessment of the facts on a flawed basis, he also allowed that assessment to affected by a number of matters which were wholly irrelevant. In support of that submission, the following contentions were advanced:

(1) At the outset of the oral hearing on 26 April 2013 the learned judge observed that:

> "what is at stake as I understand it is a maximum of US$870,000 costs. The question that I'm interested to know the answer to is who's going to pay those costs. . . ."

This question was then discussed further with the appellants' counsel. In the course of that discussion, the judge indicated that the question of who should pay the costs was "foremost" in his mind. Those comments demonstrated that, from the outset, the judge approached the application on a fundamentally incorrect basis: the question "who should pay the costs" is entirely separate from and immaterial to the question "whether as a matter of law jurisdiction existed to permit service out of the jurisdiction of a costs summons upon Mr Kenney and CCI". By focusing on the question "who should pay the costs", from the outset of the hearing the judge took into account irrelevant considerations. The person who was to pay was the plaintiff. The appropriate course for a defendant to take where a liquidator brings proceedings on behalf of an insolvent estate is to seek an order for security at an early stage.

(2) In both the judgment of 26 April 2013 and his written refusal of leave to appeal the judge observed that the appellants were:

> ". . . in exactly the same position in relation to the legal principles as to joinder and service as Echemus Group LP and Echemus Investment Management Ltd. [They] have accepted that they have been validly served and are subject to the jurisdiction of the Court."

The fact that the judge chose to repeat that statement suggests that he felt that support could be drawn from the submission of the Echemus parties for the proposition that jurisdiction existed; but such an approach is clearly flawed. The fact that one party has elected to submit to the jurisdiction cannot be determinative of (or even probative in relation to) the question whether jurisdiction exists over another party. Put another way, the fact that Echemus submitted to the jurisdiction did not show that the Mr Kenny and CCI were wrong to contest jurisdiction any more that the fact that Mr Kenney and CCI contested jurisdiction showed that Echemus were wrong to submit to jurisdiction: the question of jurisdiction plainly fell to be determined in respect of each party independently, without reference to the approach adopted by other non-parties who had been served with the costs summons. The judge was wrong to take the view that the position taken by one non-party in relation to jurisdiction was of any relevance in relation to jurisdiction over another non-party.

(3) The judge stated in both rulings that there was "in many respects a serious issue as to whether what has happened is beyond conventional litigation funding". The repetition of that statement suggests that the judge considered that point to be material to his decision. It was irrelevant. Even where the most serious of issues to be tried exists, that factor is incapable of curing a want of jurisdiction: the one is not material to the other. Whilst the lack of a serious issue to be tried might be a reason to refuse leave to serve out, the existence of a serious issue to be tried cannot create jurisdiction to do so. It is clear from *Masri (No.4)* that the test is concerned solely with whether the third party can be regarded as the *alter ego* of the existing party to the litigation. If it cannot, the matter ends there, irrespective of the nature of the issues that would otherwise be tried.

(4) Taken together, the repeated references to these various factors demonstrated that the approach of the judge to the questions before him were seriously flawed. Secondary issues as to who would pay costs and whether serious issues existed to be tried were considered before addressing the fundamental preliminary point as

to whether jurisdiction existed over the non-parties. The judge's conclusions on the former coloured his determination of the latter, notwithstanding that the issues were wholly separate; and, in consequence, the judge fell into error in determining that jurisdiction existed.

75. It is further submitted of behalf of the appellants that, although the judge recorded in his judgment of 26 April 2013 that account had been taken of the totality of the evidence before the court, including the evidence of Mr Kenney, that statement is inconsistent with a subsequent statement in the judgment that;

> "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".

That supposed inconsistency, it is said, suggests that the judge approached the question of jurisdiction by taking ACE's case at its highest, without weighing it against Mr Kenney's points in rebuttal. This approach appears to have been confirmed in the ruling on leave to appeal where the learned Judge stated:

> "I do not consider that the proposed appeal has a real prospect of success if the relevant facts are as contended for by the Defendant"

It is submitted that the judge's approach was plainly flawed in that respect; in that it cannot be correct that ACE's version of events (which is substantially in dispute) is determinative of whether jurisdiction exists. Were it so, the issue would effectively go by default. It is said that there was much in Mr Kenney's affidavit as to the structure of CCI and the nature of the arrangements in respect of the litigation which had not been previously been in evidence and was of direct and clear relevance to the questions which the judge ought properly to have addressed: (i) "can Mr Kenney and/or CCI properly be described as the *alter egos* of the plaintiff", and, if so, (ii) "was it legitimate to assimilate them". In failing properly to consider that important evidence, the judge's decision was defective. It is submitted that, even on ACE's evidence alone, which was not addressed to the question of *alter ego* (because an *alter ego* submission did not then form any part of ACE's case on the application) there were no grounds for concluding that Mr Kenney was the *alter ego* of the plaintiff. It is said that, when proper weight is given to the evidence on behalf of CCI and Mr Kenney, it is clear that they have by a wide margin the "better of the argument".

76. At paragraphs 48 and 49 of the skeleton argument filed on their behalf (in a section headed "Summary"), the appellants summarise their submissions on this appeal. They are, I think, entitled to expect that Summary to be set out in this judgment:

> "48. When measured against the correct approach to the issues before him, Cresswell J plainly and obviously fell into error in a number of ways. He wrongly interpreted Lord Mance's judgment in *Masri***,** wrongly disregarded the Appellants' submissions and wrongly disregarded the evidence submitted on behalf of the Appellants and the submissions based upon such evidence. He appears to have proceeded on the basis of a desire to ensure that some party was made liable to pay the costs without having due regard to the fundamental issue of whether he in fact had jurisdiction over that party, and derived support for his approach from nothing more substantial than the fact that another costs party had voluntarily submitted to the jurisdiction.
>
> 49. In consequence the very limited jurisdiction, per *Masri*, to allow service of a Costs Summons on a third party out of the jurisdiction was elided with the wider test for whether there was a good arguable case that a third party should pay the costs of the action. The effect of this approach would be that in any case where an applicant contended, on affidavit evidence, that there was a good arguable case that a third party should pay the costs of the action, then the Court would have power to order that the relevant Costs Summons could be served out of the jurisdiction on the third party. As such, the application for leave to serve out became self-fulfilling and circular. It should not, in fact, have been allowed."

*The submissions advanced on behalf of the respondent*

77. It is submitted on behalf of the respondent, ACE, that the scope of this appeal is narrow; and that many of the issues canvassed during the hearing before the judge on 26 April 2013 are not raised on appeal. It is said, correctly and self-evidently in my view, that the scope of the appeal is set by the nine grounds relied upon in the Memorandum of Grounds of Appeal. Further, it is said that those grounds – "when stripped to their base" - can fairly be summarised as follows: (i) that the judge misinterpreted the jurisdiction of the Grand Court to give leave for service of a costs summons on a non-party out of the jurisdiction as it was applied by the Court of Appeal of England and Wales in *The Ikarian Reefer (No. 2)* and subsequently analysed by Lord Mance in *Masri*; and (ii) that once that jurisdiction has been correctly interpreted, it cannot apply on the available facts to Mr Kenney and/or CCI.

78. In addressing the first of those grounds – the judge's failure to appreciate the true scope of the court's jurisdiction to give leave to serve a costs summons on a non-party out of the jurisdiction - the respondent submits (by way of preliminary observation) that the appellants' challenge is directed to the judge's conclusion on the second of the three requirements identified in *Seaconstar*. There is no challenge, it is said, the judge's conclusion, on the first of those requirements, that there is a serious issue to be tried on the merits whether an order should be made, under section 24(3) of the Judicature Law, that Mr Kenney and CCI should pay the costs of the litigation in the these proceedings down to the point at which the plaintiff's claims before the Grand Court were abandoned or dismissed; and there is no challenge to the judge's conclusion, on the third of those requirements, that (if the second requirement is met) the Cayman Islands would be the appropriate forum in which to determine the issue under section 24(3) of the Judicature Law; and that the judge was correct to exercise his discretion to permit service of the cost summons out of the jurisdiction to enable that issue to be brought before the Grand Court. Accordingly, it is said, this appeal is focussed on the second requirement: whether ACE has a much better argument than Mr Kenney or CCI that this case falls within one or more of the classes in which permission to serve out of the jurisdiction may be given.

79. In reliance on the observations of Lord Justice Waller in *The Ikarian Reefer (No. 2)* the respondent submits that the case falls within GCR Order 11, rule 9(2). That rule, it is said, is a "stand-alone rule": in that it does not require a party seeking leave to serve a summons on a non-party out of the jurisdiction to demonstrate that any of the grounds under GCR Order11, rule 1(1) are established. In support of that contention, reliance is placed on Lord Justice Waller's observation in *The Ikarian Reefer (No 2)* that:

> "It would not on any view be material to look at Ord. 11, r 1. Order 11, r 9(4) would apply";

on an observation in the judgment of the Hong Kong Court of Appeal in *The Hong Kong Housing Authority v Hsin Yieh Architects & Associated Ltd* [2006] HKLD 316, 324, at paragraph 35; and on a note in Hong Kong Civil Procedure 2014 (Note 11//1 on page 195) which (perhaps surprisingly) cites that case as authority for the proposition that:

> "For ordinary summonses within existing proceedings to be served abroad, O.11, r.9(4) and (5) form a code of their own and there is no need additionally to bring the application within a limb of r.1(1)."

It is said, correctly in my view, that the appellants do not challenge the existence of a "stand-alone" jurisdiction under GCR Order 11, rule 9(2); rather, they challenge the scope of that jurisdiction.

80. It is acknowledged by the respondent that the jurisdiction under RSC Order 11, rule 9(4) to make an order permitting service of a costs summons on a non-party out of the jurisdiction, identified by Lord Justice Waller in *The Ikarian Reefer (No. 2)*, was considered by Lord Mance in *Masri (No. 4).* It is said that the appellants contend that the court's powers under RSC Order 11, rule 9(4) are confined "to a narrow and exceptional jurisdiction, that only exists where the third party in question 'is the alter ego of a party and it is legitimate to assimilate the two by treating them as effectively the same person'". The respondent challenges what it describes as the narrow interpretation of this jurisdiction. But it contends that "however one interprets the jurisdiction applied in *The Ikarian Reefer (No. 2)* and analysed by Lord Mance in *Masri (No. 4)*, on the available facts Mr Kenney and CCI fall within it".

81. The respondent introduces that challenge with two points. First, it is said that the decision in *Masri (No. 4)* was that, on the true construction CPR Part 71, its provisions did not apply to the examination of company officers abroad. Lord Mance's discussion of *The Ikarian Reefer (No. 2)* "reinforced" that conclusion; but the decision of the House of Lords turned on the absence of an explicit power to serve an order under CPR Part 71 out of the jurisdiction. In those circumstances, the observations of Lord Mance on *The Ikarian Reefer (No. 2)* were *obiter dicta*. Second, it is said that courts have emphasised, repeatedly, that the precise words used in a judgment are not to be construed and interpreted as if they had been enacted in a statute; and that, in seeking to rely on what they say is a rigid and narrow definition of the words used by Lord Mance in the relevant paragraphs of his speech in *Masri (No.4)*, they are seeking to flout that principle.

82. It is submitted that, on a true analysis of Lord Mance's observations, in paragraphs 31 to 34 of his speech in *Masri (No. 4)*, it can be seen that:

    (1) In paragraph 31, Lord Mance set out the two relevant propositions in the judgment of Lord Justice Waller in *The Ikarian Reefer (No. 2)*: (i) that RSC Order11, rule

9(4) enabled leave to be given for service of an application for a costs order on a non-party; and (ii) that the Court must in any case have an inherent power to give leave to join a non-party and serve him out of the jurisdiction.

(2) In paragraph 32, he addressed the second proposition; contrasting it with the generally understood position that the Court's jurisdiction to grant leave to serve out must be based on express authorisation either by statute or in the procedural rules. Lord Mance thereby implies that the applicable jurisdiction must be founded upon the interpretation of rules such as RSC Order11, rule 9(4).

(3) In paragraph 33, he addressed the first proposition; and he analysed the Court of Appeal's interpretation and use of RSC Order 11, rule 9(4) in at way that enabled leave to be given for service of an application for a costs order on a non-party. He described the Court's granting of leave to serve the costs application on Mr Comninos 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 . . .
>
> > '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.'"

On the basis of that analysis, it is submitted that the "narrow and limited jurisdiction" that the appellants seek to derive from the words used by Lord Mance in *Masri (No. 4*) is founded on "a strained and artificial interpretation" of those words. It is said that "*alter ego*" is only one expression used to describe the circumstances in which courts will either assimilate one party with another or look through different structures to do justice: reliance is placed on the discussion about piercing the corporate veil in *Prest v Petrodel Resources Ltd & Ors* [2012] UKSC 34; [2013] 2 AC 415.

83. The respondent submits that there are three possible approaches to the construction of GCR Order 11, rule 9(2); which it describes as "a narrow approach", an "intermediate approach" and a "broader approach". It develops those approaches as follows:

(1) A narrow approach: It is said that, in paragraph 33 of his judgment in *Masri (No. 4)*, Lord Mance explained that the Court has jurisdiction to serve a costs summons on a non-party outside of the jurisdiction if it is legitimate to assimilate the party and the non-party. Such assimilation is possible, he says, where the non-

party is the *alter ego* of the plaintiff, whose proceedings he has instigated, controlled and financed.

(2) An intermediate approach: It is said that, nowhere, in his consideration of the jurisdiction afforded by RSC Order 11, rule 9(4), did Lord Mance state that it was confined to the specific facts of *The Ikarian Reefer (No. 2)*: rather, he said (in paragraph 33 of his judgment) that the facts in that case could be viewed as "a special case", so indicating that the facts of that case could be viewed as illustrative of cases on which it might be legitimate to assimilate the party and non-party. The key point, it is said, is that, because of the assimilation of the party and the non-party, the non-party has in effect brought the underlying proceedings, and has thus effectively submitted to the jurisdiction. It is pointed out that Lord Mance quoted the second limb in the following passage in the judgment of Lord Justice Waller in *The Ikarian Reefer (No. 2)* with approval:

> "[It] seems to me…the English court has jurisdiction to decide the issue whether a non-party has taken such steps in relation to an action as should render that person liable to pay the costs of that action. Even more clearly, if what is alleged (as in this case) 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."

Further, it is said, Lord Justice Waller explained the practical effect of this principle in plain words:

> "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 that you have had such a connection with proceedings within the jurisdiction and, more clearly still, 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.'"

The Court's analysis as to whether (in the particular case) the relationship between the party and the non-party is such that it can be said that it was the non-party who in fact brought the proceedings must, it is said, be informed by speech of Lord Brown in *Dymocks* (*supra*). Lord Brown describes just such circumstances:

> "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 . . ."

It is acknowledged that the appellants challenge that approach; contending that the court should not elide the test for giving permission for service out of the jurisdiction with the test for ordering costs against a non-party. But the respondent points out that that was, in effect, the submission of counsel for the successful defendants in *The Ikarian Reefer (No. 2)*, who 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 non-party had submitted to the jurisdiction:

> "The application is made on the basis that Mr. Comninos was the directing mind of the company that brought the proceedings and that thus he and the company were really one and the same. [Counsel for the defendants] submitted thus that the English court should have jurisdiction to decide that issue and that in reality the preliminary point on jurisdiction and the main point under section 51 merge one with the other. [Counsel] submitted that if the issue is decided against Mr. Comninos that will establish that Mr. Comninos has in fact submitted to the jurisdiction by bringing the action through his company. … [T]he main thrust of [Counsel's] submission that the hearing on the merits and the jurisdiction question are really intertwined involves, as it seems to me in reality, a submission that if the section 51 proceedings were decided against Mr Comninos that decision would involve deciding that Mr Comninos had in effect submitted to the jurisdiction."

But the logic of an intermediate approach is said to be clear in the light of consideration of the possible result were it not to be applied. It is said that it would, for example, clearly be an unjust result if a non-party within the jurisdiction were liable for costs under the proposition (just cited) in *Dymocks*; but a non-party out of the jurisdiction who has conducted himself in precisely the same way could escape liability because the applicant was unable to show that he was the *alter ego* of the plaintiff.

(3) A broader approach: In so far as necessary – that is to say, if (on the facts) the court is not persuaded that the case falls within a narrow or an intermediate approach – the respondent relies on what it describes as "a broader approach". It points out that the first of the two propositions in the judgment of Lord Justice Waller in *The Ikarian Reefer (No. 2)* to which Lord Mance referred at paragraph 31 of his speech in *Masri (No. 4)* was that RSC Order 11, rule 9(4) – the terms of which are indistinguishable from those of GCR Order 11, rule 9(2) – enabled the Court to give parties leave to serve a costs summons out of the jurisdiction on a non-party. It is submitted that, in paragraph 33 Lord Mance accepted that , on the special facts in *The Ikarian Reefer (No. 2)* "since Mr Comninos was the *alter ego*

of the claimant company whose proceedings he had instigated, controlled and financed . . . 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 as against the latter." But, it is said, Lord Mance was not saying there that that was the only circumstance in which leave could be given. His concern was, it is said, that leave was required before any such service could be effected. That that was his concern appears, it is said, from his observations in paragraph 34 of his speech, where he stated:

> "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."

And it is said that the addition of CPR r 6.20(17), in order to supplement CPR 6.30(2) as proposed by the Rule Committee – to which Lord Mance refers in paragraph 34 of his speech - confirms the need for leave before such a summons can be served out of the jurisdiction. The submission under this head continues:

(i) The ability of the Court to grant leave under RSC Order 11, rule 9(4) did not require that new proceedings be commenced by the issue of a writ or other originating process, and thus was not limited to the originating processes specified in that rule's title or in RSC Order 11, rule 9(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."

(ii) If it is necessary to limit the exercise of the discretion that the Court has to grant leave under RSC Order 11, rule 9(4), then, by analogy with the provisions of RSC Order11, rule 9(1), the grounds for service out under RSC Order 11, rule can be applied.

(iii) The similarity in the drafting between the relevant Grand Court Rules and the former Rules of the Supreme Court means that the same reasoning applies: leave for service out of the Costs Summons out of the jurisdiction under GCR Order 11, rule 9(2) may be granted on one or more of the grounds set out in GCR Order 11, rule 1.

(iv) In this case, the relevant ground is GCR Order 11, rule1(1)(c):

> "1(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 duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto."

(v) This Court has described the test under this provision (in *Contadora Enterprises S.A. v Chile Holdings (Cayman) Limited* 1999 CILR 194, 201, lines 5-11) in the following terms:

> "The approved test is whether, if the directors and the appellants had all been present in the Cayman Islands, they could have been made parties to the same proceedings: see *Qatar Petroleum Producing Auth. v. Shell Intl. Petroleum Maatschappij B.V.* ([1983] 2 Lloyd's Rep. at 41). In turn this depends upon whether a common question of law and fact arises in respect of the claims against each of them."

(vi) In the later case of *Condoco v Broadhurst DaCosta* 2004-05t CILR 248, 24, Justice Henderson summarised the test further as follows:

> "48 Is KYC a 'proper' party? The classic test is whether, if the foreign defendant were present in the Cayman Islands, it could have been joined as a defendant to the same proceeding: *Contadora Enterprises S.A. v. Chile Holdings (Cayman) Ltd.* ; and *Qatar Petroleum Producing Auth. v Shell Internationale Petroleum Maatschappij B.V.* ([1983] 2 Lloyd's Rep. at 41). In *Contadora*, the Court of Appeal said (1999 CILR at 202) that 'this depends upon whether a common question of law and fact arises in respect of the claims against each [defendant]'.
>
> 49. Where the joinder of the foreign defendant would confer no real additional advantage on the plaintiff in the litigation, the court has a discretion to refuse leave: *The Supreme Court Practice 1999*, para. 11/1/23, at 97; *Electric Furnace Co. v Selas Corp. of America*. The example given in the White Book is where the proposed defendant outside the jurisdiction has merely induced the tort of the internal defendant and the total damages will not be increased by the joinder.
>
> 50 The position is summarised in *Dicey & Morris, The Conflict of Laws*, 12th ed., Rule 27, at 326 (1993),116 in this way:
> 'Y, who is out of England, must be either a necessary or proper party to the action. If Y is a proper party it is not also a requirement that he be a necessary party; but if adding Y is likely in practice to achieve no potential advantage for the plaintiff, it would not ordinarily be a proper case for service out of the jurisdiction. The question whether Y is a proper party to an action against X depends on this: supposing both X and Y had been in England, would they both have been proper parties to the action? If they would, and only one of them, X, is in this country, then Y is a proper party and leave may be given to serve him out of the jurisdiction. It is not necessary that the alleged liability of Y be joint or several with that of X'
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> 51. Two not necessarily consistent principles emerge from these authorities:

(1) if the foreign defendant were in the Cayman Islands and could be properly joined as a defendant to the action, then it is a proper party; but

(2) if adding the foreign defendant is likely in practice to achieve no potential advantage for the plaintiff, it will not ordinarily be a proper case for service out of the jurisdiction."

(vii) If Mr Kenney and CCI were located in the Cayman Islands, they could properly be joined as defendants for the purposes of satisfying the costs orders in the January Order and the Default Judgment by exercise of the Court's jurisdiction under section 24(3) of the Judicature Law (2007 Revision). The reasoning would rely on the actions of Mr Kenney and CCI . . . namely their design, instigation, control and funding of the proceedings in the Grand Court.

(viii) These costs proceedings constitute a continuing dispute (both as to liability for those costs as well as their quantum), predicated upon related issues of law and fact that arise in respect of the plaintiff's liability for costs of the proceedings in the Grand Court. Adding Mr Kenney and CCI as parties to the proceedings will ensure that there is a possibility that the unsatisfied costs orders will be satisfied; whereas if they are not added as parties, those costs orders will not be satisfied.

84. In addressing the second of the appellant's grounds (as distilled by the respondent) – that once that jurisdiction has been correctly interpreted, it cannot apply on the available facts to Mr Kenney and/or CCI. - the respondent makes the following submissions:

(A) Adopting the narrow approach - that the Court has jurisdiction to serve a costs summons on a non-party out of the jurisdiction if it is legitimate to assimilate the party and the non-party and the non-party is the *alter ego* of the plaintiff, whose proceedings he has instigated, controlled and financed - it is submitted that Mr Kenney and CCI clearly fall within it. The following contentions are advanced in support of that submission:

(1) That, as the judge pointed out in his judgment dated 27 January 2012, and repeated in his judgment of 26 April 2013, "there is material before the Court . . . which would justify the conclusion that the Plaintiff is a nominal plaintiff." The definition of a nominal plaintiff in those circumstances can be found in GCR Order 23, rule 1(1)(b): a plaintiff in name, but who in fact sues for the benefit of another. The judge gave as an example, a case where the plaintiff

had assigned or charged the whole fruits of the action to another. It is said that this finding is significant, as it indicates that the substantive proceedings in the Grand Court were in fact brought for the benefit of those persons and entities standing behind the named plaintiff.

(2) The respondent has previously filed substantial evidence from documents obtained in other proceedings from Mr Kenney and CCI; as well as from testimony from Mr Kenney and other officers of CCI. It is said that, when considering questions of fact in applications for leave to serve out of the jurisdiction, the Court must look primarily at the applicant's case and not attempt to try factual disputes on affidavit.

(3) In support of its case that Mr Kenney and CCI exercised control over the actions of Mr Senesie as receiver of the plaintiff the respondent relies on the following contentions:

(a) It was Mr Kenney who devised the plan to enforce the Liberian Judgments against ACE. The plan involved the procurement of the appointment of Mr Senesie as 'receiver' of the purported "Liberian branch" of CIGNA WW. The plan was for the 'receiver' to recognise the Liberian Judgments as debts of CIGNA WW's Liberian "estate", and thereafter bring indemnity enforcement claims directly against ACE for the benefit of the AJA and G-22 claimants, Mr Kenney's clients.

(b) Mr Kenney developed this plan long before Mr Senesie was appointed as 'receiver' and well before the Liberian Judgments were recognised as valid claims on the receivership estate. In particular:

(i) Mr Kenney has admitted that CCI, which he formed in early 2005 to finance pursuit of the Liberian Judgments, was designed "so that the Liberian judgment holders could, through representation by a local insolvency officeholder and Commissioner of Insurance, obtain access to a court to adjudicate their claims against ACE".

(ii) In addition, Mr Kenney had already agreed with Mr Senesie before his appointment as 'receiver' that he would seek such an appointment and (once appointed) recognise the Liberian Judgments as valid debts of the estate.

(c) As part of this plan, Mr Kenney and CCI controlled Mr Senesie's actions. This is evidenced by a series of contractual agreements entered into

between, inter alia, Mr Kenney, CCI and Mr Senesie, mostly before his appointment as 'receiver' (on 24 April 2007):

(i) The 20 October 2006 "Compromise Agreement", which specified (a) that the 'receiver' would be appointed to pursue the Liberian Judgments, and (b) the limits within which the 'receiver' could settle those claims without CCI's approval;

(ii) The 22 February 2007 "Memorandum of Understanding", which set out the strategy for funding and implementing the 'receiver's'' claims against ACE;

(iii) The 25 April 2007 series of agreements regarding (a) the appointment of lawyers for the 'receiver', (b) the steps required to implement the claims against ACE, (c) the grant of authority with respect to the claims against ACE, and (d) the rights and obligations of the parties in connection with funding and implementing those claims.

(4) In addition to control, Mr Kenney and CCI funded the proceedings in the Grand Court, in that:

(a) Mr Kenney created CCI in February 2005 as a means to fund pursuit of the Liberian Judgments. He was involved in drafting most of the relevant documents in relation to the formation of CCI and its financial transactions;

(b) The AJA and G-22 claimants transferred their rights to any recovery in the proceedings to CCI in exchange for an undertaking that CCI would provide financial support to Mr Senesie;

(c) Mr Kenney helped arrange the US$2.85 million investment from the as-yet-unidentified "Garrett", a friend of Mr Kenney's, and continues to hide his identity from ACE. CCI was the channel through which this investment was used to pay attorneys and finance the development and pursuit of the proceedings in the Grand Court, long before these proceedings were issued in June 2008;

(d) Once additional funding was required, Mr Kenney incorporated Echemus Manager on 5 December 2008, initially serving as its sole director and shareholder, and thereafter remaining its majority shareholder until June 2012;

(e) On 30 June 2010, Mr Kenney established Echemus Fund as a vehicle to raise subscriptions to fund claims determined by its general partner, Echemus Manager, who had the full and exclusive authority to act for it (in effect, to fund claims originating with Mr Kenney's BVI law firm);

(f) When, by the order of 27 January 2012, the Grand Court ordered the plaintiff to post security for ACE's costs of the proceedings, Echemus Fund made a clear decision to provide no further funding and instead to "repurpose the ACE budget" for other claims; thereby causing the plaintiff to default because the Receiver had no other source of funding. At this time Mr Kenney was the managing director and majority shareholder of Echemus Manager, the general partner of Echemus Fund.

(5) ACE has put evidence before the Court that shows that Mr Kenney's plan went further than litigation funding; it effectively amounted to the purchase of a cause of action:

(a) On an unknown date, Mr Kenney, CCI and Mr Senesie entered into an agreement assigning the latter's interest in the claims against ACE to CCI;

(b) The "Kenney Report" dated 29 October 2009, which is a report prepared by Mr Kenney on behalf of the 'receiver', shows that, in return for the assignment of his interest in the claims against ACE, Mr Kenney and CCI agreed that Mr Senesie would retain 1.25% of any amounts realised under the Liberian Judgments, even though such an arrangement was not authorised under Liberian law.

As the judge pointed out in the May 2013 Judgment: "There are many respects in which there is a serious issue as to whether what has happened is beyond conventional Litigation Funding."

(6) Mr Senesie was not, as he presented himself to be, an independent government official. He was instead a judgment-proof, nominal plaintiff who accounted to Mr Kenney and CCI for his actions and who was restrained by prior contractual agreements that Mr Kenney arranged and to which he and CCI were parties. The use of Mr Senesie in this way provided Mr Kenney and CCI with a means of issuing a claim against ACE in a costs-shifting jurisdiction without the apparent risks of costs exposure.

(7) The evidence submitted by ACE shows that Mr Kenney and CCI were the parties who in reality brought the proceedings in the Grand Court. Mr Kenney and CCI's design, instigation, control and funding of the proceedings by means of a straw man, nominal plaintiff (who could not conduct the claims without their say-so, and who had no other means of funding) means they must be assimilated with Mr Senesie in the way envisaged by Lord Mance. In this way it is easy to say that Mr Kenney and CCI have submitted to the jurisdiction of the Grand Court – they have in fact chosen it.

(8) In much the same way, Mr Kenney and CCI can also be said to be the *alter ego* of Mr Senesie with respect to the proceedings in the Grand Court. He was a nominal plaintiff; he was "nominal" in the sense that his whole existence as Receiver, and the proceedings he purportedly brought on behalf of the named plaintiff, CIGNA WW's Liberian branch, had been designed by Mr Kenney prior to his appointment; he was funded by Mr Kenney and CCI, his actions were contractually controlled by Mr Kenney and CCI, and his interest in the claims he was purportedly bringing against ACE had previously been assigned to CCI for a percentage recovery that was itself illegal under his country's own laws. Where an entity has no ego of its own in relation to proceedings it has purportedly issued, there necessarily must be an *alter ego* that controls him; that control was effected by, amongst others, Mr Kenney and CCI.

(9)`The contentions advanced on behalf of Mr Kenney and CCI - that neither can be deemed the *alter ego* of, or assimilated with, Mr Senesie because (i) the original Liberian judgment creditors took 55% of the ordinary shares in CCI and, in addition, have held a seat on CCI's board of directors together with one representative director of the funders and an independent director; and (ii) Mr Kenney only held an indirect personal stake in the proceedings against ACE, which amounted to less than 1% and was acting only as a lawyer doing the best for his clients - should be rejected. It is said:

(a) That the first of those contentions relies on the premise that an *alter ego* or assimilated party cannot arise save in the case of a company with a sole director or shareholder (as in *The Ikarian Reefer (No. 2*). This was not the judge's finding and is not the respondent's submission. The fact that the Liberian judgment creditors hold shares in CCI (as does "Garrett") is not inconsistent with the proposition that CCI's funding and

control of the Receiver is such that they can be assimilated. It is the plaintiff (not CCI) that takes the role of the one-ship company for the purposes of the analogy: the plaintiff (through the Receiver) was a nominal plaintiff controlled and financed by Mr Kenney and CCI with the expectation of gain.

(b) The second of those contentions seeks to portray Mr Kenney as simply acting as a responsible attorney in his clients' best interests. But the evidence shows that Mr Kenney's role was very different: he identified a highly suspect legal claim, devised a means of monetising it on behalf of investors by enlisting the cooperation of a foreign official, misrepresented the independence of that official and caused others to do so, devised an ownership structure that would conceal the identity of his investors, devised a funding structure that was intended to protect them and himself from costs exposure, created an arrangement to give himself a direct profit interest in any recovery, and caused the plaintiff (through the Receiver) to default, rather than post security for costs as ordered by the Court, in order to protect his own investment in the proceedings.

(10) Mr Kenney's expectation of benefit from the proceedings in the Grand Court included his legal fees earned throughout his representation of the AJA and G-22 Claimants, CCI and the Receiver, as well as his success fee in the litigation (the terms of which remain unknown). In addition, Mr Kenney has also conceded that:

(a) Blue Hawk Investments Limited, a BVI company of which he is the sole shareholder, was until recently a limited partner in Echemus Fund, entitled to a share in any recovery on the Liberian Judgments in return for its funding of the case; and

(b) He was, from the creation of the Echemus entities until June 2012, the majority shareholder of Echemus Manager, which is entitled to the residual profit interest in the Liberian Judgments after Echemus Fund's limited partners have been paid.

Mr Kenney's expectation of financial gain was therefore not limited to ordinary legal fees, but included the expectation of success fees and eventual recovery of profits as both a limited partner in Echemus Fund and a shareholder in Echemus Manager. He was not simply acting as a lawyer doing

the best for his clients; he and CCI designed, instigated, controlled and funded the proceedings such that they can be assimilated with Mr Senesie.

(B) Adopting the intermediate approach - that the court may give permission to serve a costs summons on a non-party outside the jurisdiction in circumstances where the relationship between the party and the non-party is such that it can be said that it was the non-party who in fact brought the proceedings and so is to be treated as "the real party to the litigation"- it is submitted that the actions of Mr Kenney and CCI clearly fall within the second of Lord Brown's categories in *Dymocks*; in that their design, instigation, control and funding of the proceedings (from which they expected to benefit) show that both were "the real party to the litigation". It is said that it does not matter, for the purposes of this analysis, whether Mr Kenney and CCI were the only real parties. Reliance is placed on the observation of Lord Brown in the *Dymocks* case (*ibid*, page 204 [25]:

> "Nor, indeed, is it necessary that the non-party be 'the only real party' to the litigation in the sense explained in *Knight v FP Special Assets Ltd*, provided that he is 'a real party in . . . very important and critical respects' (see *Arundel Chiropractic Centre Pty Ltd v Deputy Comr of Taxation* (2001) 179 ALR 406, 414, referred to in *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5, at [96], [103], and [111])."

On that analysis it is said that Mr Kenney and CCI can be deemed to have submitted to the jurisdiction of the Grand Court for the purpose of serving the Costs Summons upon them.

(C) Adopting the broader approach - that the court may give permission to serve a costs summons on a non-party outside of the jurisdiction in circumstances where the non-party could have been served with an originating process pursuant to GCR Order 11, rule 1(1)(c) on the ground that it was a "necessary and proper party" to the proceedings - it is submitted that there is a good arguable case that Mr Kenney and CCI are necessary or proper parties to the proceedings in the Grand Court and that, on that basis also, permission to serve the Cost Summons on them out of the jurisdiction should have been granted.

*Determination of this appeal*

85. There is no dispute on this appeal that the Grand Court has jurisdiction to hold non-parties liable for costs incurred in proceedings which have been before it. The power to do so is conferred by section 24(3) of the Judicature Law (2007 Revision):

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

86. The equivalent provision in the laws of England and Wales is contained in section 51(3) of the Supreme Court Act 1981. The principles to be applied by a court when considering whether to make an order for costs to be paid by a non-party under that section were set out in the speech of Lord Brown of Eaton-under-Heywood when delivering the advice of the Judicial Committee of the Privy Council in *Dymocks Franchise Systems (NSW) Pty v Todd (No. 2)* [2004] UKPC 39, [25]; [2004] 1 WLR 2807. He said this:

> "[25] A number of the decided cases have sought to catalogue the main principles governing the proper exercise of this discretion and their Lordships, rather than undertake an exhaustive further survey of the many relevant cases, would seek to summarise the position as follows:
>
> (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* [2002] 3 All ER 641 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, the judgments of the High Court of Australia in *Knight* [*Knight v FP Special Assets Ltd* (1992) 107 ALR 585] and Millett LJ's judgment in *Metalloy Supplies Ltd (in liquidation) v MA (UK) Ltd* [1997] 1 WLR 1613. Consistently with this approach, Phillips LJ described the non-party underwriters in *TGA Chapman Ltd v Christopher* [1998] 1 WLR 12 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 *Knight*, 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 ALR 406, referred to in *Kebaro [Kebaro Pty Ltd v Saunders* [2003] FCA 5]. Some reflection of this concept of 'the real party' is to be found in CPR 25.13(1)(f) which allows a security for costs order to be made where 'the claimant is acting as a nominal claimant. '

. . . "

It is, of course, that head – which may, for convenience, be described as the "real party" head - on which ACE relies in the present case. Lord Brown continued:

"[26] In a more recent case in the High Court of New Zealand, *Arklow Investments Ltd v MacLean* (unreported, 19 May 2000), Fisher J said:

'19. The guiding principle here is that costs orders against third parties are exceptional but that they are warranted in cases where there would otherwise be a situation in which a person could fund litigation in order to pursue his or her own interests and without risk to himself or herself should the proceedings fail or be discontinued.

20. . . . [W]here a person is a major shareholder and dominant director in a company which brings proceedings, that alone will not justify a third party costs order. Something additional is normally warranted as a matter of discretion. The critical element will often be a fresh injection of capital for the known purpose of funding litigation.

21. . . . [T]he overall rationale [is] that it is wrong to allow someone to fund litigation in the hope of gaining a benefit without a corresponding risk that that person will share in the costs of the proceedings if they ultimately fail."

[27] In the High Court of Australia in *Knight*, Mason CJ and Deane J at p595 said this:

'For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. The category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made.'

[28] The final judgment from which their Lordships would cite in this connection is that of Millett LJ in *Metalloy Supplies* already referred to, at p424-425:

'[An order] may be made in a wide variety of circumstances where the third party is considered to be the real party interested in the outcome of the suit . . . It is not, however, sufficient to render a director liable

> for costs that he was a director of the company and caused it to bring or defend proceedings which he funded and which ultimately failed. Where such proceedings are brought bona fide and for the benefit of the company, the company is the real plaintiff. If in such a case an order for costs could be made against a director in the absence of some impropriety or bad faith on his part, the doctrine of the separate liability of the company would be eroded and the principle that such orders should be exceptional would be nullified.
>
> The position of a liquidator is a fortiori. Where a limited company is in insolvent liquidation, the liquidator is under a statutory duty to collect in its assets. This may require him to bring proceedings. ... If he brings the proceedings in the name of the company, the company is the real plaintiff and he is not. He is under no obligation to the defendant to protect his interests by ensuring that he has sufficient funds in hand to pay their costs as well as his own if the proceedings fail.'
>
> [29] In the light of these authorities their Lordships would hold that, generally speaking, where a non-party promotes and funds proceedings by an insolvent company solely or substantially for his own financial benefit, he should be liable for the costs if his claim or defence or appeal fails. As explained in the cases, however, that is not to say that orders will invariably be made in such cases, particularly, say, where the non-party is himself a director or liquidator who can realistically be regarded as acting rather in the interests of the company (and more especially its shareholders and creditors) than in his own interests."

87. In the light of the guidance given by the Privy Council in the *Dymocks* case, it seems to me, if I may respectfully say so, that Lord Justice Waller was plainly correct when he said, in *The Ikarian Reefer (No. 2)* (in a passage already cited) 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 that you have had such a connection with proceedings within the jurisdiction and, more clearly still, 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."

The relevant question, as it seems to me is not whether the Court has jurisdiction to make an order for costs against a non-party who is outside its territory; the relevant question is by what process (if any) is a non-party who is outside its territory brought before the court so that that jurisdiction can properly be exercised.

88. In the Cayman Islands the answer to that question must be found in Order 11 of the Grand Court Rules. I accept – as did Lord Goldsmith QC in the course of his

submissions - that there is no inherent jurisdiction to serve a summons or other process on a non-party who is outside the territory; if there were any doubt in that point – and, if I may say so, notwithstanding the observation of Lord Justice Waller in *The Ikarian Reefer (No..2)* that there must be an inherent power to give leave to join a non-party and serve him out of the jurisdiction, I do not think that there was doubt - it was laid to rest by Lord Mance's observations at paragraph [32] of his speech in *Masri (No.4)*.

89. Order 11 is headed "Service of Process, etc, Out of the Jurisdiction". Rule 1 is headed "Principal cases in which service of writ out of jurisdiction is permitted". Sub-rule (1) of that Rule provides, so far as material in the present context:

> "1. (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 duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto;
> . . ."

In the present case the proceedings were commenced by a writ issued by the plaintiff. The claim in the writ was for payment of the sums alleged to be due from ACE under the Liberian judgments. I think it impossible to contend that either Mr Kenney or CCI were necessary or proper parties "thereto": that is to say, necessary or proper parties to the claim made in the writ. Sub-rule (2) of Rule 1 provides that service of a writ out of the jurisdiction is permissible without the leave of the court if every claim made in the action begun by writ is one which by virtue of a Law or these Rules the court has power to hear and determine notwithstanding that the person against whom the claim is made is not within the jurisdiction, including, for the avoidance of doubt, applications made pursuant to section 48 of the Trusts Law (2011 Revision) or Order 85. Sub-rules (3) and (4) of Rule 1 require that, where a writ is to be served out of the jurisdiction under sub-rules (1) or (2), the writ must be endorsed with the time within which the defendant must acknowledge service: those sub-rules are not in point in the present case.

90. There are no Rules 2 or 3 in GCR Order 11. Rule 4 – which is headed "Application for, and grant of, leave to serve writ out of jurisdiction" - is in these terms, so far as material:

> "4. (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."

91. Rules 5 and 6 of Order 11 relate to the manner in which service out of the jurisdiction is to be effected. Rule 7 relates to service of process on a foreign state and Rule 8 requires (in a case where service is to be effected pursuant to an inter-governmental request under Rule 6(5) or under Rule 7) that the person making the request gives an undertaking to pay the Governor's expenses. None of those Rules is in point in the present case. Rule 9 is headed "Service of originating summons, petition, notice of motion, etc". It is in these terms (so far as material):

> "9 (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.

. . . ”

92. In *The Ikarian Reefer (No. 2)* Lord Justice Waller considered the question whether an application for a costs order against a non-party should be made by originating summons. He said this (in a passage already cited):

> “I do not myself see that an originating summons effectively commencing fresh proceedings would have been the appropriate course and thus Order 11 rule 9(1) would not be material. Despite the dictum of Phillips LJ in *Murphy v Young & Co’s Brewery,* I prefer the approach of Sir Robert Gatehouse in *Seismik Securitik AG v. Sphere Drake Insurance* (unreported) 3 February 1998. . . .”

It is not, I think, necessary to decide, in the present case, whether it would have been open to ACE to commence fresh proceedings, by originating summons or otherwise, seeking orders for costs against Mr Kenney and CCI. They did not do so; and it is not suggested that the position would be materially different if they had. As Lord Justice Waller had pointed out in *The Ikarian Reefer (No. 2)*:

> “It seems to me important to distinguish between a situation in which there is no pending action but the English court is concerned to exercise jurisdiction over someone resident outside its territory, and a situation in which there is pending in the English court an action over which on any view the English court has jurisdiction.”

ACE took the view – no doubt on the basis of the observation which I have just set out – that the appropriate course was to proceed by way of summons in the existing proceedings.

93. It is clear that the Court of Appeal in *The Ikarian Reefer (No. 2)*, [2008] EWCA Civ 876; [2010] 1 AC 90, took the view that RSC Order 11, rule 9(4) conferred power on the court to give permission (in an appropriate case) to serve a summons in existing proceedings out of the jurisdiction on a person who was not a party to those proceedings. The Court of Appeal in *Masri (No. 4)* took the same view. In his judgment (with which the other members of the Court, Lord Justice Longmore and Lord Justice Collins, agreed) Sir Anthony Clarke, Master of the Rolls, said this, at paragraph [57];

> “[57] While I agree that [CPR] rule 6.30(2) is concerned with documents required to be served on parties to the proceedings, I would not construe it as being so limited. Rule 6.30(2) is not naturally limited to parties and its predecessor, RSC Ord 11 r 9(4) was not so limited, as Waller LJ explained in *The Ikarian Reefer (No. 2),* at p.613B-D.”

and, at paragraph [59], this:

> "[59] Thus it was clear under the RSC that orders under Order 48 could be served out of the jurisdiction under Order 11 rule 9(4), either with or without permission, depending upon whether the substantive proceedings did or did not require permission to serve out of the jurisdiction. Moreover, as I see it, that was so whether the person served was a party to the substantive proceedings or not, although it would be necessary for that person to have a close connection with them. Thus Mr Comninos was said to have such a connection in *The Ikarian Reefer (No 2)* for the purposes of an application for costs against a non-party . . ."

94. If, on the basis of those decisions, GCR Order 11, rule 9(2) does confer power of the Grand Court to bring before it a non-party who is out of the territory for the purpose of determining whether a order should be made against that non-party for the payment of the costs of existing proceedings, the court may give leave for service out of the jurisdiction of a summons, issued in the proceedings. But, when seeking such leave, the applicant must support its application with an affidavit which complies with GCR Order 11, rule 4(1). And, when deciding whether or not such leave should be granted, the court would need to have in mind the requirement in Order 11, rule 4(2) that

> "4(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."

Those requirements are made applicable by Order 11, rule 9(3).

95. In addressing the second of those points – "is this a proper case for service out of the jurisdiction" the court would, of course, need to have in mind the first of the requirements identified in *Seaconstar*: it would need to be satisfied that there was a serious issue to be tried, on the merits, as to whether a costs order should be made against the non-party under section 24(3) of the Judicature Law. But, as it seems to me, if satisfied that a good arguable case had been made out that the facts fell within the "real party" head of Lord Brown's summary in the *Dymock's* case, the court could have been expected to take the view that a proper case for service out of the jurisdiction had been made out. If, the applicant has made out a good arguable case that, in the words of Lord Brown, the non-party has not merely funded the proceedings but substantially also has controlled or is to benefit from the proceedings, justice will ordinarily require that, if the proceedings fail, he will pay the successful party's costs: in such a case the non-party is not so much facilitating access to justice by the party funded as himself gaining access to justice for his own purposes.

96. Nevertheless, it is said on behalf of Mr Kenney and CCI on this appeal that the analysis which I have just set out cannot be supported in the light of the observations of Lord Mance in *Masri (No.4).* It is said that, before it can give permission to serve a summons in existing proceedings out of the jurisdiction on a non-party, the court must be satisfied (i) that the non-party is the *alter ego* of an existing party to the proceedings and (ii) that it is legitimate to assimilate the non-party with the existing party by treating them as effectively the same person. It is necessary to examine the passages in the speech of Lord Mance in their context in order to determine whether that proposition can be made good.

97. I can take the facts in *Masri (No. 4)* from the summary in the headnote in the Law Report. A creditor had obtained judgment in English proceedings against (*inter alios*) a foreign company which had submitted to the jurisdiction by defending the proceedings. The company, which was incorporated in Lebanon and domiciled in Greece, had failed to pay the judgment debt. The judgment creditor obtained, without notice, an order under Part 71, rule 2 of the Civil Procedure Rules for an officer of the company, Mr Khoury, who was himself domiciled in Greece, to be examined in England in respect of the company's foreign assets. Mr Khoury applied for the order to be set aside, on the grounds that CPR 71.2 did not apply to an officer of a foreign judgment debtor in respect of debts 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 71.2; that the language of that rule was sufficient to include the order which had been made against Mr Khoury; and that to make the order was not in breach of international law or comity. Mr Khoury appealed to the House of Lords.

98. Part 71 of the Civil Procedure Rules provided, at rule 71.2, that (so far as material):

> "71.2(1) A judgment creditor may apply for an order requiring:
>
> (a) a judgment debtor or;
>
> (b) if a judgment debtor is a company or other corporation , an officer of that body,
>
> to attend court to provide information about:
>
> (i) the judgment debtor's means; or

(ii) any other matter about which information is needed to enforce a judgment or order.

(2) An application under paragraph (1):

(a) may be made without notice;

. . .

(4) If the application notice complies with paragraph (3), an order to attend court will be issued in the terms of paragraph (6).

(5) A person served with an order issued under this rule must:

(a) attend court at the time and place specified in the order;

(b) when he does so, produce at court documents in his control which are described in the order; and

(c) answer on oath such questions as the court may require.

(6) An order under this rule will contain a notice in the following terms:

'You must obey this order. If you do not, you may be sent to prison for contempt of court,'"

99. At paragraph [9] of his speech, Lord Mance summarised the issues before the House. They were, he said:

> "(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."

It can be seen that the only issue which might be said to have relevance to the former RSC Order 11, rule 9(4) (or, in these Islands, GCR Order 11, rule 9(2)) is issue (4): whether there was any basis under CPR Pt 6 for service of the order upon Mr Khoury out of the jurisdiction.

100. As I have indicated, Lord Mance had identified as the first issue for determination "whether the language of CPR r 71.2 purports to confer power to order examination of a foreign director of a foreign company". At paragraph 26 of his speech he concluded that it did not. It may be said that, having reached that conclusion, issue (4) – which is prefaced by the words "if it does" – did not arise; and that it was unnecessary for the House to go on to consider whether CPR Pt 6 would have provided a basis for service of the order (if properly made) on Mr Khoury out of the jurisdiction. Nevertheless,

Lord Mance found it helpful to do so. At paragraph [27] of his speech – at the start of a section headed "Service out of the jurisdiction" - he said this:

> "[27] This conclusion is reinforced by a consideration of the position relating to service. Mr Salzedo [junior counsel for the judgment creditor] advances two alternative bases upon which he submits that an order made against a non-party under CPR 71 could be served: under CPR 6.30(2), or alternatively under CPR 6.20(9). The Court of Appeal accepted the former, and found it unnecessary to consider the latter."

101. CPR 6.30(2) was in these terms:

> "6.30(2) 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 paragraph 16 of his speech, after referring to that rule, Lord Mance had said this:

> "RSC. Ord 11, r 9(4) (the differently worded predecessor to CPR r 6.30(2)) was, rightly, held to authorise service out with leave in such a situation in *Union Bank of Finland Ltd v Lelakis* [1997] 1 WLR 590."

102. At paragraph [28] of his speech Lord Mance said this:

> "[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."

And he went on, at paragraph [29], to observe:

> "[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 (e.g. because the defendant was domiciled in a Brussels Regulation state), a non-party could be served abroad (on the face of it in any country in the world) without leave."

103. At paragraph [30] of his speech, Lord Mance pointed out that, in reaching its conclusion that CPR 6.30(2) should be given "the wider interpretation" or "much

wider effect" to which he had just referred, the Court of Appeal in *Masri (No, 4)* had relied upon two cases under the former RSC Order 11, rule 9. After setting out the provisions of sub-rules (1) and (4) of Order 11 rule 9 – which, as he had observed at paragraph 16 of his speech, was the differently worded predecessor to CPR 6.30(2) – he said this:

> "[31] In *Union Bank of Finland Ltd v Lelakis* [1997] 1 WLR 590 [the first of the two cases on which the Court of Appeal had relied] the Court of Appeal held that it was sufficient to engage Ord 11, r 9(4) if the proceedings against the defendant were proceedings which could have been served out of the jurisdiction. They did not actually have to be so served. (In that case, the proceedings had in fact been served within the jurisdiction under submission to jurisdiction clauses contained in the guarantees upon which suit was brought against the defendant.) The issue under Ord 11, r 9(4) arose in relation to the service on the defendant of an order for his examination as a judgment debtor. So there was no question of service on a non-party. The case does not help on the present issue. . . ."

As Lord Mance pointed out the reason why *Lelakis* was of no assistance in the determination of issue (4) in *Masri (No. 4)* was that, in that case, Mr Lelakis was a party (as defendant) to the proceedings: in *Masri (No. 4)* Mr Khoury was not a party to the proceedings.

104. At paragraph [31] of his speech, Lord Mance turned to the second of the two cases on which the Court of Appeal had relied, *The Ikarian Reefer (No. 2)*. He said this, in a passage which I have already set out earlier in this judgment:

> "[31] The second case is *The Ikarian Reefer*, 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 O. 11 r.9(4) enabled 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."

At paragraph [32] he rejected the proposition that reliance could be placed on an inherent power. At paragraph [33], he said this:

> "[33] As to the former proposition, *The Ikarian Reefer* 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, at p.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".

And, after pointing out that nothing equivalent was or could be alleged against Mr Khoury, Lord Mance went on:

> "[33] . . . 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 Sir John Donaldson MR in *Mansour* had been addressing a version of O.11 r.9(4), which omitted the words "out of the jurisdiction" . . . In fact Sir John Donaldson was in error in omitting those words. Waller LJ, believing that they had been added subsequent to *Mansour*, said 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."

I pause to mention that the words "out of the jurisdiction" (at the end of the second limb of RSC Order 11, rule 9(4) following amendment) do not appear in GCR Order 11, rule 9(2); which, I assume derives from RSC Order 11, rule 9(4) as it was before amendment; and which has not, itself been amended. But nothing, I think, turns on that. Lord Mance continued:

> [34] . . . Bearing in mind that the proceedings in *The Ikarian Reefer* 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."

The two propositions to which Lord Mance referred when he said that he found it difficult to discern the distinction between the proposition rejected and the proposition accepted were (i) that, on the amended form of RSC Order 11, rule 9(4), it was 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; and (ii) 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. If I may say so, I think that the

distinction that Lord Justice Waller was seeking to draw was between service with leave and service without leave. But, it not being suggested on behalf of ACE in the present case that its Costs Summons could have served on Mr Kenney or CCI without leave, it is not necessary to pursue the point. Lord Mance concluded paragraph [34] of his speech with these observations:

> "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 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 Rules Committee, following *The Ikarian Reefer*, concluded that the rules should be supplemented by adding CPR 6.20(17) in order expressly to permit service out of a claim for an order for costs against a non-party."

CPR 6.20(17) was in these terms:

> 'In any proceedings to which rule 6.19 does not apply, a claim form may be served out of the jurisdiction with the permission of the court if . . . (17) a claim is made by a party to proceedings for an order that the court exercise its power under section 51 of the Supreme Court Act 1981 to make a costs order in favour of or against a person who is not a party to those proceedings.'

105. At paragraph [36] of his speech Lord Mance referred to the decision of Mr Justice Tomlinson in *Vitol SA v Capri Marine Ltd* [2008] EWHC 378 (Comm); [2009] Bus LR 271. He said this:

> **"**[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)*) and his conclusion."

I should, for completeness, set out the relevant passage from the judgment in *Vitol SA v Capri Marine Ltd*. At paragraph 11 Mr Justice Tomlinson had said this:

> "[11] . . . In *National Justice Compania Naviera S.A. v. Prudential Assurance Co. Ltd* [2000] 1 WLR 603 the Court of Appeal decided that even before [CPR 6.2017)]had come into force the court had power to permit service out of the jurisdiction of such an application. The rationale of the decision was explained by Waller LJ in this way:
>
> > '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.'"
>
> I do not consider that this rationale assists here by analogy. As it happens Vitol is in this action additionally claiming relief on this basis against both Gerassimos and Ioannis Kalogiratos. It is not however every officer of a company who can properly be described as its alter ego. An order under CPR 71.2 depends upon no such description. It is sufficient to render a person amenable to such an order that he be 'an officer' of the judgment debtor. The fact that the court has jurisdiction to permit service upon Gerassimos and Ioannis Kalogiratos out of the jurisdiction of an application seeking their joinder to the action for the purpose of being required to pay costs does not mean that the court has jurisdiction to permit service upon them of an order requiring their attendance before the English court on pain of imprisonment."

106. It is clear that the House of Lords decided in *Masri (No. 4)* – albeit, strictly, *obiter* – that Lord Justice Waller had been wrong, in *The Ikarian Reefer (No. 2)* to take the view (if he did) that RSC Order 11, rule 9(4) – in its amended form - gave any general power to authorise service of a summons in existing proceedings on a non-party out of the jurisdiction. The rule was confined to the service of summonses and other notices on existing parties who were out of the jurisdiction. But there were, nevertheless, circumstances in which the rule could be relied upon as conferring power to serve a summons on a non-party; those were circumstances in which it was "legitimate to assimilate the party and the non-party, and to treat any means of service available against the former as available against the latter." In such circumstances the non-party could be treated as if he were a party to the existing proceedings for the purposes of rule. In my view, this Court should interpret GCR Order 11, rule 9(2) in a manner consistent with that analysis of the decision of the House of Lords in *Masri (No. 4).*

107. That leaves for consideration whether the House of Lords intended to confine the circumstances in which it was legitimate to assimilate the named party to the proceedings and the non-party in the manner for which Mr Kenney and CCI contend. They rely – for the proposition that, before it can give permission to serve a summons in existing proceedings out of the jurisdiction on a non-party, must be satisfied (i) that the non-party is the *alter ego* of an existing party to the proceedings and (ii) that it is legitimate to assimilate the non-party with the existing party by treating them as

effectively the same person - upon Lord Mance's observation, in the first sentence of paragraph 33 of his speech in *Masri No. 4),* that:

> "The Ikarian Reefer 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."

and, I think, to his observation in the sentence in the concluding section of paragraph [34] that:

> "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 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."

In my view, those observations do not support the proposition advanced on behalf of the appellants.

108. I have reached that conclusion for the following reasons:

(1) It is necessary to read Lord Mance's observations in the context in which they were made. He was not concerned to provide an exhaustive or definitive test by which to determine the circumstances in which it would be legitimate to treat a non-party as if he were a party to the existing proceedings for the purposes of RSC Order 11, rule 9(4). His concern was to establish – by way of support for his conclusion (already reached, earlier in his speech) that CPR 71.2 was not intended to apply to officers of a corporate judgment debtor who were outside the jurisdiction – that the rules (and, in particular CPR 6.30(2)) did not provide a means for service of an order made under CPR 71.2 on such officers. In addressing that question, he needed to explain or distinguish the observations of Lord Justice Waller in *The Ikarian Reefer (No. 2)*, which had been relied upon for the proposition that CPR 6.30(2) should be taken to extend to service on non-parties. He did so by treating *The Ikarian Reefer (No.2)* as a case in which Mr Comninos was the *alter ego* of the claimant company "whose proceedings he had instigated, controlled and financed". He observed that "in such circumstances" it might be legitimate to assimilate the party and the non-party. He did not say that "only in such circumstances" would it be legitimate to do so: he did not need to. It was enough for him to demonstrate that the circumstances in which leave to serve a summons on Mr Comninos out of the jurisdiction in *The Ikarian Reefer (No. 2)* had been granted were very different from those which existed *Masri (No. 4)* in

respect of Mr Khoury. And no doubt, he had in mind that, in expressing his conclusion in *The Ikarian Reefer (No. 2)*, Lord Justice Waller had referred to the allegation that Mr Comninos was the *alter ego* of the party named in the proceedings. As he said, in paragraph 33:

> "Nothing equivalent can be or is alleged in respect of Mr Khoury in the present case."

(2) Lord Mance referred, immediately after the sentence in paragraph 33 on which Mr Kenney and CCI rely, to the observation of Lord Justice Waller in *The Ikarian Reefer (No. 2)* that:

> ". . . 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."

There is nothing in his speech to suggest that he disagreed with that observation.

(3) In head (3) of his summary in the *Dymocks* case Lord Brown (who was also a member of the House in *Masri (No. 4);* as was Lord Rodger of Earlsferry who, too, had had been a member of the Board in *Dymocks*) said this (in a passage already cited):

> "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".

It would, in my view, be an extraordinary result if a person who is to be treated as "gaining access to justice for his own purposes" – so as to be "'the real party' to the litigation" – for the purposes of the jurisdiction to make a costs order against him, was, nevertheless to be treated as not a 'real party' to the litigation for the purpose of the jurisdiction to authorise service of a summons upon him under GCR Order 11, rule 9(2). I cannot think that Lord Mance intended, by the first sentence in paragraph [33] of his speech, to lay down a test which would or might exclude those who were to be treated as "real parties" in the former context from being treated, also, as "real parties" in the latter context. And I cannot think that, if they had though that that was Lord Mance's intention, Lord Rodger or Lord Brown who had propounded and endorsed the "real parties" test in the former context would have agreed with the exclusion of some of those who met that test from being treated as "real parties" in the latter context.

(4) I am not able to accept that, when Lord Mance referred (in paragraph 34 of his speech) to "situations where the non-party is the alter ego of a party to existing litigation", he was intending anything more than a reference to the situations which he had described in paragraph 33: that is to say, situations in which it might be legitimate to assimilate the party and the non-party. If support for the appellants' two-limb test is not found in paragraph 33 of Lord Mance's speech (as, in my view, it is not) it cannot be found in paragraph 34.

109. As I have said, I reject the submission that the observations in paragraphs 33 and 34 of Lord Mance's speech in *Masri (No.4)* support the appellant's contention as to the test to be applied under RSC Order 11, rule 9(4) when the court was asked to authorise service of a costs summons on a non-party out of the jurisdiction. In my view, on an application in these Islands to authorise service of a costs summons on a non-party out of the jurisdiction, the Grand Court should ask itself whether, on the material before it, the applicant has "much the better of the argument" that the circumstances are such that it is legitimate to assimilate the party to the existing proceedings with the non-party on whom the applicant seeks to serve the summons; and so legitimate to treat the non-party as a "party" for the purposes of GCR Order 11, rule 9(2). I would add that, in my view, it is appropriate for the court, when addressing that question in circumstances where the applicant's case for an order that the non-party pay the costs is advanced under what I have described as the "real party" head of the *Dymocks* case, to assess, as best it can at that stage, the strength of that case.

110. On the basis of material before the judge, including the evidence in the affidavit of Mr Kenney, I have no doubt that he was entitled to reach the conclusion that this was a proper case in which to give permission to serve the Cost Summons on Mr Kenney and CCI out of the jurisdiction.

*Conclusion*

111. I would dismiss this appeal. My provisional view – subject to any representations which the parties may wish to put before the Court in writing within the period of 28

days from delivery of this judgment – is that the appellants should pay to the respondent its costs of and occasioned by this appeal. Those costs to be assessed if not agreed.

Chadwick P

Mottley JA I agree.

Campbell JA I also agree.