IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS

CICA No: 35 of 2013

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

ORDER

UPON JUDGMENT in this Appeal having been delivered on 6 May 2015

AND UPON READING the written representations filed on behalf of the parties pursuant to paragraph 111 of the Judgment **AND** without an oral hearing

AND FOR THE REASONS set out in the Schedule to this Order

IT IS ORDERED

1. That the Appellants pay to the Respondent its costs of and occasioned by this appeal which, for the avoidance of doubt, shall include the costs incurred by the Respondent in resisting the applications for leave to appeal determined on 28 June 2013 and 7 October 2013.
2. Such costs are to be assessed on the standard basis if not agreed) and paid within 14 days of such assessment or agreement.

Given under my hand and the Seal of the Court this 11 day of November 2015.

Registrar

SCHEDULE OF REASONS

(1) At paragraph 111 of its judgment on this appeal the Court expressed the provisional view – subject to any representations which the parties might wish to put before it – that the appellants should pay to the respondent its costs of and occasioned by this appeal.

(2) The Court has considered the written submissions on costs dated 20 May 2015 filed on behalf of the Appellants, Martin S Kenney and CC International Limited. For the reasons set out in those submissions the appellants seek an order that that the costs of the appeal be reserved; alternatively (if that primary submission is not accepted) that those costs be costs in the case. In advancing those submissions the appellants remind the Court that the judge below, Justice Sir Peter Cresswell, ordered (on 26 April 2013 and on 28 June 2013) that the costs of hearings before him should be reserved.

(3) In advancing their submission that the like order – "costs reserved" – should be made in respect of the costs of the appeal the appellants contend that it would be premature, at this stage of the litigation, to make an order for costs and/or to assess those costs, in that (i) the issue determined on the appeal was of an interlocutory nature and that costs are more appropriately determined after a final hearing of the substantive issues with the benefit of full submissions on costs in the light of the outcome of that final hearing and (ii) that the approach of the judge below should be adopted at this stage (there being, it is submitted) no good reason to depart from that approach. In particular, it is submitted, the appeal was from an interlocutory order and the Court was required to determine issues on the basis of limited evidence, by assessing the strength of the case against the appellants on an interim basis "as best it could" and by applying a "good arguable case" test (rather than the higher threshold for success that would be applied at the final substantive hearing). Further, it is said that, given the interlocutory nature of the application, the Court has not had the benefit of hearing oral evidence on disputed issues of fact. An order reserving the costs at this stage would, it is said, give rise to no, or no real, prejudice to the respondent.

(4) In advancing their alternative submission, that an order that the costs of the appeal be "costs in the case", the appellants rely on the same contentions. It is said that the party that prevails at the final substantive hearing should be awarded the costs of the hearings to date as well as the costs of any future hearings.

(5) The submissions advanced on behalf of the appellants are founded on a misunderstanding of the nature of the appeal which was before this Court. Although it was an appeal from a decision of the judge on an interlocutory application in these proceedings – that is to say, an application to set aside permission to serve the proceedings out of the jurisdiction - this Court was not deciding the issues before it on an interim basis. The issues for this Court were i) whether GCR Order 11, rule 9(2) enabled the court to order service out of the jurisdiction in a "non-party costs" case on a person who, although not named as a party to the proceedings, could be treated as a "real party" for the purposes of the test in *Dymocks Franchise Systems (NSW) Pte v*

Todd (No 2) [2004] UKPC 39; and, if so, (ii) whether the judge had been entitled, on the material before him, to take the view that the party seeking the order for service out had "much the better of the argument" that the person to be served was to be so treated. The first of those issues turned on a proper understanding of the law: it did not turn on findings of fact made on incomplete evidential material. In determining the second of those issues, this Court was not deciding on an interlocutory basis that the parties to be served were to be treated as "real parties" within the *Dymocks* test: it was deciding whether the judge was entitled to take the view, assessing the strength of the case as best he could on the material before him, that ACE had much the better of the argument. Those were not issues on which there would be a further determination after disclosure of documents and oral evidence: in particular, a decision, in the future, that Mr Kenney and CC International Limited (or either of them) should not be treated as "real parties" for the purposes of the *Dymocks* test will be of no relevance to the question whether the judge was correct to determine the second of those issues as he did.

(6) The Court has also considered the written submissions as to costs dated 20 May 2015 filed on behalf of the respondent. The respondent is content with an order for costs in the termsindicated by the Court in its judgment of 6 May 2015; but seeks clarification, for the avoidance of doubt, that the costs of and occasioned by this appeal include the costs of the applications (both to the judge and to this Court) for leave to appeal. Plainly, they do.

(7) For those reasons this Court is not persuaded that it should depart from the provisional view expressed in paragraph 111 of the judgment dated 6 May 2015.

CHADWICK, P