



Cayman Litigation &
Dispute Resolution
Q3 2017 Review

Welcome to the Q3 2017 Stuarts litigation and dispute resolution review. Stuarts' litigation and dispute resolution team acts in a wide range of company, commercial and insolvency related disputes arising under Cayman Islands law. The Q3 2017 Quarterly Review addresses obtaining Costs Orders against Non-Parties outside the Cayman Court's Jurisdiction.

Seeking Costs Orders against Non-Parties outside the Cayman Court's Jurisdiction

Our Second 2017 Quarterly Review concerned the ability of the Grand Court to make Costs Orders against persons other than the actual parties to proceedings, including Non-Parties outside the territorial jurisdiction of the Cayman Court.

This Third 2017 Quarterly Review considers the process by which the Cayman Islands Court has the ability to bring a party who is outside the Cayman Islands jurisdiction before it.

When will the Cayman Islands Court have jurisdiction to serve a Non-Party Costs Summons outside the jurisdiction?

Particularly in matters before the Cayman Islands Courts, it may often be the case that the Non-Party is itself outside the Court's jurisdiction.

As a result, a preliminary and fundamental procedural issue is whether the Grand Court has the ability to permit service of a Non-Party Costs Summons on the party abroad. This concern will apply where the Non-Party has not already otherwise submitted itself to the Court's jurisdiction.

It has long been established that service out of the jurisdiction requires express authorisation either by statute or under the Court Rules (GCR Order 11),¹ albeit an important caveat to that is where the third party is in fact the "alter ego" of the party to the proceedings so that service is then permitted on the "alter ego" because it is treated as the same entity as the party to the proceedings.

Cigna Worldwide Insurance Company -v- ACE Limited, Grand Court, 26 April 2013

In *Cigna -v- ACE Limited*, an Order had been granted *Ex-Parte* permitting ACE Limited, the Defendant, to serve a Non-Party Costs Summons on a Mr. Kenney (a BVI Resident) and CC International Ltd ("CCI"), incorporated in Nevis and thereby both outside the Court's jurisdiction. Mr. Kenney and CCI applied to have that *Ex-Parte* Order set aside.

In order to be able to obtain leave to serve proceedings outside the Court's jurisdiction, it is necessary, *inter alia*, to show that there is a "good arguable case"² that the claim falls within one or more of the classes of case prescribed in GCR Order 11 in which permission to serve out may be given.

The proceedings concerned serving a *Summons* seeking a Costs Order (not, for instance, a Writ) outside the Jurisdiction. The relevant rule thereby being Order 11, Rule 9 (2).



Key Contacts



Richard Annette
Head of Litigation
Tel: (345) 814-7920
richard.annette@stuartslaw.com

¹ Masri -v- Consolidated Contractors International (UK) Ltd and Others (No. 4) [2009] UKHL 43, Lord Mance at paragraph 32.

² "Good arguable case" means "that one side has a much better argument than the other" (Cresswell J, paragraph 5, page 30 of 33).

“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”.; equivalent to RSC Order 11 Rule 9 (4) as addressed in the English authorities.

Cresswell J held that:

“The principle underlying the jurisdiction (so far as relevant) under GCR O. 11, r 9(2) to be derived from Masri is that where a person (B) instigates, controls and finances proceedings brought in the name of A, **there may be circumstances in which it is legitimate to assimilate the party A and the non-party B and to treat any means of service available against A, as available also against B.** This is so where B in reality brought the main proceedings and there has in effect been a submission to the jurisdiction by B” (page 31 of 33 of Judgment) (emphasis added).

Although that would include the situation where the Non-Party is the “*alter ego*” of the actual party to the Proceedings, Cresswell J did not conclude that the jurisdiction was limited to such cases.

The Court concluded that where (i) the Non-Parties “instigated, controlled and financed” the proceedings so that it was “legitimate to assimilate” the Non-Parties with the Plaintiff; (ii) the Non-Parties had “... in reality brought these proceedings” and that they had “in effect” submitted to the jurisdiction; and (iii) even though it was *not* necessary (as set out above) to determine that the non-parties were the *alter ego* of the Plaintiff, in this case the Non-Parties were such because the actual plaintiff was a “nominal plaintiff”,³ the Court refused to set aside the *Ex-Parte* Order permitting service of the Summons outside the jurisdiction.

Martin Kenney, CC International Limited -v- ACE Limited, Cayman Islands Court of Appeal, 6 May 2015

The Cigna case went to appeal.

The Court of Appeal acknowledged that there was no dispute that the Grand Court had jurisdiction to hold Non-Parties liable for costs, Sir John Chadwick, the President of the Cayman islands Court of Appeal said:

“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 the jurisdiction can be properly exercised”.

That basis needs to be found in GCR Order 11 as there is no inherent jurisdiction to serve a summons or other process on a Non-Party who is outside the Cayman Islands.

In deciding whether to permit service outside the jurisdiction, the three stage test in Seaconsar Far East Ltd. -v- Bank Markazi Jomhourī Islami Iran [1994] 1 AC 438, 452-457 must be met:

1. there must be a serious issue to be tried on the merits;
2. there must be a good arguable case that the case fits within one of the circumstances in which service outside the jurisdiction is permitted – i.e., one of the grounds in GCR Order 11; and
3. the Cayman Islands Court must be “clearly or distinctly” the appropriate forum for trial of the dispute.

The appellants, seeking to set aside the *Ex-Parte* Order that had been made, argued that before the Court could give permission to serve the Summons outside the jurisdiction on a Non-Party, the Court must be satisfied both that:

1. the Non-Party is the *alter ego* of an existing party to the proceedings; and
2. it is legitimate to assimilate the Non-Party with the existing party by treating them as effectively the same person.

³ “Nominal Plaintiff” being defined in the Grand Court Rules relating to security for costs as follows: “A nominal plaintiff is a plaintiff (not being a plaintiff who is suing in a representative capacity) who is suing for the benefit of some other person or persons and there is reason to believe that he will be unable to pay the costs of the defendant if ordered to do so” (GCR Order 23, rule 1(1)(b)).



The Court of Appeal rejected both of those contentions. Essentially, the Court of Appeal concluded that if the test in Dymock's Franchise Systems (NSW) Pty Ltd -v- Todd, and Others (Costs) was satisfied in that it was considered that there was a sufficient basis to conclude that there was a serious issue to be tried as to whether a Non-Party Costs Order should be made and the Court was satisfied of that, then that was enough to enable service outside the jurisdiction:

"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)".

The Court of Appeal concluded that:

"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" (emphasis added).

Where the Grand Court Rules contain no provision expressly enabling service of a Summons seeking a Non-Party Costs Order outside the jurisdiction, the solution found by the Court is to permit a third party to be served if that third party should be treated as essentially the same party as is before the Court. It is probably fair to say that the basis of such an application needs to be compelling.

However, if the case falls within those circumstances, it is not necessary to go further and demonstrate that that "real party" is the *alter ego* of an existing party to the proceedings, which would restrict the circumstances in which service outside the jurisdiction was permissible.

Accordingly, in a similar way to how the Grand Court has very recently supported a wide view of its ability to make Costs Orders against Non-Parties, the Cayman Islands Court of Appeal has also refused to adopt the restrictive approach sought as to when Non-Parties outside the jurisdiction can be served and brought before the Court.

This publication is for general guidance only and it is not intended to be a substitute for specific legal advice. Advice should be sought about specific circumstances. This review relates to Cayman Islands Law only as at 4 December 2017. No advice is given herein as to the laws of other jurisdictions and case law from other jurisdictions is referred to only for illustrative purposes. If you would like further information please contact Richard Annette of Stuarts Humphries.



Cayman Litigation and Dispute Resolution Q3 2017 Review

Key Contacts



Richard Annette
Head of Litigation
Tel: (345) 814-7920

richard.annette@stuartslaw.com



Cayman Litigation &
Dispute Resolution
Q3 2017 Review

