EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2015/0001

BETWEEN:

[1] HALLIWEL ASSETS INC
[2] PANIKOS SYMEOU
[3] MARIGOLD TRUST COMPANY LIMITED

Appellants/Defendants

and

HORNBEAM COPRORATION

Claimant

VADIM SHULMAN

Respondent

BEFORE:

The Hon. Dame Janice M. Pereira, DBE — Chief Justice
The Hon. Mde. Gertel Thom — Justice of Appeal
The Hon. Mr. Anthony Gonsalves — Justice of Appeal [Ag.]

Appearances:
Mr. Vernon Flynn, QC with him, Mr. Robert Nader for the Appellants

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2015: May 18;
October 12.

Civil appeal – Ex parte hearing – Court's costs jurisdiction – Service out of jurisdiction of non-party costs application – Whether judge erred in dismissing application to serve party out of the jurisdiction – Rule 7.3 of the Civil Procedure Rules 2000 – Rule 7.14 of the Civil Procedure Rules 2000 – Section 11 of the Eastern Caribbean Supreme Court (Territory of the Virgin Islands) Act

The appellants were granted costs orders against Hornbeam Corporation ("Hornbeam"). They filed applications that the costs should be made payable by Mr. Vadim Shulman ("Mr. Shulman"), the ultimate beneficial owner of Hornbeam's Halliwell shares, jointly with Hornbeam. The appellants applied for Mr. Shulman to be joined as a party to each set of

the proceedings giving rise to the costs orders against Hornbeam. They also applied for permission to serve the applications on Mr. Shulman out of the jurisdiction, in Monaco.

The learned judge, without addressing the merits of the case, refused permission to serve out on the basis that rule 7.3 of the Civil Procedure Rules 2000 ("CPR") did not provide a gateway for service out of third party costs applications in that the claim for costs did not fall under CPR 7.3(10).

The appellants appealed contending that the learned judge ought to have found that there was jurisdiction to serve out under CPR 7.3(10) and/or rule 7.14 or, alternatively, in the absence of any rule enabling permission to serve out, by applying the importation provision provided by section 11 of the Eastern Caribbean Supreme Court (Territory of the Virgin Islands) Act ("the Supreme Court Act").

Held: allowing the appeal; and remitting the applications to the court below, that:

1. The court's jurisdiction to make costs orders are derived from statute. This jurisdiction is grounded in section 50(1) of the **Supreme Court of Judicature (Consolidation) Act 1925** imported into the Virgin Islands by virtue of section 7 of the **Supreme Court Act**, and further buttressed by rules of court namely the ECSC CPR which by rule 64.10(1) specifically empowers the court to make costs orders against non-parties.

2. CPR 7.3 provides gateways for service out. The appellants must be able to show that the claim form is one which qualifies under one or more gateways contained in CPR 7.3 for service out to be effected.

   Rule 7.3 of the **Civil Procedure Rules 2000** applied.

3. CPR 7.14 contemplates service of an application out of the jurisdiction where the claim form itself qualifies for service out of the jurisdiction and where permission may be granted by the court. For CPR 7.14 to be engaged, Mr. Shulman must have been a party to the original claim. A claim for costs against Mr. Shulman pursuant to rule 64.10 does not without more make him a party to the claim.

   Rule 7.14 of the **Civil Procedure Rules 2000** applied.

4. The application to join Mr. Shulman as a party is inextricably linked to the non-party costs application. The appropriate course therefore is for the court below to consider the joinder application and determine it on its merits along with the non-party costs applications and permissions to serve out.

   Part 19 of the **Civil Procedure Rules 2000** applied.

5. Section 11 of the **Supreme Court Act** is a procedural empowering provision and is not one which may be relied upon as a basis for importing a substantive jurisdiction.

   Section 11 of the **Eastern Caribbean Supreme Court (Territory of the Virgin Islands) Act** Cap. 80, Revised Laws of the Virgin Islands 1991 applied.

JUDGMENT

[1] **PEREIRA, CJ**: This is an ex-parte interlocutory appeal following the grant of leave to appeal. It arises from a dismissal of the appellants' application to serve an application seeking a third party costs order out of the jurisdiction on the named respondent Mr. Vadim Shulman ("Mr. Shulman").

Background

[2] The appellants obtained in the court below substantial costs orders against the above named claimant Hornbeam Corporation ("Hornbeam") a Panamanian company. Those costs were assessed and made payable by Hornbeam collectively in a sum of US$846,526.00 on 10th December 2014 ("the Costs"). Meanwhile the appellants[1] on 28th November 2014 made applications that the Costs should be made payable by Mr. Vadim Shulman ("Mr. Shulman"), the ultimate beneficial owner of Hornbeam's Halliwell shares and who is said to be ordinarily resident in the principality of Monaco. The appellants applied for Mr. Shulman to be joined as a party to each set of the proceedings giving rise to the Costs orders against Hornbeam and for Mr. Shulman to be made jointly liable with Hornbeam for the payment of the Costs pursuant to rule 64.10 of the **Civil Procedure Rules 2000** ("CPR"). Because Mr. Shulman is out of the jurisdiction, they applied for permission to serve the applications on Mr. Shulman in Monaco.

[3] On 18th December 2014 the learned judge, without addressing the merits as to whether a case was made out for grounding liability for payment of the Costs

[1] Halliwell separately and Mr. Panikos Symeou and Marigold Trust Company Limited together.

against Mr. Shulman, refused permission to serve out on the basis that CPR 7.3 simply did not provide a gateway for service out of third party costs applications. The appellants have accordingly appealed. Nothing was said in relation to the application for joinder and no reference was made to CPR Part 19 which deals with addition and substitution of parties. It may be that the learned judge not being persuaded as to an available gateway under CPR 7.3 considered it unnecessary to address the question of joinder.

[4] It is noted that by the time the appeal came on for hearing, Hornbeam had been placed into voluntary dissolution.[2]

The judge's reasons

[5] The learned judge refused permission to serve out on two main grounds:

(a) Firstly, that a claim for costs was not a claim under an enactment which confers jurisdiction on the court as contemplated under CPR sub rule 7.3(10) which permits service out where "[a] claim is made under an enactment which confers jurisdiction on the court and the proceedings are not covered by any of the other grounds referred to" in the rule. In paragraph 6 he opined that the only rule in the Eastern Caribbean CPR ("ECSC CPR") which might be said to come close to permitting service out of the applications was sub rule 7.3(10) but that this sub rule covered cases where a statute gives the court jurisdiction which it would not otherwise have but for the provisions of the enactment in question. By way of example he cited the Trade Marks Act 1887 section 31. He was of the view that the court's power to make third party costs orders was not a power which the Court would not otherwise have but for an enactment and opined that this power was part of the "Court's general *batterie de cuisine*".[3] He felt fortified in this view because in the comparative English Rule the rule-maker had, instead of relying on the equivalent of the ECSC

[2] Fresh evidence had been admitted by the Court showing Hornbeam's dissolution.
[3] See judgment para. 7.

CPR 7.3(10), found it necessary to insert a specific gateway for third party costs applications brought pursuant to the power contained in section 51 of the Supreme Court Act 1981.[4] The ECSC CPR had no similar insertion.

(b) Secondly, he considered that CPR 7.3 was not appropriate to deal with third party costs applications as it referenced and thus dealt with causes of action (by a claim form) requiring acknowledgments of service and filing and service of defences. He thus concluded that third party costs applications were "not 'claims' as that word is used in Rule 7.3".[5]

The Appeal

[6] The appellants say that the learned judge erred in that he ought to have found that there was jurisdiction to serve out under rule 7.14 and/or rule 7.3 or, alternatively, in the absence of any rule enabling permission to serve out, by applying the importation provision provided by section 11 of the **Eastern Caribbean Supreme Court (Territory of the Virgin Islands) Act**[6] ("the Supreme Court Act"). They further ask this Court to deal with the substantive applications on their merit as they consider that the third party costs applications have a realistic prospect of success against Mr. Shulman.

Discussion

[7] I propose to deal with the issues raised under two main heads namely:

(a) whether the court's costs jurisdiction is statutory rather than inherent; and

(b) applications which may be served out pursuant to CPR 7.14.

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[4] See UK Civil Procedure Rules 2000 - 6.20 - subparagraph 18 of para. 3.1 in PD 6B.

[5] See judgment para. 8.

[6] The Eastern Caribbean Supreme Court (Territory of the Virgin Islands) Act Cap. 80, Revised Laws of the Virgin Islands 1991. Section 11 states that "The jurisdiction vested in the High Court in civil proceedings … shall be exercised in accordance with also the provisions of this Ordinance and any other law in operation in the Territory and rules of court, and where no special provision is therein contained such jurisdiction shall be exercised as nearly as may be in conformity with the law and practice administered for the time being in the High Court of Justice in England."

The Court's Costs Jurisdiction

[8] It is true to say that the court's costs jurisdiction has been so long established that much thought is not given as to the source of the court's jurisdiction. It is taken as a given. It is therefore not surprising that the learned judge considered it as part of the court's general 'batterie de cuisine'. It is not clear whether the learned judge meant that it was an inherent power incidental or ancillary to the court's substantive jurisdiction or was in and of itself a necessary part of the court's inherent jurisdiction particularly as a tool of the court in protecting against abuse of its process or ensuring observance of due process. The concepts of 'jurisdiction' and 'power' are distinct concepts. Jurisdiction is ordinarily the authority or substantive power which the court has to decide matters before it and in doing so may invoke powers inherent to the exercise of that jurisdiction in giving it full effect. Jurisdiction may be said to be a substantive power whereas powers may be considered as procedural for the purpose of giving effect to the substantive power. If the learned judge meant that it was embodied in the court's inherent jurisdiction then he is not alone. In **Norgulf Holdings Limited et al v Michael Wilson and Partners Limited**[7] a case decided by this Court (differently constituted), Barrow JA (and with whom the other members of the panel agreed) relied on the court's inherent jurisdiction in relation to costs, albeit interim costs. After stating at paragraph 27 that he was satisfied that the Supreme Court has both a statutory and an inherent jurisdiction to make an order for interim costs, he supported his pronouncement as to the court's inherent costs jurisdiction by quoting from **Halsbury's Laws of England**[8] which speaks to the court's inherent jurisdiction. It is to be noted however, that the quote from **Halsbury's** contains no specific reference to the court's jurisdiction in respect of costs. Rather, it explains the concept of the court's inherent jurisdiction and its purpose.

[9] As several ancient authorities show, the concept of costs is not natural to the common law. It found its way into the law by way of statute. In fact the old

[7] BVIHCVAP2007/0008 (delivered 29th October 2005, unreported).
[8] 4th edn. (Butterworth, 1982) Volume 37, para. 14.

authorities show that there was much confusion between the courts of common law and the courts of equity. This is demonstrated by the following passage from the 1878 case of **Edward Garnett v William Bradley**[9] in relation to the Supreme Court of Judicature Act 1875:

> "I think this will be apparent when you come to consider what the object of this Act of James was. It was this: in the matter of costs the Common Law Courts had no discretion such as the Courts of Chancery had at all times asserted. The Common Law Courts were obliged to go back to a legislative enactment in order to arrive at their power, or rather their duty, for power they had none, of dealing with costs. The Statute of Gloucester, which was passed in the 6th Edw. 1, is the foundation of the Common Law jurisdiction as to costs, and that statute bound the Common Law Judges, so that they could not in any way depart from the rule that was laid down, that costs followed the event. Therefore it was necessary to except out of that strict and rigid rule any case which the Legislature might consider worthy of such exception. The Legislature, finding that there was one general sweeping enactment which deprived the Common Law Courts of their discretion, and compelled them to hold in all cases that the costs followed the event, thought that there was a particular case in which there might be an exception made from the hard and fast rule, that costs followed the event, whatever the particular circumstances might be. Now, when the Judicature Act was passed, this difficulty was got rid of for ever, once for all, as regards the Common Law Courts. The two jurisdictions were mingled, and the same powers and authorities were given to what were formerly the Common Law Courts, - that is to say, to those who had to try what previously were Common Law actions - the same authority was given to them as had always existed on the part of the Courts of Equity. The Legislature gave its sanction distinctly, as a part of the Judicature Act of 1875, to this Order LV. in the schedule. By the Judicature Act the Legislature gave a direct authority to all the Judges of the Courts constituted under the Judicature Act, and vested in them a discretion which was to guide and determine them, according to the circumstances of each case, in the disposition of costs."[10]

[10] That said, it is now necessary to consider the source from which the High Court of the Virgin Islands derives its jurisdiction in respect of costs. Section 7 of the **Supreme Court Act** provides:

> "The High Court shall have and exercise within the Territory all such

[9] (1878) 3 App Cas 944.
[10] At pp. 953-954.

> jurisdiction (…) and the same powers and authorities incidental to such jurisdiction as on the first day of January, 1940, were vested in the High Court of Justice in England."

[11] As at 1st January 1940 the **Supreme Court of Judicature (Consolidation) Act 1925** ("the 1925 Act") was in force in England. Section 50(1) of the 1925 Act provided:

> "**Subject to the provisions** of this Act **and to rules of Court** and to the express provisions of any other Act, the costs of and incidental to all proceedings in the Supreme Court … shall be in the discretion of the court or judge and the court or judge shall have full power to determine **by whom** and to what extent costs are to be paid." (Emphasis added).

The source of jurisdiction of the High Court of the Virgin Islands is therefore the 1925 Act made applicable by virtue of section 7 of the Supreme Court Act.

[12] The ECSC CPR are rules of court made pursuant to section 17 of the **Supreme Court Order 1967**, which is an imperial enactment in force in all the States and Territories over which the Eastern Caribbean Supreme Court exercises jurisdiction pursuant to the said order. The ECSC CPR, in the context of section 50(1) of the 1925 Act, are to be seen as 'rules of court' contemplated by that provision. CPR Part 64 deals with costs. Sub rule 64.3 states:

> "**The court's powers to make orders about costs include** power to make orders requiring a party to pay the costs of another person arising out of or related to all or any part of any proceedings". (Emphasis added).

This sub-rule implicitly recognizes the court's costs jurisdiction and further makes clear that the court is empowered to make costs orders in favour of persons who may not be parties to the proceedings.

[13] ECSC CPR, sub rule 64.10 may be described in some respects as the flip side to sub-rule 64.3. It empowers the court to make costs orders against a person who is not a party to the proceedings. It states:

> "(1) This rule applies where
> (a) an application is made for; or
> (b) the court is considering whether to make;

an order that **a person who is not a party** to the proceedings nor the legal practitioner to a party should pay the costs **of some other person**."

(2) Any application by a party must be on notice to the person against whom the costs order is sought and must be supported by evidence on affidavit.

(3) If the court is considering making an order against a person the court must give that person notice of the fact that it is minded to make such an order.

(4) A notice under paragraph (3) must state the grounds of the application on which the court is minded to make the order.

(5) A notice under paragraph (2) or (3) must state a date, time and place at which that person may attend to show cause why the order should not be made.

(6) The person against whom the costs order is sought and all parties to the proceedings must be given 14 days' notice of the hearing." (Emphasis added).

[14] In **Alden Shipping Co. Ltd. v Interbulk Ltd.**[11] the House of Lords held that section 51(1) of the **Supreme Court 1981 Act** (UK), which for all material purposes is identical to section 50(1) of the 1925 Act,[12] gave the court a discretionary power to award costs and was a power expressed in wide terms, leaving it to the rule-making authority to control its exercise by rules of court and to the appellate courts to establish principles for its exercise. Lord Goff, (with whom the other members of the House of Lords agreed) in interpreting section 51(1) of the **Supreme Court Act 1981** held that the court had jurisdiction pursuant to section 51 to make costs orders against non-parties.[13] He made clear that the jurisdiction conferred on the court to make costs orders is a "broad jurisdiction conferred by the statute". In essence it is a "wide statutory jurisdiction".[14]

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[11] [1986] AC 965.
[12] The 1925 Act was said to be identical for all material purposes to earlier Supreme Court of Judicature Act 1890. 1873-1875.
[13] See pp. 979C, 981H and 982E.
[14] See p. 979D and E.

[15] In **Lockley v National Blood Transfusion Service**[15] Lord Scott at page 497, also referring to the court's costs jurisdiction said, "It is possible to regard all questions regarding costs as being subject to the statutory discretion conferred on the court by section 51 of the Supreme Court 1981 Act".

[16] These pronouncements make it plain that the court's jurisdiction to make costs orders are derived from statute. This jurisdiction is not only grounded in section 50(1) of the 1925 Act imported into the Virgin Islands by virtue of section 7 of the **Supreme Court Act** of the Virgin Islands, but is further buttressed, as envisaged by section 50(1), by rules of court namely the ECSC CPR which by rule 64.10 specifically empowers the court to make costs orders against non-parties. I am satisfied that, but for the jurisdiction and power so statutorily conferred, the same could not be assumed under its inherent jurisdiction.

[17] This brings me to a consideration of the provisions of the ECSC CPR which deals with service of process out of the jurisdiction. This is contained in Part 7. Rule 7.3 provides for what are commonly termed 'the gateways' for service out. Sub-rule 7.3(10) has already been set out in paragraph 5 above. The appellant, in making his case for a non–party costs order against Mr. Shulman appear to be urging upon the Court that there is a close connection between the company and Mr. Shulman and that he is the person who was truly behind the fueling of the litigation against the appellants. Without deciding the point, it would seem to me to be arguable that CPR Part 7.3(10) would afford an appropriate gateway for service out once the claim form could so qualify as discussed later in this judgment and the criteria for ordering service out were satisfied. Allowing for the same qualification, it may very well be that CPR 7.3(2) also affords a gateway.[16]

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[15] [1992] 1 WLR 492.

[16] (2) A claim form may be served out of the jurisdiction if a claim is made –
(a) Against someone on whom the claim form has been or will be served, and –
(i) there is between the claimant and that person a real issue which it is reasonable for the court to try; and
(ii) the claimant now wishes to serve the claim form on another person who is outside the jurisdiction and who is necessary or proper party to the claim;…"

In **National Justice Compania Naviera S.A. v Prudential Assurance Co. Ltd. (The Ikarian Reefer (No. 2)**[17] the English Court of Appeal, having considered that the officer was the alter ego of the company, held that it had jurisdiction to order the officer who was a non-party, but who had instituted the proceedings by the company which he controlled and financed, to pay the costs.

[18] Counsel for the appellant informed the Court that the insertion of the specific gateway dealing with third party costs applications in the United Kingdom Civil Procedure Rules ("UK CPR") was inserted at a time when its equivalent of ECSC CPR 7.3(10) was limited to enactments specifically referred to thereunder and was not in the more all-embracing terms as now currently in effect both under the UK provisions and under the ECSC CPR.[18] The specific UK insertion has nonetheless remained despite the replacement in the UK CPR of the broader provision which mirrors ECSC CPR 7.3(10). To date, no similar insertion has been made to the ECSC CPR. The question then remains as to whether an application for a non-party costs order which is not by way of claim form suffices for the purposes of the gateway provisions under CPR 7.3.

CPR 7.14

[19] This brings me to the second reason for the learned judge's refusal of the service out of the costs application. The ECSC CPR 7.3(10) which allows for service out of the jurisdiction in respect of a claim under an enactment which confers jurisdiction on the court and not otherwise provided for under the Rule speaks only to service out of a claim[19] as distinct from the prescript of a 'claim form'. However, when the totality of rule 7.3 is considered in context, the conclusion to which one is ineluctably drawn is that even though the various sub rules deal with different types of claims which may be served out of the jurisdiction, it is clearly contemplated that those claims are claims which have been commenced by claim

[17] [2000] 1 WLR 603.
[18] See the ECSC CPR, prior to the 2011 amendments.
[19] It may be considered however, that the use of the phrase "claim form" in sub rules 7.3(2) to (8) is superfluous as CPR 7.3(1) speaks generally to permitting a 'claim form' to be served out of the jurisdiction.

form. Indeed CPR 7.2 states as follows:

> "**A claim form** may be served out of the jurisdiction only if:
> (a) rule 7.3 allows; and
> (b) the court gives permission." (Emphasis added).

[20] This brings me to the issue as to whether a CPR 64.10 non-party costs application (if I may term it that way) is contemplated by CPR 7.14 which allows service out of applications in certain circumstances. Sub rule 7.14 states:

> "(1) An application, order or notice issued, made or given in any proceedings may be served out of the jurisdiction **without the court's permission if it is served in proceedings in which permission has been given to serve the claim form out of the jurisdiction.**
>
> (2) The procedure by which a document specified in paragraph (1) is to be served is the same as that applicable to the service of a claim form and accordingly rules 7.8 to 7.13 apply." (Emphasis added).

[21] This sub-rule does not appear to have been brought to the learned judge's attention as there is no mention of it in his judgment. The appellant argues that it follows implicitly, that if an application may be served out without permission where permission was previously given to serve the claim form out of the jurisdiction, that where no permission to serve out the claim form was formerly given, then permission to serve out an application would be required.

[22] The difficulty with this argument is that firstly, the person who it is now being sought to serve out of the jurisdiction was not a party to the claim, and a claim for costs as against him pursuant to CPR 64.10 does not thereby without more make him a party to the original claim, so that the issue of service out of the claim form would not arise. Secondly, it seeks to equate a non-party costs application, albeit a claim for costs, with a claim form for the purposes of CPR 7.3(10) which it is not.

[23] It is in this respect that the application for joinder of Mr. Shulman as a party to the original claim becomes relevant. CPR Part 19 deals with joinder of parties. It is fairly arguable that if the joinder application was successful in the court below

(although I express no opinion on its merits), then it is also fairly arguable that the claim form would qualify for service out under the gateways as discussed at paragraph 17 above. Such a scenario would then sufficiently engage CPR 7.14 which is predicated upon permissibility of the claim form being served out of the jurisdiction.

[24] At first blush, CPR 7.14 appears to be wide enough to encompass a CPR 64.10 non-party costs application as it does not appear to be limited only to persons who are already parties to an action. In **Union Bank of Finland Ltd. v Lelakis**[20] the English Court of Appeal expressed the view that it was sufficient to engage RSC Order 11, rule 9(4) if the proceedings against the defendant were proceedings which could have been served out of the jurisdiction. This still required that the substantive claim be one that qualified (or would have qualified) for service out under a gateway. That rule stated as follows:

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

[25] In **Masri v Consolidated Contractors International (UK) Ltd and others (No 4)**,[21] a decision of the House of Lords, Lord Mance, expressed the following view at paragraphs 28 and 29:

> "The primary purpose of CPR r 6.30(2)[22] 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

[20] [1997] 1 WLR 590.
[21] [2010] 1 AC 90.
[22] UK CPR 6.30 deals with service of documents other than the claim form out of the jurisdiction. 6.30(2) states:
"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".

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

[26] In **Masri,** the House was accordingly of the view that CPR 6.30(2) was to be read as referring to service upon an existing party only and did not extend to allowing service out of an ancillary document on a non-party. It is arguable that a similar interpretation can be accorded to ECSC CPR 7.14.

[27] It bears noting however, that the UK CPR 6.30(2) is not on all fours with the ECSC CPR 7.14. Whereas the English provision says that permission must be given to serve out other documents where permission is required to serve out the claim form, that is not the case under the ECSC provision which states that no permission is needed to serve out other documents (such as an application, order or notice) where permission has been previously obtained to serve out the claim form. In essence, permission to serve out the claim form covers service out of other documents in the proceedings. Accordingly, in my view, the ECSC provision is substantively different to the corresponding provision under the current English rules. The ECSC CPR 7.14 specifically and expressly makes reference to an application, without limitation, 'in any proceedings'. Though worded somewhat differently, it is to my mind similar in effect to what appertained under the older English version contained in RSC 11 rule 9(4) rule with which the **Union Bank**

decision was concerned. In relation to **Union Bank** Lord Mance stated at para. 16 that "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 the situation in **Union Bank**. I hasten to point out however, that this does not mean that service out of the jurisdiction of an application is permissible under CPR 7.14 without more. The prerequisite remains that the claim form in the proceedings in which the application is issued must be one which would qualify for service out under one of the gateways contained in CPR 7.3.

[28] Although **Masri** is not binding authority on this Court it is highly persuasive. **Masri** makes plain that the corresponding UK rule (6.30(2)) does not extend to service on non–parties, and is to be construed as being confined to service of other documents on existing parties. This is no doubt where the joinder application comes into play. I point out also, that **Masri** was not dealing with an application to join a party as is the case here. The application to join Mr. Shulman as a party is inextricably linked to the non-party costs application. If the application to join Mr. Shulman is successful then the claim becomes one which quite arguably would qualify for service out of the jurisdiction under the CPR 7.3 gateways previously mentioned. This would bring the case very much in line with the reasoning of the English Court of Appeal in **Union Bank** with which the House in **Masri** did not disapprove.

[29] It cannot be doubted that a CPR 64.10 non-party costs application is one to be made in the proceedings, in respect of the original claim commenced by claim form. Further, CPR 7.14 contemplates service of an application out of the jurisdiction where the claim form itself qualifies for service out of the jurisdiction and where permission may be granted by the court.

[30] I agree with counsel for the appellants that it is implicit in CPR 7.14, that if an application may be served out without permission where permission was already given to serve out the claim form, it follows that where an application is to be

served out of the jurisdiction such service may be effected with the permission of the court. But this alone does not provide a complete solution. The appellants must also be able to show that the claim form is one which qualifies under one or more gateways contained in CPR 7.3. This in turn will depend on their success in the joinder application. Joinder of a party is governed by CPR Part 19 which gives the court power to add a new party to proceedings without an application in certain circumstances,[23] and on the application of an existing party provided the requirements in CPR. 19.2(7) are met. The order adding a party must then be served on the party so added[24] – in this case, the order would be required to be served out of the jurisdiction on the added party. The appropriate course however is for the court below to consider the joinder application and determine it on its merits along with the non-party costs applications and permissions to serve out.

[31] I do not consider that questions of filing and service of acknowledgments of service or defences need enter the discussion as CPR 64.10 contains its own regime in respect of time of service of such an application. Further, the self-contained regime thereunder is wide enough for the court to give directions as to the filing and service of a response by the non-party, as it is clearly contemplated and provided that the person sought to be made liable must be provided with an opportunity to be heard as to why such a costs order ought not to be made.

Section 11 of the Supreme Court Act

[32] I can see no good reason for considering the alternative argument for grounding jurisdiction by resort to section 11 of the Supreme Court Act which in any event is a procedural empowering provision and is not one which may be relied upon as a basis for importing a substantive jurisdiction. The ambit and purport of section 11 of the **Supreme Court Act** is well settled in various judgments of this Court.[25]

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[23] See CPR 19.2(3)(a) and/or (b).

[24] See CPR 19.3(5) (b).

[25] See Panacom International Inc v Sunset Investments Ltd and Another (1994) 47 WIR 139; Veda Doyle v Agnes Deane GDAHCVAP2011/0020 (delivered 16th April 2012, unreported); Ocean Conversion (BVI) Limited v The Attorney General of the Virgin Islands, per Bannister J BVIHCV2008/0192 (delivered 1st December 2009, unreported).

Conclusion

[33] For the reasons set out above I would hold that the court has jurisdiction to grant permission to serve the non-party costs applications out of the jurisdiction under CPR 7.14 provided that the claim form qualifies for service out of the jurisdiction under one of the gateways contained in CPR 7.3. I would accordingly allow this appeal.

Disposition

[34] The gravamen of the appeal was to clarify the court's costs jurisdiction and the application of the rules in relation to that jurisdiction as it relates to service out. In as much as the learned judge did not address the merits of the applications for the purpose of determining whether a case had been made out for permitting service out, notwithstanding the appellants' request that this Court determines the applications based on the documents contained in the record, I am of the considered opinion that the appropriate course is to remit the applications to the court below for determination on their merits. The court below is better placed to give such directions and orders as to the time, date and place of hearing and such other directions as may be necessary to facilitate a hearing of the applications and any consequential applications which may be made.

[35] Finally, I am grateful to counsel for his very helpful and well-articulated arguments and submissions.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

I concur.

Anthony Gonsalves
Justice of Appeal [Ag.]