

**IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS ON APPEAL FROM THE
GRAND COURT OF THE CAYMAN ISLANDS FINANCIAL SERVICES DIVISION**

**CAUSE No. CICA (Civil) Appeal 37 of 2019
(Formerly Cause No. FSD 22 of 2018 (RPJ))**

BETWEEN

**1. GEORGE ALLEN COWAN
2. GEORGE ALLEN COWAN, ON BEHALF OF EQUIS SPECIAL LP
(previously known as Equis Asia Fund Special LP)**

APPELLANTS

-AND-

JOSEPH THOMAS CARMODY

RESPONDENT

Before: The Hon Sir Richard Field, JA
The Hon C. Dennis Morrison, JA
The Hon Sir Michael Birt, JA

Appearances Mr Stephen Atherton QC instructed by Nick Dunne and
Annalisa Shibli of Walkers for the Appellants
Mr Alex Potts QC and Erik Bodden of Conyers Dill & Pearman
for the Respondent

Judgment Delivered: 19 October 2020



JUDGMENT ON COSTS

Birt, JA

1. In a Judgment issued today, this Court dismissed the appeal of the Appellants on the ground that it did not have jurisdiction to hear the appeal. In relation to the two substantive grounds of appeal, it rejected the first ground, namely that the judge had been wrong to find that the Respondent had not unequivocally submitted to the jurisdiction of the Grand Court (“the submission to the jurisdiction point”). As to the second ground, namely that the judge was wrong to have found that there was no serious issue to be tried against the Respondent because of the Deed of Indemnity (“the no serious issue point”), the Court expressed no opinion, but made clear that the point was open for fresh consideration by any judge considering any future application to serve the proceedings out of the jurisdiction on the Respondent. I now address the issue of the costs of the appeal.

2. The Respondent submits that, the appeal having been dismissed, he should be awarded his costs in relation to the appeal on the standard basis.
3. The Appellants argue that the position is not so straightforward. They make essentially two points in support of this submission.
4. First, in relation to the issue of the Court's jurisdiction, they point out that the Respondent only raised the issue for the first time in his skeleton argument filed on 21 August 2020; there had been no suggestion of a lack of jurisdiction in the skeleton argument filed by the Respondent for the hearing before Parker J in December 2019, when he granted leave to appeal.
5. Secondly, in relation to the no serious issue point, they submit that they have to some extent been successful. It is only now, following the decision of this Court, that it is clear that, when considering any future application to serve out the proceedings on the Respondent, the judge will be able to consider completely afresh whether there is a serious issue to be tried, without regard to the decision of Mangatal J.
6. In all the circumstances, the justice of the matter would be better reflected therefore either by an order that the Respondent pay all or a significant proportion of the Appellants' costs in connection with the appeal or, alternatively, that there be no order as to costs.
7. In my judgment, subject to what is set out at paragraphs 8-11 below, costs should follow the event and the Appellants should pay the Respondent's costs in connection with the appeal. I reach this decision for the following reasons:-
 - (i) The appeal has been dismissed. The Respondent is therefore, on the face of it, the winner.
 - (ii) The appeal was dismissed on the ground that this Court did not have jurisdiction to hear it. I do not consider that the fact that the Respondent did not raise this argument until his skeleton argument means that he should be ordered to pay some of the costs or that no order to costs would be a fair outcome. It is for an appellant to consider whether an appellate court has jurisdiction to hear his appeal and if he

is wrong, he must usually face the costs consequences. In any event, even after the Respondent had raised the point in his skeleton argument, the Appellants maintained that this Court did have jurisdiction to hear the appeal, but they failed in that argument.

- (iii) Despite holding that it had no jurisdiction, this Court nevertheless went on to consider the submission to the jurisdiction point. It found against the Appellants on that issue.
 - (iv) In relation to the no serious issue point, the Court expressed no opinion. The consequence is that the position is, strictly speaking, the same as if the Appellants had never appealed. The correct legal position is that no question of res judicata, issue estoppel or abuse of process can arise as a result of Mangatal J's decision in the event of a fresh application to serve out; and that would have been so even if there had been no appeal.
8. The qualification referred to in the preceding paragraph relates to the costs of the hearing before Parker J when he granted the Appellants leave to appeal. Parker J ordered the Respondent to pay the costs of that application as he had unsuccessfully opposed the application for leave.
9. The Respondent argues that, the appeal having succeeded, this Court should overturn Parker J's decision and include the costs of the application for leave to appeal in the costs of the appeal itself. He submits that the normal and appropriate order for Parker J to have made would have been "*costs in the appeal*".
10. I do not think we should overturn Parker J's decision. Parker J was sitting as a judge of the Grand Court and the costs order which he made was an order of the Grand Court. If the Respondent had wished to appeal against that costs order, he should have sought leave to appeal from Parker J or from this Court pursuant to section 6(f) of the Court of Appeal Law. He has not done so and the matter is therefore not properly before us.
11. Even if the Respondent had obtained leave to appeal the costs order, I would not have interfered with Parker J's decision. Whilst I accept that a more normal order would have been "*costs in the appeal*", so that the costs of the application for leave would have been dealt with in the same manner as any costs of the substantive appeal, costs decisions are

pre-eminently a matter of discretion for the judge at first instance. Provided that his decision falls within the range of reasonable decisions open to him, this Court may not interfere. The fact is that the Respondent chose to oppose the application for leave to appeal and Parker J decided against him, holding that the Appellants had an arguable case on the two grounds upon which he gave leave, namely the submission to the jurisdiction point and the no serious issue point. The fact that the appeal has failed does not itself mean that they were not arguable grounds and the Respondent did not raise before Parker J the issue of the jurisdiction of this Court, upon which the appeal ultimately turned.

12. In summary, I would order the Appellants jointly and severally to pay the Respondent's costs of and in connection with the appeal on the standard basis, but would leave the order of Parker J, dealing with the costs of the application for leave to appeal, untouched.

Morrison JA

I agree

Field JA

I also agree