

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

Heard: 14th September 2020

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Judgment Delivered: 19th October 2020

JUDGMENT

Sir Michael Birt, JA

1. By order dated 3rd October 2019, for reasons given in a judgment of the same date, Mangatal J (“the judge”) discharged and set aside an order which she had made ex parte on 24th September 2018 (“the Service Out Order”) giving leave to the Appellants as plaintiffs to serve proceedings on, amongst others, the Respondent (“Mr Carmody”). By leave of Parker J dated 16th December 2019, the Appellants now appeal against the judge’s decision to discharge the Service Out Order.
2. A preliminary issue has arisen as to whether this Court has jurisdiction to hear the appeal and I must consider that matter first. However, before doing so, I need to summarise the relevant background to the proceedings and to this appeal.

Background

3. In the proceedings in respect of which the Service Out Order was made, the First Appellant (“Mr Cowan”) and the Second Appellant (“Special LP”) are the First and Second Plaintiffs respectively (together “the Appellants” or “the Plaintiffs” as appropriate). The Re-Amended Writ of Summons (“the RAWS”) is brought against Special LP as First Defendant, Equis Special GP (“Special GP”) as Second Defendant and, for present purposes, six individuals who were limited partners in Special LP and directors of Special GP. Mr Carmody was one of those directors and was named as the Sixth Defendant. A company called Equis Development Limited was the Ninth Defendant.
4. The reason that Special LP appears both as Second Plaintiff and as First Defendant is that the claim on behalf of Special LP is a derivative action and is brought on behalf of Special LP by Mr Cowan in his capacity as a limited partner of Special LP on the basis that Special GP has, without cause, failed to bring such proceedings. Section 33(3) of the Exempted Limited Partnerships Law (2018 Revision) (“the Law”) allows for a derivative action.
5. The RAWS is a complex document but, for present purposes, the allegations brought by the Plaintiffs can be summarised as follows.
6. Mr Cowan was employed by the Equis Group in 2011 in connection with the establishment of an Asian energy and infrastructure private equity fund. Special LP is an exempted limited partnership formed in the Cayman Islands under the Law. Special LP acts by its general partner, the Second Defendant, Special GP. Special GP is a company incorporated in the Cayman Islands.
7. Mr Cowan, together with the Third to Seventh Defendants was a limited partner in Special LP and they are referred to as the “Foundation Partners”. Special LP was the founder partner and investor in two investment funds (“the Initial Funds”) and was entitled to receive performance fees based on the performance of the Initial Funds.
8. A Limited Partnership Agreement (“LPA”) was entered into on 18th November 2011 in respect of Special LP by Special GP, the Foundation Partners, a company which owned Special GP (which was in turn owned directly or indirectly by the Third to Seventh Defendants) and others (“the Founding Partners”). The LPA made provision for performance fees received by Special GP to be distributed in turn to the Foundation Partners, amongst others.

9. It is alleged that it was anticipated that Special LP would also invest in funds other than the Initial Funds and would receive performance fees as a result. Following Special LP's investment in the Initial Funds, Special LP also invested into other funds ("the Subsequent Funds"). It was entitled to performance fees in relation to those funds. In the circumstances described in the RAWs, Special LP also became entitled to performance fees known as the Soleq Performance Fees and the Energon Performance Fees.
10. It is then pleaded that on or about 10th January 2018, without any prior or subsequent notice to Mr Cowan, Special GP assigned ("the Assignment") all of Special LP's rights to performance fees in respect of the Subsequent Funds and to the Soleq Performance Fees and the Energon Performance Fees to a new entity created in December 2017 called Equis Special II LP ("Special LP II"). It is said that the limited partners in Special LP II are the Foundation Partners other than Mr Cowan. He was therefore excluded from the financial benefit to which he says he was entitled.
11. The loss to Special LP as a result of the Assignment is said to be approximately US\$90 million ("the Improperly Diverted Sum"). It is pleaded that the Improperly Diverted Sum should have been available to Special LP for the benefit of all the Founding and/or Foundation Partners including Mr Cowan.
12. Based on these factual allegations, a number of causes of action are pleaded. The first general head of claim is for breach of statutory and contractual duties.
13. It is pleaded that there are statutory duties under the Law that Special GP must at all times act in good faith and in the interests of Special LP. There are similar obligations in the LPA and it is pleaded that these contractual duties are also owed to the other parties to the LPA, including Mr Cowan and Special LP.
14. It is further pleaded that there was an implied term in the LPA that Special GP and/or each other party to the LPA would not take any action which would impair the ability of Mr Cowan to enjoy the fruits of being a Founding and/or Foundation Partner under the LPA and would not take any action which would impair the ability of Special LP to enjoy its performance fees. The Assignment is said to be in breach of those statutory duties, contractual duties and implied contractual duties.
15. The second main cause of action is one in conspiracy. It is alleged that in about January 2018, the Third to Seventh Defendants and others conspired to deprive Special LP of the Improperly Diverted Sum and Mr Cowan of his entitlement to his rightful share in that amount. Alternatively, it is

alleged that wrongfully and with an intent to injure Mr Cowan and/or Special LP, by unlawful means they conspired and combined together to divert the Improperly Diverted Sum and therefore deprive Special LP of that amount and Mr Cowan from his entitlement to his rightful share in that amount. It is pleaded that Special LP has suffered loss and damage in the sum of US\$ 90 million and Mr Cowan has thus suffered loss and damage in the amount of his rightful share of that sum pursuant to the terms of the LPA.

16. The RAWS then pleads a claim in relation to Japan Solar LP (“the Japan Solar Claim”). It is not necessary to describe the Japan Solar Claim in any detail because, as described below, it is no longer maintained: but in short Special LP was said to have been deprived of some US\$ 350 million with a consequent loss to Mr Cowan.
17. Mr Cowan’s employment was terminated on 29th October 2017. On 23rd February 2018 the Plaintiffs’ instituted the current proceedings against, at that stage, Special LP and Special GP as the First and Second Defendants. However, they subsequently decided to amend so as to include the allegations against the Third to Ninth Defendants as set out in the RAWS.
18. On 24th September 2018, as already mentioned, the judge, at an ex parte hearing, granted the Plaintiffs leave to amend the claim into the form of the RAWS and to serve the RAWS on the Third to Ninth Defendants out of the jurisdiction.

The set aside applications before the judge

19. The Third to Ninth Defendants all applied to set aside the Service Out Order. The Third to Fifth and Seventh to Ninth Defendants (“the Foreign Maples Defendants”) brought their application on two grounds:-
 - (i) there had been a failure to give full and frank disclosure when the Service Out Order was obtained; and
 - (ii) the Japan Solar Claim raised no serious issue to be tried.
20. Mr Carmody as Sixth Defendant issued his own summons which, in its amended form, raised three grounds:-
 - (i) the RAWS had not been served in accordance with the Service Out Order because it was served on him in Australia rather than Singapore;

- (ii) further or alternatively and without prejudice to (i), the RAWS disclosed no good arguable case against Mr Carmody; and
- (iii) further or in the further alternative and without prejudice to (i) and (ii), the RAWS should be struck out on the grounds that it disclosed no reasonable cause of action.

21. In relation to the summons of the Foreign Maples Defendants, the judge held that the Plaintiffs had failed to provide full and frank disclosure at the time of the ex parte application and that the Service Out Order should accordingly be set aside on this ground. Although this ground had not been specifically included in Mr Carmody's summons, the judge made it clear at paragraphs 92 and 121 of her judgment that the failure to provide full and frank disclosure applied to all Defendants, so that the Service Out Order was set aside in respect of all of them on this ground.
22. She also held that the RAWS did not disclose a serious issue to be tried in respect of the Japan Solar claim.
23. In relation to Mr Carmody's summons she ruled as follows:-
 - (i) The Plaintiffs had argued that, by including an application to strike out on the grounds of no reasonable cause of action ("the Strike Out Application") in his summons, Mr Carmody had submitted to the jurisdiction and accordingly there was no need for service to be made outside the jurisdiction. The judge rejected this submission and held that Mr Carmody had expressly reserved his right to challenge jurisdiction and service so that the Strike Out Application would only arise if he failed on the first two grounds set out in his summons;
 - (ii) She held that the RAWS had not been validly served on Mr Carmody in accordance with the Service Out Order because it had been served on him in Australia rather than Singapore; and
 - (iii) Mr Carmody had submitted that the RAWS did not disclose a serious issue to be tried in relation to him because, following his retirement as a limited partner of Special LP on 1st August 2018, Special LP and Special GP had entered into a deed of release and indemnity ("the Deed of Indemnity") with

him whereby Special LP had waived any and all claims against Mr Carmody of any nature or description and had agreed to indemnify Mr Carmody for any loss, damage or liability which Mr Carmody might incur in respect of the current proceedings. The judge held that the Deed of Indemnity acted so as to release all claims by Special LP against Mr Carmody and that there were no personal claims by Mr Cowan against Mr Carmody in the RAWS which did not rely upon Mr Carmody's alleged breach of duty to Special LP. She held therefore that there was no serious issue to be tried in relation to Mr Carmody. This was therefore an additional reason for discharging the Service Out Order.

24. In summary, the judge discharged and set aside the Service Out Order against all of the Third to Ninth Defendants on the ground of a failure to provide full and frank disclosure. She also held that the Japan Solar Claim did not raise a serious issue against any of the Defendants. In relation to Mr Carmody, she held that there was an additional ground for setting aside the Service Out Order, namely that, because of the Deed of Indemnity, the RAWS did not raise a serious issue to be tried against Mr Carmody in respect of any of the claims.
25. The order drawn up to reflect the judge's judgment was agreed as to form and content by the attorneys for all the parties. It was in simple terms. Paragraph 1 stated:-

“Paragraph 2 of the Service Out Order be discharged and set aside.”

Paragraph 2 of the Service Out Order was the paragraph giving leave to serve the RAWS on the Third to Ninth Defendants out of the jurisdiction.

This Appeal

26. The Plaintiffs have not appealed against the judge's decision in relation to the Defendants other than Mr Carmody. We were informed that on 27th July 2020, Parker J granted leave to the Plaintiffs to serve a Re-Re-Amended Claim out of the jurisdiction on each of the Third to Fifth and Seventh to Eighth Defendants. The claim apparently no longer includes the Japan Solar Claim.
27. However, with leave of Parker J dated 16th December 2019, the Plaintiffs have appealed against two aspects of the judge's judgment in relation to Mr Carmody, namely (i) her decision that Mr Carmody had not submitted to the jurisdiction and (ii) her decision that there is no serious issue to be tried against Mr Carmody because of the existence of the Deed of Indemnity. In relation to the

second aspect, there is a subsidiary ground that the judge did not give any reasons for her conclusion.

28. The Plaintiffs have not appealed against the judge's decision that the Service Out Order be discharged and set aside against all the Defendants on the ground of the failure to provide full and frank disclosure. The Court was somewhat uncertain as to exactly what was being sought on appeal and invited the Plaintiffs to provide a draft of the order they were seeking from this Court. The draft was in the following terms:-

- (i) *Paragraph 1 of the Order of Mangatal J dated 3 October 2019 (the "Order") be set aside insofar as it relates to [Mr Carmody] and to the extent only of the declarations rehearsed in paragraphs 2 and 3 below.*
- (ii) *It is declared that the learned judge was wrong to conclude that there was no serious issue to be tried in relation to [Mr Carmody] as to the terms and effect of the Deed of Indemnity.*
- (iii) *It is declared that the learned judge was wrong to conclude that [Mr Carmody] had not submitted to the jurisdiction of the Grand Court as a consequence of the addition of paragraph 3 of the Amended Summons dated 11 December 2018."*

29. In view of the fact that, as can be seen from the draft order, the Plaintiffs are not seeking to overturn the judge's decision to discharge the Service Out Order as such, but merely some of the grounds upon which she reached that decision. Mr Potts QC, on behalf of Mr Carmody, has raised an issue as to whether this Court has jurisdiction to hear the appeal.

The jurisdictional point

(i) Submissions

30. Mr Potts submitted that this Court has no jurisdiction to hear an appeal in respect of a particular finding of fact, reasons or alternative conclusions contained in a judgment which do not affect the result. In this case, the Plaintiffs were not challenging on appeal the conclusion of the judge that the Service Out Order should be discharged on the ground of a failure to provide full and frank disclosure. Accordingly, even if they were to be successful on the grounds of appeal which they were raising, the Service Out Order would remain discharged. In support, he relied in particular upon the observations of Waller LJ in the English Court of Appeal in *Cie Noga D'Importation et D'Exportation SA v Australia and New Zealand Banking Group Limited* [2003] 1 WLR 307. That approach had, he submitted, been followed in other cases such as *M (Children)* [2013] EWCA Civ 1170 and *Skanska Construction Limited v Egger (Barony) Limited* [2004] EWCA Civ 1810.

31. Mr Atherton QC, whilst not disputing the general principle that academic appeals are not permitted, submitted that Waller LJ in *Cie Noga* had envisaged an exception where a particular finding was ‘*pregnant with legal consequences*’. That was the case here. The judge had held that there was no serious issue to be tried against Mr Carmody because of the Deed of Indemnity. There was a real risk that this finding would be used to prevent the Plaintiffs succeeding in any fresh application to serve out of the jurisdiction on Mr Carmody. They might well be met with an argument of res judicata, issue estoppel or abuse of process. The Plaintiffs could therefore find that they were unable to proceed against Mr Carmody because of the judge’s finding that there was no serious issue to be tried, but yet be unable to challenge that finding (which they said was clearly erroneous) by way of appeal. This would be unjust and unfair.
32. In reply, Mr Potts did not accept that the exception referred to by Mr Atherton existed. The comments of Waller LJ were in relation to whether the judge below could make a declaration (thereby potentially giving a right of appeal) if a particular finding was pregnant with legal consequences. However, his main response was that, even if Mr Atherton was right about the exception, there could be no question in this case of res judicata or issue estoppel applying to prevent the Plaintiffs arguing, on any fresh application to serve out, that, contrary to the judge’s finding, there was a serious issue to be tried against Mr Carmody despite the existence of the Deed of Indemnity. Depending on how the Plaintiffs presented any subsequent application for leave to serve out on Mr Carmody, it might be open to Mr Carmody to argue that the subsequent application was an abuse of process; but the mere fact that the judge had found that there was no serious issue to be tried because of the Deed of Indemnity could not mean that it was an abuse of process for the Plaintiffs to argue on a subsequent application that the judge was wrong and that there was indeed a serious issue to be tried against Mr Carmody. On any view, it would be up to the judge hearing any fresh application to serve out to decide independently whether there was a serious issue to be tried. It followed, he submitted, that the judge’s decision that there was no serious issue to be tried was not a finding which was pregnant with legal consequences.

(ii) Discussion

33. The jurisdiction of this Court is statutory. Section 5 of the *Court of Appeal Law (2011 Revision)* provides that the Court shall have jurisdiction to hear and determine appeals from ‘*any judgment of the Grand Court given or made in civil proceedings.....*’. Rule 11(2) of the *Court of Appeal Rules (2014 Revision)* provides:-

“Notice of Appeal may be given either in respect of the whole or in respect of any specified part of the judgment or order of the court below.”

34. The jurisdiction of the Court of Appeal in England and Wales is also statutory and it has jurisdiction to hear appeals from any ‘judgment or order’ of the High Court. Assistance as to the extent of this Court’s jurisdiction to hear appeals can therefore be derived from cases considering the issue in England and Wales.

35. In *Cie Noga*, Hale LJ summarised the position concisely in the following terms at [53]:-

“53. It is clear that the statutory jurisdiction of the Court of Appeal is to hear appeals from a ‘judgment or order’ of the High Court or a ‘determination’ of a county court. It has long been axiomatic that these words refer to the result of the hearing rather than to the reasons given by the judge for reaching that result.”

36. In the same case, Waller LJ considered the matter in terms which have been relied upon by both parties in this case:-

“27.Lake v Lake [1955] P 336 properly understood means that if the decision when properly analysed and if it were to be recorded in a formal order would be one that the would-be appellant would not be seeking to challenge or vary, then there is no jurisdiction to entertain an appeal. That is in my view consistent with in Re B. That this is so is not simply by virtue of interpretation of the words ‘judgment’ or ‘order’, but as much to do with the fact that the court only has jurisdiction to entertain ‘an appeal’. A loser in relation to a ‘judgment’ or ‘order’ or ‘determination’ has to be appealing if the court is to have any jurisdiction at all. Thus if the decision of the court on the issue it has to try (or the judgment or order of the court in relation to the issue it has to try) is one which a party does not wish to challenge in the result, it is not open to that party to challenge a finding of fact simply because it is not (sic) one he or she does not like.

28. The decision on a preliminary issue will be a judgment or order even if it is limited to a finding of fact..... In Re B (a Minor) (Split Hearings: Jurisdiction) [2000] 1 WLR 790 is a good example of a decision on preliminary issues of fact. Furthermore the case having been adjourned, and the facts making a difference as to what might flow from the adjournment, the facts in Mr Pollock’s words were ‘pregnant with legal consequences’. If however in that case the court had gone on to make a decision in relation to the legal consequences which one party would not seek to challenge, in my view that party would not be entitled simply to appeal the findings because it did not like the reasons for the decision in his or her favour. It is in that context that it might be appropriate for the court at first instance to consider whether some declaration should be granted to provide a ‘judgment’ or ‘order’ or ‘determination’ which could be the subject of an appeal. If for example the findings of fact might be relevant to some other

proceedings (and Mr Pollock accepted this), it might be appropriate to make a declaration so as to enable a party to challenge those findings and not find him or herself prejudiced by them. The findings would still be pregnant with legal consequence. It is to go beyond the scope of this judgment to consider precisely what circumstances might allow for the granting of a declaration where findings of fact might affect other proceedings. If an issue estoppel might arise that I suppose might provide a basis....”.

37. The expression ‘*pregnant with legal consequences*’ has been adopted in subsequent cases e.g. *M (Children)* (*supra*).
38. Waller LJ returned to the topic in *Skanska Construction* (*supra*) and summarised the position helpfully at [5] in the following terms:-

“5. It seems to me that the first point on this renewed application is that Mr Davies faces an insuperable difficulty. He accepts, as I have already stressed, that this finding in relation to the lateness in agreeing the final account finds no concrete reflection in the order which the judge has made, so there is in fact no challenge to any part of the judgment or order of the judge based on the finding. The notes in the CPR at 52.0.13 refer to the fact that the jurisdiction of the Court of Appeal is to hear and determine appeals from any judge [sic] or order of the High Court and the note continues: “accordingly appeal lies only against the order made by the lower court, not against the reasons which that court gave for its decision or the findings which it made along the way”. It refers to an authority, Lake v Lake... It is true that that case was concerned with whether a party who had succeeded in the court below could appeal certain of the findings of the judge, and it was held that the Court of Appeal had no jurisdiction to do so. But, in my view, there is no difference in principle. The position is that a mere finding of fact in a judgment which has no consequence in terms of an order is something which the Court of Appeal cannot entertain. The note also reflects the fact that if it is desired to bring a finding of fact to the Court of Appeal, it may be possible to persuade the judge to make a declaration of that finding of fact so as to have a form of order which can be brought to the Court of Appeal, but that certainly did not happen in this case. In my view, there simply is no jurisdiction to hear an appeal to reverse a finding of fact which a party wishes the judge had not made when it has no consequence in terms of the order or judgment actually made by the judge.”

Interestingly, Waller LJ went on to emphasise in the following paragraph that the finding of fact referred to would not be binding in any subsequent argument on costs in the sense of being a finding which the judge would be unable to reconsider when the finding might have a consequence on the costs order he was to make.

39. Whilst acknowledging the force of Mr Potts’ submission that, in the quoted extract from *Cie Noga*, Waller LJ is focusing on the possibility of the judge at first instance making a declaration when a

finding might be relevant to other proceedings and therefore ‘*pregnant with legal consequences*’ and also acknowledging the clarity of the quoted passage from *Skanska Construction*, I would wish to leave open (without deciding) the possibility of this Court having jurisdiction to hear an appeal in respect of a particular finding which forms part of the reasoning or one of the grounds for a decision if that finding is pregnant with legal consequences. By this expression, I mean that the finding may have legal effect either later in the same proceedings or in subsequent proceedings. For my part, I see the force of the essential thrust of Mr Atherton’s submission, namely that it would be wrong to prevent an appeal against a finding which may have legal effects subsequently. It would mean that the party adversely affected would have no means of challenging a finding which could have legal consequences for him.

40. However, it is not necessary to decide the point because I do not think that this is such a case, essentially for the reasons put forward by Mr Potts.
41. First, the judge’s finding cannot be the subject of res judicata. As Spencer Bower and Handley; Res Judicata (5th edition) (“Spencer Bower”) states at 2.01, a res judicata is a decision on the merits pronounced by a judicial body. It includes final judgments by default or consent and arbitral awards, but excludes decisions on procedural grounds and decisions which are not final. The decision of the judge in this case was clearly not a final decision.
42. Secondly, the judge’s view that there was no serious issue to be tried cannot, in my judgment, found an issue estoppel. In *Re State of Norway’s Application (No 2)* [1988] WLR 603, May LJ and Balcombe LJ (at 624 and 632 respectively) both specifically approved a passage from the 2nd edition of Spencer Bower at page 179 of that work. The views expressed in the 2nd edition, which were approved by the Court of Appeal, find reflection in the 5th edition in the following terms:-

“8.23 *The determination must be fundamental, not collateral. An express decision will not necessarily create an issue estoppel. Only determinations which are necessary for the decision, and fundamental to it, will do so. Other determinations, however positive, do not.....*

8.25 *Another useful test is whether, given a right of appeal, the losing party could effectively appeal against the determination. If there can be no effective appeal against a determination this normally indicates that it was not fundamental. The test is not universally valid because decisions of a court of final appeal and decisions of lower courts from which there is no right of appeal create issue estoppels in the normal way. The ultimate test is whether the determination is such that without it the judgment cannot stand. A decision of fact or law against the party who succeeded or one which is not necessary to the decision will not found*

an estoppel because it cannot be fundamental to the decision. It would be unjust for such a decision to create an estoppel because the person who failed on that issue cannot effectively appeal against it....

The same principle applies where the court finds alternative grounds in favour of the successful party. Those findings do not create issue estoppels because the losing party could not effectively appeal against any of them separately, and if one was upheld the appeal would fail....”

43. The judge’s decision that there was no serious issue to be tried because of the Deed of Indemnity was not fundamental to or necessary for her decision. On the contrary, she had decided to set aside the Service Out Order because of the lack of full and frank disclosure. Her decision would have been exactly the same even if she had never considered whether there was a serious issue to be tried.
44. Even if there were no res judicata or issue estoppel, it would in some circumstances amount to an abuse of process to make a further application to serve proceedings out of the jurisdiction following an unsuccessful previous application; see for example the decision of Morgan J in *Rawlinson & Hunter Trustees SA v ITG Limited* [2015] EWHC Ch 1664. However, the facts were very different in that case. Consistently with his submission that there could be no res judicata or issue estoppel in respect of the judge’s finding that there was no serious issue to be tried, Mr Potts accepted that, whilst depending on the circumstances it might be open to Mr Carmody to argue abuse of process in the event of a further application to serve out, any such application could not be based or rely upon the mere fact that the judge had concluded that there was no serious issue to be tried. Any abuse of process argument would have to be based on other factors. In my judgment that submission was correct.
45. Indeed, Mr Potts accepted that, were he or some successor counsel on behalf of Mr Carmody to attempt to argue res judicata or issue estoppel on the basis of the judge’s decision that there was no serious issue to be tried because of the Deed of Indemnity, this in itself could well be viewed as an abuse on the part of Mr Carmody, given the forceful submissions made on his behalf before this Court that neither of these could apply in the event of a fresh application to serve out.
46. In summary, I accept Mr Potts’ submission that the judge’s decision that there was no serious issue to be tried because of the Deed of Indemnity cannot give rise to res judicata, issue estoppel or (of itself) an abuse of process in the event of the Plaintiffs making a fresh application to serve out on Mr Carmody. It follows that the judge’s decision on the point does not have legal consequences.

Accordingly, even if (which, as already stated, I do not propose to decide) there is an exception to the general rule where a finding does have legal consequences, this Court does not have jurisdiction to hear this appeal.

47. I would add that, during his submissions in reply at the hearing, Mr Atherton conceded that, if the Court were to find as it has in respect of res judicata, issue estoppel and abuse of process, this would address any unfairness which might otherwise arise from holding that the Plaintiffs had no right to appeal.
48. In view of my conclusion that this Court does not have jurisdiction to hear this appeal, it is not necessary to consider the arguments which the Plaintiffs wished to raise on appeal. However, in case I am wrong, I think it would be helpful to touch upon them briefly.

Submission to the jurisdiction

49. The original summons filed by Mr Carmody raised only one issue, namely that the proceedings had not been served on him in accordance with the terms of the Service Out Order.
50. An Amended Summons was filed on 11th December 2018 which repeated the original ground as paragraph 1 but added two new paragraphs in the following terms:-

“2. Further or alternatively, and without prejudice to paragraph 1 above, pursuant to GCR Order 12 Rule 8(1)(c) that leave to serve the Re-Amended Writ of Summons on the 6th Defendant out of the jurisdiction be set aside on the ground that there is no good arguable case against the 6th Defendant in respect of all, alternately some, of the claims contained in the Re-Amended Writ of Summons.

3. Further or in the further alternative, and without prejudice to paragraphs 1 and 2 above, pursuant to GCR Order 18 Rule 19 and/or the inherent jurisdiction of the Court that the claim against the 6th Defendant contained in the Re-Amended Writ of Summons be struck out on the basis that it discloses no reasonable cause of action and/or is frivolous or vexatious or is otherwise an abuse of the process of the court.”

51. The Amended Summons was accompanied by an affidavit sworn by Mr Carmody (although not filed with the Court until later because of the need to obtain the original from Australia), paragraph 1 of which stated:-

“I am named as the sixth defendant in this action and without prejudice to my challenge to the jurisdiction of this honourable court by reason of improper

service of the Re-Amended Writ of Summons, I make this affidavit on my own behalf in support of the alternative relief sought in my amended summons.”

52. The skeleton argument on behalf of Mr Carmody before the judge stated at paragraph 4.1 that the strike out application arose only in the event that the judge rejected the jurisdictional challenge and was made without prejudice to that jurisdictional challenge under paragraph 2 of the Amended Summons.
53. Mr Atherton submitted that the reservation in the skeleton argument was too late because by then Mr Carmody had submitted to the jurisdiction. He further submitted that, when correctly construed, the use of the expression ‘without prejudice’ in paragraphs 2 and 3 of the Amended Summons meant ‘further’ or ‘alternatively’. It was an additional application rather than one which only arose if paragraphs 1 and 2 were unsuccessful.
54. Mr Atherton relied on the well-known statement of Robert Goff LJ in *Astro Exito Navegacion SA v Hsu* [1984] 1 Lloyd’s Rep, 266. The facts of that case were very different because the appellant had been served within the jurisdiction, but an issue arose as to whether he had submitted and at 270-271, Robert Goff LJ said this:-

“Now a person voluntarily submits to the jurisdiction of the Court if he voluntarily recognises, or has voluntarily recognised, that the Court has jurisdiction to hear and determine the claim which is the subject of the relevant proceedings. In particular, he makes a voluntary submission to the jurisdiction if he takes a step in proceedings which in all the circumstances amounts to a recognition of the Court’s jurisdiction in respect of the claim which is the subject matter of those proceedings. The effect of a party’s submission to the jurisdiction is that he is precluded thereafter from objecting to the Court exercising its jurisdiction in respect of such claim. Whether any particular matter, for example an application to the Court, amounts to a voluntary submission to the jurisdiction must depend on the circumstances of the particular case....

Applying these principles, it is plain to us that the appellant in the present case did indeed submit voluntarily to the jurisdiction. We need not decide whether his application for a stay was alone sufficient for this purpose; for his application for an order striking out par. 4 of the claim indorsed on the writ puts the matter beyond doubt. For if he had been successful in that application the Court would have decided that issue in his favour and against the respondents. The Court’s decision on the point would then have created an issue estoppel against the respondents, which the appellant could have invoked to prevent the respondents pursuing such a claim in the Courts of this country, and possibly also in Courts overseas. Plainly, therefore, by making his application for an order striking out par. 4, the appellant was voluntarily submitting to the jurisdiction of the Court.

In these circumstances, it was in any event not open for the appellant thereafter to dispute the jurisdiction of the Court.”

55. It is clear however that any submission to the jurisdiction must be unequivocal. In *SMAY Investments Limited v Sachdev* [2003] 1 WLR 1973 Patten J quoted with approval at 1976 a statement by Colman J in *Spargos Mining NL v Atlantic Capital Corporation*, *The Times*, 11 December 1995, part of which said: ***“In Sage v Double A Hydraulics Ltd, The Times, 2 April 1992, Farquharson LJ said.....: ‘A useful test was whether a disinterested bystander with knowledge of the case would have regarded the acts of the defendant, or his solicitors, as inconsistent with the making and maintaining of his challenge.’ In arriving at the view to be imputed to the disinterested bystander, it seems to me that one has to bear in mind that there will be an effective waiver, or a submission to the jurisdiction, only where the step relied upon as a waiver, or a submission to the jurisdiction, cannot be explained except on the assumption that the party in question accepts that the court should be given jurisdiction. If the step relied upon, although consistent with the acceptance of jurisdiction, is a step which can be explained also because it was necessary or useful for some purpose other than acceptance of the jurisdiction, there will, on the authorities, be no submission.... If the well-informed bystander had been left in doubt because what the defendants had done was equivocal, in the sense that it was explicable on other grounds in addition to agreement to accept the jurisdiction of the court, then the conclusion must be, on the authorities, that there would have been no submission to the jurisdiction. The representation derived from the conduct of the party said to have submitted must be capable of only one meaning.”***

56. In *Global Multimedia International Limited v Ara Media Services* [2007] 1 All ER (Comm) 1160, Sir Andrew Morritt C held that, by entering into correspondence and taking other action for some five weeks before indicating that the defendant wished to challenge the jurisdiction of the court, the defendant’s solicitors had taken action which was only consistent with an acceptance of the jurisdiction of the court. There had been no indication of any intention to challenge the jurisdiction until the end of the five week period. In passing, however, Morritt C endorsed the observations of Patten J and Colman J referred to above and summarised the position as follows at [28]:-

“28. Thus the test to be applied is an objective one and what must be determined is whether the only possible explanation for the conduct relied on is an intention on the part of the defendant to have the case tried in England.”

57. The final case I would refer to is the decision of the English Court of Appeal in *Zumax Nigeria Limited v First City Monument Bank Plc* [2016] 1 CLC; [2016] EWCA Civ 567. In that case

Zumax served proceedings out of the jurisdiction on the defendant FCMB. FCMB acknowledged service and sought from Zumax and was given a twenty-eight day extension of time to prepare an application challenging the jurisdiction of the English court. Zumax refused to agree to a further extension and after the extension had expired, FCMB applied to the court for an extension of time and made a substantive application challenging English jurisdiction. It also made an application under the Bankers' Books Evidence Act 1879 in order to obtain certain documents. It also appears (from [49] of the judgment of Kitchin LJ) that at the same time as FCMB applied for a declaration that the court did not have jurisdiction to hear the dispute, and without prejudice to that jurisdiction challenge, it applied for an order striking out the claims as disclosing no reasonable cause of action or as being an abuse of process of the court.

58. In his judgment Kitchin LJ agreed at [46] with the statement of Patten J in *SMAY* that any conduct said to amount to a submission to the jurisdiction and therefore a waiver of a right to challenge must be wholly unequivocal. He held that, notwithstanding the application under the Bankers' Book Evidence Act and the fact that, without prejudice to the jurisdiction challenge, FCMB had sought an order striking out the claim as disclosing no reasonable cause of action, there had been no unequivocal submission. FCMB's conduct was not inconsistent with making and maintaining the challenge to the jurisdiction.
59. The question for this Court therefore is whether the inclusion of paragraph 3 in the Amended Summons constitutes an unequivocal submission to the jurisdiction of the Grand Court; in other words whether the only possible explanation for its inclusion is an intention on the part of Mr Carmody that the case should be tried in the Grand Court.
60. I accept that, taken in isolation, a strike out application is likely to involve a submission to the jurisdiction for the reasons stated by Lord Goff in *Astro Exito*. But it is always necessary to consider all the surrounding circumstances in order to decide whether particular conduct amounts to an unequivocal submission to the jurisdiction.
61. In my judgment, the judge was correct in her conclusion. Despite Mr Atherton's argument on the correct interpretation of the exact wording used in the summons, it would in my view be clear to the disinterested bystander that, by virtue of paragraphs 1 and 2 of the summons, Mr Carmody was challenging the jurisdiction. Paragraph 3 is expressed to be "*without prejudice*" to those paragraphs, and the natural meaning of that is that paragraph 3 will only fall to be considered if Mr Carmody fails on his jurisdictional challenge. The position appears to be similar to that considered

by the Court of Appeal in *Zumax* where the strike out application was expressed to be without prejudice to the jurisdictional challenge. Where a strike out application is expressed to be without prejudice to a jurisdictional challenge, I do not think it can fairly be said that the submission is unequivocal or that making the strike out application as an alternative is inconsistent with making and maintaining a challenge to the jurisdiction.

62. I therefore agree with the judge that there was no unequivocal submission to the jurisdiction by Mr Carmody by including paragraph 3 of the Amended Summons.

No serious issue to be tried

63. In his affidavit of 11th December 2018 sworn in support of his Amended Summons, Mr Carmody disclosed that he had retired as a limited partner of Special LP on 1st August 2018 and that, acting by Special GP, Special LP had entered into the Deed of Indemnity. The Plaintiffs had not previously been aware of the existence of the Deed of Indemnity and hence no mention of it was made in the RAWs. Mr Carmody submitted that there was no serious issue to be tried as he could have no liability to Special LP as a result of the Deed of Indemnity.
64. In his submissions to the judge, Mr Atherton put forward a number of arguments as to why the Deed of Indemnity would not operate to defeat the Plaintiffs' claim and submitted that these arguments raised real and substantive issues which had to be tried and were not suitable for adjudication without the matter going to trial. Those arguments can be summarised as follows:-
- (i) The Deed of Indemnity was voidable at the instance of Special LP and constituted a further breach of the fiduciary duties owed by Special GP to Special LP and/or the directors of Special GP to Special LP by attempting to stifle a legitimate claim by Special LP against one of the persons that had caused it loss; alternately it represented an example of the directors of Special GP causing or procuring or assisting in a breach of fiduciary duty owed by Special GP to Special LP. It was a paradigm example of the type of 'wrongdoer control' which the derivative action procedure was designed to counter.
 - (ii) In such circumstances, the Plaintiffs would either plead to the Deed of Indemnity in their Reply or seek to amend the RAWs, if necessary, in order to avoid the Deed of Indemnity on that basis.

(iii) In any event, on a proper interpretation of its terms, the Deed of Indemnity did not have the effect of excluding some or all of the claims being pursued against Mr Carmody. Mr Atherton elaborated on this point before this Court and submitted that, for example, there was a pleaded claim that the various Defendants, including Mr Carmody, had conspired to intentionally cause harm to Mr Cowan as well as Special LP and that the Deed of Indemnity did not affect any claims by Mr Cowan, only those brought by Special LP.

(iv) The Plaintiffs would also contend that the entry into the Deed of Indemnity breached the general principle that a director of a company or, by parity of reasoning, a party in a fiduciary relationship with an entity akin to that of a director cannot legitimately contract out of his/her irreducible core of duties.

65. Given that her decision on this point was not necessary to her overall conclusion, because she was setting aside the Service Out Order in any event, it is understandable that the judge's reasons would not be developed in great detail. Nevertheless, it has to be said that in the two paragraphs (122 and 123) which give the reasons for her decision on this point, the judge does not address the submissions put forward by Mr Atherton and it is therefore not clear why she rejected them.
66. Following our decision that this appeal is to be dismissed on the ground of a lack of jurisdiction, it will be open to the Plaintiffs to make a fresh application to serve their claim (presumably in a further amended form in the same way as in the case of the other Defendants) out of the jurisdiction on Mr Carmody. It will then similarly be open to Mr Carmody to seek to set aside any such fresh service out order on the ground that there is no serious issue to be tried because of the Deed of Indemnity. At that stage, the Grand Court will have to determine the matter. It will have to consider the matter completely afresh without regard to the judge's previous conclusion. That is the legal position in any event, but the fact that the judge did not address the Plaintiffs' arguments in coming to her conclusion is an additional reason for the matter being considered afresh. In the circumstances, it would be wrong for this Court to express any views on the issue.

Conclusion

67. In summary, I would dismiss this appeal on the ground that this Court has no jurisdiction to hear an appeal based on the grounds raised by the Appellants as, even if successful, this would not affect the order made by the judge to set aside the Service Out Order. I propose that the Court should reserve its position on whether there might be jurisdiction if the findings sought to be challenged

were pregnant with legal consequences such that unfairness would be caused if an appeal were not permitted; but that is not the situation in this case.

Morrison JA

68. I agree

Field JA

69. I also agree.