CHP 19/0066

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN

CIVIL DIVISION

CHANCERY PROCEDURE

Proceedings under the Companies Act 1974, the High Court Act 1991 and the Financial Services Act 2008 relating to Montpelier (Trust and Corporate) Services Limited

BETWEEN:

ISLE OF MAN FINANCIAL SERVICES AUTHORITY

Claimant

And

MONTPELIER (TRUST AND CORPORATE) SERVICES LIMITED

Defendant

DEEMSTER MOHAMMED KHAMISA QC

Judgement on Application for a Stay

10th October 2019

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1. By a Notice of Application dated 4th October, 2019, the Defendant made an application for a stay of any "any order appointing a manager, receiver or inspectors pending an appeal to the Appeal Division" (the "**Stay Application**").

2. The application is opposed by the Financial Services Authority (the "**Authority**").

3. This is not a case where it is, in my judgement appropriate to grant a stay and I decline to do so for the reasons set out below.

Introduction

4. The full background to the case is set out in my detailed judgement of 2nd October, 2019 and Order of 7th October 2019. The Defendant wishes to appeal that judgement and order and seeks a stay on the implementation of the order on the grounds of "new information". In short, that "new information" is that the Defendant has entered into an agreement with Hillberry Trust Company Limited ("**Hillberry**"), a Financial Services Authority regulated company based in the Isle of Man, whereby the Defendant's business (but not the defendant itself) is being sold (the "**Hillberry Agreement**").

5. I have the benefit of detailed written submissions from both parties and supporting material which I have read. I have also read the defendant's application, the witness statement of Edward Watkin Gittins (**EWG**) and the draft order sought. The Defendant has asked for the application to be dealt with administratively and the Authority does not demur from that suggestion.

The law

6. By Rule 14.10 of the Rules of the High Court of Justice it is provided that:

> "Unless the appeal court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court."

7. There is ample and clear Manx case law which sets out the approach to applications for a stay. It is evident from this rule that it is for the defendant to persuade the court that a stay should be granted.

8. The Staff of Government Division(SGD) in **Irvings v Harding and others** in a judgment dated 15 June 2012 stated:

> "11. The approach to be taken to such an application by the court to which any appeal is made was considered by Sullivan LJ in *Department for Environment, Food and Rural Affairs v Downs* [2009] EWCA Civ 257:
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> > "*8. ... The approach to be adopted in respect of applications for a stay is clearly set out in the notes to CPR 52.7. A stay is the exception rather than*

the rule, solid grounds have to be put forward by the party seeking a stay, and, if such grounds are established, then the court will undertake a balancing exercise weighing the risks of injustice to each side if a stay is or is not granted.

9. It is fair to say that those reasons are normally of some form of irremediable harm if no stay is granted because, for example, the appellant will be deported to a country where he alleges he will suffer persecution or torture, or because a threatened strike will occur or because some other form of damage will be done which is irremediable. It is unusual to grant a stay to prevent the kind of temporary inconvenience that any appellant is bound to face because he has to live, at least temporarily, with the consequences of an unfavourable judgment which he wishes to challenge in the Court of Appeal ..."

12. I conclude that no different approach should be taken by the court from which any appeal is to be made.

18. I do not believe that the Claimants have established any solid grounds for a stay. There will be no irremediable harm caused to the Claimants if the other two applications are determined now. If the Claimants are ultimately successful in obtaining permission to appeal, then their appeal can be pursued [with or without any application to adduce additional evidence under the Judicial Committee of the Privy Council Practice Directions]. If the Claimants' application to this court for permission to appeal is unsuccessful, they can renew their application to the Privy Council under Rule 11(2) of the 2009 Order [subject to Rule 11(3)]. If the Claimants are ordered to pay costs to the Defendants, there will be no irremediable harm because if that costs order is set aside on any appeal, any money can be repaid. In the meantime, the Claimants would have to face temporarily the consequences of an unfavourable judgment which they wish to challenge. The outcome of the police investigation cannot invalidate our conclusions of law on issues [1], [2], [3] and [4], as any single conclusion would be sufficient to uphold the SGD Judgment, so the result that the Claimants' appeal be dismissed would remain, even if [taking an extreme scenario] the First Defendant was to be convicted of a criminal offence in connection with his conduct on 23rd

February 2010. I am therefore of the view that this court should consider the two applications before it and I would dismiss the application for a stay."

9. The Staff of Government Division(SDG) in **Nugent v Willers** (judgement 15 September 2016) stated:

"6. The appropriate rule, Rule 14(10) of the 2009 Rules, simply says:

"Unless the appeal court or the lower court orders otherwise, an appeal shall not operate as a stay of any order or decision of the lower court.""

Indeed, neither this court nor any other court would grant a stay pending appeal unless it was satisfied there are good reasons for so doing. The starting point for that should be that no stay pending appeal should be granted, but the court will look to see whether there are special circumstances to justify a stay pending the determination of an appeal.

10. In **Hiranandani v Hirco Plc** (Staff of Government Division(SDG) judgement 4 December 2014) at paragraph 23

"*Prima facie* this court ought to extend the stay to allow the Privy Council appeal process to run its course. To do otherwise would render any appeal to the Privy Council nugatory. For example, if the Appellant was required to [and did] file a further Acknowledgement of Service he would be submitting to the Isle of Man jurisdiction."

11. The defendant cites guidance from **Leicester Circuits Ltd v Coats Brothers plc [2002] EWCA Civ 474 at [12-13]**

"[12] Based on the comments of Mr Woolf, Mr Slater has submitted that this is a case where the stay of execution should be continued either wholly or in part until after the hearing of the appeal. Based on two unreported authorities in this court, namely Winchester Cigarette Machinery v Payne (No 2) CA 10 December 1993, and Combi (Singapore) v Srinam CA 23 July 1997, Mr Slater has submitted, uncontroversially, that the principles to be applied in relation to the application are that, while the general rule is that a stay of judgment will not be granted, the court has an unfettered discretion and no authority can lay down rules for its exercise. It is relevant that the appellant may be unable to recover from the respondent the sum awarded in the event of judgment being set aside on appeal.

[13].The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal. "

12. The defendant also refers to **Department of Environment Food and Rural Affairs v Downs [2009] EWCA Civ 257[8-9]**, to the effect that a stay is the exception rather than the rule and that "solid grounds" which an applicant must put forward are normally:

> "...some form of irremediable harm if no stay is granted..."

13. I do not consider that the addition of the words "solid grounds" adds anything to or is inconsistent with the test set out above in paragraph 13 or the approach of the Manx courts. In my judgement, there is no evidence here that the appeal will be stifled. An appeal does not operate as a stay. It follows that the court has a discretion whether or not to grant a stay. Whether the court should exercise that discretion to grant a stay will depend upon all the circumstances of the case. The essential question is whether there is a risk of injustice to one or the other or both parties if the court grants or refuses a stay. In making that judgement about the risk of injustice, I have to balance the public interest in the orders I have made and their implementation. I have the advantage of having conducted a detailed evaluation of the evidence at the hearing previously and which I have already dealt with in my judgement of 2nd October, 2019. That previous assessment required me to carry out a balancing exercise including proportionality of the orders which I have already made. An important factor there was the public interest against the risk of injustice to a party but which of necessity included safeguarding investors, creditors and third parties and of the Isle Man's reputation as a financial centre with the regulatory framework. On the evidence I was satisfied that the statutory criteria for making the orders had been met, namely, serious failures in keeping and maintaining records of important financial transactions involving investors' funds and governance failures. Whether the "new information" about entering into the ***Hillberry Agreement*** dislodges that earlier assessment or not is something that I shall have to decide when assessing whether there is a risk of injustice to any party.

14. **The defendant's submissions in support of the application for a stay**

(i) That there is a far reaching reputational damage that will result if a manager and receiver is appointed;

(ii) In relation to the ***Hillberry Agreement***, loss of a significant number of clients will result in a greatly reduced proceeds payable to the defendant by the buyer; the prejudice from this could not be rectified on appeal;

(iii) The cost to the defendant resulting from the appointment of a manager and receiver will be borne by the defendant;

(iv) The defendant relies on the merits of the appeal which it submits might be relevant to the exercise of the court's discretion

(iv) That (i)-(iv) above demonstrate the sort of *solid grounds* and *risk of irremediable harm* referred to in **DEFRA v Downs** *(Ibid).*

15. **The Authority's submissions in resisting the application for a stay**

(i) Defendant has failed to demonstrate the"exceptional circumstances" required to disapply the general starting point that there should be no stay pending appeal;

(ii) The Defendant, in its written submission (at paragraph 4) says that the appointment of a manager and receiver is "forward – looking relief". The Defendant does not provide any cogent arguments as to why the appointment of inspectors should be stayed pending appeal. The Authority's position is that a stay should not be granted of the appointment of a manger, receiver or inspectors. The Authority also makes the point that the appointment of inspectors is "backward looking relief" and notes that the Defendant does not even attempt to put forward detailed arguments as to why the appointment of inspectors should be stayed pending any appeal;

(iii) The court in considering the **Stay Application** must have "regard for the public interest" and not just the Defendant's interests. It is not just a case of balancing the interests of the Authority and the Defendant. The matters at stake in respect of this matter are far wider than that. They include the reputation of the Island and its financial services sector. The Authority also invites the Court to take into account the

Authority's statutory functions and regulatory objectives (see paragraphs 7-10 of the judgment delivered on 2 October 2019).

(iv) The Defendant when advancing its arguments of "clear risk of irremediable harm" refers to the "far reaching reputational damage that will result if a manager and receiver is appointed". A stay would not prevent that. An open judgment has already been delivered.

(v) There is a very strong public interest in the manager, receiver and inspectors continuing their vital work. First Deemster Corlett was persuaded to order an expedited hearing when he gave directions. The Orders now need to be enforced forthwith. The judgment now delivered records the "strong public interest" in respect of the orders (paragraph 187).

(vi) There is evidence that some of the Defendant's clients are unhappy and extremely concerned. The judgment references the complaints as providing some support for the Authority's concerns about the conduct of the Defendant (paragraph 188).

(vii) There have already been some delays occasioned by the Defendant's misconceived applications (transfer to Ordinary procedure, disclosure, cross- examination) which have all been unsuccessful. An appeal could take months to be heard and determined even on an expedited basis. In the meantime to continue to allow the Defendant "free reign" in the interim betrays the serious concerns of the Authority as validated by the judgment;

(viii) The Manx case law appears to have shied away from looking at the merits of the appeal in the exercise of the discretion on applications of an interlocutory nature see: A v B (20 December 2017) at paragraph 44 stated that it would only have regard to the merits if, without much investigation, it was clear that the grounds of appeal were very weak or very strong;

(ix) The general prospects of success of any appeal is that the Court of First Instance was undertaking an evaluative exercise and exercising a judicial discretion in determining to grant the appointments sought by the Authority. The considerable constraints upon the ability of the Staff of Government Division to review the exercise of a discretion have been "consistently applied" and were summarised in Alder v Lloyds

Bank International Limited (judgment 12 June 2017) at paragraphs 38-39 and at paragraphs 15-16 in the judgment delivered on 18 January 2019.

Discussion

16. The Authority rightly reminds the court that it should place reliance on Manx case law (which is what I shall do) but the absence of such a reference in the defendant's application for a stay here is not fatal to it. I have reminded myself of the dicta of Deemster Corlett(First Deemster) and Tattersall JA in **Re Spirit of Montpelier Ltd (IN LIQUIDATION), Gittins and others v Simpson (No 3) 2016 MLR N16**:

> "[23] We cannot over-emphasise the importance of relevant Manx authorities and in particular those of this court, being cited to a court. It is simply not appropriate to cite English or other authorities to the exclusion of Manx authorities."

17. It has been said, in particular in **Leicester Circuits Limited v Coates Brothers Plc** *(ibid)* by Potter LJ at paragraph 13, that where the justice of refusing a stay is in doubt the answer may well depend on the perceived strength of the appeal. I do not consider that the merits are strictly relevant to the stay application. I intend to leave out of my analysis here whether there is any merit in the grounds of appeal that I have seen so far. The Authority submits that the grounds of appeal are weak and the Defendants says, there are reasonable grounds here. However, I do intend to approach this application on the basis of the law of the Isle of Man as it relates to applications of this sort and the facts in support. The onus of proof remains on the Defendant.

18. What I have to deal with is effect of the "New events" (not referred to in the application) and "New events-effect on relief"(referred to in the written submissions) whereby the Defendant has entered into the **Hillberry Agreement** very recently, on 4th October 2019, for the sale of the Defendant's business but not the Defendant itself. None of the evidence which relates to this agreement was placed before me at the hearing or referred to in the extensive submissions of the Defendant and no application has been made to file further evidence. The absence of any reference is of some importance because it was argued previously that the orders sought by the Authority were of an intrusive and draconian nature and I should have the issue of proportionality in mind. If, as is argued in *this* application, the impact of the orders is such that the sale of the business might be adversely affected by the orders and the Defendant will suffer

reputational damage, I find it surprising that no reference was made to that fact in the course of the arguments before me a the earlier hearing.

19. In his witness statement **EWG** of 4 October 2019 (and for which no direction or permission to file was given or sought) states that a contract for the sale of the entire business of the Defendant was executed on 4 October 2019 with Hillberry Trust Company Limited ("Hillberry"). There are a number of features which have been highlighted by the Authority in its objections and which I agree are concerning: (i) the document appears to be incomplete and is undated (ii) the Defendant gives a warranty that it is not engaged in any litigation or other legal proceedings in connection with the Business or any clients of the Business and to the best of its knowledge there are no facts likely to give rise to any legal proceedings however, there is as I understand it, an appeal pending and this application for a stay is being made; (iii) significantly, bearing in my assessment of the evidence in the hearing as to serious shortcomings in the governance and use of investor's monies, the Authority has not yet formed a view in relation to the proposed sale. There are other features of the sale which may require closer scrutiny by others. I am troubled too, by the proximity of the date of my judgement of 2nd October, 2019 and the apparent sale agreement of 4th October, 2019.

20. There is nothing in this application for a stay which in my judgement comes close to demonstrating "exceptional circumstances" to warrant a departure from the starting point that there should be no stay. In carrying out a balancing exercise therefore, absent exceptional circumstances being demonstrated, for the reasons I have given in my detailed judgement, following a careful analysis and assessment of the evidence before me then, the interests of justice in the protection of the public and investors trump those of the Defendant here. The "New events"/"New events-effect on relief" as pleaded and argued in the written submissions, namely the ***Hillberry Agreement*** do not persuade me that a stay should be granted because whilst the orders I have made may cause some concern or have consequences for the Defendant, including some reputational damage (factors I took into account in my assessment of the case), the strong public interest in the appointment of the manager, receiver and inspector plays a vital role in giving the public and investors confidence in the Isle of Man's ability to regulate the conduct of those licence-holders in relation to whom, there are serious concerns relating to governance and other issues. In that sense, exercising my discretion here, I find that the public interest plays heavily in the balancing exercise of whether and

if so, to what extent there is a risk of irremediable damage (injustice) to the Defendant- the public interest and the interest of justice are better served by refusing the stay. A transaction such as the sale of the Defendant's business, immediately in the aftermath of judgement and orders but before the appointments have been given effect, must raise a heightened degree of concern about the Defendant's conduct and seriously brings into question the Defendant's motivation. The Defendant can and should, engage with the appointees and if the apparent sale to "**Hillberry**" is regular, legal, and justifiable and makes commercial sense, in the judgement of those managers, receivers and inspectors, then doubtless the Defendant will be able to persuade them of the same. I cannot see any reason why Hillberry would not wish to engage with the manager and receiver if it is a serious buyer, as the Hillberry Agreement purports to suggest. Those appointees will of course have to keep the regulatory framework in mind when making those judgements. The Defendant's point about costs of the managers and receivers is a consequence of the serious concerns as to its conduct in a regulated environment.

21. Therefore, on the basis of the evidence before me in support of this application for a stay, the defendant has not persuaded me that there would be would suffer *irremediable harm or that risk injustice*, if a stay is not granted. The Defendant can and should minimise any perceived or actual harm by engaging with the various appointees in the task they are charged to carry out. I do not wish to recite the passages from my judgement of 2nd October, 2019(see paragraphs 180-191) but the concerns which I highlighted there were based on the evidence then before me; none have been dislodged by the factors relied on in support to the application for a stay.

22. For the reasons given above, I refuse the defendant's application for a stay.

23. I invite the parties to draw up the appropriate order.

DEEMSTER MOHAMMED KHAMISA Q.C.