2DS 2019/22

IN THE HIGH COURT OF JUSTICE OF THE ISLE OF MAN
STAFF OF GOVERNMENT DIVISION

Between:

MONTPELIER (TRUST AND CORPORATE SERVICES) LIMITED Appellant

and

ISLE OF MAN FINANCIAL SERVICES AUTHORITY Respondent

Constitution of the court:

Judge of Appeal Storey QC
Deemster Malek QC

Ex Tempore Judgment of the court
delivered on 10 February 2020

INTRODUCTION

1. By paragraphs 1, 15 and 24 of an order dated 7 October 2019 [the 'Order'] Deemster Khamisa QC ordered the appointment of:

    (1) a business manager (Gordon Wilson of CW Consulting Limited) to manage the affairs of Montpelier (Trust and Corporate) Services Limited ['Montpelier'], the Appellant, relating to the carrying on of a regulated activity, under section 22 Financial Services Act 2008 ['FSA'];

    (2) a receiver (Mr Wilson), without security, of the affairs, business and property of Montpelier, under section 21 FSA and section 42 High Court Act 1991 ['HCA']; and

    (3) joint inspectors (Adrian Hyde and Robert Starkins of CVR Global LLP) to investigate the affairs of Montpelier, and report on those matters set out in a Schedule to the Order, under section 5 Companies Act 1974

    for the reasons set out in the Deemster's judgment dated 2 October 2019 [the 'Judgment'].

2. Montpelier is licensed by the Isle of Man Financial Services Authority [the 'Authority'], the Respondent, under section 7 FSA to carry out certain regulated activities. By licence dated 3 October 2017 Montpelier's licensed regulated activities were restricted to Class 4 (corporate services) and Class 5 (trust services) activities.

3. By a Claim Form (Chancery Procedure) dated 17 June 2019 (amended on 21 June 2019) [the 'Claim Form'] the Authority had sought the three appointments made in the Order. The Claim Form was supported by three witness statements of John Mylchreest, a senior manager with the Authority, dated 17 June, 28 June and 26 July 2019.

4. On 19 July 2019 Montpelier served a Defence and a witness statement of the same date from Edward Watkin Gittins, a director and the controlling shareholder of Montpelier. There was one further director of Montpelier, Paul William Garrett, who also acted as company secretary.

5. Montpelier's application to cross-examine Mr Mylchreest was refused by Deemster Khamisa in his unappealed judgment of 15 August 2019.

6. The Judgment followed a two day expedited hearing, on 3 and 4 September 2019, when Montpelier was represented by Mr Gittins and the Authority by Mr Wannenburgh, the Solicitor General. Although Montpelier's application for a Temporary Advocate's Licence had been refused by the First Deemster on 9 July 2019, Mr Gittins was assisted for the purposes of drafting Montpelier's applications and written submissions by James Collins QC, including a 67 page skeleton argument dealing in considerable detail with the relevant law and the factual matrix. During the hearing Mr Gittins was assisted by Mr Jones, English counsel. Deemster Khamisa observed in paragraph [3] of the Judgment that Mr Gittins, a fellow of the Institute of Chartered Accountants of England and Wales since 1981 with nearly 50 years' experience in business and finance in industry and public practice, appeared *"articulate"* and *"able"*, *"well versed in the factual aspects … with a good understanding of the law relating to the Claim and fiduciary duties".* Deemster Khamisa believed that Mr Gittins was *"given all the assistance that was necessary for the purpose of defending the claim".*

7. By its Appeal Notice signed by Mr Garrett dated 11 October 2019 Montpelier appealed against the Order and sought to set it aside. At a board meeting of Montpelier held on 22 October 2019 Mr Gittins (Chairman) and Mr Garrett authorised the former to act as Montpelier's advocate.

8. The court set a procedural timetable for this appeal at a hearing on 23 October 2019. On 14 November 2019 Montpelier sought more time to comply with the order of 23 October 2019 to allow Athena Law (Ms Samani), which had only been instructed on 12 November 2019, to advise, assist and represent Montpelier on the appeal. The Authority did not oppose the application, on the basis of Athena Law's assurance that Montpelier *"would like this matter to be resolved as soon as possible"* (Ms Samani's email to Mr Wannenburgh of 12 November 2019) and that Montpelier *"is very keen to get to a determination of its appeal and deeply regrets that the extension sought would have the effect of vacating the hearing of this appeal"* (paragraph 6 of Montpelier's application of 14 November 2019, signed by Mr Garrett). On 14 November 2019 the court granted Montpelier the extensions of time sought to file any application for permission to amend its Appeal Notice and its written submissions and put back the hearing of 10 January 2020 by 4½ weeks to 10 February 2020 to accommodate this. In a letter to the court of 20 November 2019 Athena Law stated:

> *"As a result of a number of matters, Athena Law has had to terminate its engagement with Messrs Gittins and Garrett and accordingly we will not be*

> *representing* [Montpelier] *in the … appeal. We have advised Messrs Gittins and Garrett of the position and have forwarded to them a blank notice of change of advocate form so that they may file and serve the same …"*

On 2 December 2019 Athena Law formally ceased to act for Montpelier. On 4 December 2019 Montpelier filed an amended Appeal Notice without any accompanying application for permission. By a further order dated 17 January 2020 the court granted Montpelier a further week within which to serve its responsive written submissions, following a request by Mr Garrett for more time.

9. By an application dated 29 January 2020 (served on 30 January) Mr Vaughan-Williams of LVW Law Limited ['LVW'] (instructed by Montpelier on 23 January) applied for permission to amend Montpelier's *"skeleton argument"* (it was not clear whether this applied to Montpelier's skeleton argument of 4 December 2019 or 22 January 2020 or both, or even to its Appeal Notice(s), because no draft amended documents were attached), for directions in relation to the Authority's application dated 6 January 2020 (to adduce new evidence pursuant to Rule 14.14(3) of the Rules of the High Court of Justice 2009) and to vacate the hearing of 10 February 2020, to be relisted *"after two months"*. Montpelier's application was supported by a witness statement of Mr Vaughan-Williams dated 29 January 2020. The request to vacate the hearing had first been made in a telephone call from Mr Vaughan-Williams to Mr Wannenburgh on 23 January 2020 *"in order to familiarise ourselves with the papers"*.

10. The Authority was not willing to consent to Montpelier's application. In his written submissions of 30 January 2020 opposing the application Mr Wannenburgh made the point that this was Montpelier's second request to vacate the hearing of its appeal, notwithstanding that within its Appeal Notice (filed and served within four days of the Order) Montpelier had sought an expedited hearing of its appeal:

> *"Without such expedition, there is a real risk that … damage … will have occurred by the time the issue is determined. It is accordingly in the interests of justice and consistent with the overriding objective that this … appeal should be dealt with expeditiously."*

The Authority had agreed with the need for expedition at the first directions hearing on 23 October 2019 which was why the appeal was listed in under three months.

11. Mr Wannenburgh's objections to the adjournment were as follows. First, Montpelier has had over two months within which to obtain new legal representation since Athena Law ceased to act. Second, Montpelier has previously had the assistance of English counsel (see above) and its written submissions of 4 December 2019 and 22 January 2020 were probably drafted by them and not by laymen. Third, Mr Vaughan-Williams ought not to have accepted instructions from Montpelier if LVW was unable to prepare in time, alternatively the 18 days between 23 January and 10 February 2020 ought to have been sufficient to read into the appeal. Fourth, Mr Vaughan-Williams can clarify or amplify Montpelier's two skeleton arguments at the oral hearing; no directions are needed in respect of the Authority's application to adduce new evidence as the matter can be argued at the hearing on 10 February 2020, when the court considers the Authority's new evidence and Montpelier's rebuttal evidence, all of which has been filed and served *de bene esse*. Finally, the public interest required the appeal to be heard expeditiously, not least because winding up proceedings have now been commenced. There has been uncertainty hanging over Montpelier since at least

June 2019 and over the appointments of the manager, receiver and inspectors since October 2019.

12. We accept Mr Wannenburgh's submissions. Mr Vaughan-Williams put forward no good reason to vacate the hearing of this appeal, fixed at short notice to accommodate both parties' requests for an expedited hearing and already adjourned once at Montpelier's request to allow its legal representatives more time to prepare. No information has been provided as to why it took Montpelier over two months to engage new advocates. We are quite satisfied the hearing could have been a fair one – Mr Vaughan-Williams had sufficient time to prepare, no doubt aided by the same English counsel as assisted below. A delay of *"at least two months"* would not have been fair to the Authority or been in the public interest, especially as the two off-Island members of the three-judge court specially convened for this appeal (and who had started their preparation prior to the filing of Montpelier's application to adjourn) would have had difficulty in committing to an alternative date in April or May 2020. Montpelier's application for permission to amend its Appeal Notice was ordered to be filed by 4 December 2019 and has never been filed. The Authority's application to adduce fresh evidence was filed on time in accordance with the order of 14 November 2019. Montpelier's two sets of written submissions did not require *"amendments".*

13. Detailed written submissions on the merits of the appeal signed by Mr Gittins were filed by Montpelier dated 4 December 2019 and 22 January 2020 and by the Authority dated 6 January 2020.

PURPORTED DISCONTINUANCE

14. On 4 February 2020 LVW filed a 'Notice of Discontinuance' purporting to discontinue Montpelier's appeal. The accompanying letter to the court stated that LVW had been instructed by Mr Gittins to file the Notice. LVW requested that the hearing be vacated. The court declined to accede to this third request to vacate a hearing, which proceeded on 10 February 2020 when we had the benefit of oral submissions from Mr Vaughan-Williams and Mr Wannenburgh. LVW and the Authority had filed written submissions of 6 February 2020 on all remaining ancillary issues.

15. As Mr Wannenburgh pointed out, Notices of Discontinuance are not appropriate in relation to proceedings before the Appeal Division of the High Court. Rule 7.73 provides that the Rules in Chapter 8 of Part 7 in respect of Discontinuance set out the procedure by which a claimant may discontinue all or part of <u>a claim</u>. A defendant may apply to have the Notice of Discontinuance set aside under Rule 7.76(1). This relates to a claim at first instance. There is no equivalent procedure by which an appellant may discontinue all or part of an appeal. Under Rule 7.78(1), a claimant who discontinues is liable for the costs which a defendant, against whom he discontinues, incurred on or before the date on which the Notice of Discontinuance was served on him, unless the court orders otherwise. Under Rule 11.11(1)(c) where costs arise under Rule 7.78 any costs order is deemed to have been made on the standard basis although any arguments as to costs can be determined by a court if not agreed: Rule 7.77(3).

16. The procedure in respect of appeals is governed by Part 14 of the Rules. For good reason, there is no provision which enables an appellant to issue unilaterally a Notice of Discontinuance in respect of an appeal.

17. We treat the purported Notice of Discontinuance as a notice by Montpelier of an intention to withdraw its appeal. Unsurprisingly the Authority does not object to this course and so this court orders that the appeal be dismissed. The Authority applied for our order to record that the appeal was 'totally without merit' for the purposes of Rule 14.13(5)(c)(i). In the absence of full argument on the merits of the substantive appeal, we are unwilling to accede to this purely on the basis of the written submissions filed in December 2019 and January 2020.

COSTS

18. By its application dated 6 February 2020, supported by a witness statement of Mr Mylchreest of the same date, the Authority seeks the costs of the appeal from Montpelier following its abandonment, such costs to be assessed summarily on the indemnity basis and paid within 14 days, with execution to follow if not paid, pursuant to Rules 11.3(1), (2)(a), (5)(a) and (6), 11.4(1)(b) and (3), 11.5(1)(b) and (3), 11.7(a), 11.8(1), (2) and (4) and 11.9(a) and Schedule 11.1. The amount sought in the Authority's Statement of Costs is £11,594 (no VAT being payable): 42.16 hours at £275 per hour. The Authority also seeks to join Mr Gittins and Mr Garrett as parties to the proceedings, for the purposes of costs only, pursuant to Rule 11.41, to allow the Authority to seek a costs order against them personally, jointly and severally. This application had not been served personally on Mr Gittins or Mr Garrett. Mr Vaughan-Williams is not instructed by the directors, only on behalf of Montpelier. As a result that application is not before us today.

19. Mr Wannenburgh argued for indemnity costs because of the unreasonable conduct of Montpelier in the pursuit of its appeal by seeking an expedited hearing, twice seeking to adjourn the hearing (the first time successfully) and then discontinuing the appeal, a cynical course of conduct to delay the inevitable dismissal of its appeal. Such conduct is said to fall squarely within Rules 11.3(6)(a), (b) and (c) and 11.5(3)(a)(i). The Authority relied on paragraphs [41(1) – (3), (5) – (7), (26) and (31) – (33)] of Deemster Doyle's 'check list' in *Clucas Food Service Limited v Ice Mann Limited* CPL 2004/6 (15 December 2005) and says Montpelier acted well 'outside the norm'.

20. Mr Vaughan-Williams argued that there should be no order as to costs, alternatively that Montpelier be ordered to pay the Authority's costs on the standard basis, to be the subject of a detailed assessment in default of agreement. He says that the reason why the appeal was not pursued was because things had moved on since October 2019 in that Montpelier agreed to sell its business to a third party on 15 January 2020, subject only to the Authority not preventing such sale. He also submitted that the appeal was not pursued because the Authority's application of 6 January 2020 to adduce further evidence was to proceed on 10 February 2020 and that this would have been 'procedurally unfair' because *"the court would have been considering facts which are disputed and which Montpelier intends to rebut at length".*

21. In summary, Mr Vaughan-Williams said it was now difficult to put the clock back four months after the appointments. Montpelier is said to have taken a *"commercial and pragmatic approach to the matter and once the application to adjourn had been refused and it appeared that* [Montpelier] *would not have the opportunity to adequately respond to the* [Authority's] *application notice filed on 6 January 2020,* [Montpelier] *acted swiftly to discontinue the appeal".* Mr Vaughan-Williams submits *that "there has been no conduct on the part of* [Montpelier] *such as would justify the award of costs upon an indemnity basis".* He says the court should not order

Montpelier to pay the Authority's costs under Rule 7.78(1) but should *"order otherwise"* and make no order, in view of supervening events which have made the appeal academic and because the court does not know whether the appeal would have succeeded. He referred us to *Longstaff International Limited v Evans* [2005] EWHC 4 (Ch) per Nicholas Warren QC, as he then was, sitting as a Deputy Judge of the Chancery Division, at [12] and [38].

22. In resisting indemnity costs Mr Vaughan-Williams relied on *Gulf Hibiscus Limited v Lime Petroleum Plc* 2DS 2017/20 (2 February 2018), SGD, differently constituted but including Storey JA, where this court approved at [14] remarks of Nugee J in *Merck KGaA v Merck Sharp & Dohme Corporation* [2014] EWHC 3920 (Ch) at [7], but that was in connection with an application for only standard costs which were appropriate even where a losing party's argument was reasonable with realistic prospects. Mr Vaughan-Williams put forward no reason, let alone any good reason, for not assessing any costs summarily.

23. This court has an unfettered discretion under section 53(1) HCA and Rule 11.3(1) on questions of costs. The general rule is that an unsuccessful Appellant should pay the costs of the Respondent: Rule 11.3(2)(a).

24. As this court (differently constituted, but including Storey JA) stated in *Bellamy v Forster* 2DS 2017/28 (15 June 2018):

> *"10. There are two differences between the standard and the indemnity bases of assessment. Where costs are assessed on the standard basis, the court will only allow such costs as are proportionate to the matters in issue to be recovered. On the indemnity basis, proportionality plays no part. Both bases of assessment require the court to consider whether the costs were reasonably incurred and reasonable in amount, but when the assessment is on the indemnity basis any doubt is resolved in favour of the receiving party, on the standard basis any doubt is resolved in favour of the paying party – see Rules 11.4(1) – (3) and 11.5(1).*
>
> *11. This court … has recently restated in Carter v Irving 2DS 2017/24 (19 February 2018) at [9] and [10] and in Oakley v Osiris 2DS 2017/26 (26 February 2018) at [9] and [10] the test for ordering an assessment of costs on the indemnity basis, as set out in Hiranandani v Hirco plc 2DS 2014/2 (6 November 2014) at [22] and by this court (differently constituted …) in Lewin v Braddan Parish Commissioners 2DS 2014/1 (4 August 2015) at [10] – [12]. We do not repeat these well-known principles here.*
>
> *12. We have also been referred to the indemnity costs checklist set out by Deemster Doyle in Clucas Food Service Limited v Ice Mann Limited CPL 2004/6 (15 December 2005) at [41]."*

25. As to indemnity costs, the court must have regard to all the circumstances under Rules 11.3(5), (6) and 11.5(1) and (3). Such circumstances include the conduct of the parties.

26. No order as to costs would be wholly inappropriate here. In our judgment it is appropriate to order indemnity costs against Montpelier. The management of the appeal has been conducted in an unreasonable manner and, in our view, had an

improper purpose, namely to buy Montpelier time and to allow it to represent to its creditors and investors that the Order was in some way not final because it was subject to appeal. This takes the appeal out of the norm. The possible sale of Montpelier to a third party has not, as yet, been agreed to by the Authority (and may never be) and in any event had first been mooted on 4 October 2019, so that is not a material change of circumstances or good reason for abandoning the appeal.

27. By its application dated 6 January 2020 the Authority had sought permission pursuant to Rule 14.14(3) to adduce and rely upon evidence not before the lower court, supported by the witness statement of Mr Mylchreest of the same date:

    (1) the reports of Mr Wilson (as manager and receiver of Montpelier) dated 18 October, 5 November and 10 December 2019;

    (2) the reports of Messrs Hyde and Starkins (as joint inspectors of Montpelier) dated 5 November and 6 December 2019 and 7 January 2020; and

    (3) Montpelier's responses dated 31 October, 5 November and 21 November 2019 to Mr Wilson's first and second reports and Mr Wilson's responses dated 14 November and 3 December 2019.

    Montpelier's evidence in rebuttal of the reports of Mr Wilson and Messrs Hyde and Starkins was therefore included. It would have been open to Mr Vaughan-Williams today, during the hearing of Montpelier's appeal, to oppose the Authority's application to adduce additional evidence on the ground that Montpelier wished to adduce yet further rebuttal evidence and the court would have had to make a ruling. There would have been nothing procedurally unfair upon such a procedure. We therefore reject Mr Vaughan-Williams' suggestion that the withdrawal of the appeal was commercial and pragmatic if this was based upon the reasons he put forward. We are bound to conclude, on the material before us, that Montpelier, represented by a highly experienced Isle of Man advocate, has decided not to pursue its appeal simply because it would fail, a view we share on the basis of our careful reading of the written submissions filed and the other documents on the parties' reading lists. There can be no other credible reason for Montpelier's eleventh hour volte-face.

28. As to quantum, we are willing to assess summarily the Authority's costs at £11,594 on the indemnity basis. Mr Vaughan-Williams did not address us to the contrary, save that some of the Authority's dates were not particularised but there is no suggestion that any of the work was not reasonably incurred or reasonable in amount.

29. We therefore:

    (1) dismiss the appeal; and

    (2) order Montpelier to pay the Authority's costs on the indemnity basis which we assess summarily in the sum of £11,594 to be paid on or before 24 February 2020 failing which execution shall issue without further notice or order of the court.