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Print Judgment

MONTPELIER, JONES, MORRIS, GITTINS / 12 December 2013 / STAFF OF GOVERNMENT (APPEAL DIVISION)

Title	MONTPELIER, JONES, MORRIS, GITTINS
Case Reference - Division Code	2DS
Case Reference - Year	2011
Case Reference - Number	41
Court	HIGH COURT OF JUSTICE OF THE ISLE OF MAN
Further Information	2DS2012/39 and 2DS2012/45
Division	STAFF OF GOVERNMENT (APPEAL DIVISION)
Judgment Date	12 December 2013
The Judgment of	His Honour Judge of Appeal Tattersall QC
The Judgment of	His Honour Deemster Corlett
Party One	MONTPELIER TAX PLANNING (ISLE OF MAN) LIMITED (In Liquidation) - Appellant [and First Respondent to the Second Respondent's Cross Appeal]
Advocate Party One	Miles Benham (MannBenham)
Party Two	ALAN JONES - First Respondent
Advocate Party Two	In Person
Party Three	GILES MORRIS - Second Respondent [and Cross Appellant]
Advocate Party Three	Charles Coleman (Gough Law)
Party Four	EDWARD WATKIN GITTINS - Second Respondent to the Second Respondent's Cross Appeal
Advocate Party Four	Miles Benham (MannBenham)

Judgment

1. This is the judgment of the court.

Introduction

2. This litigation relates to a dispute over the proprietary rights in a tax avoidance scheme marketed by Montpelier Tax Planning (Isle of Man) Limited [`Montpelier`], now in liquidation, to mitigate the effect of the `IR35` legislation for United Kingdom taxpayers. Although details of the scheme are set out in the Skeleton Argument of Montpelier in this appeal, for the purposes of this appeal it is not necessary to consider them.

3. Such scheme had been devised by Mr Alan Jones [`Mr Jones`], then an employee of Montpelier, and Mr Edward Watkin Gittins [`Mr Gittins`], the managing director and controlling shareholder of Montpelier. Until September 2011 Montpelier was an important trading subsidiary of the Montpelier Group of companies and dealt with the creation and marketing of tax avoidance schemes.

4. Following Mr Jones and Mr Giles Morris [`Mr Morris`][together described as `the Respondents`] ceasing to be employees of Montpelier, they contacted many potential customers of the scheme and commenced to trade on their own behalf.

5. Montpelier commenced proceedings against the Respondents. Such litigation pleaded a number of causes of action including :

> [1] misuse of confidential customer contact information by contacting such customers or potential customers;
>
> [2] procuring breaches of contract by customers contracted to Montpelier who were induced to transfer to the Respondents;
>
> [3] passing-off by continuing to use the name and website by which the Respondents had been promoting Montpelier`s scheme;
>
> [4] breach of copyright in various documents relating to the scheme and
>
> [5] misuse of confidential information relating to the nature of the scheme.

6. In his judgment delivered on 18 September 2009 His Honour Deemster Newey QC, as he then was, upheld Montpelier`s claim as to the misuse of the confidential information relating to the nature of the scheme but dismissed all other claims. He also dismissed the Respondents` counterclaims which asserted that any proprietary rights in the scheme belonged to them. Damages were to be the subject of a further hearing.

7. Both Respondents appealed such judgment.

8. On 22 March 2010, after a hearing by this court on a preliminary issue raised by the Respondents as to the admission of further evidence, this court [Tattersall JA and Deemster Sullivan] allowed the admission of such further evidence and remitted the matter back to Deemster Newey for him to reconsider his primary finding of breach of confidence in the light of such further evidence.

9. There was a delay in Deemster Newey reconsidering his primary finding of breach of confidence because since he had delivered his judgment he had been appointed as a Judge of the High Court of England and Wales. Such appointment notwithstanding, there was a further hearing on 27-28 April 2011, after which, in his judgment delivered on 23 June 2011, Deemster Newey maintained his original findings. It thus remained for this court to determine the Respondents` appeals.

The interlocutory appeals

10. However since September 2011 there have been two interlocutory hearings before His Honour Deemster Doyle and His Honour Deemster Melton QC which have given rise to the interlocutory appeals by Montpelier and Mr Gittins which are now before this court. Such appeals require to be determined before we can turn to consider the substantive appeal of the Respondents.

11. At the hearing before this court Mr Benham appeared on behalf of Montpelier and Mr Gittins, Mr Jones represented himself and Mr Wilson QC and Mr Coleman appeared on behalf of Mr Morris.

12. At the conclusion of such hearing the court gave Mr Benham the opportunity to make further written submissions as to the effect of CPR 25.14, which is the English equivalent of Rule 7.29.

13. The history giving rise to such interlocutory appeals may conveniently be summarised thus.

14. In September 2011 Montpelier went into voluntary liquidation. The Respondents were first advised of this when a public notice was issued by Montpelier on 31 August 2011 giving notice of a creditors` meeting of Montpelier on 8 September 2011, the purpose of which was to place Montpelier into voluntary liquidation because it was unable to pay its debts.

15. On 8 September 2011 an Extraordinary General Meeting of Montpelier resolved that Montpelier could not by reason of its liabilities continue trading and would be wound up.

The applications by the Respondents

16. It was in such circumstances that by his application dated 19 September 2011 Mr Morris sought an order, in accordance with section 336 of the Companies Act 1931, for security for costs against Montpelier or its liquidator in the sum of £ 500,000 to be paid into court and an order that in default of such payment into court Montpelier`s claim be stayed without further order and that Mr Morris be at liberty to make an application to strike out Montpelier`s claim. Such sum was calculated on the basis that thus far Mr Morris had expended costs of more than £ 400,000 and that the costs of an enquiry as to damages or account of profits could be a further £ 100,000 or more.

17. For the sake of completeness we record that on 26 September 2011 there was a directions hearing before this court, albeit differently constituted, which was adjourned on the application of Mr George Noble, Montpelier`s Liquidator [`the Liquidator`], who wished to obtain and consider documentation in relation to the judgment of Deemster Newey and to determine thereafter what stance he should adopt in relation to the Respondents` appeals.

18. By his application dated 29 September 2011 Mr Jones made a similar application to Deemster Doyle to that previously made by Mr Morris for an order for security for costs against Montpelier or its liquidator in the sum of £ 300,000.

19. Montpelier resisted such applications for security for costs. In his witness statement dated 2 November 2011 the Liquidator stated that he was currently not in a position to decide whether this litigation `should be adopted and continued with` and that he required to see and consider further documentation before he could make an informed decision on that issue. However, he confirmed that the Estimated Statement of Affairs as at 31 August 2011 revealed a deficiency of £ 2,471,007.

20. By their letter dated 14 November 2011 MannBenham, the Liquidator`s advocates, advised Deemster Doyle and the Respondents that `as a result of a lack of funding the [Liquidator] is not currently in a position to file a skeleton argument and authorities, as required by order of Deemster Doyle made on 6 October 2011` and that `the liquidator is seeking to rectify the funding issue and is currently considering assigning the action to a Third Party`.

An award for security for costs

21. We set out below the court`s jurisdiction to order security for costs but two matters should be noted at the outset of this judgment.

22. Firstly, it is important to recognise that any award of security made by way of payment into court, such as was sought by each of the Respondents, would be returned to Montpelier in the event that Montpelier was ultimately successful, albeit that a court must be careful to ensure that an award of security for costs does not stifle and thereby prevent the pursuit of a genuine claim. In his written submissions to this court Mr Jones complained that Montpelier and/or Mr Gittins wrongly treated the award of security as a draconian penalty.

23. Secondly, where it is contended by a party that an award of security for costs will have the effect of stifling their claim, the onus is on that party `to adduce full, frank and clear unequivocal evidence to support such claim` : see the observations of Deemster Kerruish in *Re World Duty Free Company Limited* [2008] MLR 264, at 286 which agreed with observations of Eady J in *Al-Koronky v Time Life Entertainment Group Ltd* [2005] EWHC 1688 (QB). We accept and adopt such an approach. In this case it was contended by Montpelier that the effect of ordering security for costs would have the effect of stifling their claim and the above onus was thus on Montpelier to adduce the evidence referred to above.

The order made by Deemster Doyle

24. At the outset of the hearing on 22 November 2011 before Deemster Doyle Mr Benham, on behalf of Montpelier, sought an adjournment of the Respondents` application for security for costs on the basis that Mr Gittins had made an offer to have the litigation assigned to him in his personal capacity and that `an assignment of the litigation to Mr Gittins would mean that there would be no requirement for security from the Claimant`.

25. Deemster Doyle refused to grant an adjournment. He noted that the Liquidator had been appointed on 8th September 2011 and concluded thus :

> `27. ...The funding position has still not been finalised. Any delay can only further prejudice the [Respondents]. The liquidator has had an opportunity to `secure funding` and to engage in this litigation and to oppose the applications for security for costs. Mr Gittins or any other potential funder had had adequate time to secure any funding. The last minute production of an unsigned assignment was frankly unsatisfactory and appeared designed to put off, without good cause, a hearing that had been ordered as long ago as the 6th October 2011.
>
> 28. The security for costs applications needed to be dealt with. Valuable court time had been allocated for the hearing. To put them off would have been prejudicial to other litigants and indeed to the Defendants. The liquidator has had a reasonable opportunity of putting in evidence and a skeleton argument in opposition to the security for costs applications and I was not persuaded that the hearing of such applications should be put off.`

26. Having heard the submissions of all parties Deemster Doyle made an order for security for costs against Montpelier.

27. In his determination of the Respondents` applications Deemster Doyle firstly set out the jurisdiction under section 336 of the Companies Act 193, namely that :

> `Where a limited company is plaintiff or pursuer in any action or other legal proceeding, any judge having jurisdiction in the matter may, if it appears by credible testimony that there is reason to believe that the company will be unable to pay the costs of the defendant if successful in his defence, require sufficient security to be given for those costs, and may stay all proceedings until the security is given.`

28. Deemster Doyle also reminded himself that in December 2008 Deemster Newey had rejected an earlier application by the Respondents for security for costs because he was not persuaded that Montpelier would be unable to pay the Respondents` costs if they had been successful in their defence of Montpelier`s claim and that in so concluding Deemster Newey had been influenced by the sworn affidavit evidence of Mr Gittins that Montpelier had net assets of over £1,500,000 as at 31 December 2007, that Mr Gittins contended that Montpelier was well able to meet its debts and obligations as they fell due and that Mr Gittins had deposed :

> `I can assure this Honourable Court that [Montpelier] will do nothing to dispose of its assets, or trade, other than at arm`s length, with any person whether connected to [Montpelier] or otherwise until this litigation is concluded and I will personally guarantee that the net realisable assets of [Montpelier] do not fall below £1.5 million for the same duration.`

29. Deemster Doyle continued thus :

> `47. That was the evidence and the personal guarantee from Mr Gittins before Deemster Newey in December 2008 which plainly influenced Deemster Newey in the decision he made. The evidence before this court in November 2011 is very different. [Montpelier] is in liquidation. Mr Noble was appointed liquidator on the 8th September 2011. No personal guarantee or assignment has been executed. On the face of it Mr Gittins has failed to honour the personal guarantee he gave in his affidavit which he put before Deemster Newey in December 2008.
>
> 48. Mr Noble ... states that `the company is in an insolvent state`. The company is plainly hopelessly insolvent. ... It is plain on the evidence now presented to this court that [Montpelier] is insolvent. No evidence has been adduced that it would be able to pay the costs of the Defendants. Indeed it appears it cannot even pay the costs of its own advocates.
>
> 49. I have considered the evidence now before the court and I have concluded that it appears by `credible testimony` that there is reason to believe that the Claimant will be unable to pay the costs of the Defendants if they are successful in their defence. Indeed Mr Benham on behalf of [Montpelier] accepts as at today`s date that [Montpelier] is insolvent and has no funds to pay any costs order.
>
> 50. I have a discretion to exercise. I take into account the various factors referred to in the statutory provisions, the 2009 Rules and the relevant case law. I am satisfied, having regard to all the circumstances of the case, that it is just to make an order in respect of security for costs and that the relevant applicable conditions have been duly satisfied. I am not satisfied that such orders would stifle genuine claims.

51. The applications for security for costs were not presented with the intention of stifling genuine claims and if granted such orders will not have that effect. Mr Gittins and/or other creditors must put funds forward if [Montpelier] is to continue with the quantum hearing, if the appeals against the judgment on liability are unsuccessful. If funding is put forward the claims will not be stifled by any security for costs orders.

...

54. I am satisfied that there is reason to believe that [Montpelier] will be unable to pay the costs of the [Respondents] if ordered to do so. There is no evidence that the [Respondents] caused the insolvency of [Montpelier]. There has been no undue delay in the making of the applications for security. They were made in the same month as the insolvency of [Montpelier] became public. There is a serious risk of injustice to the [Respondents] if orders are not made. There is presently an appeal pending in respect of the judgment on liability. The appeal should not prevent any applications for security for costs being determined at this stage at first instance. [Montpelier] is plainly insolvent. The [Respondents] are entitled to make applications in an endeavour to protect their positions in respect of costs.`

30. Deemster Doyle then referred to the fact that the Respondents had made payments in and *Calderbank* offers and concluded thus :

`58. I have concluded that sufficient security needs to be given for the costs of the [Respondents] in respect of the first instance proceedings including any steps in respect of the determination of quantum and I have also concluded that if sufficient security is not provided within a time period that I am about to specify that the first instance proceedings, including any steps in respect of the determination of quantum, should be stayed. Sufficient security needs to be given within the next 14 days.`

31. Deemster Doyle thus ordered that :

[1] Montpelier within 14 days pay into court £ 250,000 as security for Mr Jones`s costs of the proceedings at first instance and £ 450,000 as security for Mr Morris`s costs of the proceedings at first instance;

[2] the first instance proceedings, including any steps in respect of determination of quantum, be stayed if Montpelier did not pay such total sum of £ 700,000 into court by 4.00 pm on 6 December 2011 and

[3] the Respondents be not prevented from proceeding with their appeals in respect of judgments on liability.

32. By its Notice of Appeal dated 6 December 2011 Montpelier appealed against such order.

33. Although the grounds of appeal were very detailed, at the heart of such appeal was an application to adduce fresh evidence on the appeal, namely the existence of an Assignment made between the Liquidator and Mr Gittins dated 6 December 2011 `whereby the claim in these proceedings is assigned to Mr Gittins personally and under whose terms Mr Gittins assumes personal liability for all costs orders, whether historic or to be made in the future in the course of these proceedings`.

34. It may be noted that clause 4.3 of such Assignment provided that Mr Gittins covenanted with the Liquidator that he would assume personal liability and indemnify Montpelier and the Liquidator `for all costs orders whether historic or to be made in the future in the course of the proceedings` whether against Montpelier, the Liquidator or Mr Gittins personally.

35. It may be further noted that the original draft of such clause [supplied, inter alia, to Mr Morris annexed to his witness statement dated 12 December 2011] provided that Mr Gittins should `pay by way of loan to [Montpelier] any amount that [Montpelier] may be ordered to pay by way of security for costs` in the proceedings. In his submissions to both Deemster Melton and this court Mr Wilson submitted that the omission of this provision in the assignment as executed clearly demonstrated that the assignment had taken place with a view to avoiding the possibility of a security for costs order being made against Montpelier.

36. The Notice of Appeal recorded that on 22 November 2011 Deemster Doyle had been informed of the intention of the Liquidator and Mr Gittins to agree such an assignment but that the making of such assignment required notice to and the consent of Montpelier`s other creditors. It was contended that such assignment was `critical in that it removes the necessary condition which permitted the court to exercise its discretion to award security for costs` because the claimant was now an individual ordinarily resident in the Isle of Man.

The application by Mr Gittins

37. By an application dated 8 December 2011 Mr Gittins sought an order that he be substituted as the claimant in these proceedings in place of Montpelier pursuant to Rule 3.10 of the Rules of the High Court of Justice [`the Rules`].

38. In his witness statement dated 16 January 2012 in support of such application Mr Gittins explained that :

[1] in September 2010 search warrants had been obtained to search the premises of the Montpelier Group of companies in both London and the Isle of Man;

[2] in doleance proceedings the search warrant issued in the Isle of Man had been quashed because it was conceded that it was unlawful;

[3] the events of September 2010 and the resulting publicity had had an immediate and devastating impact on the business of Montpelier such that it had no subsequent new clients and was no longer trading; and

[4] notwithstanding that the major creditors of Montpelier were other members of the Montpelier Group, it was the act of one creditor which threatened to issue a petition to liquidate Montpelier which led to the decision to place Montpelier into Creditors Voluntary Liquidation on 8 September 2011.

39. Mr Gittins was anxious to emphasise that :

[1] such liquidation was not of the making of Montpelier or himself and that Montpelier `was not manipulated into liquidation to avoid a damages and/or costs order against it in the substantive proceedings`;

[2] prior to the assignment the Respondents faced the prospect of uncertain recovery of any costs award in their favour should their appeals be successful whereas the assignment provides that they can enforce any costs award against him personally and that he had substantial assets both within the Isle of Man and elsewhere worth in excess of £ 20 million. Accordingly he believed that the Respondents` true motive in objecting to the assignment, save on terms as to security for costs, was to stifle the proceedings and to avoid liability;

[3] once the appeal for the security for costs order has been heard, he would arrange for such security to be given

40. For the sake of completeness we add that by a further application dated 16 January 2012 Mr Gittins sought an order that the stay of the first instance proceedings made by Deemster Doyle on 22 November 2011 be temporarily lifted and/or varied so as to enable the application for the substitution of Mr Gittins to be made, heard and determined.

41. On 19 March 2012 this court [Deemster Moran QC and Deemster Roberts] lifted the stay imposed by Deemster Doyle `temporarily and solely for the limited purpose of permitting Mr Gittins to pursue an application to be substituted as the claimant in this action`. At paragraph 7 of its judgment, the court stated that the appropriate time to determine whether any security for costs should be ordered against a non-party and/or whether any conditions should be placed on the substitution of Mr Gittins for Montpelier was when Mr Gittins` application for substitution was determined.

42. In answer to such application for substitution each of the Respondents made application that any order for substitution should be made conditional on Montpelier paying into court the same security for costs which Deemster Doyle had ordered Montpelier to provide.

43. In his application dated 16 May 2012 Mr Morris stated that he considered that the assignment of Montpelier`s cause of action to Mr Gittins was `a mechanism to avoid the requirement that the Ordered security for costs be paid in and had been made with a view to avoiding the requirement for the Ordered security to be paid` and that in such circumstances the court should make an order for security for costs against a non-party, namely Montpelier, in the same sums as those ordered by Deemster Doyle on 22 November 2011 and that, in the event that such sums were not paid into court, the proceedings should be stayed.

44. In his application dated 21 May 2012 Mr Jones repeated such matters and relied on paragraph 6 of the witness statement of the Liquidator dated 16 January 2012 in support of Mr Gittins` application in which the Liquidator made it clear that the purpose of the assignment was to avoid the liability to pay costs orders.

45. After referring to this litigation and advice which he had received from Montpelier`s former advocate, the Liquidator had stated :

`Notwithstanding the helpful advice of [Montpelier`s former advocate] I was in receipt at the same time of troubling advice from MannBenham. That advice was to the effect that as the liquidator I could be exposed to personal liability if I adopted the action in terms of a costs award both future and past. As a liquidator I adopt a clear policy that under no circumstances will I expose myself to any personal liability. I therefore felt that if I was to adopt the proceedings I would need to be fully indemnified by a third party.`

46. The Liquidator went on to refer to advice given by MannBenham that the likely costs of future litigation were up to £ 150,000, that they required such sum to be paid into their client account before they began work, that he had asked Mr Gittins for a loan in order for him to adopt the litigation [his then current incurred costs being £ 44,476.80 exclusive of VAT], that Mr Gittins had rejected his request but had advanced him an unsecured loan of £ 15,000 in respect of the then current fees of MannBenham and that, after communicating with all the creditors in the liquidation, he had entered into the assignment referred to above.

47. By a yet further application dated 21 June 2012 Montpelier and Mr Gittins made an application for disclosure by the Respondents of documentation which it was contended by Montpelier and Mr Gittins would show that the Respondents had participated in the misuse of confidential information until January 2003. Given that the Respondents` case was that there was a misuse of confidential information for only a very limited period of about 6 weeks after the Respondents had commenced to trade independently from Montpelier, such would inevitably have had an important effect on the quantum of damages to which Montpelier would have been entitled pursuant to the judgment of Deemster Newey and the significance of the fact that the Respondents had made payments in and *Calderbank* offers.

The order made by Deemster Melton

48. In his judgment delivered on 26 November 2012 Deemster Melton dismissed the application for disclosure on the basis that in his judgment it would be impossible to reach a clear decision as to which party will eventually succeed in the litigation and that it would not be consistent with the overriding objective to order disclosure at that stage. There is no appeal against such decision, notwithstanding that such an appeal was initially contemplated. It may be recorded that a very substantial amount of time at the hearing before Deemster Melton was taken up by the parties respective submissions as to disclosure.

49. More importantly, for the purposes of this appeal, Deemster Melton further ordered that Mr Gittins be substituted as Claimant and further ordered, pursuant to Rule 7.29 of the Rules, security for costs equivalent to that previously ordered by Deemster Doyle.

50. Deemster Melton dealt with the question of substitution fairly shortly. He stated :

`21. Rule 3.6(4) of the Rules of the High Court of Justice 2009 confers on me the power to order the substitution of a new party for an existing one if the existing party`s interest or liability has passed to the new party and it is desirable to substitute the new party so that the Court can resolve the matters in dispute in the proceedings.

22. The application is not in principle objected to by the Defendants. Instead, they say that I should impose onerous conditions upon Mr Gittins if the substitution is to take place.

23. I grant the application, in the exercise of my discretion. This is because;

a. The appointment of Mr Noble is unchallenged;

b. The validity of the assignment is also unchallenged;

c. The interest of Montpelier has passed to Mr Gittins;

d. It is desirable to substitute Mr Gittins so that the Court can resolve the matters in dispute in the proceedings;

e. I consider that appropriate conditions should attach to the substitution, as set out below.

24. For the avoidance of doubt, this substitution, in my judgment, renders Mr Gittins personally liable for all costs for which Montpelier would have been liable, both past and present.`

51. Deemster Melton then turned to consider what further orders he should make.

52. For these purposes it is important that we should set out the appropriate provisions of the Rules. The Rules provide as follows :

`**7.27 Security for costs**

(1) A defendant to any claim may apply under this Chapter for security for costs of the proceedings.

(2) An application for security for costs must be supported by written evidence.

(3) Where the court makes an order for security for costs, it shall -

(a) determine the amount of security; and

(b) direct the manner in which; and the time within which the security must be given.

7.28 Conditions to be satisfied

(1) The court may make an order for security for costs under rule 7.27 if -

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) either -

(i) one or more of the conditions in paragraph (2) applies, or

(ii) an enactment permits the court to require security for costs.

(2) The conditions are -

(a) the claimant is ordinarily resident out of the jurisdiction;

(b) the claimant is a company or other body (whether incorporated in or outside the Island) and there is reason to believe that it will be unable to pay the defendant`s costs if ordered to do so;

(c) the claimant has changed his address since the claim was commenced with a view to evading the consequences of the litigation;

(d) the claimant failed to give his address in the claim form, or gave an incorrect address in that form;

(e) the claimant is acting as a nominal claimant, other than as a representative claimant under Chapter 6 of Part 3, and there is reason to believe that he will be unable to pay the defendant`s costs if ordered to do so;

(f) the claimant has taken steps in relation to his assets that would make it difficult to enforce an order for costs against him.

7.29 Security for costs other than from claimant

(1) The defendant may seek an order for security for costs under rule 7.27 against someone other than the claimant.

(2) The court may make an order for security for costs against that person if -

(a) it is satisfied, having regard to all the circumstances of the case, that it is just to make such an order; and

(b) that person -

(i) has assigned the right to the claim to the claimant with a view to avoiding the possibility of a costs order being made against him;

(ii) has contributed or agreed to contribute to the claimant`s costs in return for a share of any money or property which the claimant may recover in the proceedings; or

(iii) where the claimant is a company or other corporation, is a person in accordance with those directions or instructions the directors or other persons holding a senior position in the company or corporation are accustomed to act; and

(c) that person is a person against whom a costs order may be made.`

53. Having referred to Rules 7.28 and 7.29 Deemster Melton continued thus :

`27. The [Respondents] say that Rule 7.29 confers a power on the Court to order security for costs to be paid by a non-party, such as Montpelier, provided the conditions set out in 7.29(2) are met. The Claimant says that the conditions set out in Rules 7.27 and 7.28 must also be met before I should consider the conditions set out in Rule 7.29.

28. In my judgment, Rule 7.29 stands alone and when an application is made under that Rule, there is no separate requirement that the conditions set out in Rule 7.28 should also be met. I conclude that I should, therefore, focus on the conditions set out in Rule 7.29 alone, because;

a. Rule 7.29 refers to Rule 7.27 but not 7.28;

b. Rule 7.29(2)(a) would be unnecessary because identical wording appears at Rule 7.28(1)(a);

c. There is no obvious deficiency in Rule 7.29 that requires a search elsewhere for guidance.

29. I then have to consider whether it is just to make such an Order.

30. In my judgment it is and I make such Order. The most important reason is Mr Gittin`s failure to stand by the guarantee he made in 2008. I cannot begin to decide whether he could not afford to do so or whether he was unwilling to do so but the unequivocal nature of the guarantee and the very significant 2011 indebtedness to other companies in the group means that there must exist at the very least a real concern that if the [Respondents] do succeed in this litigation, any costs orders they may obtain will be of no value to them. I reach this view even though Mr Gittins is domiciled here.

31. The other factors which inform the exercise of my discretion largely reflect those that informed the decision of Deemster Doyle. They are as follows.

32. Mr Gittins is a man of considerable wealth who will not be stifled in this litigation by the order I intend to make.

33. It is impossible for me to form any judgment as to who will ultimately succeed in this litigation. ...

34. I do not ignore the judgment that [Montpelier] has in its favour but this does not weigh decisively in the balance.

35. It also weighs against an Order for security for costs that Mr Gittins is ordinarily resident on the Isle of Man and now stands in the shoes of Montpelier, with all the potential personal costs liabilities that such a position entails. On the other hand, all the parties in this litigation are financially and fiscally astute and none will be happy to pay over money to any of the others. Mr Gittins resident status also weighs in the balance but not decisively so.

36. I ignore completely the vindictive personal criticisms that are made by the parties against the others.

37. I see no good reason to deviate from the sums ordered to be paid by Deemster Doyle`.

54. So it was that Deemster Melton ordered, inter alia, that Mr Gittins be substituted as Claimant in the proceedings in place of Montpelier, that Montpelier should pay into court in respect of security for costs for both Respondents a total sum of £ 700,000 by 4.00 pm on 11 January 2013 and that all further proceedings at first instance be stayed until security was given.

55. The sums ordered by Deemster Melton to be paid into court as security for the Respondents` costs were not paid into court.

Montpelier`s appeal against the order of Deemster Melton

56. By its Notice of Appeal dated 8 November 2012, as amended by the order dated 10 December 2012, Montpelier appealed against the order for security for costs. Its Grounds of Appeal stated :

`The Deemster was wrong in law in his application of r 7.29 of the High Court Rules in ordering security for costs in the sum of £ 700,000 against Montpelier in that:

I. The Deemster made no reference to the requirements of r 7.29(2)(b)(i), (ii) and (iii);

II. R 7.29(2)(b)(ii) and (iii) cannot apply to [Mr Gittins] or to Montpelier;

III. R 7.29(2)(b)(i) requires that Montpelier has assigned the Claim to Mr Gittins with a view to avoiding the possibility of a costs order being made against it. Deemster Melton QC made no finding of fact in respect of this and there was no evidence presented to show this to be the case. R 7.29(2)(b)(i) has not therefore been made out and the Deemster went beyond his power in ordering security for costs against Montpelier;

IV. Deemster Melton QC erred in law and/or in the exercise of his discretion in finding that it was just in all the circumstances to make an order for security for costs against Montpelier in that:

i. Deemster Melton QC found as a fact that Mr Gittins `is a man of substantial means and could support the litigation` and that `is a man of considerable wealth who will not be stifled in this litigation by the order I intend to make`.

ii. Accordingly the Deemster found that Mr Gittins has the means to support the litigation;

iii. It follows that Mr Gittins would be able to pay any costs ordered against him should the court find in favour of the [Respondents].

iv. It must follow that the [Respondents] are not in a worse position than they would have been had Mr Gittins initiated these proceedings.

v. Further, the Deemster erred in finding at paragraph 35 of his judgment that: `[i]t also weighs against an order for security for costs that Mr Gittins is ordinarily resident on the Isle of Man and now stands in the shoes of Montpelier, with all the potential personal costs liabilities that such a position entails. On the other hand, all the parties in this litigation are financially and fiscally astute and none will be happy to pay over money to any of the others`. The Deemster`s judgment erred in law and/or fact in considering that the wealth of Mr Gittins is relevant to
the position of Montpelier and the justice of making an order. In doing so the Deemster attempts to pierce the corporate veil of Montpelier and in effect make an order for security for costs against Mr Gittins. The Deemster went beyond his power in doing this.

V. Montpelier is an insolvent company. The Deemster erred in law and/or fact in concluding that an order for security for costs against Montpelier would not stifle the litigation. An order for security for costs together with an order that the proceedings be stayed failing payment of such security will stifle the claim as Montpelier has no funds to pay such security for costs.

VI. Given the facts as set out in the judgment, an order for security for costs against Montpelier is in fact a back door attempt to order security for costs against Mr Gittins which the court has no power to do.`

57. By way of cross-appeal Mr Morris submitted that in his order made on 27 November 2012 Deemster Melton erred in that he did not expressly make the provision by Mr Gittins of such security for costs a condition of his substitution for Montpelier. He thus sought an order that in addition to the security for costs ordered against Montpelier under Rule 7.29 of the Rules there should also be a condition placed on the substitution of Mr Gittins for Montpelier, namely that unless the sum of £ 700,000 was paid into court by Mr Gittins within 14 days of the substitution being made, the proceedings should be stayed.

The role of an appellate court in reviewing an exercise of discretion

58. It is common ground that in ordering security for costs, both Deemster Doyle and Deemster Melton were exercising a discretion. In such circumstances it is thus important that we remind ourselves of the reviewing role of this court in such a context.

59. In *Kyrgyz Mobil Tel Limited & Others v Fellowes International Holdings Limited & Others* [2008] MLR 614, at 689, this court, albeit differently constituted, in the context of the reviewing role of the exercise of a discretion by a judge at first instance, stated :

`284. … In *Eurotrust International Limited v Barlow Clowes International Limited & Others* [1996-1998] MLR 394 this court referred to the judgments of Cantley JA in *Highway & Transportation Board v Johnson* [1961-71] MLR 92, where, at 94, he stated :

`It is not enough that I should be satisfied that I would have chosen a different course from that chosen by the judge of first instance, for two different ways of exercising a discretion may represent a perfectly legitimate choice between minds equally applying themselves to all relevant circumstances. Before I can interfere with the exercise of the discretion of the judge of first instance in an interlocutory appeal of this nature, I must be clearly satisfied that the way in which he exercised his discretion was wrong. I go further and I would say that, even if I thought that one or more of the reasons leading the judge to the particular decision which he made was wrong, I must still not reverse his decision unless I think the decision itself was wrong`

and Griffiths LJ in *Eagil Trust Co Ltd v Pigott-Brown* [1985] 3 All ER 119 where, at 121, he stated :

`The House of Lords has in a series of recent decisions reminded this court that its function is to review the exercise of the judge`s discretion and not to entertain an appeal from it in the sense of being invited to substitute its own discretion for that of the judge.`

285. In *Eurotrust International* at 408, this court concluded thus :

`We have reviewed the relevant authorities in England and are satisfied that for this court to interfere with the exercise of any judicial discretion it must be shown that the judge at first instance exercised his discretion under a mistake of law [*Evans v Bartlam* [1937] AC 473] ; or misapprehension of the facts [*Young v Thomas* [1892] 2 Ch 134] ; or in disregard of principle [*Young v Thomas*] ; or that he took into account irrelevant matters [*Egerton v Jones* [1939] 2 KB 702] ; or failed to exercise his discretion [*Crowther v Elgood* (1887) 34 Ch D 691] or that the conclusion which the judge reached in the exercise of his discretion `exceeded the generous ambit within which a reasonable disagreement is possible` and was thereby plainly wrong so that the only legitimate conclusion was that he had erred in the exercise of discretion [*G v G* [1985] 1 WLR 647]. In all of such circumstances, it is the duty of this court to substitute its own decision for that of the judge at first instance, but otherwise it should not interfere with the exercise of a judicial discretion.`

286. Such dicta have been consistently approved and applied by this court : see *Re Law Investments Ltd* [2005-07] MLR 1.

287. In *Roache v News Group Newspapers Ltd* [1998] EMLR 161, at 172, Stuart-Smith LJ [echoing dicta of Griffiths LJ in *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 WLR 394, at 403] referred to the concept of `plainly wrong` as where the `decision is wholly wrong because the court is forced to the conclusion that [the judge] has not balanced the various factors fairly in the scale`. Such dicta were endorsed by Lord Woolf MR in *AEI Rediffusion Music Ltd v Phonographic Performance Ltd* [1999] 1 WLR 1507, at 1523.

288. In this respect Manx law is no different to English law.`

60. This court has subsequently consistently applied such dicta.

Determination of the appeals

61. We firstly consider the appeal against the order made by Deemster Doyle.

Deemster Doyle`s order

62. As hereinafter appears, in reality the order made by Deemster Doyle has been overtaken by the order made by Deemster Melton because it is by that latter order that Mr Gittins was substituted for Montpelier and Montpelier was ordered to pay a total of £ 700,000 into court as security for the costs of both Respondents and that in default of such payment into court the proceedings should be stayed. Such reality notwithstanding, we will first consider the order made by Deemster Doyle.

63. In support of Montpelier`s appeal Mr Benham made a number of submissions which can conveniently be summarised thus.

64. Firstly, Mr Benham submitted that the court should set aside the order in its entirety on the basis that Deemster Doyle`s order was made pursuant to Rule 7.28(2)(b) and that in the light of the fresh evidence, namely the Deed of Assignment between Montpelier and Mr Gittins, such an order could not now be made since an order could not be made against Mr Gittins under Rule 7.28(2)(b) and that none of the other conditions specified in Rule 7.28(2) were met. Allied with this submission was Mr Benham`s second submission that Deemster Doyle erred in refusing to grant the adjournment sought. These were Mr Benham`s primary submissions which it is convenient to consider first.

65. These primary submissions starkly raised the issue of whether it is appropriate to allow fresh evidence of the Deed of Assignment to be adduced on this appeal and/or whether Deemster Doyle was entitled to refuse to grant the adjournment sought by the Liquidator.

66. In this context it is crucial to emphasise the circumstances in which Deemster Doyle refused to grant the adjournment sought by the Liquidator.

67. Mr Morris had made his application on 19 September 2011, very soon after his discovery that there was to be a creditors` meeting of Montpelier, and Mr Jones made his similar application soon thereafter. Some two months had elapsed between Mr Morris making his application and Deemster Doyle`s determination of such application.

68. Although on 22 November 2011 the Liquidator sought an adjournment of the security for costs application because Mr Gittins had offered to enter into an assignment whereby the litigation was assigned to him, such an assignment could have been entered into prior to the hearing before Deemster Doyle if Mr Gittins had wished this to happen. Moreover, at the date of such hearing there was no guarantee that there would in fact be an assignment of Montpelier`s cause of action to Mr Gittins subsequently.

69. Although Mr Benham submitted that the dismissal of the Liquidator`s application for an adjournment was `an irrational and unjustified exercise of discretion` which was borne out by the fact that the Deed of Assignment was completed within the 14 days contemplated by the Liquidator, we reject this submission. We are satisfied, as we believe was Deemster Doyle, of three fundamental matters. Firstly, that the Deed of Assignment could have been executed prior to the hearing on 22 November 2011 if the Liquidator and Mr Gittins had so wished. Secondly, that at the time of the hearing before Deemster Doyle there was no guarantee that any such Assignment would in fact be executed : it was a mere hope that it might be executed. Thirdly, that at the very least the Assignment was executed only at a time when it could be deployed to bolster the prospects of a successful appeal by Montpelier against the orders for security for costs which had been made in

favour of the Respondents and against the order for the consequential stay of the proceedings if the ordered security for costs was not paid into court : in this context it may be noted that Deemster Doyle himself held [at paragraph 27] that the production of the unsigned assignment appeared designed to prompt an adjournment of a hearing fixed almost 7 weeks earlier.

70. Faced with such an application by the Liquidator for an adjournment, we are satisfied, having regard to the prejudice which would be suffered by his refusal to determine the Respondents' applications for security for costs forthwith, that, in the exercise of his discretion, it was almost inevitable that Deemster Doyle would decline to grant an adjournment. However, in any event we are satisfied that it was a decision which, in the exercise of his discretion, Deemster Doyle was entitled to make and we are thus not persuaded that Deemster Doyle erred in declining to adjourn the hearing.

71. We entirely agree with and adopt the reasoning expressed by Deemster Doyle in paragraphs 27 and 28 of his judgment set out above. Montpelier and/or Mr Gittins had had the opportunity to secure funding to resist the application for security for costs or to execute the Deed of Assignment but had not done so. In our judgment, it inevitably follows that neither could therefore justifiably criticise Deemster Doyle for proceeding to determine the Respondents' applications on the factual basis which existed at the date of the hearing.

72. In such circumstances, notwithstanding that there was no objection to the admission of such fresh evidence, we thus do not believe that for the reasons given by Deemster Doyle it would be either fair, just or equitable to allow Montpelier to rely on the fresh evidence of the Deed of Assignment and thereby to allow Montpelier to oppose the Respondents' applications in a manner which had not been argued before Deemster Doyle.

73. On a number of occasions this court has had to consider the circumstances in which it should allow a party to raise a new point on an appeal to this court. Such circumstances were conveniently summarised by this court in *Templeton Insurance Ltd v Booth and VISP Ltd* [2010] MLR 97, at 124, where it stated :

> 'This court has repeatedly stressed the dangers of an appellate court focusing on a point not taken below and determined that new points not argued below should not be permitted to be taken on appeal except in exceptional circumstances : see *Mannin Management Services v Ward* [8th January 1999] and *Hinchliffe v Barnett* [1999-01] MLR N6. We now re-affirm such an approach.'

74. This court re-affirmed such an approach in *Petrodel v Le Breton* [20 July 2012].

75. In our judgment the particular facts of this case do not give rise to exceptional circumstances in which this court should adopt a different approach.

76. In the absence of an adjournment, in our judgment it was inevitable that Deemster Doyle would make an order for security for costs against Montpelier. We note that there seems to have been no debate as to the principle or quantum of such security or that the proceedings should be stayed in the event of non-compliance with the order for security. We note that in his written submissions to this court Mr Benham himself conceded that section 336 of the Companies Act 1931 and the condition set out in Rule 7.28(2)(b) were met in this case.

77. In addition to his primary submissions described above, Mr Benham also made a number of further submissions in which he contended that, as a matter of law, Deemster Doyle wrongly exercised his discretion in making the orders for security which he made against Montpelier. Such submissions included the matters which we set out below. In determining the merits of such submissions we have had regard to the transcript of the hearing before Deemster Doyle.

78. Firstly, Mr Benham submitted that Deemster Doyle failed to adequately address the likelihood that a costs order would be made against Montpelier by failing to properly analyse offers of settlement made by the Respondents and by failing to conclude that Montpelier's claim was highly likely to succeed.

79. We reject this submission. Montpelier was well aware of when and to what extent offers of settlement had been made by the Respondents, as was Deemster Doyle. More importantly, at the hearing below Mr Benham made no attempt to analyse in any detailed way the likely impact of the Respondents' offers of settlement beyond identifying the different contentions advanced by Mr Gittins [namely, that Montpelier was likely to be awarded damages of £ 1,500,000] and by the Respondents [namely, that the likely award was £ 60,000] and contending that Mr Gittins believed that his assessment of the quantum of recoverable damages 'must be right'. Indeed in argument Deemster Doyle himself [at page 41 of the transcript] expressly raised the issue that the Respondents' case was that, even if their appeal on liability was unsuccessful, since they had made significant payments into court and/or *Calderbank* type offers, Montpelier's recoverable damages would not exceed such payments in and/or offers so that there would be costs orders made against Montpelier. To this argument Mr Benham responded only that no one was in a position to determine who was correct as to the likely quantum of recoverable damages.

80. Secondly, Mr Benham submitted that in reaching the decisions which he did Deemster Doyle appeared to place some reliance on the fact that on a previous application for security for costs by the Respondents Mr Gittins had undertaken that Montpelier's assets would not fall below £ 1.5 million and that, by reason of its liquidation, in some way Mr Gittins had 'failed to honour his personal guarantee' when there was in reality no guarantee given by Mr Gittins : such 'undertaking' was merely part of the evidence weighed by Deemster Newey in deciding to reject the application.

81. Whilst we accept that Deemster Doyle did place reliance on Mr Gittins' previously expressed undertaking, we are satisfied that he was entitled to do so in the then different context where Montpelier was in liquidation with an estimated deficiency of almost £ 2,500,000 and Mr Gittins had not only failed to comply with such undertaking but had also, as yet, declined to execute a personal guarantee or assignment in favour of Montpelier.

82. Thirdly, Mr Benham submitted that Deemster Doyle failed to take into account that the Respondents had made a counterclaim against Montpelier which had been dismissed by Deemster Newey and that in such circumstances security for costs might be inappropriate in that it would merely hamper Montpelier's conduct of its case whilst offering no such disadvantage to the Respondents in the pursuit of its counterclaim. Whilst we accept that in some cases it may be appropriate to reduce the amount of security ordered by quantifying the proportion of costs attributable to the counterclaim, Montpelier did not choose to make any such submission to Deemster Doyle. It may well not have done so because it recognised that the counterclaim was simply a response to its claim and not wholly independent of it.

83. Fourthly, Mr Benham submitted that Deemster Doyle erred in concluding that security for costs would not stifle Montpelier's claim against the Respondents, part of which had been upheld by Deemster Newey.

84. Although we do accept that before Deemster Doyle Mr Benham submitted that the effect of ordering security would be to stifle the claim, we reject this submission. It ignores the fact that both the Liquidator and Mr Benham conceded that Montpelier was insolvent [in fact we agree with Deemster Doyle's own assessment that Montpelier was 'plainly hopelessly insolvent'] and had no funds to pay any costs order and indeed could not even pay its own advocate's costs. Moreover, we do not accept that the Respondents' applications were made with the intention of stifling genuine claims made by Montpelier or that, given the financial position of Mr Gittins, they would have had that effect. Although, as explained above, it was for Montpelier to adduce 'full, frank and clear and unequivocal evidence' to support its claim, in our judgment Montpelier failed to adduce such evidence.

85. Fifthly, Mr Benham submitted that the quantum of the security ordered by Deemster Doyle was manifestly excessive. For example, he submitted that as a litigant in person Mr Jones could only claim a fraction of the hourly rate properly claimable by Mr Morris, who was represented by an advocate. Having read and considered the transcript of the hearing before Deemster Doyle, we note that, save for the matters referred to above, no discrete submissions were made by Mr Benham as to the amount of the security which it was appropriate to order against Montpelier and in our judgment it is inappropriate to allow submissions as to quantum which were not raised below to be raised on this appeal.

86. Finally, Mr Benham submitted that Deemster Doyle's exercise of his discretion to award security in the sums ordered was in breach of his duty, pursuant to the overriding objective, 'to dispose of cases justly'. This issue was never raised by Mr Benham below. In any event we are satisfied that the orders made by Deemster Doyle did in fact comply with the overriding objective of enabling the court to deal with cases justly and we note that Rule 1.2(2)(d) requires the court to ensure that a case is dealt with 'expeditiously and fairly' and that Rule 1.2(2)(e) requires the court to allot to a case an appropriate share of the court's resources.

87. We remind ourselves that although Mr Morris and Mr Jones had sought orders for security for costs of £ 500,000 and £ 300,000 respectively, Deemster Doyle ordered that there should be security for costs of £ 450,000 and £ 250,000 respectively.

88. For these reasons we thus dismiss Montpelier's appeal against the order made by Deemster Doyle.

89. We now turn to consider the appeal of Montpelier against the orders made by Deemster Melton and Mr Morris's cross-appeal in relation to Mr Gittins.

Deemster Melton's order

90. It will be remembered that Deemster Melton in fact made two orders : firstly, that Mr Gittins be substituted as claimant in place of Montpelier; and secondly that Montpelier should pay into court a total of £ 700,000 by way of security for the Respondents' costs.

91. The first issue was in essence uncontroversial because, save for contending that the substitution of Mr Gittins for Montpelier should be on terms as to the provision of security for costs, the Respondents did not object to such substitution. The Respondents adopt the same stance on this appeal and there is no appeal by Mr Gittins on such issue. It is thus unnecessary to consider the question of substitution.

92. As to the making of orders for security for costs, before Deemster Melton Mr Benham made two principal submissions.

93. Firstly, Mr Benham made extensive submissions as to the relationship between Rule 7.29 on the one hand and Rules 7.27 and 7.28 on the other hand. Although it was the Respondents' case that Rule 7.29 conferred a free standing power to award security for costs to be paid by a non-party provided that the conditions set out in Rule 7.29(2) were met, Mr Benham submitted that before a court could award security for costs not only must the conditions set out in Rule 7.29(2) be met but also the conditions set out in Rules 7.27 and 7.28 must be met. In particular he relied on the condition set out in Rule 7.28(2)(a) that the claimant is ordinarily resident out of the jurisdiction and further contended that no other condition in Rule 7.28(2) could apply in this case.

94. Deemster Melton rejected such submission : see his reasoning for so doing set out in paragraph 28 of his judgment at paragraph 53 above.

95. In our judgment Deemster Melton was correct to reject the approach contended for by Mr Benham. In our judgment Rule 7.27 having provided a framework in which security for costs may be ordered, Rule 7.28 [although it does not expressly say so] determines whether on the particular facts of a case a defendant may obtain security for costs against a *claimant* and all the conditions in Rule 7.28 refer to a 'claimant' whereas Rule 7.29 determines whether a defendant may obtain security for costs from *someone other than a claimant*. That is why both Rules 7.28 and 7.29 begin with the same words, namely 'The court may make an order for security for costs under Rule 7.27 if ...'. We note that Rule 7.30 makes provision for security for costs of an appeal.

96. We can see no reason in principle why an order for security for costs under Rule 7.29 [or indeed for that matter Rule 7.30] may only be made if the conditions set out in Rule 7.28 are also met : in short Rule 7.29 is not subject to Rule 7.28. Neither can we see that such an approach is justified in practice or by the plain reading of Rule 7.29. We have no doubt that Deemster Melton was correct to adjudge that Rule 7.29 conferred a free standing jurisdiction.

97. Moreover, we note that a potential mischief which Rule 7.29(2)(b)(i) is aimed at is the possibility of a cause of action being assigned to a person against whom a security for costs order could not be made, such as a person who is not ordinarily resident out of the jurisdiction. We agree with Mr Wilson that if Rule 7.29 were subject to Rule 7.28, such mischief would be permitted because of Rule 7.29's subservience to Rule 7.28.

98. Secondly, Mr Benham made fairly fleeting submissions as to the effect of Rule 7.29(2)(b)(i) in that he submitted that an order for security for costs is not a 'costs order' within the meaning of such Rule : he contended that a 'costs order' is simply an order for costs.

99. Deemster Melton does not appear to have determined such submission in his judgment.

100. We reject this second submission of Mr Benham. Although we agree that a 'costs order' can include an order for costs, Rule 7.29(2)(b)(i) in fact refers to the avoidance of 'the possibility of a costs order being made' and we are satisfied that in the context of such Rule the words 'costs order' should be given a wider meaning to include a security for costs order. Although we can find no decided authority which supports such a construction we are satisfied that such a purposive construction of Rule 7.29(2)(b)(i) is necessary to give proper effect to the purpose underlying Rule 7.29.

101. As appears from Montpelier's Grounds of Appeal as set out in paragraph 56 above, Montpelier's Grounds of Appeal which were ventilated in this court were far more extensive. Such Grounds of Appeal may conveniently be summarised thus.

102. Firstly, it was submitted that in making the order for security, although Deemster Melton concluded that in all the circumstances of the case it was 'just to make such an order', as was required by Rule 7.29(2)(a), he made no reference to either the additional conditions set out in Rule 7.29(2)(b) or the requirement that the person against whom an order for security for costs was made was 'a person against whom a costs order may be made' as required by Rule 7.29(2)(c).

104. As to the conditions set out in Rule 7.29(2)(b), it is correct that Deemster Melton did not identify which of the conditions set out in Rule 7.29(2)(b) had been met.

105. However, it is abundantly clear from the transcript of the hearing before Deemster Melton that he well understood that in order to make an order for security against Montpelier under Rule 7.29 he had to be satisfied of all three conditions set out in Rule 7.29(2)(a), (b) and (c) and that in respect of Rule 7.29(2)(b) the only condition which Mr Wilson had submitted was met was that that contained in Rule 7.29(2)(b)(i), namely that Montpelier had assigned the right to the claim to Mr Gittins with a view to avoiding the possibility of a costs order being made against it. In such circumstances, we are satisfied that in making the orders for security for costs which he did, Deemster Melton accepted that the condition set out in Rule 7.29(2)(b)(i) was met. Whilst we note that the Deed of Assignment did not expressly record that the claim had been assigned for the purpose of avoiding the possibility of a costs order being made against Montpelier or the Liquidator, we do not find such omission surprising or particularly significant. Neither do we accept, as was submitted by Mr Benham, that in this context it was significant that the Deed of Assignment expressly provided that Mr Gittins assumed a personal liability for costs and agreed to indemnify Montpelier and the Liquidator against orders for costs. Per contra, but for such Deed of Assignment Montpelier would have been liable for orders for costs and the Deed of Assignment avoided such possibility.

106. Moreover, as Mr Benham correctly observed, it is plain that neither of the conditions set out in Rule 7.29(2)(b)(ii) or (iii) were met on the particular facts of this case.

107. If we were wrong to so conclude and it fell to this court, exercising its own judgment afresh as to whether there should be orders for security for costs, we would have been satisfied on the evidence before Deemster Melton that Montpelier had assigned the right to the claim to Mr Gittins with a view to avoiding the possibility of a costs order being made against it.

108. As to Rule 7.29(2)(c) we are satisfied that in all the circumstances of this case Montpelier constituted a 'person against whom a costs order may be made'.

109. Secondly, it was submitted that Rule 7.29(2)(b)(ii) and (iii) could not apply to Montpelier or Mr Gittins.

110. Such submission is uncontroversial. All the submissions before Deemster Melton related to Rule 7.29(2)(b)(i).

111. Thirdly, it was submitted that although Rule 7.29(2)(b)(i) required that Montpelier had assigned its claim to Mr Gittins with a view to avoiding the possibility of a costs order being made against it, Deemster Melton made no finding of fact to that effect. Moreover Mr Benham submitted that it was the Liquidator who had assigned the claim to Mr Gittins and not Montpelier.

112. In this context it should be remembered that the Respondents' case, as put by both Mr Wilson QC and Mr Jones, was that Montpelier had assigned the claim against the Respondents to Mr Gittins with a view to avoiding the possibility of a costs order being made against Montpelier and to avoid the need to provide the security for costs which Deemster Doyle had ordered it to provide. Mr Wilson also relied on the observations of the Liquidator set out at paragraph 45 above to demonstrate that the purpose of the Assignment, or at the very least one of the purposes, was to avoid his exposure to personal liability.

113. Although we accept that Deemster Melton made no express finding as to the condition set out in Rule 7.29(2)(b)(i), we repeat what we have already said. We are satisfied that having set out the relevant Rules in his judgment and having heard argument from all parties on that discrete issue, there can be no doubt that Deemster Melton was satisfied that such condition was met.

114. As to the issue of by whom the claim was assigned to Mr Gittins, we are satisfied that the Liquidator assigned the claim on behalf of Montpelier and that for the purposes of Rule 7.29(2)(b)(i) Montpelier is to be treated as the assignor of the claim.

115. Fourthly, it was submitted that Deemster Melton QC erred in law and/or in the exercise of his discretion in finding that it was just in all the circumstances to make an order for security for costs against Montpelier. In particular he criticised Deemster Melton's findings that Mr Gittins was a person of substantial means who could support the litigation and that the order for security for costs made against Montpelier would not therefore stifle the litigation.

116. We do not think that this submission adds anything. Moreover, given that it was Mr Benham's case that Mr Gittins was a man of substantial means who could support the litigation, we are surprised that he should seek to criticise Deemster Melton for so finding or that in such circumstances it could sensibly be contended that the security for costs ordered by him could possibly stifle the litigation. In our judgment there was no evidence that, if he so wished, Mr Gittins could not himself provide Montpelier with the security which it had been ordered to pay.

117. Fifthly, relying on *Eurocross Sales Ltd v Cornhill Insurance Plc* [1995] 1 WLR 1517, it was submitted that the Respondents were not in a worse position than they would have been had Mr Gittins

initiated these proceedings from the outset and that the order for security for costs made against Montpelier was simply an illegitimate way of making an order for security against Mr Gittins which the court had no power to make.

118. We reject this submission. Our reasoning for so doing may be summarised thus. Firstly, although in *Eurocross* the Court of Appeal recognised the possibility of abuse if the practice of impecunious companies assigning claims to penniless directors who could litigate without giving security became prevalent and determined that safeguards must be found in other ways such as the amendment of rules of court, such approach was not approved by the House of Lords in *Norglen Ltd v Reeds Rains Prudential Ltd* [1999] 2 AC 1.We thus do not regard the reasoning in *Eurocross* as persuasive. Secondly, we believe that such submission is founded on a false premise in that the Respondents have defended Montpelier`s claim thus far on the basis that Montpelier was financially able to meet adverse orders as to costs and that the assignment of its claim to Mr Gittins, against whom no security can be ordered as claimant, might therefore result in grave injustice. Thirdly, both *Eurocross* and *Norglen* were decided at a time when there was no equivalent of Rule 25.14(2)(b)(i) of the Civil Procedure Rules which now provides a means by which security for costs can be obtained against the assignor of a cause of action. Fourthly, there has recently been a change in the Rules and in our judgment the application of Rule 7.29 now determines the circumstances in which security for costs may be ordered against a person other than the claimant. In this context we note that the English Supreme Court Practice introduces CPR 25.14(1), the English equivalent of Rule 7.29, with the words `The subject matter of this rule is new. It supplies the lacunae in the previous rules which were identified in *Eurocross* ...`. Fifthly, on the application of Rule 7.29 we are satisfied that Montpelier, having commenced these proceedings but now being unable to pay its debts, was rightly ordered to provide security for costs.

119. Sixthly, it was submitted that the effect of paragraph 35 of Deemster Melton`s judgment and the consideration of Mr Gittins` wealth was to pierce the corporate veil of Montpelier.

120. We do not agree. Deemster Melton`s order that Montpelier should give security for costs simply followed from the application of Rule 7.29 to the facts of this case.

121. Accordingly, for the reasons set out above we thus dismiss Montpelier`s appeal.

122. In the light of our dismissal of Montpelier`s appeal it is unnecessary for this court to determine Mr Morris`s cross-appeal. The effect of the dismissal of Montpelier`s appeal will have the same effect as if Mr Gittins himself had been ordered to provide security for costs. Indeed Mr Wilson himself recognised that provided that there continued to be a stay of further proceedings until security was provided the cross-appeal might be said to be academic.

123. However, it is important that we should record that we reject Mr Benham`s submission that the cross appeal was out of time, given that it was an appeal against an order made by Deemster Melton on 27 November 2012.

124. For these reasons we dismiss both Montpelier`s appeal and Mr Morris`s cross-appeal.

Conclusion

125. It thus follows that both appeals and Mr Morris`s cross-appeal are dismissed.

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