

IN THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

MONTserrat
CASE MNIHCV2021/0011

BETWEEN

OFFICE OF THE PREMIER OF MONTserrat	CLAIMANT
AND	
BERTRAND BURKE and JENNIFER BURKE	
Trading as JENNY TOURS	DEFENDANTS

APPEARANCES

Ms Renee Morgan for the Claimant.

Mr David Dorsett for the Defendants.

2021: NOVEMBER 29

RULING

On costs on discontinuance

- 1 **Morley J:** Application is made by Counsel Dorsett for the Defendants Bertrand and Jennifer Burke to receive costs of \$17637.38ec following discontinuance filed by Counsel Morgan on 22.11.21. The claim was for \$304441.74ec for monies allegedly unaccounted to the Government of Montserrat (GOM) between January 2018 and March 2020 while the Burkes¹ ran the ferry between Montserrat and Antigua, said to amount to breach of contract, following a special investigation in October 2020 by the internal audit unit of the Montserrat Ministry of Finance. The costs are 'prescribed', calculated mechanistically against the value of the claim and are not put

¹ The parties will be referred to as such where arising for ease of reading and no disrespect is intended by not writing out titles, full names and the legalese of whether claimant or defendant.

as the sum by which the Burkes are 'out of pocket' for paying fees to Counsel Dorsett. The purpose of this ruling is to decide what if any costs Counsel Dorsett can justly claim.

2 The claimant in this file MNIHCV 2021/0011 has been given the nomenclature 'Office of the Premier'.

- a. The reason seems because the ferry contract signed on 27.06.19 with the defendants was expressed to be with the 'Government of Montserrat', whose agent was Daphne Cassell signing as a member of the 'Office of the Premier', noting government departments expressed as ministers or ministries have in the past been claimants, thinking the office akin to a ministry.
- b. Counsel Dorsett filed argument an entity expressed as an 'office' cannot be a legal person and sought strike out.
- c. After consideration, though Counsel Morgan submits the legality of the entity arguable, and in addition could seek amendment to add the Attorney General as a claimant to the existing action, nevertheless to avoid interlocutory appeal causing delay on a technical point, she has refiled the action on 01.10.21 as claim MNIHCV 2021/0025 where the claimant is without complication nor possible complaint, and as more traditional simply the 'Attorney General' (AG).
- d. As the action has merely changed file-number and claimant-name, so that the discontinuance of file 11/21 is just to save unnecessary technical argument in the Court of Appeal, or elsewhere, being not remotely substantive, nor going to the merits of the action, which remains as claim 25/21 identical in nature and detail, Counsel Morgan argues the costs claim inappropriate, being an attempt to garner an unjustifiable 'windfall' from an overly strict application of the civil procedure rules **CPR 2000**, recalling at all times the overriding objective is to deal with cases justly.

3 Turning to the history of proceedings:

- a. On 10.06.21, Counsel Morgan sought permission to serve claim 11/21 outside the jurisdiction of Montserrat, namely in Antigua, and by email, which was granted in court on 25.06.21.

- b. On 23.09.21, not filing a defence, Counsel Dorsett filed for strike out (or summary judgment), with supporting submissions seeking the \$17637.38^{ec} costs, calculated under **rule 65.5 CPR 2000** as 45% of prescribed costs on a claim valued at \$304441.74^{ec}, which on the same date led to Counsel Morgan filing amendment of the claim to add the AG.
- c. On 01.10.21, during discussion in court, Counsel Morgan argued claim 11/21 valid, even if not amended, while Counsel Dorsett argued it cannot be amended if strike out has been filed and further pressed the claimant was not a legal entity. It was very clear substantial delay would follow, whatever happened, by reason of appeal, by either party. Moreover, Counsel Dorsett further wanted to argue that if file 11/21 was discontinued, it would be abusive of the court's process to resurrect the claim under a fresh file-number with the AG as claimant. And of course he wanted the costs. In sum, arguably for want of using the wrong words to articulate the claimant in claim 11/21, Counsel Dorsett suggested he was entitled to a seeming windfall and the claim could never be pursued. Later in the day, Counsel Morgan then filed claim 25/21, which now sat parallel to claim 11/21.
- d. On 02.11.21, Counsel Dorsett again pressed his argument, complaining Counsel Morgan had not discontinued claim 11/21 before knowing if costs would be awarded, as if seeking a *Goodyear* direction in criminal proceedings. The proceedings were adjourned for submissions, which were filed by Counsel Morgan on 16.11.21 and countered immediately the same day 16.11.21 by Counsel Dorsett.
- e. Discontinuance of claim 11/21 was filed on 22.11.21.
- f. Argument was heard orally during 2.25hrs on 23.11.21, with this ruling set for today 29.11.21.

The legal framework

- 4 As to the legal framework, costs on discontinuance appear governed by **rules 1, 37 and 64** of the **CPR2000**, which read, as relevant:

1.1

(1) The overriding objective of these Rules is to enable the court to deal with cases justly.

(2) Dealing justly with the case includes –

- (a) ensuring, so far as is practicable, that the parties are on an equal footing;
- (b) saving expense;

- (c) dealing with cases in ways which are proportionate to the –
 - (i) amount of money involved;
 - (ii) importance of the case;
 - (iii) complexity of the issues; and
 - (iv) financial position of each party;
- (d) ensuring that it is dealt with expeditiously; and
- (e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

1.2

The court must seek to give effect to the overriding objective when it –

- (a) exercises any discretion given to it by the Rules; or
- (b) interprets any rule.

1.3

It is the duty of the parties to help the court to further the overriding objective.

37.1

(1) The Rules in this Part set out the procedure by which a claimant may discontinue all or any part of a claim.

(2) A claimant who –

- (a) claims more than one remedy; and
- (b) subsequently abandons a claim to one or more remedies but continues with the claim for the other remedies;

is not treated as discontinuing part of a claim for the purposes of this Part.

37.6

(1) Unless the –

- (a) parties agree; or
- (b) court orders otherwise;

a claimant who discontinues is liable for the costs incurred by the defendant against whom the claim is discontinued, on or before the date on which notice of discontinuance was served.

64.6

(1) Where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.

(2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.

(3) This rule gives the court power in particular to order a person to pay –

- (a) costs from or up to a certain date only;
- (b) costs relating only to a certain distinct part of the proceedings; or
- (c) only a specified proportion of another person's costs.

- (4) The court may not make an order under paragraph 3(a) or 3(b) unless it is satisfied that an order under paragraph 3(c) would not be more practicable.
- (5) In deciding who should be liable to pay costs the court must have regard to all the circumstances.
- (6) In particular it must have regard to –
 - (a) the conduct of the parties both before and during the proceedings;
 - (b) the manner in which a party has pursued –
 - (i) a particular allegation;
 - (ii) a particular issue; or
 - (iii) the case;
 - (c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;
 - (d) whether it was reasonable for a party to –
 - (i) pursue a particular allegation; and/or
 - (ii) raise a particular issue; and
 - (e) whether the claimant gave reasonable notice of intention to issue a claim.

- 5 The rules make clear costs lie in the discretion of the court, under **rules 37.1(b)** and **64.6(2)**, with there being a rebuttable presumption a claimant is 'liable for the costs' for discontinuance under **rule 37.6(1)**, further supported as a 'general rule' under **rule 64.6(1)**. It follows to depart from the general rule will be unusual, requiring reasoned justification, to be framed in the context of the overriding objective in **rule 1**.

- 6 Considering the overriding objective, Counsel Morgan's reason for discontinuance was to avoid procedural delay on a technical point, submitting it is a technical point to write the claimant wrong. Bertrand Burke is 79. It is not unreasonable to contemplate, sadly, he may pass before judgment, if delayed, leading to further complication.
 - a. This court is of the view counsel should always consider ways to avoid interminable delay, particularly created by interlocutory appeal, which can be many in a single case, possibly up to the Privy Council, stretching it out years, at vast expense, leading to a snail's pace over sometimes more than a decade before finally getting to the trial issue, causing uncertainty and the oppression of mind unending litigation can instil. Regionally delay is a frequent tactic. Within reason, anything which might keep proceedings swift is to be encouraged.
 - b. Support is found in **rule 1** which at **1.1(2)(b)** and **(d)** points to saving expense and being expeditious, requiring at **1.2(a)** to exercise discretion with these principles in mind.

- c. In my view, in principle Counsel Morgan was not wrong to look for ways to stop delay to these proceedings coming to trial, which would obviously arise if appealing a decision whether to grant leave to amend claim 11/21 to add the AG, or a finding by this court on whether the 'Office of the Premier' is a legal entity, all of which forward thinking is in keeping with **rule 1** and the discretion it raises.

7 Moreover, reviewing how to approach exercise of the court's discretion in awarding costs, under **rule 64.6(5)** I must 'have regard to all the circumstances'.

- a. These include under **rule 64.6(6)**: whether it has been reasonable to pursue the claim, which given the internal audit report it is; the manner in which the claim has been pursued, where discontinuance here points to a mere mistake in nomenclature; and whether this mistake was 'reasonable', which in the context of how the contract was signed off is understandable and in that sense is reasonable.
- b. More, the claim has not de facto been discontinued, it has instead been reissued, cured of a defect in language. This begs whether there has been meaningful discontinuance, to an extent by analogy contemplated in **rule 37.1(2)(b)** where a continued claim for other remedies is not treated as discontinued, with here the claim and remedies being continued under a different file number.
- c. Finally, all the circumstances include recognising this costs claim is a pursuit in reality of a 'prize' requestable under the **CPR2000** out of proportion to expense the Burkes incurred, by reason only of a mechanistic calculation, rewarding taking technical points likely to lead to inordinate delay, and therefore in a sense rewarding subversion of the overriding objective.

8 Counsel Dorsett argued the principles relevant to the determination of costs upon a discontinuance were authoritatively laid down in **Brookes v HSBC Bank plc 2011** EWCA Civ 354, [2012] 3 Costs LO 285, adding *Brookes* was recently applied in **Crowther v Crowther 2020** EWHC 3555 (Fam), [2021] 1 WLR 2705, where at para 28 it was stated:

In *Brookes v HSBC Bank plc 2011* EWCA Civ 354, Moore-Bick LJ summarised the relevant principles applicable under CPR r.38.6 at para 6 [the equivalent of rule 37.6 under the ECSC CPR2000]:

“(1) When a claimant discontinues the proceedings, there is a presumption by reason of CPR 38.6 that the defendant should recover his costs; the burden is on the claimant to show a good reason for departing from that position;

- (2) the fact that the claimant would or might well have succeeded at trial is not itself a sufficient reason for doing so;
- (3) however, if it is plain that the claim would have failed, that is an additional factor in favour of applying the presumption;
- (4) the mere fact that the claimant's decision to discontinue may have been motivated by practical, pragmatic or financial reasons as opposed to a lack of confidence in the merits of the case will not suffice to displace the presumption;
- (5) if the claimant is to succeed in displacing the presumption he will usually need to show a change of circumstances to which he has not himself contributed;
- (6) however, no change in circumstances is likely to suffice unless it has been brought about by some form of unreasonable conduct on the part of the defendant which in all the circumstances provides a good reason for departing from the rule."

On dismissing the appeals, Moore-Bick LJ said at para 10:

"It is clear, therefore, from the terms of the rule itself and from the authorities that a claimant who seeks to persuade the court to depart from the normal position must provide cogent reasons for doing so and is unlikely to satisfy that requirement save in unusual circumstances. The reason was well expressed by Proudman J in **Maini v Maini** 2009 EWHC 3036 (Ch): a claimant who commences proceedings takes upon himself the risk of the litigation. If he succeeds he can expect to recover his costs, but if he fails or abandons the claim at whatever stage in the process, it is normally unjust to make the defendant bear the costs of proceedings which were forced upon him and which the claimant is unable or unwilling to carry through to judgment.

- 9 Careful reading of principle 4 suggests 'practical' or 'pragmatic' reasons for discontinuance will not avoid costs except per para 10 in 'unusual circumstances'. However, the circumstances here are unusual; and moreover, practical or pragmatic reasons as offered by Moore-Bick LJ seem more about how pursuit of a claim may be impractical perhaps inherently within its facts or considering unlikelihood of recovery if successful, rather than as here where the discontinuance is instead to further the overriding objective, which seems 'cogent' reason to depart from the presumption.
- 10 Separately, Counsel Dorsett argued costs for discontinuance more unavoidably arise than in other situations because they are specifically mentioned in **rule 37**, leading to the court being more limited in its discretion not to award them, such that the court's approach is not governed by **rule 64.6**. I do not agree, recalling **Conrad Morris v Troy Campbell 2021 JMCA Civ 30** at para 42 our sister Jamaican Court of Appeal opined (concerning identical rules):

It is clear, taking into account the provisions of rule 64.6 and the tenets stated in the authorities of...*Nelson's Yard Management, ...and Doshi*², that a judge is given a wide margin when exercising a discretion in relation to costs following discontinuance. Those authorities all establish that the court is allowed to consider the general factors set out in rule 64.6, rather than being slavishly bound by the "constraints imposed by" the default principle in rule 37.6(1).

- 11 In short, having reviewed the principles, costs on discontinuance remain in my discretion and for the unusual circumstance here I will not accede to awarding the mechanistic calculation.
- 12 However, the court does recognise Counsel Dorsett has done intelligent work which has led to closing claim 11/21, and analogous perhaps to a successful strike out application, in my wide discretion I order costs payable to the Burkes in the sum of \$1250ec, as being within the range contemplated by Counsel Morgan at para 45 of her submissions of 16.11.21.

Obiter

- 13 Though no longer necessary formally to adjudicate on it, if pressed I would have given leave to amend claim 11/21 to include the AG as claimant.
- a. Counsel Dorsett would have argued I should not do so as it would have cured the issue over which he was seeking strike out and would mean Counsel Morgan was being allowed to 'steal a march' on him. In his submissions of both 23.09.21 and 16.11.21 he pointed out the Court of Appeal in **Attorney General of St. Lucia v Montrope 2020** SLU HCVAP 2019/0021 held (in the headnote):
2. The principle in **Index Communication Network Limited v Capital Solutions Limited and others** and **Maria Agard v Mia Mottley and Anor** is that the filing of an application to strike has the effect of prohibiting a party whose pleadings are under attack from amending its pleadings without the court's leave. While it is true that there is no rule in the CPR which imposes such a requirement for leave, if leave to amend were not required, a party seeking to attack or strike out pleadings would have to address any subsequent amendments made without the court's leave, by perhaps mounting subsequent applications if there remained any basis for doing so. Such an approach would sanction one party 'stealing a march' on the other by curing defects in its pleadings which the application to strike sought to impugn, and would not be in keeping with the overriding objective.

² **Nelson's Yard Management Company et al v Nicholas Eziefula** [2013] EWCA Civ 235 and **Re Smart-Tel (UK) Plc Official Receiver v Ketan Doshi** [2007] BCC896

- b. However, it appears to quote only para 2 of the headnote is selective, as Counsel Dorsett did not point out it further reads at para 4:
 - 4. Even if leave of the court was not required to amend Mr Montrope's originating motion (which it was), the judge ought only to have permitted the amendments if it was in the interest of justice to do so, and if the amendments were not fanciful or served some real purpose.
- c. To borrow the language of the headnote at para 4 I find here the amendment would have been in the interests of justice for the reasons above, it would not have been fanciful, and it would have served the purpose of clarifying a claimant as unarguably a legal entity.
- d. Further, the court reminds itself of its recent ruling in **Nunns v Rotherham 2021** MNIHCV2020/0041 where criticism was offered to Counsel Dorsett at para 23 about selective quoting of authority. It must stop.

- 14 In addition, during hearing, it was remarked upon Counsel Dorsett would not answer questions directly. Clearly an immensely bright man, with PhD, it was a frustration the court found relying on what he had to say like gripping a flapping fish which kept slipping out of hand. At one point, confusion arose in the mind of the court and acting-Registrar whether the costs claimed were \$300000ec, which the court accepts was its own mistake, this being the value of the claim, but the confusion was avoidable if questions were more crisply answered. Further he was reluctant to offer any idea what the actual 'out-of-pocket' cost has been to the Burkes thus far. Indeed at one point, in the confusion of indirect answers it was mistakenly thought he was saying \$17000ec was his fees (which for example in London among some counsel might not be inordinate).
- a. Where there is a busy list, the court may not always have every fact in every case immediately to mind, so that the role of counsel is to assist in training the court's focus.
 - b. Counsel are reminded their duty as officers of the court is to help it, not avoid it, or get round it, or confuse it, and to ensure if possible it does not fall into error misunderstanding the factual or legal matrix. Court is not a game, and as metaphor the judge is not a bull in the corrida with whom to fence like a matador, being dazzled by a skilfully wrought cape of verbal dexterity, seeming shimmering before it but behind which there may be no substance.
 - c. Simpliciter, a direct answer to questions is counsel's duty.

- 15 Moreover, the only place in the already voluminous papers there is mention of the precise value of the costs as '\$17637.38ec', though calculation is not fully demonstrated (yet not challenged), is at the end of para 14 on p4 near the close of Counsel Dorsett's submissions of 23.09.21. The value is not offered in any draft order or even in the substance of the strike out application, where instead the figure is left blank. As to Counsel Morgan, the figure of '\$17000ec' is only first mentioned from para 22 on p6 of her submission of 16.11.21.
- a. In an attempt by the court to make helpful observation about future submissions, here each should have begun with the costs sought in the opening paragraph; the figure should not be difficult to find, given it lies at the heart of the argument. While the submissions have been learned, and most impressive, in a sense they missed the point, or did not make it crisply, noting counsel need constantly to be tying their learning back to notional civilian onlookers so they might understand why there is an argument.
 - b. Argument in court does not exist in a vacuum of sophistry, but has consequences for ordinary folk and every time an argument is raised the real-life impact needs to be at the forefront of the lawyers' minds. The role of lawyers and judges ought to be to simplify not complicate. In fairness the submissions are well-written, particularly the conclusion by Counsel Morgan, but it should be clear as ringing a bell, from the opening written words this argument has been about whether Counsel Dorsett should be paid \$17637.38ec by the GOM in light of claim 11/21 being discontinued for pleading the claimant wrong, yet further filed as claim 25/21.
 - c. Submissions should always start using easy language a non-lawyer observer can follow with a pithy statement of what is the problem. So, going forward, may counsel please always have in mind 'let the people better understand the court': *et populus intelligere atrium melius*, to coin a phrase.
- 16 Finally, insofar as this decision will be appealed, which I expect, I further opine subject to correction by the Court of Appeal, claim 25/21 should continue separately and I propose if possible today to case manage it to a trial date.

The Hon. Mr. Justice Iain Morley QC

High Court judge

29 November 2021