

Judgment 34/2012

**In the matter of Propinvest Group Limited
and Part XXI of The Companies (Guernsey)
Law, 2008 – Application for an
Administration Order –
- Civil Action File No 1620 - Royal Court
- 4th November 2011**

**Companies (Guernsey) Law 2008 – application for an administration order – Section
374 – insolvency test – application granted.**

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

The 14th day of November, 2011 before Richard John Collas Esquire, Deputy Bailiff and
Susan Mowbray, Terrance Snell and Terrance Ferbrache, Jurats

IN THE MATTER OF

PROPINVEST GROUP LIMITED (“PGL”)

AND

PART XXI OF THE COMPANIES (GUERNSEY) LAW, 2008

APPLICATION FOR ADMINISTRATION ORDER

Whereas on 4th November 2011 the Court made an order that Propinvest Group Ltd (“PGL”) be placed in administration under section 374 of The Companies (Guernsey) Law, 2008 on the application of DnB NOR Bank ASA (“the Bank”). THE COURT this day handed down written reasons for the said decision in the terms attached hereto.

S M D ROSS
Her Majesty’s Deputy Greffier

IN THE ROYAL COURT OF THE ISLAND OF GUERNSEY

ORDINARY DIVISION

IN THE MATTER OF

PROPINVEST GROUP LIMITED (“PGL”)

AND

PART XXI OF THE COMPANIES (GUERNSEY) LAW, 2008

APPLICATION FOR ADMINISTRATION ORDER

Before: Richard John Collas Esq., Deputy Bailiff and

Jurats: S Mowbray, TG Snell and T J Ferbrache

Date of hearing: 3rd & 4th November 2011

Judgment issued: 14th November 2011

Advocate for DnB NOR Bank ASA: Advocate C H Edwards

Advocate for Propinvest Group Limited: Advocate M G A Dunster

Cases referred to:

Re a Company (No 006685 of 1996) [1997] BCC830

Introduction

1. On Friday 4th November, the Court made an order that Propinvest Group Ltd (“PGL”) be placed in administration under section 374 of The Companies (Guernsey) Law, 2008 on the application of DnB NOR Bank ASA (“the Bank”). The application, which was opposed by PGL, had been heard by the Court the previous day. When announcing the Court’s decision, the Deputy Bailiff gave a brief outline of the Court’s reasons for its decisions and said a fuller written judgment would be handed down in due course. This is our reasoned judgment.

Background

2. We begin by summarising the dealings between PGL and the Bank.
3. PGL is the Guernsey registered holding company of a group of companies with an extensive international property portfolio, including properties in Norway, Finland and Sweden. The company structure includes a holding company in each of those Scandinavian countries respectively: Royston Norway AS, Propinvest Finland Oy and Propinvest Sweden AB (“the Scandinavian holding companies”). Each such holding company was a wholly owned subsidiary of PGL until ownership passed to the Bank

in the circumstances described below. Each of the Scandinavian holding companies owned, and still owns, a number of subsidiaries which, in turn, own the properties in their respective countries which comprised the Scandinavian portion of Propinvest’s property portfolio. (In this judgment we use the name “Propinvest” to refer generally to the Propinvest group or to a company within the group when it is not clear whether the company in question is PGL or another group company.)

4. By a Multicurrency Term Loan Facility Agreement dated 19 December 2007 (“the 2007 Facility Agreement”), the Bank made facilities available to the three Scandinavian holding companies in the amounts of NOK 1,373,692,793, EUR 18,318,562 and SEK 274,932,500 respectively. Each loan was in two tranches. The first tranche was to be repaid in full on 20 December 2010 and the second tranche was to be repaid in twelve equal quarterly instalments of 1.75% of the original loan with a final repayment of the outstanding balance to be repaid in full on 20 December 2010. The interest rates were 0.85% and 1.20% per annum on each of the tranches respectively.
5. The borrowings refinanced existing facilities granted by Royal Bank of Scotland Plc and Kaupthing HF. The borrowings were guaranteed by PGL pursuant to a Guarantee and Indemnity Agreement dated 20 December 2007 (“the Guarantee”). The Guarantee was subject to Norwegian law although it was written in the English language. The present application is brought pursuant to the Guarantee.
6. During the autumn of 2008, the Bank became concerned at the values of the properties and the risk of a breach of loan to value covenants. The Bank’s fears were confirmed by a valuation of the properties obtained by it that showed the properties were worth less than the borrowings.
7. The Bank, PGL and each of the three Scandinavian holding companies executed an Interim Amendment Agreement dated 19 December 2008 whereby, inter alia, the interest rate payable on each tranche of the lending was increased to 2.50% per annum and PGL pledged its shares in Royston Norway AS which in turn pledged the shares in its subsidiaries to the Bank.
8. On 12 May 2009, the Bank issued a waiver letter which further varied the terms of the 2007 Facility agreement. The Bank agreed to waive the loan to value covenants and the quarterly instalment obligations until 30 September 2009. The waiver was subject to terms and conditions which included a variation of the interest rates to 2.0% on one tranche and 7.25% on the other tranche of the lending; further security over certain assets; and a prohibition against making dividend payments without the Bank’s agreement. The terms were accepted by each of PGL and the Scandinavian holding companies. The waiver period was extended to 30 September 2010 by letter dated 9 November 2009.
9. On 22 February 2011, the Bank served on each of the three Scandinavian holding companies a written demand for repayment of all monies due on the grounds that there had been a failure to repay monies due to the Bank in a timely manner.
10. On 25 February 2011, the Bank demanded repayment from PGL under the terms of the Guarantee by serving a Statutory Demand on PGL pursuant to section 407 of The Companies (Guernsey) Law, 2008 through the office of H M Sergeant demanding repayment of NOR 1,401,904,712.79, SEK 280,433,605.41 and EUR18,666,747.78.

11. In an email to the Bank of the same date Glenn Maud, the beneficial owner of PGL, wrote that:

“As far as I can see the service of these formal proceedings makes PGL technically insolvent as the company is not in a position to make these payments as demanded and Tim[Southern, a director of PGL] is probably now obliged to put the Group into Administration.”

12. Following the issue of the Statutory Demand, Propinvest paid all outstanding tax and trade creditors of the Scandinavian companies, in the belief that the Bank had agreed it would then withdraw the Statutory Demand. In paragraph 31 of an affidavit sworn on 26 July 2011, Mr Maud said that the agreement that the Bank would release the Statutory Demand on condition that the tax and trade creditors were paid by Propinvest was confirmed in a telephone conversation and supported by an email from Mr Maud on 5th April.
13. The Bank denies that it had agreed not to rely upon the Statutory Demand. The Bank said that the reason it required the creditors to be paid was to avoid its security being compromised by third party action. The Bank also said that it expected such creditors to be paid out of funds from PGL, not from the subsidiaries. In other words, even if there was an agreement as alleged, PGL did not comply with it because it did not use its own funds, or shareholder funds, to pay the tax and trade creditors of the Scandinavian subsidiaries.
14. Discussions continued between PGL and the Bank and at the same time PGL sought fresh investment from third parties. Despite some expressions of interest, no such investment has been forthcoming because, PGL claim, the Bank was unwilling to cooperate and has frustrated PGL’s attempts to secure funds from any third party.
15. We do not need to summarise all the communications and discussions that passed between the Bank and PGL during this period but we do have to consider an important meeting that was held on 20 May 2011. The two sides have conflicting recollections of what resulted from the meeting.
16. Mr Maud and Mr Southern say that an oral agreement was reached whereby PGL would consensually transfer the shares in the Scandinavian holding companies to the Bank and assist that transfer in every way. That assistance included the transfer of existing PGL staff involved in the Scandinavian portfolio from both Oslo and London to the Bank; the provision of all relevant financial and management information and hand over of software; the waiver of creditors; and the assignment of substantial intercompany loans. PGL also agreed not to deal further with two potential outside investors. In return the Bank agreed that it would not take any action in respect of the Guarantee at least until the sale of the underlying properties had been effected. The agreement is mentioned by Mr Maud in a contemporaneous email to a colleague on the same day. Further corroboration is given in the affidavit of an employee of PGL who said that when Mr Southern returned to his office in Guernsey after the meeting, he was relieved and told her the Bank had agreed not to enforce the Guarantee.
17. The Bank says that no such agreement was reached or even discussed; the Bank was entitled to act as it did; and to suggest the transfer of the shares was voluntary is misleading. The Bank claims it lacks credibility to suggest it would waive its rights against PGL when it was receiving nothing in return beyond that to which it was legally entitled.

18. The Bank's evidence is vehemently refuted by PGL in particular by Mr Maud who responded to the Bank's allegations in a detailed affidavit sworn on 12 September 2011. He declared that, contrary to the Bank's assertions, two staff members were not independently recruited by the Bank. Instead, their transfer was facilitated by PGL who arranged for one staff member to be released from her contract of employment with another company in the Propinvest group (Propinvest Asset Management LLP ("PAM")) that owed no obligations to the Bank under any of the security documentation and PGL paid for a second employee to travel to Oslo at its expense to negotiate terms of employment with the Bank. Propinvest provided financial and management information to the Bank from PAM that was not an asset of any of the transferring companies and hence was not pledged to the Bank, as the Bank have claimed.
19. By way of further support to show there was an oral agreement as alleged, Mr Maud pointed out that the share pledges in respect of the Scandinavian holding companies were executed on 16 September 2010; they were not part of the original facility. PGL never anticipated that ownership of the companies and their underlying assets would pass to the Bank under the pledges leaving PGL still liable under the Guarantee.
20. Further, with regard to the pledge of the intercompany loans, PGL would never have agreed to pledge the loans if it had thought it would continue to remain liable under the Guarantee if the benefit of the loans were to be transferred to the Bank.
21. We return later in this judgment to consider the evidence in relation to the alleged oral agreement of 20 May 2011.
22. In a letter dated 1 June 2011, the Bank expressed its frustration at the failure to negotiate a reasonable restructuring of the indebtedness but indicated that there was still an opportunity to avoid proceedings in the Royal Court. An attorney-at-law employed by the Bank wrote:

“Despite our mutual understanding of transparency and cooperation we experience that you do not respond to our requests nor provide us with information. Unless you facilitate for and provide us with necessary insight of the financial condition of Propinvest and the Group (as defined in the Agreement), we will have no choice but to apply to the Court in Guernsey for winding up Propinvest and the appointment of a liquidator.”
23. The letter went on to invite the directors to apply to the Court for the appointment of an administrator and to remind the directors of their responsibilities under Guernsey law.
24. Mr Southern made reference to the terms of the alleged oral agreement when he replied to the Bank on 3 June on behalf of PGL. He expressed his shock at receiving the letter of June 1, stating that he had proceeded on the basis that the Guarantee would not be enforced in the light of their discussions and cooperation and protesting that PGL had fully cooperated with the transfer of assets, companies, staff, information and software to the Bank.
25. The Bank's application to the Royal Court for an Administration Order was issued on 6 July, returnable in Court on 12 July. Since that date there have been a number of adjournments, largely to enable PGL to have the opportunity to prepare its response to

the application and to respond to affidavits lodged by the Bank including, in particular, valuation evidence relied upon by it that was not disclosed at the time of the initial application.

Directions to the Jurats as to Guernsey law

26. Having thus summarised the facts and events leading up to the issue of the application, the Deputy Bailiff will now set out the directions he gave to the Jurats and which they are obliged to accept and follow.
27. The Deputy Bailiff is the sole judge of matters of law and the Jurats must accept and follow his directions as to the law. The Jurats are the sole judges of fact and were directed to ignore any view the Deputy Bailiff might express, or appear to express, as to the factual issues.
28. The burden of proof rests on the Bank throughout, not on PGL. For example, it is for the Bank to show that PGL fails the Solvency Test; it is not for PGL to prove that it satisfies the Test. The standard of proof is the normal civil standard of the balance of probabilities which has been said to mean that something is more likely so than not so.
29. The application to place PGL in administration is brought under Part XXI of The Companies (Guernsey) Law, 2008.
30. The class of persons who may bring such an application includes, in section 375(d) “*any creditor of the company, including any contingent or prospective creditor*”. In a skeleton argument lodged on 11 August, Advocate Dunster on behalf of PGL, questioned whether the Bank had the *locus* to apply in circumstances where it had enforced its security against the Scandinavian holding companies and hence had acquired control and ownership of the properties comprised in the Scandinavian portfolio which, at the time, PGL believed were equal to or greater in value than the amount of the Bank’s lending. By the time of the substantive hearing, the properties had been revalued and Advocate Dunster accepted in argument that the Bank was, at the very least, a contingent creditor even if it was not an actual creditor. Hence, he conceded during his oral submissions that the Bank had the necessary *locus*. In the opinion of the Deputy Bailiff, he was right to do so. By reason of the terms of the Guarantee and having regard to the evidence, especially the valuation evidence, before the Court, the Bank’s status as a contingent creditor is beyond doubt even if it could be argued it is not yet an actual creditor of PGL.
31. Section 374(1) of the Law specifies two conditions that must be satisfied before the Court may make an administration order. The first is that the company “*does not satisfy or is likely to become unable to satisfy the solvency test*”. The second is that the Court considers the making of an order may achieve one of the two purposes set out in sub-section (3): the first being the survival of the company or a part of it as a going concern; the second is a more advantageous realisation of its assets than would be achieved in a winding up.
32. The Bank explained why it believes that both purposes of the second condition may be achieved if an administration order is made. The explanation is at paragraphs 43 to 46 of the Affidavit sworn on 6 July by Andreas Nordstjøl, in-house legal counsel of the Bank and has not been contested by PGL. For the reasons given by Mr Nordstjøl, the Jurats were satisfied that the purposes would be achieved.

33. The use of the word “*may*” in section 374(1) indicates that the Court has a discretion to exercise in deciding whether to make an administration order, even when all other conditions are satisfied.
34. Thus the two contentious issues for the Jurats to decide were whether PGL does not satisfy or is likely to become unable to satisfy the solvency test and, if so, how to exercise the Court’s discretion. There was some overlap between the two issues and so the Court considered them together.
35. There are two limbs to the solvency test. The first is whether the company “*is able to pay its debts as they become due*” and the second is whether “*the value of the company’s assets is greater than the value of its liabilities*” (section 527 (1) (a) and (b)).
36. PGL asserted a number of grounds on which it disputed owing the debts claimed by the Bank. The parties agreed, and the Court recognises, that an application for an administration order is not the appropriate forum for deciding a disputed debt if the existence of the debt is denied or to decide the quantum of a claim where quantum is in dispute. In the absence of reported Guernsey cases, the Court was referred to a number of English decisions as persuasive authority, including Re a Company (No 006685 of 1996) [1997] BCC830 where Chadwick J. held:

“the general rule under which the court refuses to entertain a petition [for winding up] founded on a disputed debt applies only where the dispute is a genuine dispute founded on substantial grounds.”

37. The legal test has been expressed in several different ways but the Deputy Bailiff directed the Jurats to accept the above and to consider whether there is a genuine dispute founded on substantial grounds. PGL denies that any monies are owed by PGL to the Bank. It also disputes the amounts asserted by the Bank. In relation to quantum, the Deputy Bailiff directed the Jurats that they need not determine the precise level of indebtedness claimed if they are satisfied there is a sum owing which cannot be genuinely disputed on substantial grounds and which is of such amount that PGL is unable to pay it, or likely to become unable to do so.

The alleged oral agreement of 20 May 2011

38. The first basis on which PGL asserted the Bank was presently unable to enforce its claim against PGL was based on the oral agreement allegedly made at the meeting on 20 May 2011 whereby it claimed the Bank agreed that it would not take steps to enforce the Guarantee until after the sale of the underlying Scandinavian properties in return for PGL consensually assisting in the transfer to the Bank of ownership of the Scandinavian holding companies in the manner described above. PGL has done all that was required of it under such agreement but the Bank have reneged on the oral agreement by bringing the present application in the Royal Court.
39. PGL relied upon an affidavit as to Norwegian law sworn by two lawyers in the litigation and corporate group of Kvale Advokatfirma DA. (Norwegian law applies because all the security documentation, including the Guarantee, is expressed to be

subject to Norwegian law.) They advised that as a matter of Norwegian law, parties may amend or vary the terms of an agreement in any manner, including orally. They stated that:

“The main rule under Norwegian contract law when deciding the content of an agreement is that the parties’ joint understanding shall be decisive for what has been agreed.”

40. They added:

“In determining the contents of an oral agreement, a court will generally look to identify the parties’ joint intention and may freely take all circumstances into consideration that may shed light over what has actually been agreed.”

41. The Deputy Bailiff directed the Jurats to accept that Norwegian law in relation to oral agreements is as explained by Kvale.

42. The Jurats reviewed all the evidence including: all the surrounding circumstances; the contemporaneous email sent by Mr Maud to his colleague; the evidence of Anna Jenkins, the work colleague of Mr Southern, as to his mood and what he said after his return to the office; and the steps taken by PGL to implement the terms of the alleged oral agreement. The Jurats believe there is substantial evidence to support PGL’s assertion that Mr Maud and Mr Southern genuinely believed that an oral agreement had been made.

43. The Bank and PGL disagree over the extent of PGL’s cooperation. For example, the Bank says it was merely taking the steps to which it was entitled and that transferred assets such as management and financial information and computer software were in the ownership of the companies whose shares were being transferred. The Jurats are unable to resolve such a dispute but they do accept that there was some cooperation from PGL, for example in assisting and enabling the transfer of employees to the Bank and that such assistance was over and above what was required of PGL under the security obligations.

44. Such cooperation supports the Jurats’ view that PGL genuinely believed it had reached an oral agreement with the Bank. However, a genuine belief in the existence of an oral agreement is not sufficient. Norwegian law requires that there must be a common understanding or a joint intention.

45. The Bank denies the oral agreement and draws attention, in particular, to the absence of any contemporaneous document between the parties evidencing such an agreement and the absence of any contemporaneous minute or note of the meeting recording the agreement. On behalf of the Bank, Advocate Edwards relied upon the earlier written agreements prepared by the Bank recording the terms of previous amendments to and variations of the Bank’s security. He also submitted there would be no reason for the Bank to enter into the alleged oral agreement when it was not receiving anything other than that to which it was entitled. He also submitted that the terms of the oral agreement were too vague to be enforceable.

46. In the view of the Jurats, it is the first of those submissions that is the most compelling. Having regard to the significance and effect of the alleged oral agreement and in the light of the previous dealings between the parties, it is beyond belief that the Bank would not have recorded in writing the alleged oral agreement.

As we have said, the Jurats are unable to decide how much benefit the Bank received from PGL’s cooperation; there may have been some commercial advantage to the Bank but, if so, it was less than the benefit to PGL in not having to face early enforcement of the Guarantee.

47. As for the terms of the alleged oral agreement, there was some vagueness. Nothing was agreed as to what the Bank was expected to do to achieve sales of the properties or when they were to be sold and there was some vagueness as to when exactly it would have been entitled to enforce the Guarantee. It is therefore possible that the oral agreement would have been unenforceable for uncertainty but the Jurats are unable to reach such a conclusion on the affidavit evidence available.
48. Fortunately, there is no need for them to do so. In the view of the Jurats, it is beyond belief that the Bank would have been satisfied with only an oral agreement. If such agreement had been reached, the Bank would have reduced it to writing as with other previous amendments. For that reason, there can be no substantial ground on which to assert that the parties had reached a common understanding or that they shared a joint intention to delay enforcement of the Guarantee until the underlying properties had been sold.

The Property Valuations

49. The Jurats considered next the valuation evidence before the Court. Each side had obtained expert valuations of the underlying Scandinavian properties and of the shares in each of the Scandinavian holding companies.
50. We review first the property valuations. At the start of the proceedings, Mr Southern said in his affidavit sworn on 11 July:

“17. It is my initial view that as [the Bank] now owns the shares of Scandinavian subsidiary companies and in doing so has recovered assets of a value greater than or equal to the outstanding liability (sic). As such the sums are no longer due and [the Bank] is not able to double recover those sums pursuant to the Guarantee and Indemnity Agreement.”

“18. I believe that the value of the underlying property portfolio is equal to or in excess of the sums [the Bank] claims are due. In that regard, I refer to the valuation prepared by DTZ as part of the proposed Cerberus deal in July 2010 showing a value between €216 million and 219 million. I believe the value of the property portfolio has increased considerably since then. All this is, however, a matter for expert evidence by property professionals.”

51. In an affidavit sworn on 26 July, Mr Maud referred to a valuation obtained by a potential third party investor who, he said, had valued the portfolio at *“between €230-€236 million which exceeded the debt attached to it of approximately €220 million”*. Those values are mentioned in Kvale’s legal opinion dated 5 August.
52. Thus, when PGL began its defence of the administration application, it did so on the basis that the value of the properties transferred to the Bank was equal to, or greater than, the value of the indebtedness to the Bank. That assumption underpinned much of PGL’s defence although, as we explain below, it was not supported by the evidence of expert valuers received later.

53. The Bank relied upon a detailed valuation dated October 2010 and updated as at 15 July 2011 by Akershus Eiendom who assessed the total value of the Scandinavian properties in October 2010 at NOK 1,475,600,000 equivalent to £164,346,425.60 and estimated that by July 15 2011 it had increased by between 1% and 4% to between £165,989,889.90 and £170,920,282.60.
54. In response, PGL produced a valuation by DTZ dated 11 September 2011. Their first valuation was later revised. A copy of the revised valuation was exhibited to an affidavit sworn on 28 October. In it, DTZ assessed the values of the Scandinavian properties as at 16 June 2011. DTZ gave a mid-range and a high-range market value. After conversion to sterling currency, the total values are £195,624,640.50 at the high end of the range and £175,523,949.90 at the mid end range.
55. In the opinion of the Jurats, even the most optimistic valuation demonstrates clearly that the Bank is owed a sum greater than the total value of the properties.
56. Advocate Dunster urged the Court to take account also of some valuations that appeared to have been made by potential outside investors. In the view of the Jurats, there was little weight to be attached to such valuations because they were not explained in detail, the basis on which they had been obtained was not known and, in any event, DTZ had had regard to such valuations in forming its own conclusions.
57. In the opinion of the Jurats, it was reasonable to take a mid-range view and to treat the value of the properties as £175 million approximately.

The Share Valuations

58. As to the value of the shares in the Scandinavian holding companies, the Bank produced valuations prepared by PricewaterhouseCooper and PGL replied with a valuation by Norwegian accountants, Kjelstrup & Wiggen Consulting AS. PwC concluded that the companies were insolvent and hence the shares had no value whereas KWC's conclusion was that the Norwegian and Swedish companies' liabilities exceeded their assets but the Finnish holding company had net assets of between €0.2 and 4.2 million.

Indebtedness owed to the Bank

59. Next, we turn to the indebtedness owed to the Bank, the value of which is disputed, like so many other matters in this case. Advocate Edwards produced a "Liability and Valuation Schedule" dated 3 November which Advocate Dunster said his client had not been able to consider properly. It showed the total indebtedness of the Scandinavian subsidiaries of PGL under the Facility Agreements as at 3 November to be £203,676,326.75. Advocate Dunster submitted that interest should have ceased to accrue when the ownership of the Scandinavian subsidiaries passed to the Bank and said there were other items included in the figures which his clients did not know about such as overdrafts and other charges claimed by the Bank including penalty interest. In any event, the Guarantee liability of PGL is capped at figures which, when converted to Sterling amount to about £196 million.
60. A further dispute relates to Interest Rate Swaps entered into by the Scandinavian companies which have become a contingent liability of the companies. The existence of the contingent liabilities is not in dispute but the respective experts disagree as to their value. PwC relied upon valuations provided to it by the Bank based on a mark to

market value as at 12 May 2011 in respect of the Swedish and Finnish companies and 14 June 2011 in respect of the Norwegian company. KWC relied upon valuations prepared by Vector Financial Systems AS as of 16 June 2011 for the Norwegian contracts and 23 June for the others. KWC commented that the Bank had not assigned any value to their options to terminate in 2014, 2017, 2022 or 2027.

61. It is not easy for the Court to understand why there is such a disparity between the two valuations. In the Liability and Valuation Schedule presented to the Court on behalf of the Bank, there are three sets of valuations. The Bank's updated calculation as at 1 November (which PGL says it did not have the opportunity to consider) amounts to £38,959,737.45 in total for the three countries; the PwC total value is £24,888,339.37; and the KWC total is £16,618,794.47.

62. Another area of dispute was raised in a letter to Advocate Dunster from Kvale dated 2 November and which he produced to the Court during the course of the hearing. Kvale were replying to the updated quantification of the Bank's claim set out in the Liability and Valuation Schedule, which Kvale called the "New claim":

"The New claim includes fees ("Break fees") related to the swap agreements. In our view the swap agreements do not represent an arrangement for the hedging of interest or currency rate exposure of the borrowers. Any potential liability pursuant to the swap agreements are therefore not guaranteed by PGL under the Guarantee Agreement."

63. Advocate Dunster explained that Kvale's reasoning relied upon the definition of "Secured Obligations" in the Guarantee:

"Secured Obligations" means all sums of any kind at any time owing actually or contingently (sic) by the Borrowers to the Bank in its capacities as Bank, Facility Agent, Arranger and counterparty to any Hedging Agreements pursuant or in relation to the Finance documents, including, but without limitation, by way of repayment of principal, payment of interest and default interest, payment upon nay indemnity or counter-indemnity, reimbursement for costs or otherwise whatsoever."

64. During the course of the hearing, there seemed to be agreement that the word "contingently" was a typographical error and is to be read as "contingently". The typographical error was apparently not appreciated by Kvale who, in their first affidavit dated 5 August, had said "the wording of the guarantee only imposes an obligation for PGL to pay sums actually owed".

65. The Bank asserted that the "Secured Obligations" included any contingent liability under the swap agreements but did not have an opportunity to lodge a Norwegian legal opinion in response to the Kvale letter of 2 November.

66. The Guarantee Agreement is, as we have said, governed by Norwegian law. Disputes as to foreign law are decided by the presiding judge, not the Jurats pursuant to section 20(2) of The Evidence in Civil Proceedings (Guernsey and Alderney) Law, 2009. The reason given by Kvale as to why liability under the interest swap agreements is not covered under the terms of the Guarantee seems to be that they are not Hedging Agreements. In the opinion of the Deputy Bailiff, that seems unlikely to be correct. An interest rate swap is, as KWC state, an agreement between two parties to exchange future interest payments. The purpose of it is to reduce the parties' exposure to risk

arising from fluctuations in interest rates which, in the Deputy Bailiff's view, is entirely consistent with the purpose of a hedging agreement. Even if, which is unlikely, Kvale's view is correct, they do not state whether they have considered the possibility that the liability might arise as an actual or contingent liability owed to the Bank in its capacity "as Bank".

67. Kvale's view does not therefore seem credible and the Deputy Bailiff directed the Jurats to assume that any contingent liability arising under the interest rate swap agreements is a "Secured Obligation" for the purposes of the Guarantee either because it is pursuant to a hedging agreement or because it is owed to the Bank "as Bank".
68. The total liability of the Scandinavian subsidiaries to the Bank includes the amounts owed under the 2007 Facility Agreement, as amended, and the contingent liabilities under the interest rate swap agreements. The Bank's calculation on the Liability and Valuation Schedule shows total indebtedness of £242,636,064 (£203,676,326.75 + £38,959,737.45) as at 3 November. Recognising that there may be a dispute as to the exact amount owing under the 2007 Facility Agreement and a dispute as to the valuation of the interest rate swap contingencies, the Jurats made the assumption that the total indebtedness is likely to be approaching £225,000,000 even if it is not higher. That is they assumed the indebtedness under the 2007 Facility Agreement is unlikely to be less than about £200,000,000 and they took a middle value for the interest rate swap contingent liabilities of about £25,000,000. The Jurats were not saying that the Bank was not owed the total amount it had alleged but they were giving the benefit of any doubt to PGL in the event that it is in due course able to challenge successfully any of the Bank's figures in court proceedings in Norway or elsewhere.
69. The liability of PGL under the Guarantee is capped at a total of about £196 million under clause 2.4 of the Guarantee, whatever may be the total of the sums owed by all of the subsidiaries.

Double Recovery

70. Another argument relied upon by PGL was that the Bank was seeking double recovery; it had already obtained the Scandinavian properties by enforcing its security against the shares in the Scandinavian holding companies and was now also seeking full payment from PGL under the Guarantee.
71. Kvale gave an opinion on the interpretation of the security documentation in its affidavit of 5 August and concluded that:

"In our view, the above indicates that [the Bank] may only claim payment by demand under the Guarantee Agreement for the Secured Obligations after having deducted the value of the Transferred Assets."
72. On behalf of the Bank, Erik Ramm, a partner of Weirsholm, Mellbye & Bech advokatfirma AS accepted the proposition that PGL's liability under the Guarantee should be reduced by the value of the assets transferred to the Bank. However, he said the inter-company loans that had been transferred have no value in circumstances where the value of the properties is less than the indebtedness to the Bank. The other assets transferred are the shares in the Scandinavian holding companies which, the Bank says, have no value. The flaw in Kvale's argument is that they were treating the properties as being the "Transferred Assets", ignoring the fact that the Bank had enforced its security against the shares not the properties and had had transferred to it

the shares not the properties. The difference between the two is highly significant; the properties have substantial value but the shares are worthless.

73. In the view of the Deputy Bailiff, the opinion of Weirsholm is to be preferred to that of Kvale because Kvale refer to the assets transferred to the Bank and to the properties as if they are one and the same when clearly they are not. The assets transferred are the intercompany loans and the shares in the Scandinavian holding companies; the value of the shares is, in broad terms, the value of the properties less the indebtedness owed by the subsidiaries to the Bank.

74. Mr Ramm opined, at paragraph 8 of his affidavit, that:

“Furthermore, pursuant to Clause 3(b)(xi) of the Guarantee Agreement, [PGL] has waived any rights it may have under the Norwegian Financial Agreements Act of 25 June 1999 No. 46 to the effect that the Bank shall seek to recover the debt from the Borrowers or any security granted for the debt before claiming under the Guarantee Agreement. The Bank may thus claim the entire outstanding debt from [PGL] without taking any such steps. There will be no ‘double recovery’ as, provided [PGL] pays the debt, it will be subrogated into the Bank’s position under the Finance Documents (as defined in the Facilities Agreement) and the Bank will have no further rights thereunder.”

75. During the course of the hearing, Advocate Edwards reiterated that there will be no double recovery; if the Bank obtains repayment from PGL, PGL will have rights of subrogation against the property owning companies whose obligations it has guaranteed. The Deputy Bailiff directed the Jurats to accept there will be no double recovery.

Valuation Procedure

76. A further argument of Kvale was expressed as follows in its affidavit of 5 August:

“the valuation of the shares [in the Scandinavian holding companies] will be material to determine the level of settlement [the Bank] has already received through the takeover of the shares. A valuation procedure as referred to in Section 6.2 of the Share Pledge Agreement is subject to arbitration in accordance with the Norwegian Arbitration Act. The valuation is disputed and such dispute shall finally and binding (sic) be determined by a third party.”

77. Mr Ramm disagrees. He said that *“Clause 6.2 of the Share Pledge Agreement (which Kvale seem to be relying upon) cannot be construed as an agreement to arbitrate”*.

78. Kvale replied in their second affidavit of 12 September:

“PGL will demand that the valuation of the Shares undertaken by Akershus Eiendom and PricewaterhouseCoopers are declared null and void by the court. The basis for this demand is that said valuations have been conducted in breach of mandatory provisions of the Norwegian Arbitration Act.”

79. The view of the Deputy Bailiff, which Advocate Dunster appeared to accept with some reluctance, is that whatever may be the status of the valuations in any proceedings that may be taken in Norway to enforce the Bank’s security, the Royal Court is entitled to take them into account for the purpose of determining whether PGL fails the solvency test.

80. Both of Kvale's affidavits were sworn before KWC produced its valuation of the shares of the Scandinavian holding companies which, as we have said, assessed the Norwegian and Swedish companies to have no value and the Finnish company to be worth, at best, €4.2 million. In the light of that conclusion, there appears to be no dispute in relation to the first two countries and the only dispute is whether the third is worth nil or, at best €4.2 million. Where there is no dispute, there is no need to arbitrate and in relation to Finland the valuation is not likely to be material having regard to the value of the total indebtedness.
81. The Deputy Bailiff directed the Jurats that even if Kvale were correct about the requirement for arbitration and Mr Ramm is wrong, it principally affects the date on which the Bank could enforce the Guarantee. As to the question of whether PGL is likely to become unable to satisfy the solvency test, the difference is not more than €4.2 million and the total liabilities are in the region of £225 million. The Jurats did not consider it to be a substantial issue.

Norwegian Litigation

82. In Kvale's first opinion they said they had advised PGL *"to consider immediate legal action before a Norwegian court to defend its interest in relation to the question of its potential obligations (if any) under the Guarantee Agreement. PGL agree with this advice and have instructed us to institute legal proceedings in Norway in due course..... A draft of the notice that will be sent to [the Bank] is attached hereto."* That opinion was written on 5 August.
83. Over a month later, when the second Kvale opinion was written (12 September), little progress had been made. Kvale advised that the notice had been served on the Bank who had replied to it and Kvale wrote: *"We have been instructed by PGL to finalize the notified writ of summons against [the Bank]. The writ is well underway and will be filed when it is completed to our and PGL's satisfaction. This matter is in all aspects a substantial case, and a writ should to the benefit of all involved, hereunder the Norwegian Courts, not be prepared and filed in haste. However we do expect the writ to be filed no later than 12 October 2011."*
84. In their third letter dated 2 November, Kvale wrote *"the case here in Norway is currently being prepared by us. We have recently been made able to complete our writ off summons and we will proceed to complete and file this with the Norwegian courts, as instructed by PGL."* Whatever may be the complexities of the case, if the issues are as important and if the legal position is as clear as Kvale suggests, it is surprising that they and PGL have not progressed the issue of the writ in as a timely a manner as they had indicated. We were given no explanation as to the reasons for the delays.
85. The basis for the Norwegian legal claims is explained in Kvale's second opinion. In summary, they relate to the valuations of the shares, the valuation procedure, double recovery and, generally, the manner of PGL's enforcement of its security. Kvale allege that the security documentation may be illegal under the provisions of Norwegian legislation specifically the Financial Collateral Act, and that the manner of enforcement pursued by the Bank is illegal.
86. Kvale prepared its first two opinions before KWC had produced their valuation of the shares. The importance of the valuation is acknowledged by Kvale who, at paragraph 4 of their second opinion:

“This legal report is not complete as our affidavit has been prepared without the benefit of the financial report which we were expecting to counter what has been said by PricewaterhouseCoopers.”

87. Unfortunately, Kvale never prepared a further report to take account of the valuation produced by KWC in response to PwC’s valuation. Their failure to do so tends to reduce the weight that can be given to their opinion, the validity of their report is thereby undermined and the credibility of their opinions is also called into question.
88. For the reasons we have already given, there does not seem to be a substantive basis to the legal issues Kvale said they are instructed to pursue in any Norwegian proceedings. If the Bank has failed to follow procedural requirements in the manner it has sought to enforce its security, the consequence will be that enforcement may have to be delayed to enable different procedures to be followed. The issues go to the question of when monies may be payable, whether now or at a future date.

Conclusion

89. The test as to solvency is whether PGL is presently unable to satisfy the solvency test or is likely to become unable to do so. The Court only had a very limited amount of evidence about the financial standing of PGL. PGL did not adduce a balance sheet or any other detailed financial information. It relied, as was its right, upon its submission that it was for the Bank to prove it failed the solvency test rather than for it to prove it satisfied the test. Its subsidiary companies have substantial property investments but we were not told the extent of its borrowings. The best evidence, such as it was, is to be found in Mr Maud’s second affidavit of 12 September in which he said, at paragraph 27, in the context of explaining the significance of a dispute as to the quantum of the Bank’s claim against PGL:

“The difference between £204m and £24m is very significant and not just in mathematical terms. My legal team in Guernsey (on my instructions) have been very clear and upfront with the court and [the Bank]. I (as Director of PGL) cannot foresee circumstances where PGL could currently pay a debt of this size (£200m+). However, whilst my absolute view is that in no circumstances is anything due to [the Bank], it is possible depending on market conditions of that if (sic), (and again I stress this is a big if as I don’t accept this figure is owing at all) a debt of circa £24m or so was found owing there is a reasonable prospect it could be paid. To put it another way even if we were wrong (which in no circumstances do I respectfully believe to be the case) and circa £24m is owing this would not mean we were automatically insolvent.”

90. He added at paragraph 61:

“As I set out earlier in this affidavit, it is a very different proposition for a company to be faced with a claim for £24 million as opposed to £204 million. I can confirm that assuming [the Bank] were correct as the loss it has suffered and is entitled to claim the disputed £24 million PGL could raise funds sufficient to discharge such a liability. It is not, therefore, insolvent or likely to become so.”

91. The Jurats formed the view, as we have said, that the combined value of the Scandinavian properties is likely to be approximately £175 million. The total indebtedness of the Scandinavian holding companies and their subsidiaries owed to

the Bank is unlikely to be less than about £225 million and may be more. Even if it is accepted that PGL could raise £24 million, there is no evidence that it would be able to pay £50 million.

92. The Guarantee liability of PGL is capped at about £196 million, so the whole amount cannot presently be recovered from PGL. However, the Court has to look at both limbs of the solvency test and whether PGL presently satisfies the test or is likely to become unable to do so. It therefore seems correct to take account of the total indebtedness as the Bank can obtain recover either from the subsidiaries or from PGL or from both the subsidiaries and the Bank, provided there is no double recovery.
93. The decision of the Jurats is that, for the reasons we have given, PGL does not presently satisfy the two limbs of the solvency test. Even if Kvale is correct in its opinion that liabilities under the Guarantee are not immediately enforceable by reason of not being enforced in accordance with the correct statutory requirements, PGL is likely to become unable to satisfy the solvency test when the correct procedures are followed.
94. The Jurats were persuaded that there was no genuine dispute on substantial grounds that should prevent the making of an administration order and that there was no other reason to prevent them from exercising their discretion in favour of making the order sought.