Judgment 09/2013

Propinvest Group Limited et al & Maud et al; AND Propinvest Group Limited and Maud
Royal Court
15th April 2013

Two applications to consolidate two civil actions.

Approved Text
15.04.2013

IN THE ROYAL COURT OF GUERNSEY

(CIVIL DIVISION)

Between: **(1) PROPINVEST GROUP LIMITED (in Administration)**

(2) GAMAY HOLDINGS LIMITED (in Voluntary Liquidation)

Plaintiffs

-and-

(1) GLENN MAUD
(2) TIMOTHY SOUTHERN
(3) MARS LIMITED
(4) ARES LIMITED
(5) NAVARRO VENTURES SARL
(6) MANY FATHERS LIMITED
(7) PROPINVEST HOLDINGS LIMITED
(8) PROPINVEST MANAGEMENT LIMITED
(9) EAGLE HOLDINGS LIMITED
(10) PROPINVEST CAPITAL LIMITED **Defendants**

-AND-

Between: **PROPINVEST GROUP LIMITED (in Administration)**

Plaintiff

-and-

GLENN MAUD **Defendant**

Hearing date: 21st March 2013 (am only)

Judgment handed down: 15th April 2013

Before: Richard James McMahon, Esq., Deputy Bailiff

Advocate for Plaintiffs: **C H Edwards**
Advocate for First & Second Defendants: **N Robison**
Advocate for Third – Tenth Defendants: **R Fullman**

Cases, Texts & legislation referred to:

The Royal Court Civil Rules, 2007
The Civil Procedure Rules
Martin v Martin [1897] 1QB 429
The Senior Courts Act 1981
De Crittenden v Bayliss (Deceased) [2005] EWCA Civ 1425
IXIS Corporate & Investment Bank v WestLB AG [2007] EWHC 1748 (Comm)
Whitehouse v Wilson [2005] EWCA Civ 1688

Introduction

1. On 21st March 2013, I heard two applications dated 7th March 2013 from Glenn Maud for consolidation of civil actions 1733 and 1725, in which he is the Defendant and the First Defendant respectively. After reflecting about the arguments presented on behalf of the parties overnight, I announced the following day the outcome of those applications, namely that they were to be dismissed with full reasons to follow. This judgment sets out those reasons.

Background

2. Civil Action 1733 is a debt action. Propinvest Group Limited (in Administration) (hereafter referred to as "PGL") is suing Mr Maud for £3,359,045.72. PGL alleges that this amount remains due to it by Mr Maud, demand for repayment having been made by letter dated 6 September 2012. Mr Maud denies owing PGL this amount, asserting instead that his borrowings were transferred to Navarro Ventures SARL (hereafter referred to "Navarro") by way of an agreement executed on 25th March 2011 (hereafter referred to as "the Loan Transfer Agreement").

3. When Mr Maud's Defences were originally filed, his position was that the terms of a loan agreement made on 26 March 2010 (hereafter referred to as "the Loan Agreement"), which is referred to in the Loan Transfer Agreement, had been modified so as to cover this additional borrowing. By Amended Defences filed by consent on 22nd February 2013, an additional line of defence has been advanced. This entails asserting that the Loan Agreement did not need to be modified in the way originally suggested because a substantial portion of Mr Maud's indebtedness to PGL, apparently covered by the Loan Agreement, had wrongly been treated as his liability rather than the liability of various other persons he has specified. The consequence of this mis-recording of Mr Maud's liabilities to PGL is that the maximum amount Mr Maud was permitted to borrow under the Loan Agreement had not been exceeded when the amounts in issue in Civil Action 1733 were advanced. Therefore, those additional advances made by PGL to Mr Maud, which he admits, were within the terms of the parties' Loan Agreement. Accordingly, Mr Maud's case, on either of these bases, is that the indebtedness in respect of the amounts pleaded on behalf of PGL was transferred in full so that this is money he now owes to Navarro rather than PGL.

4. Civil Action 1725 also involves PGL as a Plaintiff and Mr Maud as a Defendant. However, this action also involves a Second Plaintiff, Gamay Holdings Limited (in Voluntary Liquidation), and nine other Defendants. In that case, the Plaintiffs say that each of the transactions referred to in their Cause were undertaken by the directors of PGL and, in respect of one specific transaction referred to therein, also of Gamay Holdings Limited, in breach of duties owed to both companies, including their fiduciary duties. The relief sought in this action is against the directors of the two companies and such other parties who the Plaintiffs say aided or assisted those breaches. The Plaintiffs also seek relief against parties who have knowingly received assets they claim are derived from those breaches of fiduciary duty, including declarations that such assets are held on constructive trust. The three transactions covered by this action are referred to as "the Many Fathers Transaction", "the Kaupthing Loan Transaction" and "the Navarro Loan Swap". The Loan Agreement and the Loan

Transfer Agreement referred to in Civil Action 1733 are said by Mr Maud to overlap with issues raised in respect of the Kaupthing Loan Transaction and/or the Navarro Loan Swap.

5. Evidence in support of the consolidation applications was contained in the Affidavit sworn by Leonore Violet Kelleher on 12th March 2013, in which she explained the background to both actions in more detail and set out the exchanges the firms of Advocates have had about the procedure to be adopted. That Affidavit also highlights the submissions that are advanced on behalf of Mr Maud, which is material that might more properly have been contained in a Skeleton Argument. On behalf of PGL, an Affidavit sworn on 18th March 2013 by Sally Miranda French responds to those evidential points and also helpfully exhibits copies of the key documents that are in dispute in Civil Action 1733.

6. Case management conferences in both actions had resulted in orders being made in each dated 1st February 2013. By virtue of those orders, it was agreed by the parties, as endorsed by the Court, that Civil Action 1733 was to proceed separately from Civil Action 1725. The parties had further agreed that Civil Action 1725 should be consolidated with Civil Action 1729, both of which cover roughly similar ground. The timetables fixed in these matters envisaged looked to a short trial in front of a judge alone before this summer in respect of Civil Action 1733 and a three-week trial where the presiding judge would be accompanied by Jurats in the consolidated Civil Actions 1725 and 1729.

7. The Amended Defences were first provided by Mr Maud's Advocates to PGL's Advocates within just a couple of hours of the conclusion of the hearing on 1st February 2013. It was acknowledged by Advocate Robison that he had had in mind advancing these amendments before agreeing to the three orders made in the case management conferences, thereby reinforcing Advocate Edwards' submission that the consolidation applications were really only an afterthought, first being raised only on 5th March 2013.

The law

8. The Skeleton Arguments and oral submissions of Counsel offered a consistent approach in relation to the law the Court should apply on these consolidation applications. The parties differ, however, over the outcome that applying these legal principles should produce in these circumstances. Rule 31(1) of the Royal Court Civil Rules, 2007 provides:

> "*Where two or more actions or counterclaims are pending before the Court, and it appears to the Court that –*
>
> *(a) some common question of law or fact arises in all of them,*
> *(b) the rights to relief claimed therein are in respect of or arise out of the same transaction or the same series of transactions, or*
> *(c) for some other reason it is desirable to make an order under this Rule,*
>
> *the Court may order the actions or counterclaims to be crochetées (consolidated), or to be tried at the same time, or one immediately after another, or that any of them shall be stayed until any other of them is determined."*

During the course of his submissions, Advocate Robison clarified that Mr Maud relies a little bit on paragraph (a), a lot on paragraph (b) and, in so far as it is necessary to do so, also on paragraph (c).

9. As guidance in relation to the way in which rule 31(1) might be applied, Advocate Robison drew attention to the commentary contained in the English Civil Procedure Rules relating to rule 3.1 concerning the court's general powers of management. Two of the powers listed in rule 3.1(2), at paragraphs (g) and (h), provide that the Court may consolidate proceedings or try two or more claims on the same occasion. Paragraph 3.1.10 of the commentary states:

> "U*nder the former rules, consolidation of proceedings could be ordered where it appeared to the Court*
>
> *(a) that some common question of law or fact arose in both or all of them,*
> *(b) that the rights of relief claimed were in respect of or arose out of the same transaction or series of transactions, or*
> *(c) for some other reason it was desirable to make an order for consolidation."*

This indicates that the old Rules of the Supreme Court were in the same form as the 2007 Rules, leading to the inference that the approach taken in relation to them will offer useful guidance as to the approach to be taken in Guernsey.

10. In general, the approach taken reflected the fact that the main object of the consolidating power was to save costs and time by avoiding the multiplicity of proceedings covering largely the same ground. Rule 3.1(2)(g) of the CPR now contains no such confining conditions. However, as this Court, in exercising the discretionary power conferred by rule 31(1), must seek to give effect to the overriding objective set out in rule 1, the conditions stated in the former English Rules remain important considerations. Accordingly, I accept that the rationale for rule 31 of the 2007 Rules is to further the overriding objective in rule 1 by looking to save costs and time through avoiding a multiplicity of proceedings which cover largely the same ground.

11. I have, however, also borne in mind other aspects of the commentary in paragraph 3.1.10 of the CPR. The passage already quoted continues:

> "*The consolidation of proceedings has always been regarded as a flexible concept (Healy v A. Waddington & Sons Ltd [1954] 1 W.L.R. 688, CA). The cases decided under the pre CPR rules of court disclosed no principle upon which the discretion to make a consolidating order should be exercised, save the possible principle that it should be confined to cases where several separate claims have been brought which might have been joined in the same originating process (Horwood v Statesman Publishing Co (1929) 98 L.J.K.B. 450; Payne v British Time Recorder Co Ltd [1921] 2 K.B. 1, CA)."*

12. Earlier in that paragraph of commentary, it was emphasized that "*the court must take care to act justly"*. I treat that as if it were a reference to the overriding objective in rule 1 of the 2007 Rules. The commentary also notes that, "*where several proceedings have been started, consolidation may be ordered at any time, whether or not the claim forms have been served"*. There is a reference to the case of Martin v Martin [1897] 1QB 429, which appears to have been the genesis for the principle that the rule was introduced to avoid a multiplicity of proceedings and, thus, to reduce costs and delays. That passage also contained a cross-reference to the commentary in paragraph 1.4.15, to which Advocate Robison also referred.

13. In relation to paragraph 1.4.15, I first note that section 49(2) of the Senior Courts Act 1981 imposes a general duty on every court to exercise its jurisdiction so as to secure that, as far as possible, all matters in dispute between the parties are completely and finally determined, and also that, again as far as possible, all multiplicity of legal proceedings with respect to any of those matters is avoided. In De Crittenden v Bayliss (Deceased) [2005] EWCA Civ 1425, the English Court of Appeal stated that, as a general rule of public policy, a claimant has to bring forward their entire case in a single action and, where they have a choice of remedies, elect which remedy to pursue. Whilst Guernsey does not have a statutory provision equivalent to Section 49(2) of the 1981 Act, these are, in my view, principles that are capable of being derived from the application of the overriding objective in rule 1, and by reference to specific rules such as rule 31(1), and so capable of being taken into account.

Parties' submissions

14. Advocate Robison further submitted that the combination of these principles creates a presumption in favour of consolidation, which an opposing party then needs to rebut. Given the discretionary wording in 31(1) of the 2007 Rules, I am not convinced that Guernsey's Rules have created a presumption in quite the way suggested by Advocate Robison, but I do acknowledge that, taking everything in the round, the Court is required to consider how best to deal with the actions that have been commenced against Mr Maud so as to do justice between all the parties. I take the view that such an approach is consistent with what was said in the case of IXIS Corporate & Investment Bank v WestLB AG [2007] EWHC 1748 (Comm), in which Aikens J stated (at para. 40):

> "*Under the CPR Part 3.1(g) and (h), the court has power to consolidate proceedings or try two or more claims on the same occasion. The powers are discretionary and will be used in order to give effect to the "overriding" objective of the CPR, viz. to ensure cases are dealt with expeditiously, fairly and proportionately, with a view to saving expense and time."*

This case is an example of where there was a significant degree of overlap in issues of fact and law, including the likelihood of overlap of expert evidence, but where His Lordship concluded that it would not be fair and just to consolidate the two sets of proceedings.

15. Advocate Robison submitted that the debt action (Civil Action 1733) could have been raised by PGL as part of Civil Action 1725. In doing so, he has highlighted that the same parties are involved and suggests that the cases arise out of consideration of the same transactions. It is, of course, indisputable that PGL and Mr Maud are parties to both actions. That alone is not, in my view, sufficient to make it necessary to consolidate the two actions. However, as Advocate Robison submits, an element of Mr Maud's defence in Civil Action 1733 following the amendments made on 22nd February 2013 involves him demonstrating that he did not receive the loans attributed to him by PGL in October 2008, thereby reducing the liability he had under the Loan Agreement, with the consequence that his additional borrowing, which he accepts he had between 2010 and 2011, would fall within the maximum amount permitted under the Loan Agreement and so fell to be incorporated into what was transferred to Navarro on 25th March 2011. In seeking to establish that he did not receive the loans, Mr Maud may need to demonstrate who did actually receive them in October 2008. His perceived difficulty is that, whilst Navarro is a party to Civil Action 1725, it is not a party to Civil Action 1733.

16. Advocate Fullman has appeared on behalf of the Third to Tenth Defendants in Civil Action 1725. The Fifth Defendant is Navarro. The position of the Third to Tenth Defendants is that they do not object to the consolidation applications and the impression I got is that they might actually have been broadly supportive of them. Advocate Fullman gave an intimation that a representative of the corporate director of Navarro will not attend any separate trial of Civil Action 1733, and could not be compelled to do so, but would be prepared to provide some written information so as to be of assistance in the determination of the issues in that case. In contrast, however, the present position is that he would be likely to attend, and give oral evidence, at the trial in Civil Action 1725. Whilst this intimation was no doubt intended in the spirit of helpfulness, the information was not provided in the form of evidence and, ultimately, which persons are persuaded to attend to give evidence is a matter for the parties.

17. During the course of his submissions on behalf of PGL, Advocate Edwards was critical of Mr Maud's apparent delaying tactics. He suggested that every step in these proceedings had been indicative of an intention on Mr Maud's behalf to avoid having to face justice in respect of his misdeeds in relation to PGL and the wider group in which that company was involved. It is fair to say that the timing of the making of these consolidation applications is not the best it could have been. Had these issues been properly thought through, the Court would have been unlikely to have acceded to the parties' requests to fix separate timetables for the sets of proceedings involved without first addressing the issues raised now raised by the applications. Advocate Robison submitted that the applications had been made as soon as it was known to

Mr Maud that it would be necessary to make them. He points, in particular, to the disclosure of lists of documents that had been provided by both parties later on in February 2013, ie, following the case management conferences.

18. I have to say that I am slightly troubled by Mr Maud's approach to rule 1(4) of the 2007 Rules because it does strike me that he has not been assisting the Court as fully as he might by agreeing to a separate timetable to progress Civil Action 1733 to trial in the manner set out in the Court's order of 1st February 2013, whilst at the same time contemplating adding a further element to his Defences. The inference to be drawn is that he did not regard this additional element of his defence relating to what has been described as the "*accounting error"* as entailing the consolidation of Civil Action 1733 with Civil Action 1725. Although the Amended Defences were not lodged until three weeks later, Mr Maud and his Advocate do not appear to have thought through fully the consequences of what was happening. That said, the applications have now been made and, in spite of my concerns about Mr Maud's approach, they will be given full consideration.

19. Advocate Edwards also drew attention to a general principle relating to the importance of the investigation and the imposition of appropriate sanctions, be they criminal or civil, in respect of misconduct on the part of persons who may be shown to have abused the privilege of incorporation with limited liability (see, eg, Whitehouse v Wilson [2005] EWCA Civ 1688). It has to be accepted that there is a public interest in the recovery for the benefit of the company's pre-administration creditors of funds or commercial opportunities said to have been misappropriated or misdirected by the actions of a director. I regard this as a factor that should be taken into account at the stage of weighing up the pros and cons of exercising the discretion conferred by rule 31(1) once one or more of the conditions specified therein has been established.

Discussion

20. The main complaint of Mr Maud is that the issues raised by his Amended Defences need consideration of some matters relating to the Kaupthing Loan Transaction and the Navarro Loan Swap, which will be dealt with in some detail in Civil Action 1725. To that extent, it is being suggested that Mr Maud's consolidation applications fall squarely within rule 31(1)(b). However, the transactions that are in issue in the Kaupthing Loan Transaction and the Navarro Loan Swap are not the same transactions as those in issue in Civil Action 1733. Rules 31(1)(b) refers to "*the rights to relief claimed*" in both actions being "*in respect of or [arising] out of the same transaction or the same series of transactions*". I am not satisfied that the relief claimed in Civil Action 1733 arises out of the same transaction as the rights to relief claimed in Civil Action 1725. PGL does not rely on the Kaupthing Loan Transaction or the Navarro Loan Swap when suing Mr Maud for the monies it claims he owes outside of the Loan Agreement and the Loan Transfer Agreement. Its claim relates to different transactions, although I accept that they can be regarded as personal borrowing of Mr Maud from PGL and so part of a series of such transactions, which include the Loan Agreement. I am, therefore, not persuaded that the rights to relief advanced by PGL in Civil Actions 1733 and 1725 arise out of the same transaction and probably not even out of the same series of transactions. As such, I do not regard this as a case in which rule 31(1)(b) is clearly engaged, and approach the applications more on the basis that the Amended Defences now advanced by Mr Maud potentially raise some common questions of fact that fall to be aired in both actions. This does mean that one of the conditions in rule 31 has been satisfied, enabling me to consider whether this is a proper situation in which to exercise the Court's discretion to order that Civil Actions 1733 and 1725 be *crochetées*.

21. In response to Mr Maud's main complaint, Advocate Edwards has suggested that these concerns are really of Mr Maud's own making; he is seeing problems where they simply do not exist. I have approached this particular issue by considering what differences there are between the Defences originally lodged on behalf of Mr Maud and his subsequent Amended Defences. At the risk of over-simplifying matters, the latter introduced the additional line of defence that Mr Maud's liabilities had been incorrectly recorded, with the consequence that

such an "*accounting error*" affects the construction of the Loan Agreement. This line of defence involves asserting that the Loan Agreement was prepared as a result of a mistake.

22. It is, in my view, important to note that the parties to the Loan Agreement are PGL and Mr Maud. For these purposes, PGL really means Mr Timothy Southern, who held a board meeting as the representative of two corporate directors and in his personal capacity as director of PGL on 25th March 2010, "albeit that minute of that meeting incorrectly refers to the previous year". Advocate Robison has suggested that it would be relevant for Navarro to say what it thought it was acquiring through the Loan Transfer Agreement and that Mr Maud is entitled to lead such evidence as he wishes, perhaps extending to calling professional advisors involved in preparing the Loan Transfer Agreement, to support his line of defence. However, that exercise appears to me really to involve concentrating on the Loan Transfer Agreement and any mistake in relation to that document which could, and perhaps even would, have been a live issue under the original Defences. In many respects, therefore, I do not see how the additional line of defence now advanced on behalf of Mr Maud significantly extends the evidence that must already have been in the contemplation of the parties before the Defences were amended. Mr Southern and Mr Maud remain the two people who can speak to what was in the mind of the company and in the mind of Mr Maud at the time the Loan Agreement was negotiated and concluded. Similarly, they can speak to any changes to the terms of that Agreement that might have been agreed between the two parties thereafter. Whilst something of that nature may have been communicated to Navarro, it would amount to no more than confirmation of what was actually done between the principal parties to the Loan Agreement.

23. I have looked very carefully at what it is that PGL is claiming. Its Cause says that the money owed to it remains unpaid despite having been demanded. Its assertion is that the money advanced to Mr Maud was outside of the advances that were transferred by PGL under the Loan Transfer Agreement. Mr Maud denies that he owes this money to PGL on the basis that it was subject to the Loan Transfer Agreement. In effect, his overall defence remains unchanged. What the amendment to his Defences does is to add an alternative way of bringing the borrowing from PGL within the terms of the Loan Transfer Agreement. Accordingly, I struggle to see how adding the further basis on which that defence is advanced means that Civil Action 1733 should now be consolidated with Civil Action 1725.

24. On behalf of Mr Maud, there is also a suggestion that a risk of inconsistent findings has arisen. Whilst there is a theoretical chance that persons who are not parties would not be bound by the outcome in a separate trial of Civil Action 1733, when one looks at the outcomes that would be available on such a separate trial, this seems more fanciful than real. If PGL succeeds in its action against Mr Maud for the alleged debts, it will have established that those debts were outside the Loan Transfer Agreement. It will mean that Mr Maud is indebted to PGL rather than Navarro. If Navarro were to seek to recover that money from Mr Maud, Mr Maud would be able to point to the Court's decision as indicating that the money did not need to be paid back to Navarro. The Court's decision would not be directly binding on Navarro but such a claim by Navarro would have to be made outside of Civil Action 1725 in any event. If, however, Mr Maud were to be successful in resisting PGL's claim to recover the alleged debt, it would confirm his position that his borrowings in 2010 to 2011, which are the subject of Civil Action 1733, are a liability now owed to Navarro rather than PGL. If the Court were to conclude that Mr Maud's original line of defence is the correct position, then the level of indebtedness of Mr Maud under the Loan Transfer Agreement in favour of Navarro would include the additional borrowings as well as all of the liability previously recorded as being Mr Maud's liability. If, alternatively, the Court were to conclude that Mr Maud's arguments about the so-called "*accounting error*" hold substance, then I do not imagine that the exploration of those issues in relation to the way in which the defence is put in Civil Action 1733 will need to be as fully covered as they might be in the case of Civil Action 1725.

25. Whilst there will no doubt be some factual overlap, I imagine it is not as great as has been suggested on behalf of Mr Maud. As I have already pointed out, it is not PGL's claim itself in

Civil Action 1733 that seeks relief out of a transaction covered in Civil Action 1725, but rather the factual connections between the two proceedings arising from the way in which Mr Maud's defence has been constructed. Whether or not Mr Maud now owes money to PGL is much more of a discrete issue than the material over which Civil Action 1725 will have to range. I fear there is a real risk that ordering consolidation would result in the issues about Mr Maud's alleged personal indebtedness being lost in the overall scheme of allegations about breach of director's duties.

Conclusion

26. Although there will be some overlap in the evidence to be given in Civil Action 1733 and Civil Action 1725, I have concluded that it would not be fair and just to the parties to order that the two actions be *crochetées*. PGL's case is that Mr Maud owes the company money. I consider that it should be entitled to pursue that claim in the straightforward manner set out in its Cause and at the earliest opportunity. Equally, Mr Maud is entitled to defend himself against that claim. In doing so, he can develop his lines of defence in the manner he wishes by leading relevant evidence. It will be a matter for him how far this extends to personnel involved with Navarro, but the main witnesses on his behalf are always likely to be him and Mr Southern. If there is any risk of irreconcilable findings, and I am not persuaded that a risk really exists, this risk is, in my view, outweighed by the desirability of PGL being able to seek a resolution of its claim before this summer rather than at some point later in the year at the very earliest. It was for these reasons that I decided that the consolidation applications should be dismissed.

Costs

27. On the basis that the costs of the consolidation applications were likely to follow the event, when Counsel appeared on other applications involving the parties at the Interlocutory Court on 5th April 2013, Advocate Robison indicated that he could not resist PGL's application for its costs and that is the order I therefore make. PGL shall have its costs of resisting the consolidation applications on the standard recoverable basis.

