

JERSEY / JUDGMENT

Crill Canavan -v- Mackinnon

[2013] JRC 192A (01 October 2013)

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judgment

the master: Reasons for Master's Decision given on 1 st October 2013

1. This is an application by the plaintiff, Crill Canavan, a firm of Jersey Advocates and Solicitors, to convene David Brownbill Q. C. as a Third Party to a Counterclaim brought by the defendant Mr Mackinnon against Crill Canavan. At the conclusion of the hearing I gave a short summary of my decision but indicated I would give my reasons in full at a later date which I now do.

2. Prior to the hearing commencing I disclosed to both parties that while in private practice before taking up my current post I had spoken with Mr Brownbill Q. C. at a conference and that we had attended a work related social event. I also disclosed that I had acted for some of the current and former partners of Crill Canavan in an entirely unrelated matter. I also recalled that I acted for Royal Bank of Scotland International Limited in relation to the imposition of a caveat on Mr Mackinnon's property in 2006. No one objected to my sitting because of any of these matters. I also asked myself whether they required me to recuse myself and I am satisfied that they do not. The history of this matter

3. In relation to this matter the history of the application is important. In December 2003 Mr Mackinnon then represented by Crill Canavan, commenced an action alleging that three trusts were invalid on a number of grounds including sham and breach of *donner et retenir ne vaut*. The trustee and another party applied to strike out the Order of Justice insofar as it related to questions of sham. That application failed before Master Wheeler but was successful before the Royal Court and the Court of Appeal. Leave to appeal to the Privy Council was subsequently refused. After these decisions the proceedings commenced in 2003 by Mr Mackinnon were compromised. Part of the allegations in the Counterclaim brought against Crill Canavan by Mr Mackinnon in the current proceedings is that the 2003 proceedings were compromised on unfavourable terms.

4. Crill Canavan issued proceedings for the balance of their fees and Mr Brownbill's fees in relation to the 2003 proceedings by an Order of Justice issued in November 2006. It is a matter of regret and concern that these proceedings despite nearly seven years having past are still at the stage of procedural skirmishes and nowhere near ready for trial. This is not how this litigation should be conducted moving forward.

5. In 2007 Mr Mackinnon issued an application to stay the action on the basis that England rather than Jersey was the appropriate forum. That application was dismissed for the reasons set out in a judgment of the Royal Court given on 10 th May, 2007, *Crill Canavan-v-Mackinnon*

- [2007] JRC 099. I refer later to parts of that judgment in relation to the submissions made to me. 6. The plaintiff then filed an Answer on 13 th July, 2007, which was amended in August 2007 and re-amended in April 2008. The plaintiff filed a Reply in May 2008. At that stage Mr Brownbill was not convened as a Third Party. 7. Nothing further then occurred until May 2011 when Master Wheeler issued a standard circular regarding the dismissal of actions and this action was included in the schedule attached to that circular. In response both parties issued summonses. The outcome of those summonses was that Master Wheeler dismissed both the Order of Justice and the Answer of Counterclaim pursuant to Rule 6/26(13) of the Royal Court Rules 2004 , as amended. 8. Mr Mackinnon appealed Master Wheeler's decision. On 23 rd July, 2012, the Royal Court Crill Canavan-v-Mackinnon
- [2012] JRC 140A allowed the appeal and reinstated the Order of Justice and the Answer and Counterclaim. As part of its decision the Royal Court ordered Mr Mackinnon to apply within 21 days for leave to amend his Answer and Counterclaim. The purpose of the amendment was to include a claim against Crill Canavan arising from faulty loan documentation, which it was alleged could give rise to a substantial inheritance tax liability in connection with the estate of Mr Mackinnon's mother ("the IHT issue"). Mr Mackinnon stated that Crill Canavan should have identified the IHT issue, the failure to do so was negligent and entitled Mr Mackinnon to claim damages. His application to amend the Answer and Counterclaim came before Master Wheeler on 18 th January, 2013, and was dismissed. The judgment was not appealed. In making his application to amend to Master Wheeler, Mr Mackinnon raised the IHT issue against Crill Canavan alone. No application was made to add Mr Brownbill as a defendant in respect of the IHT issue, or indeed in respect of the matters pleaded in 2008. This was because Mr Mackinnon had commenced proceedings against Mr Brownbill in England sometime in 2011. Particulars of claim were filed on 30 th September, 2011, with minor amendments being made on 5 th October, 2011. Mr Brownbill filed a defence on 21 st August, 2012. Since the filing of a defence I was informed that matters in England have been stayed. The issues raised by Mr Mackinnon in England against Mr Brownbill are essentially the same as those raised by him against Crill Canavan in Jersey in 2007-2008 ("the Jersey litigation issues") and the IHT issue. 9. Following the dismissal of Mr Mackinnon's application to amend his claim against Crill Canavan in respect of the IHT issue, Master Wheeler by an Act of Court dated 21 st March, 2013, allowed Crill Canavan 21 days to apply to convene Mr Brownbill as a Third Party. This is the application I now have to consider. Mr Mackinnon's objections 10. Mr Mackinnon objects to Mr Brownbill being joined as a Third Party. His submissions were carefully put by Advocate Scholefield on his behalf. The thrust of the submissions was that if Mr Brownbill was joined as a Third Party then Mr Mackinnon was running the risk of being liable for three sets of costs should his claims in Jersey and in England not succeed. In other words he could be liable for the costs of Crill Canavan in Jersey, the costs of Mr Brownbill in Jersey and the costs of Mr Brownbill in England. It was further explained that if Mr Mackinnon were to consent to Mr Brownbill being joined in Jersey that might also prejudice his existing action in England and whether that action should continue.

However that issue would not arise if I were to order Mr Brownbill to be convened. 11. What underlay Advocate Scholefield's submissions arose out of an exchange between the then Deputy Bailiff in 2007 and Advocate Frankel who acted for Crill Canavan in the course of Advocate Frankel's submissions. The relevant part of the transcript discussing the role of Mr Brownbill in the Jersey proceedings states as follows:- "DEPUTY BAILIFF: You accept that he may well be a witness? ADVOCATE FRANCKEL: I accept he may well be a witness, but what we do not have is an argument that is only between an English Mr Mackinnon and an English Mr Brownbill. That is not what this is about, despite my learned friend's best efforts. I will come on to Miss Bayliss and H O later if I may, but that is not what----- DEPUTY BAILIFF: I mean, do you argue that Mr Mackinnon can make any allegation which he makes against Mr Brownbill against your clients; in other words, any allegation of ... the allegation of this was

- (a) a poor strategy and (b) fundamentally misunderstood the law of sham. ADVOCATE FRANCKEL: That is the essence of it. DEPUTY BAILIFF: I think that is the essence of the allegations. ADVOCATE FRANCKEL: Sir, I hope you will appreciate that----- DEPUTY BAILIFF: Now, that surely, if it is a well-made allegation, it can be made against your clients in exactly the same way as against Mr Brownbill, can't it, because they owe a duty, surely, to advise a sensible strategy and to give competent advice on the law of sham? ADVOCATE FRANCKEL: I say so, yes, Sir. The fact is----- DEPUTY BAILIFF: So if there has been negligence, if this was a negligent strategy and if he suffered losses as a result, whatever they are, then he can recover them from your client?" 12. It was contended in light of this exchange that Crill Canavan accepted that any liability for negligence advice or advice given in breach of contract was theirs so that any issue between Crill Canavan and Mr Brownbill was a separate matter from Mr Mackinnon's claim against Crill Canavan. I was advised that Mr Mackinnon had formulated his strategy in reliance on this exchange. 13. I was also referred to the last six lines of paragraph 29(ii) of the Deputy Bailiff Birt's judgment at [2007] JRC 099 which reads as follows:- "Accordingly it is not necessary as a matter of law for Mr Brownbill (or anyone else) to be joined to these proceedings. The defendant can defend and counterclaim against the plaintiffs and if it is found that the strategy employed was a negligent one (even if as a result of Mr Brownbill's advice) the plaintiffs will be liable to the defendant for any resulting loss. It would be for the plaintiffs to decide whether they wish to join Mr Brownbill to the proceedings and seek an indemnity or contribution from him in respect of any sum they may have to pay the defendant." (my emphasis) 14. I do not read the above paragraph as meaning that Crill Canavan accepted that they would not seek to join Mr Brownbill in Jersey. Rather it simply records that if the advice of Crill Canavan was negligent even if Crill Canavan relied on Mr Brownbill's advice Mr Mackinnon could pursue them. However, I do not see this part of the judgment as preventing Crill Canavan from joining Mr Brownbill to the same proceedings. As the last three lines of the paragraph cited above note it was a matter for Crill Canavan as to whether they wished to join Mr Brownbill. 15. The judgment of the Deputy Bailiff Birt (as he then was) in sub-paragraph 29(iii) continued as follows:- "Despite the fact that it is not necessary as a matter of law for the defendant to join

Mr Brownbill to the proceedings, he may of course choose to do so." 16. In other words the 2007 judgment not only left open the possibility of joinder by Crill Canavan; it also noted that it was open to Mr Mackinnon to sue Mr Brownbill in Jersey. The final sentence of paragraph 29(iii) stated:- "Nevertheless, we accept that it would not be unreasonable for the defendant to wish to claim against Mr Brownbill as well as the plaintiffs." 17. However Mr Mackinnon has chosen not to claim against Mr Brownbill in Jersey. Instead he elected to pursue him in England in respect of the Jersey litigation issues and in respect of the IHT issues. The issue he now faces in terms of a potential exposure to adverse costs orders exists because of the multiplicity of actions in relation to the Jersey litigation issues. However it is Mr Mackinnon who decided presumably on advice as he is legally represented to commence parallel proceedings in two jurisdictions in respect of largely the same issues other than the IHT issue. He made this decision even though in 2007 the Royal Court noted that Mr Mackinnon had the choice of convening Mr Brownbill to the proceedings in Jersey. The same judgment also noted at paragraph 19 that Mr Brownbill was a witness to the proceedings; Mr Brownbill was always therefore going to play some form of role in relation to resolution of the Jersey litigation issues. 18. It is true that Crill Canavan did not join Mr Brownbill in 2008 when they could have done so. The period of delay between then and now is unattractive and is not how cases should be conducted. However the reasons for the delay do not solely lie with Crill Canavan. Both parties appeared to have allowed this matter to go to sleep until Master Wheeler issued his circular in May 2011. Once that issue was resolved by the Royal Court in 2012, Mr Mackinnon attempted to sue Crill Canavan in Jersey in respect of the IHT issue but without success while suing Mr Brownbill in England. I am not therefore persuaded that the delay in joining Mr Brownbill by Crill Canavan is sufficient to prevent Crill Canavan seeking a contribution from Mr Brownbill in this jurisdiction. In reaching this decision I note that Mr Brownbill has filed a defence in England to the allegations raised against him. The claim by Crill Canavan will therefore in terms of the underlying facts not come as a complete surprise to Mr Brownbill given that he has already been pursued in England. 19. The existence of proceedings in England and in Jersey does potentially give rise to difficulties in particular the danger of more than one court reaching different conclusions on the same facts. However the English proceedings are stayed. I regard it as highly desirable that the Jersey litigation issues are best resolved by one court hearing all the evidence and having all relevant parties before it to enable the adjudication of all matters in issue to be dealt with. In light of the fact that the action is stayed in England I would hope that the English Court would be willing to agree to the continuation of that stay so that the Jersey Court can resolve the issues already before it without the dangers of inconsistent findings or indeed duplication of effort. The IHT issue would of course remain an issue for the English Court to resolve once the outcome of the Jersey proceedings was known. 20. The alternative option would be to refuse the application and to require Crill Canavan to either sue Mr Brownbill by way of separate proceedings or in England. In respect of the former any such action would be very likely to be consolidated by virtue of Rule 6/11 of the Royal Court Rules 2004, as amended and so does not progress matters. In respect of the option of Crill Canavan suing Mr Brownbill in England that would lead to further duplication of

proceedings. It would also run a serious risk of undermining the decision of the Royal Court made in 2007 because issues between Mr Mackinnon and Mr Brownbill and Crill Canavan and Mr Brownbill could end up before the English Court whereas the decision of the Royal Court in 2007 was that the claims brought by Mr Mackinnon against Crill Canavan should be heard in Jersey. 21. I would like to emphasise that these different scenarios and the difficulties they create have come about because Mr Mackinnon chose to sue Mr Brownbill in England in respect of the Jersey litigation

issues.

This is despite the fact the 2007 judgment referred to the possibility of Mr Mackinnon joining Mr Brownbill in Jersey and that such a step would not be an unreasonable one for him to take.

Although Mr Mackinnon now complains that he is exposed to an extra costs risk this risk is something that follows from the decisions he has taken in relation to the separate claims he has brought against Crill Canavan and Mr Brownbill in two different jurisdictions. It is not something that should prevent Crill Canavan from seeking a contribution or an indemnity from Mr Brownbill in one set of proceedings; it is also not something that should require Crill Canavan to have to address the sort of complexities or challenges that I have referred to. I am not therefore prepared to refuse to join Mr Brownbill on the basis contended for by Mr Mackinnon. 22.

However it is still for Crill Canavan to satisfy me that this is a matter where leave should be given to serve Mr Brownbill out of the jurisdiction. An affidavit was filed in support of this application by Mr McCormick an employee of Carey Olsen who represent Crill Canavan. The affidavit relied on Rule 7(c) of the Service of Process Rules 1994 as the basis upon which this court had jurisdiction to convene Mr Brownbill. Rule 7(c) provides as follows:- " In certain cases service of summons allowed out of jurisdiction

- (c) the claim is brought against a person duly served within or out of the jurisdiction and a person out of the jurisdiction is a necessary or proper party thereto." 23. I also referred Mr Jones who appeared for Crill Canavan to Rule 7(f) which provides as follows:-
- (f) the claim is founded on a tort and the damage was sustained, or resulted from an act committed, within the jurisdiction." 24. It is clear to me that the claim for a contribution against Mr Brownbill falls within Rule 7(f). If Crill Canavan are found to be liable to Mr Mackinnon and that is on the basis of negligent advice of Mr Brownbill (which is only an allegation at this stage) then Crill Canavan would have suffered damage within the jurisdiction. Therefore I am satisfied that Mr Brownbill can be convened as a Third Party on the basis of Rule 7(f). 25. In relation to Rule 7(c), the issue that arises is whether this rule extends to claims by a defendant against a third party. Under the former English equivalent to Rule 7 (Order 11) an express amendment was required to make it clear that a third party was a necessary or proper party to proceedings brought against a defendant (see paragraph 11/1/24 and Order 16 Rule 3(4) of the Supreme Court Practice (1999 Edition). 26. In relation to Mr Mackinnon's claim he has not sued Mr Brownbill as co-defendant which clearly would enable Rule 7(c) to be invoked. It is also not necessary for the reasons set out in the

judgment of the Royal Court in 2007 from Mr Mackinnon's perspective to join Mr Brownbill to resolve his claim against Crill Canavan. Mr Mackinnon as he has elected to do can pursue Crill Canavan alone. In that sense Mr Brownbill is not a party to the claim. However Crill Canavan is entitled to seek a contribution or an indemnity. Mr Brownbill is already also a witness and based on the pleadings appears to have been materially involved in the litigation commenced in 2003 and the strategy involved in that litigation. While therefore it is not necessary to resolve the claim against Crill Canavan for Mr Brownbill to be a party the question arises whether he is a proper party to the claim brought against Crill Canavan. 27. I consider the ordinary meaning of proper to be appropriate or correct. There is clearly a claim within the jurisdiction against Crill Canavan. It is clearly appropriate for the Crill Canavan claim against Mr Brownbill which arises directly out of the same facts and involves the same witnesses and documents to be heard at the same time. I therefore construed Rule 7(c) to apply to claims brought by a defendant against a third party where the defendant has a proper or appropriate basis to join that third party to the proceedings. 28. I appreciate that there is a risk that such a construction may be abused. However, I consider that the risk of a potential misuse of Rule 7(c) based on the construction that I consider applies is met by virtue of the obligation to satisfy the Court under Rule 9 that Jersey is an appropriate forum even if a party can invoke Rule 7(c) (see UCC-v-Bender

[2006] JLR 242). I therefore concluded that Mr Brownbill can be joined on the basis of Rule 7(c) as well as Rule 7(f). I am also satisfied that Jersey is an appropriate forum for resolution of the claim against Mr Brownbill essentially for the same reasons as set out in the Royal Court judgment in 2007 when dismissing Mr Mackinnon's attempt to stay the proceedings brought by Crill Canavan as well as because of the dangers of having separate proceedings and inconsistent findings of fact in particular involving more than one jurisdiction.

Conclusion

29. In conclusion for the reasons set out in this judgment I authorise Crill Canavan to convene Mr Brownbill as a Third Party to the proceedings. I require him to be served personally. Mr Brownbill is also required to file his Answer by 31 st October, 2013, with Crill Canavan filing their Reply by 21 st November, 2013. I further direct that the plaintiff, defendant and Mr Brownbill should attend before me for directions in the week commencing nd December, 2013. Costs 30. It was agreed before me that the costs of the amendments to the plaintiff's Reply and Answer to the Counterclaim were to be borne by the defendant. I was asked by Mr Mackinnon to agree to a stay of this costs order given that there are already costs orders in favour of both parties which have not been enforced. Mr Jones for Crill Canavan opposed such a stay. In my judgment and in exercising my discretion I consider that such a costs order should be stayed. The focus of the parties in relation to this litigation should in the future be to aim to bring this matter to trial within a sensible procedural time frame. I do not wish the parties to become embroiled in disputes over costs; rather their focus should be on resolving the substantive issues between them. Authorities Crill Canavan-v-Mackinnon

[2007] JRC 099. Royal Court Rules 2004. Crill Canavan-v-Mackinnon

[2012] JRC 140A . Service of Process Rules 1994. Supreme Court Practice (1999 Edition). UCC-v-Bender

[2006] JLR 242 . Page Last Updated: 16 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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