EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2017/0006

BETWEEN:

MAGWITCH LLC

Claimant

-and-

PUSSER'S WEST INDIES LIMITED

Defendant

Appearances:

Mr. Michael Fay, QC, for the Claimant
Mr. Sydney Bennett, QC, with him Ms. Pauline Mullings for the Defendant

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2018: October 10;
December 6;
2019: April 15

JUDGMENT

[1] WALLBANK, J. (Ag.): This judgment concerns an application for summary judgment brought by the claimant and an application for reverse summary judgment and/or for the claim to be struck out brought by the defendant. The claimant's application asserts that there is no realistic defence to the claim. The defendant's application, and amended defence, asserts that the claim is statute barred, being filed out of time. If the defendant is correct, that is the end of the matter. It is therefore appropriate to treat limitation as a preliminary legal issue. For the reasons below I conclude that the claim is indeed statute barred.

Background

[2] The following is a simplified background summary. The issues proliferated during these interlocutory proceedings, but there is no need for each of these to be addressed in order to determine these applications.

[3] On 20th January 2017 the claimant, Magwitch LLC ('Magwitch'), filed a claim form bringing a claim against the defendant, Pusser's West Indies Limited ('PWI'), together with a statement of claim. Magwitch filed an amended statement of claim on 11th July 2017.

[4] The claimant alleged the following. Magwitch is a limited liability company registered in New York, United States of America. A company called Pusser's Ltd ('Ltd') was incorporated in the Territory of the Virgin Islands ('TVI') on 25th May 1979. Up until 30th June 2003 Ltd owned and operated the Pusser's business in the TVI. This is a beverage, restaurant and retail business related to a brand of rum of the same name. PWI was incorporated on 11th January 2002. On 30th June 2003 PWI assumed ownership and control of the Pusser's business in the TVI. There were other companies in what can loosely be called the Pusser's group, incorporated and operating in the United States of America. One of these was a Florida corporation, called Pusser's Inc. ('Inc.')

[5] On a number of dates from 1st July 2003 Inc. paid various sums to PWI. The claimant claims that these were advanced by way of loan. The claimant says the best particulars for the alleged loans derive from an unaudited balance sheet of Inc. dated 27th June 2004, as well as subsequent daily cash flow reports and messages. These were prepared by PWI's and Inc.'s financial comptroller, Mr. Kert Tennikait.

[6] Magwitch says the balance sheet records show that there is a net balance due from PWI to Inc., as at 30th June 2004, of US$1,800,411. Furthermore, the daily cash flow reports and messages record that further sums were advanced, bringing the total for sums advanced from Inc. to PWI since 1st July 2003 to at least US$2,470,167.

[7] Magwitch claims that PWI has admitted and/or averred, through affidavit evidence of Mr. Tennikait filed on 14th March 2017 (Mr. Tennikait's first affidavit), that the loans were repayable by transfers of goods, services, cash or things of value going from PWI to Inc. The claimant

contends that it follows as a matter of law that the loans were not repayable immediately they were made, but that they only became repayable in cash on Inc. making a demand that the loans be repaid. The claimant contends, further or alternatively, that the loans became repayable, as a matter of inferred fact and/or law, within a reasonable time of a demand being made. The claimant claims a reasonable time would be fourteen days of a demand being made.

[8] The claimant further states that it obtained a judgment against Inc. and Ltd in Florida on 17th November 2009 for a sum of approximately US$2.3million. On 29th November 2011 the Florida court appointed a receiver over Inc. On 14th May 2012 the Florida court authorized the receiver to sell all Inc.'s claims and choses in action against PWI to Magwitch. This transfer and assignment was effected pursuant to a bill of sale dated 30th October 2012. Magwitch relies upon this assignment as the basis for this claim against PWI.

[9] The claimant claims that it demanded repayment of the loans on or about 14th February 2013 and that PWI has failed to repay any of them. The specific event the claimant relies upon as constituting its demand was its commencement of legal proceedings on that date in the Florida State Court against PWI to recover the alleged loans or debts.

[10] In terms of relief prayed for in the amended statement of claim, save for a general prayer for further or other relief and costs, there are four other heads of the prayer. These specifically concern and are consequent upon the claimant's claim in debt against the defendant for repayment of the alleged loans. Consequently, if PWI is correct that the claim was filed out of time, the entire claim should be struck out.

[11] On 2nd March 2017 PWI applied for summary judgment and/or for the claim be struck out on the basis (amongst others) that the claim is statute barred.

[12] By section 4 of the Limitation Ordinance, Chapter 43 of the Revised Laws of the Virgin Islands ('the Limitation Ordinance'), no action founded on simple contract and no action for an account shall be brought after the expiration of six years from the date on which the cause of action accrued.

[13] On PWI's case, any loans it may have made to Inc. were repayable immediately upon the loans being made. The last date of the loans pleaded by the claimant is 14th April 2005. This is on a sensible reading of the amended statement of claim. It is true that paragraph 9(a)(i) of that pleading refers to amounts due as at 30th June 2013, but that must be an error, because paragraph 9(a) states that those amounts were reflected in a balance sheet dated 27th June 2004, which would be impossible. It is uncontroversial that the claimant's claim, and its application for summary judgment, are based upon that 2004 balance sheet. On PWI's case, therefore, the claim became statute barred on or about 15th April 2011. This underlines the importance of the issue whether, as the claimant argues, the loans were repayable a reasonable time after demand for repayment has been made.

[14] PWI's evidence in support of this application was first an affidavit of Mr. Charles Tobias, the moving spirit behind the Pusser's enterprise. This was filed on 2nd March 2017. In this, Mr. Tobias takes issue with Magwitch's characterization of the commencement of the Florida proceedings as a demand for repayment of a loan. He says no mention is made in those proceedings of any loan, merely of an alleged debt. He argues that Magwitch's reliance on the issue of those proceedings as a demand is a 'gimmick' in an attempt to re-set the clock on the 'obvious' six-year statutory limitation period applicable to these claims. He says that Mr. Tennikait would address the detail of Magwitch's allegations concerning the sums claimed with reference to PWI's accounting information and materials.

[15] A few days later, on 15th March 2017, PWI filed an affidavit dated 14th March 2017 of Mr. Tennikait, his first affidavit. This was only two and a half pages in length and exhibited no documents. After explaining some of the history behind the companies, Mr. Tennikait stated:

> "8. Any intercompany transactions involving transfers of goods, services, cash or other things of value from one company to the other since I took on the role of comptroller [from about 2000], have been consistently recorded and were never booked, regarded, or treated as "loans payable on demand." The first time I heard them described that way was in Magwitch's statement of claim against PWI filed in the BVI. Rather they were always considered and treated as liabilities of the receiving company that could be offset by transfers of goods, services, cash, or other things of value going the other way.
>
> 9. I have been shown and have read, a copy not only of Magwitch's statement of claim but also of its response to PWI's request for further information and can say, based on the foregoing, that the notion that the sums claimed by it were transfers made by way of loan, let alone as loans payable on demand, is quite misleading and simply has no basis in reality or in fact." [Emphasis added.]

[16] Magwitch relies upon this statement, and the emphasized part in particular, as an admission that the amounts claimed constituted liabilities due from PWI to Inc. Magwitch then purports to apply a legal or factual inference deriving from English law authorities to contend that they should be treated as loans repayable within a reasonable time after demand for repayment is made.

[17] On 5th April 2017 Magwitch filed an affidavit responding to PWI's two affidavits. Magwitch's affidavit was by its manager, Mr. Lloyd De Vos. Mr. De Vos maintained that the proceedings commenced in 2013 against PWI in Florida were consistent with the present claims and that they had been dismissed for lack of personal jurisdiction without any consideration of the substantive merits.

[18] On 14th June 2017 Magwitch filed a second affidavit of Mr. De Vos. In this he seeks to address an apparent discrepancy in the balance sheet of Inc. for 27th June 2004. In that balance sheet there was a section listing 'Current Assets' and 'Current Liabilities' of Inc. respectively. In the 'Current Assets' section, there is a line stating 'Due from Pusser's Inc. and Pusser's Ltd'. In the 'Current Liabilities' section there was a line stating 'Due to Pusser's Inc. and Pusser's Ltd.' The apparent discrepancy is that it would make no sense for Inc.'s balance sheet to show amounts due to and from itself. Mr. De Vos gives evidence that he brought this discrepancy to Mr. Tennikait's attention and that the latter indicated to him that this had been a word processing error. Mr. De Vos's interpretation is that reference to 'Pusser's Inc.' should there have been to PWI. Magwitch relies heavily upon the fact that Mr. Tennikait has not corrected Mr. De Vos's interpretation. Magwitch submits that he must be taken to agree with it. This takes on significance because, as Magwitch reminds us, Ltd. ceased ownership and operation of the Pusser's business in the TVI on 30th June 2003. Logically, therefore, those line entries could (on Magwitch's case) only refer to amounts due to and from Inc. and PWI respectively. That is how Magwitch arrives at the net sums it says PWI owes Inc.

[19] PWI eventually (but not promptly) filed a defence to the claim and an amended defence on 24th September 2018. In this, PWI pleads that Mr. Tennikait's statements in his affidavit of 14th March 2017 do not amount to admissions of the claim, nor of any liability to repay the alleged liabilities. Also, PWI pleads that the true state of accounts between PWI and Inc. at all material times showed a balance in favour of PWI. PWI pleads that '[w]hen the accounts of Pusser's

Ltd. and its associated group of companies, inclusive of Inc., … are combined these balances are eliminated as related party transactions.'[1]

[20] PWI also pleads that there was thus no debt owed by PWI to Inc. which could have been assigned to Magwitch, according to PWI.

[21] PWI pleads also that the daily cash flow reports or messages prepared by Mr. Tennikait for Inc. do not record loans made by Inc. to PWI as alleged by the claimant. Rather, those transfers from Inc. were reimbursements for monies paid from the BVI for expenses of the Pusser's group.

[22] PWI pleads that Pusser's group accounts show considerably larger net sums were owing to PWI from Ltd. (*sic*) than PWI is alleged to owe Inc. Magwitch submits that whilst that might be an acceptable accounting treatment within a group for the production of consolidated accounts, it does not reflect the fact that Ltd. and Inc. are separate legal persons and as a matter of law PWI cannot off-set amounts due to it from Ltd. against PWI's liabilities to Inc.

[23] PWI pleads in the alternative that if any part of the sums allegedly advanced by way of loan were indeed loans from Inc. to PWI, they were repayable immediately they were advanced, not after any express demand. Consequently, says PWI, Magwitch's action is barred by sections 4(1)(a) (actions founded on simple contract) and 4(2) (actions for an account) of the Limitation Ordinance.

[24] PWI filed a second affidavit of Mr. Tennikait on 1st October 2018. In this he affirms that from inception until 30th June 2007 every period end accounting cut-off indicates that the United States group of Pusser's companies and Inc. owed money to PWI.

[25] He then seeks to comment upon Inc.'s balance sheet referred to in the amended statement of claim, which is a balance sheet showing unaudited accounts for Inc. as at 27th June 2004. But he does so with reference to a balance sheet dated 30th June 2004 relating to 'Pusser's Limited and its subsidiaries'. He qualifies the figures in this balance sheet as not reflecting the 'final numbers which are presented in the actual financial statements'. Magwitch says that apart

[1] At paragraph 2.2.

from the fact that Mr. Tennikait is obviously referring to the wrong balance sheet, he is also effectively saying that it is not reliable. Magwitch submits I must therefore place no reliance upon it.

[26] Mr. Tennikait then says that the daily cash flow reports or messages do not in fact record advances or loans made by Inc. to PWI. Those payments, says Mr. Tennikait, were largely repayments of monies that had been advanced by PWI to Inc. and there are other explanations for a small number of the items included that Magwitch alleges to be loans. He concludes this affidavit by asserting that as at 30th October 2012, the date of the purported assignment of Inc.'s debts to Magwitch, the US based group of Pusser's companies, including Inc., owed a net balance to PWI.

[27] PWI filed a third affidavit of Mr. Tennikait on 30th November 2018. He acknowledges in this that he had been referring to an incorrect balance sheet in his second affidavit. He sought to explain further that Inc. was one of several United States corporations trading under the name 'Pusser's Inc', with its State designation following. He states that on 15th November 2003 Pusser's Inc, (Maryland), Pusser's Inc. (Florida) and Pusser's Retail Inc. were merged to become the company we here refer to as Inc. He states:

> "The statement in the balance sheet of Pusser's Inc (Florida) dated 27th June 2004, … refers to monies due to Pusser's Inc (Florida) from the former subsidiaries of Pusser's Ltd including the other Pusser's Inc companies. The document is one of the working documents from which the final accounts for Pusser's Limited and subsidiaries are produced. It does not present a true and complete picture of the state of accounts between the parties."

[28] When viewed in light of the line entries quoted above from the balance sheet which Mr. De Vos sought to explain as being due to a word processing error, it becomes apparent that Mr. Tennikait is saying that there was no such error. He is saying that the reference to Pusser's Inc. in the balance sheet dated 27th June 2004 is not a mistaken reference to PWI, but rather the other United States corporations styled 'Pusser's Inc.' On this interpretation, this balance sheet is no evidence of a debt owed by PWI to Inc. at all.

[29] It is apparent that this explanation was not expressly foreshadowed in Mr. Tennikait's earlier affidavits, nor in PWI's amended defence. At the hearing on 5th December 2018 learned Queen's Counsel for PWI offered further factual explanations at some considerable length (which I clearly cannot take into account as evidence, as this amounted to evidence from the

Bar table and no certificate or affirmation of truth pertained to it) and candidly admitted that this case concept was not reflected in the amended defence. He conceded that PWI would need to amend its defence further. For completeness and good order, I should say that I did not take learned Queen's Counsel for PWI further factual explanations as an attempt to sway the Court with evidence from the Bar table. I took it rather as part of submissions on PWI's behalf that Magwitch should not be entitled to summary judgment as there are matters which, at the very least, reasonably require to be tried. As such, he did not stray into heterodoxy.

[30] It is against this background that the parties' respective summary judgment applications stand to be determined.

Limitation **– PWI's summary judgment application**

[31] Magwitch relies upon the English Court of Appeal cases of Seldon v Davidson[2] and Chapman v Jaume.[3] Magwitch relies upon Seldon v Davidson for a proposition that the payment of money by one person to another *prima facie* imports an obligation to repay it on demand and that the burden of establishing facts that rebut the presumption rests on the person seeking to suggest that there is no obligation to repay.

[32] In particular, Magwitch refers to the following dicta of Willmer LJ in Seldon v Davidson:

> "Payment of the money having been admitted, prima facie that payment imported an obligation to repay in the absence of circumstances tending to show anything in the nature of a presumption of advancement.
>
> … we have from the defendant in this case a clear admission of the payment of the money, and no suggestion that it was paid in settlement of an existing debt, or that it was given in return for cash, or anything of that sort. In the absence of any such circumstances, money paid by the plaintiff in circumstances such as these is prima facie repayable on demand."[4]

[33] Magwitch also relies upon the following reasoning of Edmund Davies LJ in Seldon v Davidson:

> "Accordingly, one is really driven back to consider this matter without the assistance of authority and, being so unassisted, I ask myself what is to be inferred as to the nature

[2] [1968] 1 WLR 1083.

[3] [2012] EWCA Civ 476.

[4] [1968] 1 WLR 1083 at page 1088.

> of the transaction when the simple payment of money is proved or admitted between strangers. I entirely agree with my Lord that, on that bald state of affairs, proof of payment imports a prima facie obligation to repay the advancement in the absence of circumstances from which presumption of advancement can or may arise.
>
> My Lord expressed the view that the loan would be repayable on demand. I would say, if not repayable on demand, at least repayable within a reasonable period of a request for repayment…"

[34] Seldon v Davidson was considered in Chapman v Jaume. There, the English Court of Appeal reasoned:

> "The judge's key finding was that there had been some sort of agreement. Since Mr. Chapman had failed to prove the precise conditions which, he said, restricted the time at which he could require repayment, his whole case failed. But in my judgment, if the judge came to the conclusion (as he did) that the precise conditions had not been proved (but there had been some sort of agreement), then the obvious inference was that the monies were a loan repayable within a reasonable period after the demand";[5]
>
> and
>
> "In my judgment, on the facts found by the judge, he ought to have drawn the inference that the money was repayable within a reasonable time after demand. What would be a reasonable time would of course depend on the facts of the particular case."[6]

[35] Learned Queen's Counsel for Magwitch submits that the balance sheet for Inc. as at 27th June 2004 shows net sums due from PWI to Inc., in respect of advances made by Inc. to PWI. Clearly there had to be some sort of agreement governing the terms for repayment of the advances. But there is no evidence for what such terms were. Therefore, applying the reasoning in Seldon v Davidson and Chapman v Jaume, it is to be inferred that the advances to PWI fell to be repaid to Inc. within a reasonable time after demand has been made by Inc. of PWI, and not before. Commencement of the action in Florida in 2013 constituted the demand. Consequently, the present claim is not time-barred.

[36] Learned Queen's Counsel for PWI urges otherwise. He agrees with the proposition as stated by Edmund Davies LJ in Seldon v Davidson at page 1090F that:

> "when the simple payment of money is proved or admitted between strangers … proof of payment imparts a prima facie obligation to repay."

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[5] [2012] EWCA Civ 476 at paragraph 21 (Lewison LJ).

[6] [2012] EWCA Civ 476 at paragraph 25 (Lewison LJ).

Learned Queen's Counsel for PWI also agrees that this proposition applies to payments made by a limited company established for trading purposes to another limited company, following the English Chancery Division (Companies Court) decision in Re Nuneaton Borough Association Football Club Ltd (No. 2).[7]

[37] Learned Queen's Counsel for PWI however parts company with Magwitch's learned Queen's Counsel on the question when the obligation to repay arises. PWI argues that Seldon v Davidson does not lay down a general principle that such obligations to repay arise a reasonable time after a demand is made. Rather, that was one of two possibilities countenanced in the judgments in that case, with the other one being that the advance would be repayable on demand. In the English Court of Appeal's leading judgment in that case, delivered by Wilmer LJ[8], the court expressed the view that the advance would be repayable upon demand. In Edmund Davies LJ's judgment, he did not disagree with Wilmer LJ's analysis, and added: '… if not repayable on demand, at least repayable within a reasonable period of a request for repayment…'.[9]

[38] PWI also disagrees that Chapman v Jaume lays down a general proposition that such advances are repayable within a reasonable period of a request for repayment being made. He submits that upon a close reading of the leading judgment of Lewison LJ in that case it is apparent that this was an inference that was to be drawn 'on the facts found by the judge'[10] and not as the application of a general principle.

[39] PWI observes further that neither in Seldon v Davidson nor in Chapman v Jaume was the English Court of Appeal called upon to determine when the plaintiff's cause of action arose. Thus, Edmund Davies LJ's observations in Seldon v Davidson (that the obligation to repay could arise a reasonable time after demand had been made) were not intended to lay down any general rule or principle as to when time started to run for limitation purposes.

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[7] [1991] BCC 44 at page 58 D.

[8] Seldon v Davidson [1968] 1 WLR 1083 at 1088 G.

[9] [1968] 1 WLR 1083 at 1090 G – H.

[10] Chapman v Jaume [2012] EWCA Civ 476 at paragraph 25.

[40] PWI submitted further that the context of both Seldon v Davidson and Chapman v Jaume was not a commercial setting. In both, the claims arose in a domestic or quasi-domestic context, even though the persons concerned were legally strangers from each other. Such advances have been called 'friendly loans', that is, private loans made between friends (or erstwhile friends) and family members.[11] In Seldon v Davidson the defendant had been the plaintiff's chauffeur and handyman. The plaintiff had provided money to him for a particular purpose of his. After they fell out, the plaintiff claimed her money back. The issue was whether the money paid had been a gift or a loan. In Chapman v Jaume the parties were cohabiting as man and wife but they were unmarried. After they fell out and split up, the plaintiff claimed back the value of expenditure he had made in respect of improvements to the defendant's house. The issue was whether payments the plaintiff made had been by way of loan or by way of contribution to the household.

[41] Learned Queen's Counsel for PWI submits that different legal principles apply to commercial situations. One such material principle is the 'acknowledged rule of commercial law'[12] known as the 'rule in Re Brown'.[13] This was there stated by Chitty J to be:

> "[I]t is plain that a distinction has been taken and maintained in law, the result of which is that where there is a present debt and a promise to pay on demand, the demand is not considered to be a condition precedent to the bringing of an action. But it is otherwise on a promise to pay a collateral sum on request, for then the request ought to be made before action brought."

[42] This was not a new doctrine. In the 1837 case of Norton v Ellam[14] the English court considered the question whether a loan payable with interest on demand implied that the money was not to be demanded immediately. The court rejected this, saying:

> "This is the same as the case of money lent payable on request with interest, where no demand is necessary before bringing the action. There is no obligation in law to give any notice at all: if you choose to make it part of the contract that notice shall be given, you may do so. The debt which constitutes the cause of action arises instantly on the loan. Where money is lent, simply, it is not denied that the statute [of limitations] begins to run from the time of lending."[15]

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[11] See e.g. Hong Guet Eng v Wu Wai Hong [2006] SGHC 42 at paragraph [17], [29] (Andrew Phang Boon Leong J.) commenting on the UK Law Reform Committee, Twenty-First Report (Final Report on Limitation of Actions) (Cmnd 6923, September 1977).

[12] Allendale Limited v Khaldoun Moualem [2004] EWCA Civ 915 (Waller LJ).

[13] Re Brown's Estate [1893] 2 Ch 300.

[14] 2 M & W 461 (Parke B).

[15] 2 M & W 461 at 464 (Parke B).

[43] Learned Queen's Counsel for PWI also refers to the 1859 English case of Jackson v Ogg.[16] It was there stated that:

> "It is settled that, in the case either of goods sold to be paid for on demand or of money lent payable on demand, the statute begins to run immediately upon the contract being made.'[17]

[44] Learned Queen's Counsel for PWI refers to Bullen & Leake & Jacob: Precedents of Pleadings (8th Edition, Volume 1, Part E, Chapter 14, 2018 Sweet & Maxwell) for a modern synopsis of the principle:

> "Where money is lent without any stipulation as to the time of repayment, a present debt is created which is generally repayable at once without prior demand."

[45] Learned Queen's Counsel for PWI submits that to the extent there were advances of cash from Inc. to PWI, these were clearly commercial advances and not advances between friends or family members. He contends that there is simply no reason to exempt these companies from the normal rule as stated in Bullen & Leake & Jacob: Precedents of Pleadings. Consequently, the alleged loans should not be taken to have been repayable only after a demand has been made, but immediately the monies were advanced.

[46] He moreover submits that there is authority which considers that the rule in Re Brown is not restricted to written agreements to repay moneys advanced on demand.[18] Also, he observes that the rule in Re Brown remains in full effect in this jurisdiction, and the TVI does not have the equivalent to the English Limitation Act 1980, section 6, which partially modified the application of the rule in Re Brown in the case of 'friendly loans'.

Discussion on limitation

[47] In my respectful judgment I consider myself compelled to accept PWI's submissions on these points. PWI has persuaded me that I must have regard to the wider legal picture and historical precedent rather than to restrict my consideration to Seldon v Davidson and Chapman v

[16] 70 E.R. 476.

[17] 70 E.R. 476 at 478 (Page-Wood VC).

[18] Goldsmith v Chittell [2016] EWHC 636.

Jaume. On the materials before the Court, the terms for repayment of any advances from Inc. to PWI were undocumented. There is no dispute over whether any such advances were gifts or domestic contributions. They were not. Any such advances were commercial in nature. The circumstances are different from those in Seldon v Davidson and Chapman v Jaume. Those arose from relations that were domestic or quasi-domestic in nature. In Seldon v Davidson, it could be said that the relationship of employer and employee was commercial, but it had been a contract for personal services, not one of exchange of goods and financial facilities between companies.

[48] The decision in Re Nuneaton Borough Association Football Club Ltd (No. 2). does not assist the claimant. In that case the learned judge expressed no opinion as to whether proof of payment between strangers imparts a prima facie obligation to make repayment only after a demand or within a reasonable time after a demand has been made. This is apparent from a close reading of pages 58B to 61G of the judgment. Nor did the learned judge there have to consider any such qualification. The court was not concerned with a claim in contract for recovery of a debt, to which a limitation defence might apply,[19] but with an 'unfair prejudice' petition under section 459 of the English Companies Act 1985. The learned judge ruled that the statutory relief afforded by section 461 of that same Act upon such a petition was wide enough to enable to court to make orders to balance the equities, which in that case meant ordering repayment of sums advanced as part of a wholistic solution.[20]

[49] Any advances from Inc. to PWI were not what could be called 'friendly loans' but they were commercial advances between companies, albeit in the same group, to which commercial law principles apply. These include the rule in Re Brown. Any such advances were made without any stipulation as to the time of repayment. I am thus persuaded that at the time any such advancement was made a debt was created upon which Inc. could immediately sue. I see no factual circumstances that displace the general principle stated by Bullen & Leake & Jacob's Precedents of Pleadings that the debt is generally repayable at once without prior demand. There is nothing in the facts of this case to suggest that repayment would need to be demanded before the cause of action in debt arose. Indeed, there is evidence to the contrary: Magwitch itself saw no difficulty suing PWI in Florida in 2013 to recover the alleged debt,

[19] [1991] BCC 44 at 59 H to 60 A.

[20] [1991] BCC 44 at 60 G – H and 61 D – F.

without making a prior demand. I consider myself compelled to conclude that by the time Magwitch commenced those proceedings the claim was already statute barred.

[50] This aside, learned Queen's Counsel for PWI argues that Magwitch should not be allowed to rely upon their filing suit in Florida in 2013 as a sufficient demand. He submits that where a cause of action arises only upon the making of a demand, the 'demand' referred to can only mean an express request for payment prior to and as a condition precedent to the issue of legal proceedings. According to Bullen & Leake & Jacob's Precedents of Pleadings[21] that is too narrow a view. It is there stated:

> "In order to constitute a valid demand: "there must be a clear intimation that payment is required: nothing more is necessary, and the word 'demand' need not be used, neither is the validity of a demand lessened by its being clothed in the language of politeness: it must be of a peremptory character and unconditional, but the nature of the language is immaterial provided it has this effect." Re Colonial Finance, Mortgage, Investment and Guarantee Corp Ltd (1905) 6 S.R.N.S.W. 6 at 9, cited with approval in Re a Company [1985] BCLC 37 and Bank of Credit and Commerce International SA v Blattner Unreported November 20, 1986."

[51] I am satisfied that filing and service on PWI of the Florida 2013 law suit claim fulfilled these requirements.

[52] The claimant has argued that PWI has admitted the debt during these proceedings. Magwitch says PWI has done so through the first affidavit evidence of Mr. Tennikait. Magwitch thereby seeks to argue that time has started running once more under the Limitation Ordinance from the date of the admission. On my reading of Mr. Tennikait's affidavits he does not make such an admission. His first affidavit, which Magwitch relies upon, did not address the specific payments which Magwitch claims were loans. It merely made general statements how advances were recorded and treated in the group's books and records. He does not there address the issue whether the payments in question were in fact advances. To consider this to be an admission of the specific debts claimed is, in my respectful view, reading too much into the general statements Mr. Tennikait makes there. I am satisfied that PWI has not admitted the debts which form the basis of the claim.

[53] It could be said that this view ignores the context in which Mr. Tennikait made his first affidavit, namely, that Mr. Tobias had previously stated on oath that Mr. Tennikait would deal with the

[21] Goldsmith v Chittell [2016] EWHC 636.

specific alleged loans Magwitch had identified. That statement of Mr. Tobias certainly raised an expectation that Mr. Tennikait would do so. It might then be reasonable to assume that when reading Mr. Tennikait's first affidavit with Mr. Tobias's assurance in mind, Mr. Tennikait should indeed be taken to have been referring to those specific alleged loans. Mr. Tennikait is however not Mr. Tobias. It would have been easy for Mr. Tennikait to include a brief statement extending his general comments to the particular case of the alleged loans in issue, but he did not do so. An affidavit is not an agreement into which terms can be implied where necessary to give business efficacy to a contractual relationship. If Mr. Tennikait's evidence fell short of addressing the matters that Mr. Tobias had hoped or intended him to address, PWI's position before the Court might be the weaker for it, but that is a litigation risk that it was open to PWI to take. It would fill me with great unease to presume to supply a possible omission from Mr. Tennikait's evidence where such omissions may well have been intentional. Where this leaves us is that I will take Mr. Tennikait's statement in his first affidavit on its own merits. As a matter of fact, it does not amount to an admission that PWI owes the debts in question.

[54] This suffices to determine the matter, with the result that the claim should be struck out. But if I am mistaken about this, there are other issues that the Court must consider.

Magwitch's Summary Judgment Application

[55] Magwitch's summary judgment application was filed on 25th April 2017. At this point PWI had not yet filed a defence to the claim. Indeed, that was the first of two grounds relied upon by Magwitch. The second ground was that PWI has no real prospect of successfully defending the claim.

[56] Since filing and service of the amended defence, Magwitch clearly does not maintain its first ground. But it maintains its second. Magwitch's affidavit evidence refers to much peripheral detail, but the heart of its initial case on summary judgment was that the balance sheet dated 27th June 2004 shows net sums due from PWI to Inc., in respect of advances made by Inc. to PWI, and that PWI had produced no evidence to contradict this. Magwitch made, and continues to make, much of the fact that despite Mr. Tobias's assurance in his affidavit that Mr. Tennikait would address the accounting treatment of the alleged loan amounts with reference to PWI's accounting materials, Mr. Tennikait did not do so. He contented himself with a wide-ranging general explanation of how sums paid were treated. Mr. Tennikait then forewent the

opportunity to descend to specifics in his second affidavit, where he proffered explanations with reference to an immaterial balance sheet. Where he did deal with specific information in relation to accounts, he did not do so with reference to ledgers or books, but relied on spread-sheet information that he prepared. Even in relation to Mr. Tennikait's third affidavit, no documentary evidence is put forward showing that Inc. in fact owed PWI money, or, largely, that the transfers referred to in Mr. Tennikait's cash report messages were reimbursements or repayments and not advances. Magwitch makes the point that the consecutive failures on the part of PWI, through Mr. Tobias and Mr. Tennikait, squarely to meet Magwitch's allegations with opposing documentary evidence suggests that they have no such evidence and no real defence to the claim. I have considerable sympathy with Magwitch's position in this regard. I accept it is curious, to say the least, that PWI is seemingly unwilling or unable to engage with the detail of the particular financial entries and transactions in question.

[57] I also have considerable sympathy with another submission put forward by Magwitch. PWI plead a case that consolidated group accounts would show that PWI is a net creditor of other Pusser's group companies, including Inc. Magwitch contends that this may well be an acceptable way to draw up consolidated group accounts, but it ignores the separate corporate legal personality of Inc. A consolidated group account in principle does not address the liability position specifically as between Inc. and PWI. It may well be, of course, that when an objective and expert analysis is done of the accounting position between PWI and Inc. it may be found that PWI does not owe Inc. money, but it would be surprising if Mr. Tennikait, who is clearly experienced in accounting matters, is unfamiliar with the concept of separate corporate legal personality. The adoption of a consolidated account approach rather creates the appearance of PWI clutching at straws to avoid the inconvenient fact of owing Inc. a net balance.

[58] PWI has the further procedural difficulty that it would need permission to amend its defence again if it wants to bring into its pleaded case that Inc. in its present form comprises a merger of various Pusser's companies incorporated in the United States of America, with a consequent merger of their financial positions, including in relation to PWI. As PWI's amended defence now stands, it cannot achieve this by filing witness statement evidence to this effect, as this aspect was not sufficiently foreshadowed in the amended defence. This difficulty is perhaps capable of being overcome, but it highlights the current weakness in PWI's pleaded case.

[59] These considerations give considerable impetus to submissions from Magwitch that PWI's case, as currently presented, does not have some real, as opposed to a fanciful, prospect of success.[22] Magwitch understandably also relies upon the well-known formulation of the summary judgment test stated by Lord Hobhouse in Three Rivers DC v Bank of England No. 3[23]: 'The criterion which the judge has to apply … is not one of probability; it is absence of reality.'

[60] Magwitch invests considerable effort, moreover, into parsing PWI's evidence, such as it is, in an attempt to show that PWI's pleaded case is unsupported and that Mr. Tennikait's evidence is erroneous and/or unreliable and/or unsupportive of PWI's case.

[61] At this point in the proceedings standard disclosure has not yet been given, nor have witness statements been filed and exchanged.

[62] Learned Queen's Counsel for PWI points out that other principles are also in play. He relies upon *dicta* of Lewison J (as he then was) in Easy Air Limited v Opal Telecom Limited[24] that:

(1) The court must avoid conducting a 'mini-trial', without the benefit of disclosure and oral evidence (following Swain v Hillman[25]);

(2) The court should avoid being drawn into an attempt to resolve conflicts of fact which are normally resolved by a trial process (following Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd[26]); and

(3) In reaching its conclusion, the court must take into account not only the evidence actually placed before it on the application for summary judgment, but the evidence that can

[22] Swain v Hillman [2001] 1 All ER 91 at 92J (Woolf MR).

[23] [2001] 2 All ER 513.

[24] [2009] EWHC 339 (Ch).

[25] [2001] 1 All ER 91 at 95.

[26] [2006] EWCA Civ 661 at [17] (Mummery LJ).

reasonably be expected to be available at trial (following Royal Brompton Hospital NHS Trust v Hammond (No. 5)[27]).

[63] Learned Queen's Counsel for PWI submits further that upon its summary judgment application Magwitch has the burden of proving that the alleged payments were loans from Inc. to PWI, following dicta in Easy Air Limited v Opal Telecom Limited that:

> "The overall burden of proof remains on the [applicant], to establish, if it can, the negative proposition that the Respondent has no real prospect of success … and that there is no other reason for a trial, see Apvodedo NV v Collins [2008] EWHC 775 (Ch), Henderson at [32] …."[28]

[64] Learned Queen's Counsel for PWI submits that the balance sheet of 27th June 2004 does not, by itself, provide even prima facie evidence that PWI owes Inc. money. It is Mr. De Vos's parol evidence of an alleged word-processing error which is required to construct Magwitch's case. That evidence requires to be tested. The balance sheet of 27th June 2004 is an interim document which presents an incomplete picture as to the state of accounts. Learned Queen's Counsel for PWI also submits that there is a fundamental dispute of fact as to whether there was a net balance in favour of PWI or of Inc. There is also a fundamental dispute of fact whether the monies mentioned in Mr. Tennikait's cash flow reports were advances to PWI or repayment of advances the other way. Learned Queen's Counsel for PWI submits that these matters involve acute conflicts of fact, which the Court should not seek to resolve outside the trial process.

[65] I agree with these submissions of PWI, but only up to a point. I agree that it is unsatisfactory to attempt to resolve the matters of fact which the parties have respectively put into issue without the benefit of disclosure of PWI's and Inc.'s accounting books and records. Once disclosure occurs, quite possibly expert evidence would be required to enable the Court to form an objective opinion of the state of balances between the parties. Whether expert evidence would be required would be a question for the Court's further review after disclosure. Try as one may, there is only so much that can be gleaned from a balance sheet, which itself contains the qualification that figures it contains are unaudited, and a small number of cash-flow messages or reports. So, limitation issues aside, I would not have been inclined to grant the claimant

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[27] [2001] EWCA Civ 550 at [19].

[28] [2009] EWHC 339 (Ch). at paragraph 7.

summary judgment on its application presently before the Court. There are questions of fact that would need to be tried.

[66] Where I depart from PWI's submission is that it must open to the claimant to bring another summary judgment application before trial, once disclosure has occurred. PWI's response to Magwitch's summary judgment application suggests, quite strongly, that PWI had difficulty in showing that Magwitch's claims are wrong. I do not know what the difficulty is and will not speculate on it. But it is unsatisfactory and contrary to the purposes of the Civil Procedure Rules 2000 ('CPR') for a party to build its basic case incrementally as the proceedings progress. It would be wrong for this Court to suggest or imply that the claimant should have no further right to seek summary judgment until a trial.

[67] Magwitch has submitted that if it is not granted summary judgment then PWI should be required to pay the amount of the claim into Court as a condition for allowing it to defend the claim, on grounds that PWI avoided summary judgment by the barest of margins. Magwitch submits that the Court has jurisdiction to make such an order pursuant to its case management powers under the CPR. Given that the claim ought, in my respectful judgment, be struck out on grounds that it is statute barred, it would not be appropriate to make such an order at this time. Without deciding the point, I am prepared to assume that the Court has jurisdiction to make such an order and that it can be used where a party's evidential presentation is weak.

Costs

[68] Where, as here, the claim is struck out following determination of a pleaded issue, logically the defendant should have its costs of the action as a whole, as well as of succeeding with its summary judgment application and defeating the claimant's summary judgment application. However, given the procedural manner in which the present claim proceeded, which was not entirely straight-forward, nor, on the part of PWI, altogether efficient, it may well be that an adjustment to the ultimate quantum may be appropriate. The parties will be free to address the Court further on this, as part of assessment of costs if they cannot reach agreement on an overall figure.

Orders

[69] The Court's order will therefore be:

(1) The defendant's application for summary judgment and/or for the claim to be struck out filed on 2nd March 2017 is granted;

(2) The claim stands dismissed and is struck out;

(3) The claimant's application for summary judgment filed on 25th April 2017 is dismissed;

(4) The defendant shall have its reasonable costs of this claim, including of its summary judgment application and of its opposition to the claimant's summary judgment application, to be assessed if not agreed within thirty (30) days.

[70] I take this opportunity to thank both sides' learned counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar