

IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 66 of 2022

**IN THE MATTER of the Companies Act, (Chapter 250) of the Substantive
Laws of Belize**

AND

**IN THE MATTER of an Application under Section 98 of the Companies Act
for an Order that the time for registration of a Charge and Memorandum
Accompanying Charge be extended**

BETWEEN

DANIEL JAY DYKGRAAF

CLAIMANT

AND

THE SPLIT HOLDINGS LIMITED

DEFENDANT

IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 84 of 2022

BETWEEN

NEIDY RODRIGUEZ

1ST CLAIMANT/APPLICANT

**(As Administratrix Ad Colligenda Bona
of The Estate of James Lynskey)**

THE SPLIT HOLDINGS LIMITED

2ND CLAIMANT/APPLICANT

THE LAND OF THE LAZY LIZARD LTD

3RD CLAIMANT/APPLICANT

AND

DANIEL JAY DYKGRAAF (by himself or through his agents or servants)	1ST DEFENDANT/RESPONDENT
BRUCE BOBBY HUNT	2ND DEFENDANT/RESPONDENT
LL CAYE CAULKER COMPANY LIMITED	3RD DEFENDANT/RESPONDENT

IN THE HIGH COURT OF BELIZE, A.D. 2023

Claim No. 319 of 2022

BETWEEN

DANIEL JAY DYKGRAAF	1ST CLAIMANT
LL CAYE CAULKER COMPANY LIMITED	2ND CLAIMANT

AND

NEIDY RODRIGUEZ (As Administratrix Ad Colligenda Bona of the Estate of James Lynskey)	1ST DEFENDANT
THE SPLIT HOLDINGS LIMITED	2ND DEFENDANT

BEFORE The Honourable Madam Justice Patricia Farnese

Hearing Date: March 16, 2022

Appearances:

Ms. Priscilla Banner and Ms. Wendy Auxillou, for the Applicant
Rt. Hon. Mr. Dean O. Barrow and Ms. Darinka Muñoz for the Respondent

DECISIONS RE APPLICATION FOR CONSOLIDATION/JOINT HEARING

Introduction

[1] The Court was asked to decide if three claims ought to be consolidated into a single claim or, in the alternative, to proceed as a joint hearing. I find that the three claims involve common questions of law and fact that justify the claims being consolidated to avoid the potential for conflicting verdicts if the matters were tried separately. Consolidation is also consistent with the Court's overriding objective to deal with matters justly. Finally, that the fact that Parties are a claimant in one matter and defendant in another is not a bar to consolidation.

Summary of the Parties

[2] Ms. Rodriguez is the Administratrix *Ad Colligenda Bona* of estate of Mr. James Lynskey. Mr. Lynskey was the sole director and sole shareholder of the Split Holdings Limited (Split Holdings). The Split Holdings owns the "Split Property", a commercial property on Caye Caulker. The Land of the Lazy Lizard Ltd (Lazy Lizard), a separate corporate entity, operates a restaurant and 2 bars on the Split Property. The estate of Mr. Lynskey controls the Lazy Lizard. Ms. Rodriguez is the instructing party in this litigation for the Lazy Lizard and the Split Holdings. All three Applicants share the same legal representation.

[3] Mr. Daniel Jay Dykgraff seized possession of the Split Property on the grounds that they were acting as a lawful receiver in relation to an unregistered charge on the Split Property executed by The Split Holdings and Mr. Dykgraff in 2019, prior to Mr. Lynskey's death. The charge relates to a US\$3,000,000 loan from Mr. Dykgraff to Mr. Lynskey, as borrower, and The Split Holdings, as surety. While in possession of the Split Property,¹ Mr. Dykgraff entered into a lease of the Split Property with LL Caye Caulker Company Limited (LL Caye). My Dykgraff controls LL Caye.

[4] Mr. Bruce Bobby Hunt was Mr. Dykgraff's employee/agent in Belize when Mr. Dykgraff seized possession of the Split Property. Mr. Hunt, LL Caye, and Mr. Dykgraff have the same legal representation and have made joint submissions to this Court.

¹ In an earlier application, I granted an interim injunction that restored the possession of the Split Property to the estate of Mr. Lynskey (S.C. Claim No. 84 of 2022.). The Court of Appeal upheld the injunction (Civ. App. No. 3 of 2022).

Summary of the Claims

- [5] This application sees to consolidate three Claims. The central issues in each claim are:

66 of 2022 Mr. Dykgraaf v Split Holdings

Mr. Dykgraaf seeks an order directing that the time for registration of a Charge and Memorandum Accompanying Charge between the parties be extended. He asserts that the missed deadline was primarily accidental and or due to inadvertence or to some other sufficient cause. Specifically, he claims that he was waiting to receive a copy of the land title for the Split Property from Mr. Lynskey. Ms. Rodriguez, on behalf of The Split Holdings, challenges the authenticity of the loan agreement that gave rise to the charge and notes that no resolution to raise a loan of US\$3 million has been filed with the Companies Registry. She further alleges that the Mr. Dykgraaf did not need the land title to register the charge but deliberately failed to register in order to avoid paying the stamp duties. Registration of the Legal Charge and Accompanying Memorandum has been suspended by the Registrar of Companies pending the outcome of this litigation. The Registrar has also denied the Notice of Appointment of Receiver.

84 of 2022 Ms. Rodriguez (as Administratrix), Split Holdings, Lazy Lizard v. Mr. Dykgraaf, Mr. Hunt, LL Caye

Ms. Rodriguez *et al.* seek damages for trespass to the Split Holdings and a permanent injunction restraining the Defendants from occupying the Split Property. Mr. Dykgraaf asserts he has a right to occupy the Split Property as a lawful receiver as a consequence of Mr. Lynksey's default of the loan agreement. Mr. Hunt and LL Caye argue that they did not trespass as their occupation arises from Mr. Dykgraaf's rights as lawful receiver.

319 of 2022 Mr. Dykgraaf, LL Caye v. Ms. Rodriguez (as Administratrix), Split Holdings

Mr. Dykgraaf seeks repayment of the \$US 3 million loan he says is in default plus damages and specific performance of the loan agreement. Mr. Dykgraaf specifically asks for specific performance of the share purchase and buy-out option in the loan agreement. LL Caye seeks damages for the breach of the lease agreement. Ms. Rodriguez denies that the loan was in default and question the authenticity of the loan agreement and the charge. Ms. Rodriguez

possesses a copy of a loan agreement between the same parties, for the same amount, containing different terms. The Defendants also say that Mr. Dykgraaf and LL Caye are not entitled to the damages they seek because their actions, including signing the lease agreement were unlawful. Ms. Rodriguez and Split Holdings assert that Mr. Dykgraaf is not a lawful receiver because the charge was never registered.

Legal Framework

- [6] That I have the discretion to consolidate these matters is without doubt. Rules 26.1(2)(b) and (h) of the *Supreme Court (Civil Procedure) Rules, 2005* (CPR) include the power to consolidate proceedings or try two or more claims on the same occasion in the Court's case management powers. Other than the overriding objective to deal with cases justly, the CPR provides no guidance on when an application to consolidate or to jointly hear matters should be granted.
- [7] The Parties submissions signal general agreement as to the factors I must consider. As outlined in *Simmonds v Minister of Labour & Social Security et al.*² consolidation typically occurs in cases that have common questions of law or fact or arise out the same transaction or occurrence. Saving time and expense to parties and the Court can justify consolidation. A real risk of inconsistent or irreconcilable conclusions of facts or law in separate proceedings is an additional reason in favour of consolidating claims. Prejudice to a party, delay, and the application coming at a later stage in the proceedings are factors that speak against consolidation.

Issues

- [8] After reviewing the Parties' submission, it is clear that this application will be decided on three issues:
1. Do the three claims involve common questions of law or fact or arise out of the same occurrence?
 2. Do the factors that support consolidation outweigh those that speak against consolidation?

² [2020] JMSC Civ 173 at para 39.

3. Is the fact that Parties are a claimant in one matter and defendant in another a bar to consolidation?

Analysis

Do the three claims involve common questions of law or fact or arise out of the same occurrence?

- [9] Yes. At the root of the three claims are questions related to the status and enforceability of a loan Mr. Lynskey entered into prior to his death with Mr. Dykgraaf. Mr. Dykgraaf alleges the loan was in default and he is entitled to specific performance of the loan agreement. Ms. Rodriguez says the loan was not in default and even if it were, the loan agreement Mr. Dykgraaf wishes to enforce is not the proper loan agreement. Deciding whether the loan agreement was in default is a key factual determination the court must make in Claims 84 and 319 of 2022. What loan agreement governs the debt between Mr. Dykgraaf and the estate of Mr. Lynskey must be decided in all three claims.

Do the factors that support consolidation outweigh those that speak against consolidation?

- [10] No. The factors considered overwhelmingly support consolidation. Consolidation is also consistent with the court's overriding objective to justly deal with cases.
- [11] I do not agree with Mr. Dykgraaf that the matters are so distinct to make them impractical to join. There are several overlapping factual and legal issues among the three claims. That a trial court must decide a matter based on the actual evidence presented in that case is well-established.³ It is similarly well-established that decisions upon matters of fact are not binding on co-ordinate courts.⁴ If these matters are tried separately, there is a real danger that different conclusions regarding common questions of facts and law could be reached that risk attracting further litigation and expenses to determine the enforceability of conflicting remedies. For example, the Court in 66 of 2022

³ *Lazard Bros & Co. v. Midland Bank Ltd.* [1933] AC 289 (HL).

⁴ *The Mostyn* [1928] AC 57

could permit the registration of Charge based on a different loan agreement than the loan agreement that is found to be in default in 84 of 2022. Or, the Court could find the loan is not in default in 84 of 2022 but is in default in 319 of 2022. The court could find that Mr. Dykgraaf has rights as a lawful receiver in one claim and not the other.

- [12] I also do not find Mr. Dykgraaf's assertion that the matters contain discrete legal issues sufficient grounds to not consolidate the matter. It is not uncommon for complex civil claims to contain multiple discrete issues. Likewise, *Discovery Enterprise Inc. V. Ebco Industries Ltd. et al.* stands for the proposition where resolution of one claim will dispose of another, consolidation is appropriate.⁵ I do not accept that case standing for the proposition that the converse is true.
- [13] I have not been presented with any evidence that consolidation will increase expense or unreasonably delay the resolution of any of these claims. I find that the opposite is more likely to be true. These matters were initiated less than a year ago and have not progressed much passed pleadings. Consolidation also does not preclude this Court from using its case management powers to decide the order in which issues are decided. Where a factual or legal determinations is likely to narrow the issues in dispute or motivate settlement, the Court can decide to proceed with a trial of those matters first. Which loan agreement governs and whether the loan was in default are examples of issues that this Court may decide first and then proceed to determine the discrete issues in each Claim that remain. The potential for settlement or narrowing of legal issues after key factual determinations are made has the potential to save expense and time.
- [14] I note that the CPR does not require that the parties be the same to consolidate proceedings. While I appreciate that persons are separate legal entities from the corporations they control, Mr. Dykgraaf and Ms. Rodriguez (as Administratrix) have presented similar claims and defences in all matters regardless of who was named in the claim. Their use of the same legal representation and single submissions is confirmation that their interests align with the corporate entities they control. Consolidation is unlikely to prejudice these Parties.

⁵ (2001) BCSC 235 at para 23.

[15] I am also not persuaded by the argument that Mr. Hunt, who is only a party in Claim 84 of 2022, is seriously prejudiced or inconvenienced by the consolidation. First, naming him a co-defendant does not result in joint and several liability. Mr. Hunt must only respond to the claims made against him. I also have no reason to believe that Mr. Hunt's costs for defending the claims against him will unreasonably increase as a result of the consolidation. Early in these proceedings, I took the extraordinary measure to order personal service where such service was not required. I felt it important to ensure that Mr. Hunt understand his personal exposure to liability in the event he wished to engage separate legal counsel from his employer. He has not engaged separate legal counsel and has joined Mr. Dykgraaf and LL Caye in providing single submissions in these proceedings. The Court has no reason to believe that approach will change with consolidation.

[16] In addition, I do not find that consolidation will result in Claim No. 84 of 2022 taking longer to resolve than if it was tried alone. It is not clear that Claim No. 84 of 2022 would be the first to be tried. Moreover, as previously explained, separate proceedings may delay the enforcement of any remedy that is granted in the claim involving Mr. Hunt. Mr. Hunt also stands an equal chance to benefit from the potential for settlement or narrowing of the issues if the Court decides to proceed with the trial on the common factual and legal issues.

Is the fact that Parties are a claimant in one matter and defendant in another a bar to consolidation?

[17] No. CPR Rule 26.2(1) gives this this Court broad authority to:

(u) to take any other step, give any other direction, or make any further order, for the purposes of managing the case and furthering the overriding objective

I find that broad authority to include an order that the Parties be re-assigned, and new pleadings be drafted. Making such an order is not unprecedented.⁶

⁶ See e.g. *A Goninan and Co. v. Atlas Steels* [2003] NSWSC 956 (24 October 2003), which also includes a helpful history of the evolution of the court's power to consolidate matters in the English Common Law.

[18] Mr. Dykgraaf relies on the *White Book*⁷ to argue against consolidation because a conflict of interest will arise, and a breach of the Rule of Joint Representation will result. He quotes the following:⁸

Two claims cannot be consolidated where the claimant in one claim is the defendant in the other, unless one claim can be ordered to stand as a Pt. 20 claim in the other.

Pt. 20 refers to Part 20 of Civil Procedure Rules in the United Kingdom. Part 20 deals with counterclaims and other additional claims. A proper reading of this section of the *White Book* recognizes that I have the power to order a matter stand as a counterclaim or ancillary claim as the case requires.

[19] The only other potential bars to consolidation raised by Mr. Dykgraaf to consolidation arising from the position of the status of the Parties are the Rule of Joint Representation and the fact that two claims were initiated as fixed date claims and the other as a regular claim. The latter is not an insurmountable hurdle. CPR Rule 8.4(1) allows a claimant to use a single claim form for all claims to be disposed of in the same proceedings. Because possession of land is sought, CPR Rule 8.1(5) requires that a fixed date claim form be used to with the consolidated proceedings.

[20] Re-assigning the Parties also avoids any potential conflict of interest or breach of the Rule of Joint Representation. Co-claimants can continue to be jointly represented by the same legal representatives. As the actions of Mr. Dykgraaf to enforce the terms of the loan with Mr. Lynskey be described as having triggered the three claims, it seems most appropriate that he along with LL Caye be the Claimants in the consolidated proceedings. Ms. Rodriguez (as Administratrix) and Split Holdings are correspondingly, the defendants. Lazy Lizard and Mr. Hunt can be added as a claimant and defendant, respectfully to the ancillary/counterclaim.

⁷ *The White Book Service* (Sweet & Maxwell, 2014) [*White Book*]

⁸ *White Book* at 74.

Disposition

[21] It is hereby ordered that:

1. Claim No. 66 of 2022 – Daniel Jay Dykgraaf v. The Split Holding Limited dated 2 February 2022 be consolidated with Claim No. 84 of 2022 – Neidy Rodriguez *et al.* v. Daniel Dykgraaf *et al.* dated 23 February 2022 and Claim No. 319 of 2022 – Daniel Dykgraaf *et al.* v. Neidy Rodriguez *et al.* dated 11 May 2022.
2. The existing pleadings of Mr. Dykgraaf, LL. Caye and Mr. Hunt in Claim Nos. 66, 84 and 2022 are to stand as their pleadings in the consolidated claim and defence to the ancillary/counterclaim.
3. Ms. Rodriguez (as Administratrix), Split Holdings, and Lazy Lizard in Claim Nos. 66, 84 and 2022 are to stand as their defence to the consolidated claim and pleadings in the ancillary/counterclaim.
4. The lead case, for the purpose of court filings shall be Claim No. 66 of 2022.
5. The Parties are to return to Court for case management at 8am on the 3rd of October 2023.
6. Costs are in the cause.

Dated 7 August 2023

Patricia Farnese
Justice of the High Court