

JERSEY / JUDGMENT

1998/192 - Eves v Viscount [1998]

UR 192 (24 September 1998)

[1998] UR 192

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COURT OF APPEAL

24 September 1998

Before: Sir David Calcutt, QC, President,

Miss E Gloster, QC, and

The Hon. M J Beloff, QC.

Between David Eves Plaintiff/Appellant

And The Viscount Defendant/Respondent

Appeal by the Plaintiff/Appellant against the Order of the Royal Court of 6 February 1998, striking out the Representation of the Plaintiff/Appellant, seeking an Order that the company, Blue Horizon Holidays Limited, or alleged causes of action vested in it should be assigned to the Plaintiff/Appellant; or that the Plaintiff be granted legal aid to pursue litigation against the parties responsible for the company's demise.

The Plaintiff/Appellant on his own behalf

Advocate F J Benest for the Defendant/Respondent.

JUDGMENT

THE PRESIDENT: This is an appeal by David Eves ("Mr. Eves") from an Order of the Royal Court dated 6 February, 1998,

[1998.028]

striking out a Representation by Mr Eves dated 27 January 1998. By his Notice of Appeal, dated 3 March 1998, Mr Eves asks this Court to set aside the Judgment of the Royal Court and to allow the Representation to proceed.

I should set out briefly the background to this appeal. On 11 February 1994 Blue Horizon Holidays Ltd ("Blue Horizon") was declared

en désastre

. Various applications were made to the Court to recall the declaration, but these were refused. The matter came before the Court of Appeal in April 1997. The Judgment, given on 11 April 1997, dealt, first, with the jurisdiction of the Court of Appeal (pages 1-6). It then went on to deal with applications by Mr Eves to call additional evidence (pages 7-8). On page 8, line 14,

et seq

the Court dealt with the appeal generally in these terms:

"Before turning to the grounds of appeal, I should say, by way of preface, that it is quite clear that Blue Horizon was a company in a hopeless financial state. It was living from hand to mouth and using advance payments to pay off past debts. Its cash flow was dependent on the chance of advance payments coming in to cover outstanding debts and it had virtually no assets. After making deductions for liabilities which were challenged or which were liabilities to Mr and Mrs Eves, or which were subject to a stay in respect of judgment, the liabilities were originally estimated at £34,000 but on the full enquiry made on the accountant's report obtained by the Viscount it became clear that there were undisputed liabilities of £79,000. It was an attitude of unreasonable commercial optimism which led Mr Eves to believe that he could trade out of these difficulties. The day of reckoning was approaching and the result was, in my view, inevitable. At some stage he would have become at the mercy of his creditors".

The Court then turned to the specific grounds of appeal. In considering one of the grounds the Court said this (page 10, line 4

et seq

):

"Mr Eves' case is that he ought to have been given notice in order that he could pay the applicants creditors claim before the application was made. This I find to be a misconception. A debtor's duty is to seek out his creditor and to pay his debts on time. He is not entitled in law to be reminded that he is in breach of duty before steps are taken to enforce his obligations. Even if Blue Horizon were entitled under the rules to advance notice of an application to place it en désastre, which it was not, the purpose of the notice would be to enable him to resist the application and not just to pay the debt. Mr Eves made no application to have the ex parte order re-argued inter partes. If he had done, given the financial condition of his company, he would inevitably have failed.... The evidence that the company was unable to pay its debts as they fell due was overwhelming since the debts due to the hotel had been outstanding for a considerable time and in view of the fact, which I analyse in more detail later, that in spite of being given the indulgence of further time the company had dishonoured three of four post-dated cheques given to secure eventual payment. It is quite possible that Mr Eves might have satisfied the Court that Blue Horizon would be able to pay as they fell due those of its debts which were owed to creditors who went to the trouble of threatening him with a désastre, but it is most unlikely that he would have persuaded them that the company could have paid all its debts as they fell due. The Court

would not have been impressed by the kind of material and arguments which we have examined on this appeal, particularly from a company which had filed no statutory accounts since its accounts for 1987. In fact, although Blue Horizon did not make an application to have the matter re-argued inter partes, it did make an application under Article 7 in the course of which it became apparent that, as I have already stated, the company was irredeemably insolvent with a large balance sheet deficiency".

Finally, the Court dealt with the matter in this way (page 13).

"Finally, I can take together three grounds under which it is contended that the 'application for the désastre was frivolous and vexatious'; that it was 'an abuse of the process of the Court'; and that it was 'for a wrongful predominant purpose and maliciously prosecuted'. The examination which I have made as to the circumstances of the debt outstanding to the hotel; the succession of dishonours of post-dated cheques; and, finally, the indication that none of the three cheques to which I have referred above, if presented, could be honoured on the then state of the account, deprives this ground of any substance. Blue Horizon was in a hopeless state and the sooner it was put to an end as a trading entity the better".

Mr Eves did not, however, allow the matter to rest there. At the end of April 1997, and again on 14 May and 21 May he wrote to the Viscount. It is sufficient if I refer to the last of these three letters (21 May 1997). It was in these terms:

"As I have pointed out to you before, it is the duty of the liquidator (in this case yourself) to act honestly and reasonably and to safeguard the interests of creditors and shareholders alike in as balanced a manner as possible, your duty being to the Company as a whole. As I have also mentioned to you before many of the Creditors were friends and long-term business associates who had always granted us credit facilities and were not to know that you were going to join in a conspiracy to put us out of business. Unless you take out a separate action against St. Brelades Bay Hotel Ltd by the 31 May 1997, I will institute my own proceedings against you on behalf of the creditors".

At this stage, therefore, it was being alleged against the liquidator that he was party to a conspiracy. Alternatively, he faced the prospect of proceedings being brought against himself by Mr Eves.

A liquidator, faced with a situation such as this, should normally bring the matter before the Court, so that the Court can give directions as to how the liquidator should exercise his statutory powers in such circumstances. But, in this particular case, the liquidator had the unusual advantage of being able to consider the Judgment of the Court of Appeal of 11 April 1997.

On 12 June 1997 the Viscount replied to Mr Eves in these terms:

"Thank you for your letter of 21 May 1997. I previously indicated to you that I would consider your letter of 24 April 1997 when I had had an opportunity to consider the written Judgment dated 11 April 1997 of the Court of Appeal relating to Blue Horizon. That written Judgment was made available to me on 16 May 1997, and I have now had an opportunity to consider it together with your request.

Your request was that I should institute an action in damages against St. Brelade's Bay Hotel Ltd on the grounds that Mr Robert Colley has admitted that his company's application for a "désastre" declaration was made for the purpose of putting you (by which I assume you mean Blue Horizon) out of business and get "us" (by which I assume you mean yourself and Mrs Eves) off the Island. You conclude that, clearly, that action lies.

I am bound to say that if such a claim is made and proved it would have to be based upon the torts of an abuse of the process of Court or based upon a wrongful predominant purpose or malicious prosecution".

The Viscount then went on to recite part of page 13 of the Judgment of the Court of Appeal (set out above) and continued in these terms:

"Furthermore, Mr Colleys affidavit was fully considered and found to be proper. The Court decided that the "désastre" was properly declared and properly not recalled.

The clear effect of this part of the Judgment and the Judgment taken as a whole is that even if you were able to prove the admission it would not be a ground for recalling the "désastre" and the claim for damages would then have to fall under Article 6 of the Bankruptcy (Désastre) (Jersey) Law 1990 ("the Law"), but Article 6 of the Law cannot apply, because as the Court indicated Blue Horizon was insolvent. It was insolvent on a cash flow basis at the time of the declaration, and at the time of the request to recall the "désastre" on a balance sheet basis: see page 5, lines 15-20, page 8, lines 14-28, page 10, lines 4-25. I have considered whether instead of you seeking such relief the company could do so. It is quite clear that if no such action lies, no such action lies by whomsoever should seek to bring it. It would be wrong in principle and wrong in practice to bring an action that is doomed to failure, and indeed an action which has effectively been the subject of a decision of the Court of Appeal. It would not be in the interests of the company, the shareholders, or the creditors, for costs to be incurred,

and effectively wasted. No benefit would arise and damage would result.

In your letter of 21 May 1997, you say that unless I take out separate action against St. Brelades Bay Hotel Ltd by 31 May 1997, you will institute your own proceedings against me on behalf of the creditors. Such an action would be groundless, both as regards the substance and the form. It would result in further costs being incurred which would jeopardise the interests of the company, the creditors and shareholders. It would be an action that would be bound to fail and I would seek to have it struck out at an early stage".

Accordingly, it is plain that the Viscount considered not only the precise proposal which had been put to him by Mr Eves, but alternatively, that the company (Blue Horizon) should institute proceedings against St. Brelades Bay Hotel; but the liquidator concluded against doing this.

In my view the liquidator was justified, in the unusual circumstances of this case, in dealing with the matter in the way he did.

Once again, Mr Eves was not prepared to allow the matter to rest there. On 27 January 1998 Mr Eves presented a Representation to the Royal Court in these terms:

"The above-named defendant is required to appear before the Royal Court, ... on Friday 30 January 1998, ... to show cause why the:

1. Company, Blue Horizon Holidays Ltd, should not be assigned to the plaintiff, its original principal shareholder, in accordance with the Judgment of Lord Hoffman in the House of Lords on 27 November 1997 or the plaintiff should not be granted legal aid or other benefit to pursue litigation against the parties responsible for the company's demise, and

2.costs of and incidental to this action should not be met by the Defendant".

On 30 January 1998 the Representation came before the Royal Court and was adjourned until 6 February, the Viscount, as defendant, being summoned to attend on that occasion.

On 6 February 1998 the Royal Court struck out the Representation, apparently on the ground that it disclosed no reasonable cause of action. No speaking judgment was given and the language used has not been recorded.

Once again, Mr Eves was not content to allow the matter to rest there. On 3 March 1998 he filed a Notice of Appeal, asking this Court to set aside the Judgment of the Royal Court and to allow the Representation to proceed.

On 1 June 1998 Mr Eves again wrote to the Viscounts Department. In the course of this letter Mr Eves proposed an alternative approach. He wrote in these terms:

"I am now preparing my bundle for the Court of Appeal, but before I do so, and to avoid further wasted costs in this litigation I would be obliged if you could advise me if you are now prepared to assign the company back to me or, in the alternative, join in an action against St. Brelades Bay Hotel Ltd for bringing the en désastre application in the first place ..."

On 3 June 1998 Mr Eves set out his Skeleton Argument. After reciting the matters set out above, Mr Eves said this:

"That the said Representation was "Struck Out" with only Skeleton Argument and no proper hearing taking place, all in breach of the rules of natural justice. The Court therefore erred in its judgment and was flawed for the following additional reasons:

(a) It never considered the implications of the House of Lords' judgments of 27 November 1997 in respect of *Circuit Systems Ltd v Zuken-Redac (UK) Ltd* and *Norglen Ltd v Reeds Rains Prudential Ltd*.

(b) It never considered the Representation of the liquidators and *Laker Airways Ltd* brought before the Royal Court on 26 July 1985 and the Royal Court Order of 6 September 1985.

(c) It never considered that the duty of the defendant is to protect creditors in an 'en désastre' application and not fraudulently and deliberately to deprive them of their money.

(5) That despite approaches to the defendant by the plaintiff for it to join in litigation against *St. Brelades Bay Hotel Ltd* in a similar manner to the liquidator in *Laker Airways Ltd*, the defendant has

bluntly refused. This is because the defendant is part of a criminal conspiracy with other parties to deliberately and without any notice to put the plaintiff personally out of business. This is a blatant breach of his oath as an officer of the Royal Court and a breach of his duty as a potential liquidator.

(6) Wherefore the Appellant prays that the Court of Appeal will overturn the Judgment of the Royal Court and grant the Assignment of *Blue Horizon Holidays Ltd* to the Appellant and/or grant him legal aid or other benefit to pursue litigation against the parties responsible for the company's demise".

On 9 September 1998 the Viscount filed his Skeleton Argument. In summary the Viscount contended that the Representation was struck out because it was manifestly devoid of any merit. He referred to the

'désastre'

proceedings culminating in the appeal to the Court of Appeal in April 1997. He submitted that the Bankruptcy (*Désastre*) (Jersey) Law 1990 contained no provision for a company declared

'en désastre'

to be assigned to anyone, and submitted that the references to the decisions of the House of Lords (referred to above) were misconceived and irrelevant. He further submitted that the appellant's Representation disclosed no cause of action "against the parties responsible for the company's demise", and the request that the appellant "be granted legal aid or other benefit" to pursue such litigation was therefore groundless. He drew attention to the fact that certain matters had not been raised in the Court below and submitted that the appellant's complaints against *St. Brelades Bay Hotel Ltd* and its Director, Mr Colley, had been fully canvassed. Finally, it was submitted that the appellant's complaints as to breach of natural justice, bias, breach of duty and conspiracy were without any foundation, and the reference to the Representation concerning *Laker Airways Ltd* (in liquidation) was irrelevant.

Also on 9 September 1998, Mr Eves swore an affidavit in these proceedings, and asked the Court to admit the material contained in it (which had not been before the Royal Court) on the hearing of the appeal. His ground for seeking admission of this new evidence was on the basis that the Court would not be able accurately to assess the strength of the case which he was seeking to make without the further evidence. Inevitably we had to read the affidavit in order to determine whether the further evidence could properly be admitted in accordance with the Court of Appeal (Jersey) Law, 1961 and the practice of the Court. For my part I doubt whether the proffered evidence is properly admissible; but we took the view that since the appellant was acting in person, the right course was to admit the affidavit

de bene esse,

and we allowed the appellant to refer to it in the course of his submissions, as he saw fit.

At the Hearing the appellants submission was further refined. Mr Eves accepted that an alternative way in which to present his case was to seek an assignment of Blue Horizons alleged right of action rather than an assignment of the company itself; and Advocate Benest, for the Viscount, accepted that the Viscount would have had the power to assign any such right of action (had he seen fit to do so) under the powers conferred on the Viscount by Articles 26 and 27 of the Bankruptcy (Désastre) (Jersey) Law, 1990.

In my view the Viscount has a complete discretion to carry out his statutory functions as he sees fit, having regard to all the various interests which he must both have in mind and seek to balance; and, proven fraud and bad faith apart, the Court will only interfere if the Viscount, as liquidator, has done something so utterly unreasonable and absurd that no reasonable man would have done it; see *In re Edenote, Ltd* "The Times", 3 June 1996.

The Court of Appeal, in April 1997, was fully apprised of the financial affairs of Blue Horizon, and reached the conclusions set out (and to which I have already referred earlier in this Judgment). The Viscount was entitled, when faced with the various requests by Mr Eves, to have regard to and to rely on the Judgment of the Court of Appeal. In my view he was entitled, notwithstanding the allegation of conspiracy made against him, himself to form the conclusion which he did, and himself to decline to institute proceedings against St. Brelades Bay Hotel, alternatively to join with Mr Eves in instituting proceedings against St. Brelades Bay Hotel, alternatively to assign Blue Horizon to Mr Eves, or alternatively to assign alleged causes of action vested in Blue Horizon to Mr Eves. He would, in my view, have been entitled to share the view expressed by the Court of Appeal in April 1997, namely that "Blue Horizon was in a hopeless state and the sooner it was put to an end as a trading entity the better"; and he was, in my view, under no duty to facilitate further purposeless litigation.

In my view, the Royal Court was entitled to take the view that the Representation made by Mr Eves in January 1998 disclosed no reasonable cause of action; it was accordingly entitled to strike out the Representation summarily and, indeed, was right in so doing.

Accordingly, for my part, I would dismiss this appeal.

GLOSTER JA:

I agree

BELOFF JA:

I also agree

Authorities

Circuit Systems, Ltd. -v- Zuken-Redox (UK) Ltd; Norglen, Ltd. -v- Reed Rains Prudential, Ltd. (27 November 1997): House of Lords: Opinions of the Lords of Appeal.

Ayra Holdings, Ltd. -v- Minorities Finance Ltd.

(1997) JLR 176

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In re Blue Horizon Holidays, Ltd., en désastre (11 April 1997) Jersey Unreported C of A.

In re Edennote, Ltd. (3 June 1996) "The Times"

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