

JERSEY / JUDGMENT

Booth (A.P.) v Viscount and Anor [2022] JCA 200 (10 October 2022)

[2022] JCA 200

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Court of Appeal 10 October 2022 Before : Clare Montgomery, KC, Jonathan Crow, KC James Wolffe
Between Alan Paul Booth Appellant And (1) The Viscount of the Royal Court of Jersey (2) David O.
Reynolds Limited, trading as Reynolds Chartered Surveyors Respondents Advocate N. B. R. Mière
for the Appellant. Advocate D. R. Wilson, for the First Respondent. Advocate S. A. Hurry for the
Second Respondent

judgment

crow JA:

INTRODUCTION

1. This is the judgment of the court. 2. The Appellant (" Mr Booth ") is appealing against a judgment given by the Royal Court (Commissioner Clyde-Smith with Jurats Blampied and Austin-Vautier) on 8 March 2022,

[2022] JRC 062 (" the Judgment below ") which declared that the refusal by the First Respondent (" the Viscount ") to assign to Mr Booth a putative cause of action (" the Claim ") against the Second Respondent (" Reynolds ") was within the range of reasonable responses open to her, and accordingly declined to intervene by directing the Viscount to make such an assignment. 3. On its face, the Notice of Appeal raises numerous issues, which we will list and address in due course. However, as matters evolved it became apparent that there was essentially just one question of real substance in the appeal. When considering whether to assign a cause of action to a debtor whose property has been declared en désastre , is the Viscount required to disregard the merits of the claim? 4. Answering that question requires us to consider the true ratio of a relatively recent decision of this court, In the matter of the representation of A. P. Booth (en désastre) (Nº 2), Booth (A. P.) v. Viscount

[2016] JCA 218 , [2016] (2) JLR 473 ("the November 2016 Judgment"). The issue raised by the present appeal, and by the Respondent's Notice filed by the Viscount, is whether the Royal Court wrongly failed to follow the November 2016 Judgment and, if so, whether this court should now depart from that decision. THE FACTS 5. The Claim is for alleged negligence by Reynolds in the provision of property valuations. The background facts need to be

explained in a little detail. 6. Mr Booth is a Chartered Surveyor. An affidavit filed on behalf of Reynolds exhibits certain extracts from the website of his business, ABA Chartered Surveyors. It describes his business as having "more than forty-four years experience in the construction industry, including quantity surveying, property valuations, construction defects, contract advice, arbitration and mediation, property and contract management" (emphasis added). 7. In August 2003, Mr Booth and his late wife acquired a property known as King's Oak on which they built a substantial house with two cottages. The work on the main house was completed in April 2005. By May 2011 the debts secured on King's Oak amounted to approximately £2.62 million, of which £1 million was due to be repaid to a company called Eret Limited in July 2011. Mr Booth therefore needed to refinance his borrowings. 8. He initially proposed to do this by obtaining a loan from Fairbairn Private Bank Limited ("Fairbairn"). In that connection, a valuation report dated 10 May 2011 was provided to Fairbairn by Reynolds. It valued King's Oak at £4.4 million. The report was addressed to Fairbairn, and it was expressly stated to be for their "sole use". It also stated that it was "confidential to the Client and his professional advisers and the Valuer accepts no responsibility to any other person". The court notes in passing that Mr Booth initially exhibited to his affidavit in these proceedings a copy of this valuation from which the title page and all references to Fairbairn were missing. He has since said that this was "a mistake" but he has not provided any satisfactory explanation as to how the mistake came to be made. 9. It will be apparent that the valuation of King's Oak was obtained from Reynolds by Fairbairn not in the context of Mr Booth seeking to raise any new borrowing, but rather in the context of his efforts to refinance an existing liability. In the event, the lending by Fairbairn did not proceed. It is accordingly important to recognise that Reynolds valuation of King's Oak did not form the basis of any lending. 10. Instead, Mr Booth and his late wife obtained a replacement offer from Investec Bank (Channel Islands) Limited ("Investec"). Pursuant to the terms of a letter dated 28 July 2011, Investec agreed to grant Mr and Mrs Booth a facility of £2.95 million secured on King's Oak, but only on condition that the property had a minimum market value of £4.4 million. Investec instructed CBRE to value the property. CBRE's valuation, dated 25 August 2011, valued King's Oak at only £4 million. As a result, Investec reduced the amount of facility offered from £2.95 million to £2.8 million. It proceeded to lend that amount to Mr Booth, and an hypothèque was registered on King's Oak on 2 September 2011. This enabled Mr Booth to pay off the existing loans and raise an additional sum of approximately £200,000 on more advantageous interest terms. 11. In early 2012, Mr Booth proposed acquiring another property called Beaumont Hill House for development. His pleaded claim against Reynolds in these proceedings is that the property was "in a distressed condition requiring improvement" at the time. Following a 'walk-through', Reynolds provided a letter dated 30 January 2012 expressing the opinion that its market value would be "in the order of" £1.3 million. The letter noted that the property had lacked any real maintenance work for a period of time, resulting in it then being in a tired and poor condition and quickly deteriorating. 12. A further valuation of Beaumont Hill House was also obtained on 19 April 2012 from a separate firm of Chartered Surveyors, NSP, at

£1.38 million, and at £1.75 million on completion of the property. 13. Mr Booth acquired Beaumont Hill House on 10 February 2012 for £1 million from Jersey Home Loans with an initial borrowing from the vendor of £1 million charged on the property. On 17 August 2012, Mr and Mrs Le Cornu registered a billet for a loan of £1.7 million to Mr and Mrs Booth (jointly and severally), which loan was registered as a first hypothèque on Beaumont Hill House and a second hypothèque on King's Oak, enabling Mr Booth to pay off the loan due to Jersey Home Loans. 14. Reynolds produced a further valuation of Beaumont Hill House on 4 March 2013, giving it a current market value of £1.5 million, and an expected market value of £1.8 million on the completion of works being carried out. Mr and Mrs Le Cornu registered two more billets, the first on 12 April 2013 for a loan of £165,000 and the second on 27 September 2013 for a loan of £90,741. Mr Booth's pleaded case in these proceedings is that he spent some £300,000 on improving the property. 15. As part of the chronology we should mention at this stage that Mr Booth remarried in September 2013. 16. Following the purchase of Beaumont Hill House, Mr Booth's financial position deteriorated and he was unable to meet the payments due to Investec, or to Mr and Mrs Le Cornu. In due course, judgment was obtained against him by Investec on 20 February 2015 in the sum of £2.91 million. On 27 March 2015, Investec obtained an acte Vicomte chargé d'écrire , and on 2 June 2015 it gave notice that it would be applying for an adjudication of renunciation in respect of King's Oak. In response, Mr Booth applied for a remise de biens . 17. The secured creditors at that stage comprised Investec for about £2.9 million, secured by a first hypothèque over King's Oak, and Mr and Mrs Le Cornu for about £2.3 million, secured by a first hypothèque over Beaumont Hill House and a second hypothèque over King's Oak, making a combined total of about £5.2 million. There were in addition unsecured creditors in the sum of about £330,000. 18. The Viscount, acting on behalf of the Jurats who were reporting to the court on Mr Booth's application for the remise , obtained reports on the value of King's Oak and Beaumont Hill House from two different firms. Le Gallais valued King's Oak the region of £2.6 million and Beaumont Hill House in the region of £800,000. Gaudin & Co were a little more optimistic: they valued King's Oak in the region of £2.75 million and Beaumont Hill House at £850,000. This produced a combined value for the two properties of between £3.4 million and £3.6 million. This amount was insufficient to clear the secured claims. Mr Booth's application for the remise was accordingly refused by the court on 17 July 2015. 19. Two applications then came before the Royal Court on 16 October 2015. The first was an application by Mr Booth for his property to be declared en désastre , and the second was an application by Investec for a dégrèvement . In support of his application, Mr Booth relied on the CBRE and Reynolds valuations of King's Oak from 2011 and claimed that the "correct value" of the property was £4 million: see para. 67 of this court's judgment in Investec Bank (Channel Islands) Limited v. Booth (A. P.) [2016] (1) JLR 101. He also claimed that Beaumont Hill House was worth £1.7 million, although he did not produce any valuations to the court in support of that assertion: *ibid* . 20. In the event, the Royal Court acceded to Mr Booth's application, declaring his property to be en désastre (" the Declaration "), although it did not give any

reasons.

Its decision was appealed by Investec. The appeal was dismissed by this court for the reasons set out in a detailed judgment dated 27 January 2016, mentioned in the previous paragraph. 21.

Following the Declaration, the Viscount and Investec jointly procured a valuation of King's Oak from Wills Associates, Chartered Surveyors. In their report of 21 March 2016, Wills Associates valued the property at £2.4 million. They also retrospectively valued King's Oak as at August 2011 at £2.3 million

- in other words, about half the valuations given in 2011 by Reynolds and by CBRE. 22. In the meantime, Mrs Booth made an application under Article 12 of the Bankruptcy (Désastre) Jersey Law 1990 (" the 1990 Law ") seeking to remain in the matrimonial home until it was sold, and also seeking to recover from the proceeds of sale certain payments she claimed to have made to assist Mr Booth in meeting his loan repayments. Her application was dismissed by the Royal Court in a judgment dated 23 March 2016, Booth (J. A. M.) v. Viscount and Investec [2016](1) JLR 201. The court noted in para. 10 of the judgment that reliance was placed on the CBRE valuation of King's Oak at £4 million. 23. The Viscount then took advice on the marketing of both properties. Having advised that Beaumont Hill House had a value of £800,000, Le Gallais suggested an asking price of £925,000. Gaudin & Co. had advised that it had a value of £850,000, and they indicated a 'fire sale' value of £750,000. The Viscount marketed Beaumont Hill House in December 2015 through Le Gallais at an asking price of £925,000. 24. In relation to King's Oak, Le Gallais advised on 5 April 2016 that it should be marketed for £2.85 million with the aim of achieving a price of perhaps £2.6 million, while Thompson Estates advised on 6 April 2016 that the property should be marketed at £3 million with a view to achieving a price as close to that figure as possible. Both firms were instructed to market the property at a price of £2.95 million. A third agent, Broadlands, was appointed in November 2016 at the request of Investec to examine King's Oak. They thought that a sale in the region of £2 million could be obtained and the asking price should be £2.49 million. After consultation with all three estate agents, the asking price was reduced to £2.65 million, and on 7 April 2017 it was reduced again to £2.3 million. 25. Mr Booth did not accept these valuations of either property. He accordingly applied by way of representation seeking the court's intervention in relation to three aspects of the désastre . The first was in relation to Beaumont Hill House, in respect of which Mr Booth challenged the Viscount's decision to accept an offer of £800,000. In support of his application, Mr Booth relied on the NSP and Reynolds valuations from 2012 - 2013: see para. 3 of the Royal Court's judgment dated 25 February 2016, Booth (A. P.) v. Viscount

[2016] JRC 049 . Mr Booth claimed that "if correctly valued" the sale of Beaumont Hill House (together with King's Oak) could result in the secured creditors being paid in full, with a surplus becoming available for unsecured creditors: *ibid* ., at paras. 7 - 8. In the event, Mr Booth's application was dismissed by the Royal Court, and Beaumont Hill House was duly sold for £800,000 . 26. The second claim in Mr Booth's representation was for an order requiring the Viscount to attempt to sell King's Oak for at least £4 million. In support of

that application, Mr Booth relied on the CBRE and Reynolds valuations from 2011: see paras. 5 - 6 of the Royal Court's unpublished judgment in *Booth (A. P.) v. Viscount*, 13 September 2016. That application was dismissed. At the time when the representation was considered by the Royal Court, no offer had been received for King's Oak. By the following year, the best offer that had been received was £1.85 million. The Viscount accordingly applied to the Royal Court for authority to sell the property at that price. Once again, Mr Booth opposed the application. Once again, he relied on the CBRE valuation from 2011 at £4 million: see para. 17 of the Royal Court's judgment dated 19 December 2017, *Viscount v. Booth (A. P.)*

[2017] JRC 215 . He also sought to persuade the court to prefer his estimate of the property's value over that provided by the estate agents instructed by the Viscount, saying: "He was a fellow of the Royal Institute of Chartered Surveyors with 49 years of experience in the buildings trade": *ibid.* , at para. 18. In the event, the Royal Court upheld the decision of the Viscount, and King's Oak was duly sold for £1.85 million. 27. The third element in Mr Booth's representation to the court related to three sets of legal proceedings which he had commenced on various dates in 2015, before the Declaration was made. One was a claim against Zenith Trust Company Limited (" Zenith "); one was against Collas Crill; and one was against a Mr Bults (together " the three claims "). By virtue of Article 8 of the 1990 Law, the three claims had vested in the Viscount on the making of the Declaration. She decided not to continue any of them, or to assign them to Mr Booth so that he could continue them personally. Mr Booth challenged those decisions. The Royal Court dismissed that challenge in a judgment dated 19 April 2016, *Booth v. Viscount*

[2016] JRC 086 , holding that the Viscount had acted reasonably in deciding not to pursue the claims herself, and that it was not open to her to assign them to Mr Booth by virtue of the 1771 Code. For the avoidance of doubt, the Royal Court also held that, if it had been open to the Viscount to assign the three claims, she had not acted unreasonably in refusing to do so. 28. Mr Booth did not appeal the Royal Court's judgment regarding the Viscount's decision not to pursue the three claims herself, but he did appeal against the ruling on the 1771 Code and in relation to the reasonableness of the Viscount's refusal to assign the three claims to him. He also sought to invoke his rights under Article 1 of the First Protocol (" A1. P1 ") to the European Convention on Human Rights. That appeal led to the November 2016

Judgment.

The detailed reasoning of this court in that judgment will be discussed below. For present purposes it is sufficient to record that this court overturned the Royal Court's decision both in relation to the 1771 Code and also in relation to the reasonableness of the Viscount's refusal to assign the three claims to Mr Booth. 29. The three claims were accordingly assigned to Mr Booth on 30 November 2016. No express provision was made in the terms of the assignment for Mr Booth to account for any recoveries to the Viscount for the benefit of the creditors in the

désastre , although the Royal Court observed, in para. 15 of the Judgment below, that it was implicit that the claims would be pursued for the benefit of the creditors. 30. In the event, the claims against Zenith and Collas Crill resulted in settlement payments being agreed on confidential terms, while the claim against Mr Bults went to trial where it was ultimately unsuccessful. The Viscount then made a claim against the sums resulting from the two settlements, initially as representing after-acquired property pursuant to Article 9(1) of the 1990 Law. A process of negotiation then followed, and the Royal Court was informed that an agreement was reached that 38.5% of the settlement sum received in respect of one claim and 34.6% of the other would be paid by Mr Booth to the Viscount. The Viscount thereby received a total of £95,000 for distribution to the creditors in the désastre after deduction of her expenses and fees. The Royal Court observed, in para. 17 of the Judgment below, that the relatively small percentages accepted by the Viscount might reflect the fact that the assignment of the three claims to Mr Booth had been made unconditionally, and that as a result there was a difficulty in establishing that the settlement sums constituted after-acquired property, the actions having been on foot before the date of the Declaration. 31. Having relied on the valuations of King's Oak and Beaumont Hill House produced in 2011/13 to try resisting their sale, Mr Booth decided to change tack in late 2016. Instead of relying on the earlier valuations as evidence of the true value of the properties in 2015/16, Mr Booth decided instead to allege that those valuations had been incorrect all along. On that basis, he contended that the loan agreements with Investec and with Mr and Mrs Le Cornu and the hypothèques granted in their favour had been entered into on the basis of mutual mistakes, and that the transactions should therefore be declared void ab initio . He met with the Viscount in October 2016 and explained that he had claims based on erreur . Mr Booth subsequently wrote to the Viscount setting out his arguments in more detail. The Viscount considered those arguments on advice, and wrote back in April 2017 explaining why she considered that the proposed claims based on erreur were unlikely to succeed. The Viscount also decided not to investigate further the causes leading up to Mr Booth's bankruptcy. 32. In late 2017, Mr Booth learned from Investec that it had made a claim against CBRE over the valuation of King's Oak. That development may have encouraged him to present a representation to the court in November 2017 seeking to set aside the loan agreements and hypothèques on the basis of an alleged mistake as to the value of the properties. However, those proceedings were subsequently overtaken by the Viscount agreeing to issue an application to the court for a review of her own decision in relation to Mr Booth's claim based on erreur and also her decision not to investigate further the causes leading to the bankruptcy. That application by the Viscount led to a judgment given by the Royal Court on 12 September 2018, Viscount

v. Booth (A. P.) (en désastre) and Investec

[2018] (2) JLR 253. In short, the Viscount's decisions were upheld. Mr Booth appealed unsuccessfully to this court, leading to a judgment given on 2 July 2019, Booth (A. P.) v. Viscount and Investec

[2019] (2) JLR 1. Mr Booth's claim in *erreu r* was dismissed by both courts essentially because they held that there was no mistake about the two essential elements of the transactions, namely the loans and the security: see para. 35 of this court's judgment at [2019] (2) JLR 1. 33. For the purpose of the present appeal, it is significant to record the following features of the claims made by Mr Booth, and the courts' judgments in the *erreur* proceedings: (i) Mr Booth's argument in support of his claim based on *erreur* in relation to Investec was that "the very substance of the agreement is based on the valuation provided by CBRE on King's Oak" ; and, in relation to both that property and Beaumont Hill House, he said this: "Had the properties not achieved those valuations then none of the contracts would have been entered into" : see para. 43 of the Royal Court's judgment at [2018](2) JLR 253. He said that " he had relied on the £4m CBRE valuation when entering into the Investec loan, and but for the valuation would not have entered into the loan. The *erreur* consisted of entering into the contract on the basis of the valuation, and since a mistake had been made the contract should be avoided ... The valuation had gone to the core of the contract: it was the whole basis of the loan. Had the true value of King's Oak been known, Mr Booth could, so he said, have refinanced elsewhere and secured the borrowing on other properties" . In other words, Mr Booth was making a case based on reliance: he was arguing that he had relied on the earlier valuations of the properties and, specifically in relation to King's Oak, his case was that he had relied on the CBRE valuation, not the Reynolds valuation. (ii) The Royal Court held, in para. 55 of its judgment, that irrespective of whether the CBRE valuation was 'wrong', its purpose was not to provide Mr Booth with any understanding in connection with the proposed arrangements with Investec, but rather to provide comfort to Investec that the property in respect of which it was taking an *hypothèque* was sufficiently valuable. That was the court's finding as to the purpose of the valuation. (iii) As to causation, the Royal Court held, in para. 58 of its judgment, that in 2011 Mr Booth wished to borrow money from Investec and was content to grant security over King's Oak. The court held that, if a lower valuation had been produced at the time, Mr Booth would have disagreed with it, and it would not have dissuaded him from refinancing his exiting borrowing or taking on the small additional borrowing to secure an interest advantage. (iv) As to Mr Booth's case on reliance, the Royal Court specifically held, in para. 60 of its judgment, that "the valuation of King's Oak neither operated on the mind of [Mr Booth] at the material time nor was the level of the valuation a matter that was to the very substance of the transaction." Similarly, the Court of Appeal held, in para. 37 of its judgment, that: "The value of the security was not essential to Mr Booth, and so was not determinative of his consent to contract. His concern was to obtain the loan, not to know what was the value of King's Oak" . (v) The claim against Mr and Mrs Le Cornu in relation to Beaumont Hill House was dismissed for similar reasons: see para. 39 of the Court of Appeal

judgment.

(vi) In para. 40 of its judgment, this court also dismissed Mr Booth's attempts to rely on his Convention rights. (vii) As a result, this court held, in para. 41 of its judgment, that Mr Booth had "suffered no loss at all" as a result of any allegedly 'wrong' valuations of the two properties in 2011/13. 34. On 3 January 2020, the Royal Court made an order of discharge pursuant to Article 41 of the 1990 Law releasing Mr Booth from all debts provable in the *désastre* except those for which statutory exception is made. At that time, some £3.1 million was still owed to creditors whose claims had been admitted, of which £1.8 million was owed to Mr and Mrs Le Cornu and £1 million was owed to Investec. 35. On 26 November 2020, Mr Booth sent Reynolds a letter before action, alleging negligence in the valuations provided by them which he claimed were the cause of his subsequent bankruptcy and loss of earnings, *inter alia*, as a Chartered Surveyor over the four-year period of the bankruptcy. 36. Reynolds' solicitors, Reynolds Porter Chamberlain LLP ("RPC"), responded by email on 10 March 2021, denying the allegations of negligence and also asserting that Mr Booth had no standing to bring the proposed Claim, since any cause of action would have vested in the Viscount on the making of the Declaration pursuant to Article 8 of the 1990 Law. 37. On 12 March 2021, Mr Booth telephoned the Viscount's office advising of his intention to make the Claim and asking for confirmation that the Viscount had no interest in it. The manager of the Insolvency Team in the Viscount's Department responded on 26 March 2021 stating that nothing in the 1990 Law suggested that any property re-vested in Mr Booth by operation of law or otherwise when he was discharged; that, as Mr Booth's creditors had no scope to enforce debts that were discharged unpaid, it would be wholly contrary to the principles of *désastre* if he were able to pursue after his discharge a claim that had vested in the Viscount due to the Declaration; and that the bankruptcy proceedings were now closed. 38. Advocate Steenson, acting at the time for Mr Booth, wrote on 28 March 2021 inviting the Viscount to assign the claim to Mr Booth, citing the November 2016 Judgment of this court. The position of the Viscount was maintained and, as time was an issue, Mr Booth brought these proceedings against the Viscount for a direction that she re-vest the Claim in him, and against Reynolds alleging negligence. THE PROCEEDINGS And JUDGMENT IN THE COURT BELOW 39. The pleaded claim against Reynolds in relation to King's Oak is based on the assertion that Mr Booth entered into the loan agreement with Investec "In reliance on" the valuation provided by Reynolds: see paras. 18

- 21 and 27 of the Order of Justice. Unlike the claim he made in the *erreur* proceedings, Mr Booth does not now say that he relied on the CBRE valuation: see para. 22 of the Order of Justice. And, unlike the position he took when seeking to restrain the sale of King's Oak by the Viscount in 2016, he now relies on the valuations by Wills Associates as being 'correct': see para. 24 of the Order of Justice. 40. Similarly, the pleaded case in relation to Beaumont Hill House is that Mr Booth entered into the purchase agreement "In reliance on" the 2012 valuation by Reynolds: see paras. 41 - 42 of the Order of Justice. He does not allege that he relied on or suffered loss as a result of the 2013 valuation. 41. The parties have agreed that the question whether the Viscount was entitled to refuse an assignment of the Claim to Mr Booth should be taken as a preliminary issue. As a result, no answer has yet been filed by Reynolds. Nevertheless, as is apparent from the response sent by RPC in March 2021,

Reynolds deny any negligence, and in the Royal Court Advocate Hurry described the Claim as hopeless, frivolous and vexatious, saying that it was brought in the hope of securing a nuisance payment at the whim of a bankrupt against whom there appears to be little or no prospect of recovering costs. 42. In its original form, the Order of Justice sought a direction that the Viscount revest the Claim in Mr Booth " unconditionally ". However, when the matter came before the court on 10 November 2021, it became apparent that Mr Booth would in fact be prepared to share a proportion of any recoveries with the Viscount for the benefit of the creditors. The matter was accordingly adjourned so that Mr Booth could put his proposals in detail to the Viscount for her consideration. The word " unconditionally " has since been deleted from the Order of Justice by amendment. 43. Following the adjournment, Advocate Wilson prepared a summary of Mr Booth's proposals, which Mr Booth confirmed as accurate. It is unnecessary to set out the proposals in any detail. Suffice it to say that Mr Booth now proposes that he should receive over half of any net recovery, with the balance going to the Viscount for the benefit of the creditors. 44. At the hearing in November 2021, Mr Booth also informed the court that he had obtained an Opinion from English Counsel on the merits of the Claim and, without waiving privilege over that advice, he agreed to provide a copy confidentially to the court and to the Viscount. That has been done, and we have read the Opinion. We also sat briefly in private, in the absence of Advocate Hurry for Investec, to hear any submissions touching on the Opinion. In the event, Advocate Wilson for the Viscount did not seek to address us by reference to the content of the Opinion. Furthermore, the legal argument presented to this court by Advocate Mière on behalf of Mr Booth was that neither this court nor the court below ought to have had any regard to the content of the Opinion or to the merits of the Claim. In the circumstances, and for the reasons given below, we do not find it necessary to refer in this judgment to anything in the Opinion, nor will we be giving a confidential judgment discussing its content. 45. Notwithstanding Mr Booth's offer to share part of any proceeds, the Viscount maintained her position that it was not appropriate to assign the Claim to Mr Booth for a number of reasons: (i) There was no requirement under the Bankruptcy Law to reassign any property to a discharged former bankrupt, particularly in circumstances where creditors have suffered a significant shortfall. (ii) The Viscount did not consider that the reassignment in this case would sit easily with the principles of bankruptcy law. Mr Booth had been discharged from significant liabilities. He was now seeking to benefit from an asset that was not realised during the course of the bankruptcy. (iii) The claim was frivolous, and to some extent vexatious. There were no clear benefits to the creditors, and if there were any substantial recoveries then Mr Booth personally would receive the greater share. 46. The Royal Court dismissed Mr Booth's challenge to the Viscount's decision. Specifically, it held that, in so far as the Claim against Reynolds was based on the valuation of King's Oak, it faced " an insurmountable problem of causation " and, in so far as the claim was based on the valuation of Beaumont Hill House, " the issue of breach of duty and causation appear equally insurmountable ": *ibid* ., paras 47 and 54 of the Judgment below. THE LAW The 1990 Act 47. For the purposes of the 1990 Act, the word 'property' as defined in Article 1(1) as meaning: "land, money, goods, things in action, goodwill, and every valuable thing, whether movable or immovable, and

whether situated in Jersey or elsewhere; and also means obligations, servitudes, and every description of estate, interest, and profit, present or future, vested or contingent, arising out of or incident to property". 48. Article 8 of the 1990 Law provides as follows: "(1) All the property and powers of the debtor specified in paragraph (2) shall vest in the Viscount immediately upon the making of the declaration.

- (2) Subject to paragraph (3) and Article 8A, the property and powers of the debtor to vest in the Viscount under this Article and be divisible amongst the debtor's creditors shall comprise - (a) all property belonging to or vested in the debtor at the date of the declaration; (b) the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of any property as might have been exercised by the debtor for the debtor's own benefit at the date of the declaration." 49. Article 9(1) of the 1990 Law provides as follows: "Subject to this Article, the Viscount may by notice in writing claim any property which has been acquired by, or has devolved upon, the debtor since the date of the declaration for division amongst the debtor's creditors." 50. Under Article 15, the Viscount has a power to disclaim onerous property. The existence of this power forms part of the relevant legislative context, but the details do not matter for the purpose of this appeal. 51. Article 18(1) provides as follows: "In addition to every other duty imposed on the debtor by this Law or any other enactment or by law, the debtor shall, to the utmost of the debtor's power, aid the Viscount in the realization of the debtor's property and the distribution of the proceeds amongst the debtor's creditors, and, more particularly, shall - (a) give a complete and accurate list of the debtor's property and of the debtor's creditors and debtors and such other information as to the debtor's property as the Viscount requires, and attend before the Viscount whenever called upon to do so; (b) disclose to the Viscount as soon as practicable any property which may be acquired by the Viscount during the course of the *désastre* ...". 52. Under Article 41, the court may make an order of discharge. By virtue of Article 42(1), the effect of such an order is to "release the debtor from all debts provable in the *désastre*" subject to certain exceptions which are immaterial for the purposes of this appeal. Review by the Royal Court of the Viscount's decisions 53. It is common ground between the parties that the Royal Court has an inherent supervisory jurisdiction over the exercise by the Viscount of his functions in a *désastre*. Reference was made in this regard to Jersey Insolvency and Asset Tracking by Dessain and Wilkins (5th ed.), at para. 5.12, and the cases cited therein. We observe that the jurisdiction discussed in those authorities is the court's jurisdiction to hear an application by the Viscount for directions - a procedure that was adopted in the course of Mr Booth's *désastre* when the Viscount sought court approval for the sale of King's Oak, and later of her decision regarding the claim in *erreur*. However, the present case does not involve an application by the Viscount for directions. Rather, it is a claim brought by Mr Booth by Order of Justice against the Viscount seeking to challenge her actions. We did not hear any argument, and accordingly we express no views, on whether this is an appropriate form of procedure to adopt. 54. In any event, we do not consider that the form of procedure affects the appropriate legal test for any review by the Royal Court of the Viscount's actions in a *désastre*, and specifically for a review of a decision by the

Viscount whether to assign any alleged cause of action to a debtor. 55. The proper formulation of the relevant legal test reflects the role of the Viscount. This was discussed in some detail in *Viscount v. A-G and Arthur*

[2017] JCA 052 . Several features of the Viscount's role are worth noting in the present context: (i) The Viscount is not just a public official: he is an officer of the court, indeed he is the executive officer of both the Royal Court and the States Assembly. (ii) Many of his functions involve dealing with assets belonging, or formerly belonging, to other people: he has functions akin to a receiver where companies are declared en désastre by reason of insolvency; he has functions akin to a trustee in bankruptcy in relation to insolvent individuals; and he can be appointed as an administrator of the affairs of individuals under the Royal Court Rules. (iii) In a désastre , all of the debtor's property, whatever form it takes, will vest in the Viscount (subject to certain prescribed exceptions) and the Viscount will accordingly be faced with potentially numerous and challenging judgment calls. He will need to assess the value of different categories of assets, and he will need to make decisions about how best to realise or surrender them. These are all likely to be questions on which different conclusions could reasonably be reached. They are not the kind of issues on which it can be said with confidence in a court of law that there are 'right' and 'wrong' answers. (iv) The Viscount is supported by a specialist Insolvency Team. In performing his public functions, he is acting disinterestedly for the public good, and he has the support of experienced staff. He has access to external legal and other expert advice on matters of law and on issues relating to the valuation and realisation of assets. (v) The particular rules which relate to the performance of the Viscount's various functions may have grown up as part of the customary law of this jurisdiction, but may also on occasions be found in the provisions of particular statutes. The 1990 Law is one example of a statutory regime, but it is not an exhaustive one. As the recital makes plain, it is a law "to amend and extend the law relating to the declaring of the property of a person to be en désastre"

- in other words it builds upon the customary law of the désastre procedure, rather than superseding it: *Viscount v. Pitman*

[2014] (1) JLR 325, at para. 18. Save to the extent that the statutory regime introduces changes, the customary rules relating to declarations of désastre continue to apply, and indeed one such rule is the Royal Court's inherent supervisory jurisdiction. (vi) Given the wide range of different functions performed by the Viscount, the nature of the duty imposed upon him and the court's willingness to intervene in the discharge of those duties will be informed by the context. It may well be that there are some common themes which can be applied across the different functions, but it is not necessarily appropriate to conclude that because the Viscount has a particular duty in relation to the administration of the désastre, it follows that the same duty necessarily applies in relation to the administration of a Saisie Judiciaire. 56. With these features in mind, it would in our judgment be contrary to the public interest if a debtor (or any third party) were entitled to invoke the

Royal Court's intervention simply on the basis that he happened to disagree with any evaluative judgment call made by the Viscount. That would serve only to encourage disputatious litigation which would drain the resources of the Viscount and clog the courts with arguments over issues that are ill suited to resolution through legal proceedings. It would also be calculated to result in the Viscount becoming increasingly cautious, prompting him to make protective applications to the court for directions, rather than exercising his own judgment and discharging his own functions without undue recourse to court proceedings. Accordingly, a suitably exacting test must be met before the Royal Court intervenes in the exercise of the Viscount's functions on the application of a disaffected debtor. 57. Our attention has been drawn to a number of earlier decisions where the test has been described in slightly different language: *Eves v. Viscount*

[1998] JLR 192; *Booth (A. P.) v. Viscount*

[2016] JRC 049 , at paras. 14 - 19; *Booth (A. P.) v. Viscount*

[2016] JRC 086 , at para. 26; and para. 35 of the Judgment below in this case. We would suggest that the correct approach for the Royal Court can be derived from these earlier decisions, from first principles, and from a proper understanding of the context in which this supervisory jurisdiction falls to be exercised. That correct approach may be conveniently summarised as follows: (i) The court will intervene if the Viscount acts unlawfully, in the sense of exercising a power he does not have, or acting fraudulently or in bad faith, or violating the obligation which rests on the Viscount as a public authority under Article 7 of the Human Rights Law 2000 (" the 2000 Law "). (ii) The court will also intervene if the Viscount takes a decision that no reasonable decision-maker, properly taking into account materially relevant factors and ignoring materially irrelevant factors, could have reached. In para. 8 of the November 2016 Judgment, this court suggested that the question could be captured by asking whether the Viscount's decision was " within the range of reasonable responses ". We would not disagree, so long as that is correctly understood as a short-hand label for describing the test we have outlined in this sub-paragraph. 58. In para. 9 of the November 2016 judgment, this court also suggested that " different grounds of review may require a more intrusive approach on the part of the Royal Court ". We respectfully question whether that is so. In our judgment, the formulation outlined in para. 57 above fully captures the test, and we are not persuaded that either the terms of the 1990 Act, or the special position of the Viscount, or the case-law in this jurisdiction justify any more intrusive approach. True it is that, if the court is ever called upon to determine whether the Viscount has violated any Convention right in breach of Article 7 of the 2000 Law, then the relevant legal framework for answering that question (including the test of proportionality) will need to be applied. But that is merely a reflection of the fact that the Royal Court will intervene if the Viscount acts unlawfully (breach of Article 7 being a form of unlawfulness). It is not an example of any different or more intrusive approach. 59. In para. 9 of the November 2016 Judgment, this court also suggested that the Royal Court could intervene " on the basis of procedural impropriety ". Whilst we would not

necessarily exclude entirely such a possibility as a matter of principle, it is not easy to foresee when in practice such an issue is likely to arise. Questions of procedural fairness tend to arise where a decision-maker is exercising an adjudicative function or is determining issues which impact on a person's rights and property, which is not what the Viscount is doing when dealing with property vested in him under Article 8 of the 1990 Law. 60. For completeness, we would add that the test outlined in para. 57 above will not necessarily apply in all circumstances where the Royal Court is invited to review an exercise of the Viscount's functions in the course of a *désastre*. For example, a review by the court under Article 31(7) of the 1990 Law of a decision to admit or reject a proof is likely to be conducted by reference to a different test: see for example *Shirley v. Deputy Viscount*

[1999] JLR 256 , *In re Amy (née Horman)*

[2013] JRC 193 , at para. 21, and *Viscount v. Booth (A. P.)* [2018](2) JLR 253, at para. 14. To be clear, the test we have propounded applies in relation to an exercise by the Royal Court of its supervisory jurisdiction over the Viscount in circumstances where any action or decision of the Viscount is under challenge. 61. Finally, we would also observe that the Royal Court's supervisory jurisdiction may (perhaps more conventionally than in the present case) be invoked by the Viscount himself asking for directions. In that situation, the question before the court may not involve a review of any action or decision that has already been taken by the Viscount at all, and nothing we have said in this judgment should necessarily be taken to apply in such a case. The test on appeal in this court 62. Having identified the correct test for the Royal Court to apply, the next step in the analysis is to consider the correct test for this court to apply on appeal. There was some discussion in this court as to whether the Judgment below involved the exercise of a discretion or an evaluative judgment. In our view, it does not particularly matter how the decision below is categorised, because the applicable test on appeal is not going to be affected either way. Irrespective of whether the Royal Court was exercising a discretion or forming an evaluative judgment, the applicable test in this court will be that outlined in para. 38 of *Financial Technology Ventures II (Q) LP v. ETFS Capital Limited*

[2021] JCA 176 : this court will only intervene if the court below has erred in law, or if it has failed to take into account a sufficiently material factor or taken into account a sufficiently immaterial factor, or if it has reached a decision which is plainly wrong (i.e. one that is irrational, in the sense that no reasonable decision-maker could have reached it). PERIPHERAL ISSUES UNDER APPEAL 63. Before turning to the main issue in the appeal, it is convenient to deal first with the peripheral issues that were raised in the Notice of Appeal but not pursued in oral argument. 64. On its face, the Notice of Appeal raised the following questions: (i) Did the Claim vest in the Viscount on the declaration of *désastre* pursuant to Article 8 of the 1990 Law? (ii) If so, was the Viscount required to decide - (a) whether or not to pursue the Claim and, if she decided not to pursue it, (b) whether or not to assign the Claim (either to Mr Booth or otherwise) and/or to consider the power of

disclaiming under Article 15 of the 1990 Law? (iii) If not, does the Claim constitute after-acquired property, pursuant to Article 9 of the 1990 Law? (iv) If the Claim was after-acquired property, was the Viscount required to - (a) issue a written notice in accordance with Article 9 of the 1990 Law in order for the Claim to vest in her, and (b) if no such notice were issued, would the Claim not have vested in the Viscount but remained the property of Mr Booth? (v) In light of the answers to the foregoing questions - (a) was the Royal Court correct in holding that the Viscount had properly carried out her functions, and/or (b) is the Claim still the property of Mr Booth, and/or (c) were Mr Booth's rights under A1. P1 engaged? 65. Most of these questions can be answered in short order. As to Question (i), the Claim is plainly a 'thing in action' within Article 1(1) of the 1990 Law. As such, it vested in the Viscount by virtue of Article 8(2)(a) on the making of the Declaration. The Skeleton Argument filed on behalf of Mr Booth appeared to dispute this analysis, saying (in para. 24) that "a chose in action is not property in a conventional sense, it is a personal right over property". We reject that argument. The debate in this case is not whether the Claim is 'property' " in a conventional sense ". Rather, the debate is whether the Claim is 'property' within Article 8(2)(a) ; and the answer to that question is clearly "yes" because the Claim falls within the express definition of 'property' in Article 1(1). 66. The Skeleton Argument filed on behalf of Mr Booth also contends (in para. 23) that " if the debtor did not know a cause of action had accrued to him at the date of the declaration, Article 8(2) (b) cannot operate to vest the capacity to "take proceedings" in the Viscount ". We consider this argument to be misplaced, because the Claim vested in the Viscount by virtue of Article 8(2)(a), not 8(2)(b). But in any event, we reject the argument on its own terms. The vesting of property, and of power over property (including the power to bring legal proceedings), under Article 8 operates automatically . Furthermore, it covers " all property belonging to or vested in the debtor " and " the capacity to exercise and to take proceedings for exercising all such powers in or over or in respect of any property as might have been exercised by the debtor " (emphasis added). As such, it is not defined or constrained by reference to such property or powers of which the debtor was aware. 67. Turning to Question (ii), since the Claim vested in the Viscount, it plainly fell to her to decide what to do with it

- i.e. whether to pursue the Claim, or disclaim it, or assign it (whether to Mr Booth or to anyone else). 68. As such, Question (iii) does not arise. If it had, the answer would clearly have been that the Claim is not after-acquired property, because it was a cause of action that crystallised before the Declaration was made. If the Claim had been assigned to Mr Booth, and if he had pursued it successfully to trial, and if he had made any recovery as a result, there might have been a nice question as to whether the proceeds (as opposed to the Claim itself) constituted after-acquired property, but that question does not arise and we express no views on it. 69. Similarly, Question (iv) does not arise, because the Claim clearly vested in the Viscount on the making of the Declaration. That also answers Question (v)(b). 70. As regards Question (v)(c), there was some discussion in the parties' written submissions as to whether the Viscount's decision not to assign the Claim to Mr Booth engaged his rights

under A1. P1. This is not the first time the issue has arisen. As noted in para. 28 above, in the course of the hearing that led to the November 2016 Judgment, Mr Booth argued that the three claims under consideration in that case constituted his 'possessions' within A1. P1: *ibid.*, at para. 33. The court on that occasion did not find it necessary to decide the point. Nevertheless, it expressed the view that it was "well arguable" that, when the Viscount was deciding whether to assign the three claims to Mr Booth, "A1P1 remained engaged": *ibid.*, para. 36. It is no more necessary in this case to decide the point than it was in the November 2016 Judgment because, in the course of oral argument before us, Advocate Mière expressly conceded that his client's rights under A1. P1 were not engaged in relation to the Viscount's refusal to assign the Claim to him. Nevertheless, in light of the obiter comment in para. 36 of the November 2016 Judgment, and in fairness to Advocate Mière, we should make clear that we consider his concession to have been rightly made. It may well be the case (as this court suggested in para. 35 of the November 2016 Judgment) that the involuntary vesting of property in the Viscount by virtue of Article 8 of the 1990 Law constitutes an interference with the debtor's possessions: but that interference is both effective and complete by operation of Article 8 before the Viscount takes any decisions about how the property should then be dealt with. We are not persuaded that any decision taken by the Viscount thereafter (whether to assign or disclaim or otherwise deal with any property vested in him) engages any A1. P1 rights of the debtor. The property which has been vested in the Viscount is, by operation of the 1990 Law, no longer the debtor's property. 71. For these reasons, the only live issue in this appeal is Question (v)(a). Was the Royal Court correct in holding that the Viscount had properly carried out her functions when refusing to assign the Claim to Mr Booth? THE MAIN ISSUE

Introduction

72. Properly analysed, there are three aspects to the main issue under appeal: (i) First, on the correct interpretation of the November 2016 Judgment, did this court actually rule that, when deciding whether to assign a putative cause of action, the Viscount must close his eyes to the apparent merits of the claim? (ii) If that is the correct interpretation of the November 2016 Judgment - (a) should it be followed by this court in this case, and (b) did the Royal Court wrongly fail to follow it? (iii) On the assumption that the Viscount was, as a matter of law, entitled to take into account the merits of the Claim, was the Royal Court 'wrong' (in the sense described in para. 62 above) in deciding that the Viscount was not 'wrong' (in the sense described in para. 57 above) in refusing to assign the Claim to Mr Booth?
- (i) What is the true ratio of the November 2016 Judgment? 73. It is apparent from para. 45 of the Judgment below that the Royal Court proceeded on the understanding that the November 2016 Judgment is authority for "the proposition that the merits of the claim being assigned were not a relevant consideration for the Viscount". That was also Mr Booth's interpretation of the November 2016 Judgment. He argued in the court below (in para. 20(f) of his affidavit dated 27 July 2021) that the Viscount's perception of the merits of the Claim "have no bearing on whether a claim should proceed, as it is for a Court to decide on that matter". 74.

We are not persuaded that this is the correct interpretation of the November 2016 Judgment. 75. The relevant issue in the proceedings leading up to that judgment was whether the Viscount had been 'wrong' (in the sense described in para. 57 above) in refusing to assign the three claims to Mr Booth. The Royal Court held that she had not been 'wrong'. In this court, the Viscount sought to uphold that ruling by reference to three arguments: see paras. 26

- 31 of the November 2016 Judgment: (i) The first was that, if the Viscount were to assign the three claims to Mr Booth, she would be exposed to a risk of adverse costs if the claims were pursued and then failed. This court held that "no real weight" should be attached to that consideration: *ibid.*, para. 27. It does not arise in this appeal. (ii) The second argument on which the Viscount relied was "the interests of all parties in finalizing the *désastre*": *ibid.*, at para. 28. That argument was also rejected. Although the same argument does not arise directly in the present appeal, nevertheless for the purpose of disposing of the issues before this court, it is important to analyse the way in which it was dealt with in the November 2016 Judgment. The court observed that there were essentially two possibilities. On the one hand: "If the Viscount considered that there were no circumstances in which the claims could succeed, she would not need to contemplate exercising her powers to give notice under art. 9" (i.e. no after-acquired property was likely to come into the debtor's hands) and the Viscount "would therefore be entitled to proceed with the finalization of the *désastre* in the ordinary way": *ibid.*, at para. 29. On the other hand, if the Viscount foresaw the possibility of Mr Booth securing any recoveries from the three claims such that Article 9 of the 1990 Law might arise, she would nonetheless be entitled to proceed to distribute the existing assets and declare a dividend under Article 36 of the 1990 Law: *ibid.*, para. 30. We will return to the significance of this analysis below. (iii) The third argument in support of the Royal Court's ruling in that case was that an assignment of the three claims "would have caused unnecessary prejudice to the defendants to the claims by subjecting them to unmeritorious litigation": *ibid.*, at para. 31. That argument was rejected in this court on the grounds that, if the three claims were "unmeritorious or expose the defendants to unjustifiable financial risks, it is for the courts before which those claims are brought to make such orders as meet the justice of the case." The court added that "a solvent but impecunious litigator cannot be prevented, by reason of the possible exposure to irrecoverable costs on the part of his opponent, from continuing with his claim as long as it does not fall within the rules for striking out or summary judgment". 76. It is this part of the court's ruling that led the Royal Court in its Judgment below to conclude that the November 2016 Judgment was authority for the proposition that, when in the course of a *désastre* the Viscount is deciding whether to assign a claim, the merits of the claim are not a relevant consideration. We do not agree with that interpretation. In our judgment, it is clear from para. 29 of the November 2016 Judgment that, in deciding whether an assignment of the putative claim would interfere with the due finalisation of the *désastre*, the Viscount was entitled and required to decide whether "there were no circumstances in which the claims could succeed". In order for the Viscount to reach any such conclusion, he would

necessarily have had to consider the merits of the claim. It is therefore inherent in the logic of the November 2016 Judgment that the merits of any claim would be a relevant consideration in the context of a proposed assignment. The court's observations in para. 31 of its judgment must be interpreted in that light. 77. Furthermore, the November 2016 Judgment, just like any other ruling, needs to be interpreted in light of the issues before the court and the circumstances of the case in hand. In that case, the three claims had been on foot for some considerable time before the onset of the *désastre*. It would appear that no application had been made by Collas Crill or by Mr Bult to strike out the claims against them. An application had been made to strike out the claim against Zenith which had succeeded in part, but had failed in respect of another part of the claim. What remained of that claim, and separately the other two claims were therefore all proceeding towards an eventual trial on the merits at the time when the Declaration was made. The issue facing the court in the *désastre* was accordingly whether, in those circumstances, the Viscount had been 'wrong' to form a view on the merits of those three claims when reaching her decision on whether to assign them to Mr Booth. The court was not called upon to decide whether, in circumstances (such as those which arise in this case) where no proceedings have been issued before a declaration is made under Article 6 of the 1990 Law, the Viscount would be required to ignore the merits of a proposed claim before deciding whether to assign it. Nor was the court required to propound any general principle of law as to whether, in any circumstances involving any claims, the Viscount must always necessarily ignore the merits of the claim before deciding whether to assign it. Rather, the court was simply deciding the issue in the case before it. 78. For these reasons, and contrary to the view taken in the Judgment below, the November 2016 Judgment does not stand as authority for " the proposition that the merits of the claim being assigned were not a relevant consideration for the Viscount " in this case. (ii)(a) Should the November 2016 Judgment be followed in this court? 79. In light of this analysis, the next question does strictly not arise. It is posed on the assumed basis that the Royal Court was correct in saying that the November 2016 Judgment is authority for the proposition set out above. Since we have concluded that it is not, we do not have to answer whether this court would have followed that ruling if it had been authority for that proposition. Nevertheless, we have reached the clear conclusion that it would be wrong as a matter of principle to hold that the Viscount must in all cases disregard the merits of a claim when deciding whether to assign it. Furthermore, our reasons for reaching that conclusion serve also to fortify our interpretation of the November 2016 Judgment as not laying down any such principle. For these reasons, we will give our ruling of principle on that point. 80. We will do so without answering the further question whether this court could and would have refused to follow its own previous decision if (contrary to our conclusions) the November 2016 Judgment had been authority for the proposition that the Viscount must in all cases disregard the merits of a claim when deciding whether to assign it. Answering that further question would have involved engaging with the questions of (i) whether this court is bound by its own previous decisions, on which the parties appeared to be agreed but on which we heard no sustained argument, and (ii) if this court is free to depart from its own previous decisions, the circumstances in which it should (or

should not) do so. 81. In our judgment, the Viscount is not only entitled but positively required to consider the merits of a claim when deciding whether to assign it. 82. In any case where it appears that a claim has been, or might be, brought for the benefit of an insolvent estate, there will be a range of options open to the Viscount. Most obviously, he might decide to pursue the claim, discontinue it, or assign it. In properly deciding what to do, the Viscount will necessarily need to consider the merits of the claim: (i) If it appears to be a really strong case with a likelihood of substantial recoveries that would exceed the attendant costs, then there may well be good grounds for the Viscount to pursue it, so long as there are sufficient resources in the *désastre* for doing so, or to try persuading the creditors to fund any necessary litigation if there are insufficient assets in the Viscount's hands. (ii) On the other hand, if the litigation appears to be utterly hopeless, then there would plainly be no justification for the Viscount pursuing it. Furthermore, in that situation, the Viscount would also be entitled not to assign the claim, whether to the debtor or to any third party, as this court implicitly recognised in para. 29 of the November 2016 Judgment. (iii) If it appears that a claim is neither bound to succeed nor bound to fail, the Viscount may consider assigning the cause of action to a third party, or to the debtor. In deciding whether or not to make such an assignment, and if so on what terms (for example, as to payment up front or as to the division of any proceeds) the Viscount will again need to take a view as to the likely prospects of success. If the claim appears likely to succeed, the Viscount will obviously be well placed to negotiate better terms for the benefit of creditors than if the claim is more doubtful. 83. For these reasons, it is in our judgment self-evident from the very nature of the choices facing him that the Viscount can and must take into account the merits of a claim when deciding what to do with it, including whether to assign it to the debtor. This conclusion is reinforced when proper account is also taken of the function and the status of the Viscount. In the context of a *désastre*, his function is to gather in the assets, advertise for creditors, adjudicate on claims, realise the assets, distribute the assets pro rata among the creditors, and account for any surplus to the debtor: see para. 28 of this court's judgment on the appeal by Investec against the making of the Declaration, [2016] (1) JLR 101. In performing these functions in a *désastre*, the Viscount is discharging a public duty by exercising powers which impact on both creditors and debtors of the estate, and quite possibly other third parties too. As such, his decisions cannot either be taken or judged by reference only to commercial considerations. 84. True it is that, in the harsh world of self-interested, personal and commercial litigation, a plaintiff might take a cynical decision to bring a claim that was objectively hopeless, and a defendant might well take a pragmatic decision to make a nuisance payment to get rid of the claim, because the legal cost of defending it, and the uncertainty of recovering costs against an impecunious plaintiff, might well render any victory at trial pyrrhic. As such, it is entirely plausible that, if a hopeless claim was assigned by the Viscount to a debtor, it might generate a nuisance payment which would enure to the benefit of creditors. But that harsh reality would not justify the Viscount in making that assignment, because of his status as a public official and an officer of the court. It is no part of his function to facilitate hopeless litigation by a debtor on the basis that it might squeeze some payment from the reluctant hands of a defendant who, if the case

went to trial, would be likely to succeed. 85. In fairness to Advocate Mière, he conceded as much in para. 62 of his Skeleton Argument and also in the course of oral argument, and rightly so. He accepted that the Viscount should not exercise his powers so as to cause "harassment" (his word) to a defendant. He also accepted in the course of oral argument that any decision by the Viscount whether to grant an assignment involved "a balancing act". In our judgment, those concessions were rightly made. Furthermore, they only make sense on the basis that the Viscount is entitled, indeed required, to take into account the merits of a claim when deciding whether to assign it. Were it otherwise, the Viscount would never know whether an assignment would 'harass' the proposed defendant, and he would be unable to conduct the necessary 'balancing act'. 86. Similarly, Advocate Mière accepted that, if there was an ostensibly viable claim but there was evidence of malice on the part of the debtor in wishing to pursue it, then the Viscount could be justified in refusing to grant an assignment. In our judgment, that concession was again rightly made. We would also observe that the only logical rationale for the concession is that the Viscount is a public authority and as such he ought not to facilitate malicious litigation, even if it would be likely to result in a recovery for the benefit of creditors. 87. In conclusion under this heading, it became apparent by the end of oral argument that it was common ground between the parties that there is not, and should not be, any supposed rule of law requiring the Viscount to disregard the merits of a claim when deciding whether to assign it. On the contrary: in our judgment, the Viscount is both entitled and required to take into account the merits of any claim in such circumstances. (ii)(b) Was the Royal Court entitled not to follow the November 2016 Judgment? 88. In light of our interpretation of the November 2016 Judgment and the common ground between the parties, the next question does not arise either. In the interests of clarity, however, it is convenient to add a few observations under this heading. 89. First, it is necessary to set out the basis on which the question was posed. As noted above, the Royal Court proceeded, in para. 45 of the Judgment below, on the understanding that the November 2016 Judgment is authority for "the proposition that the merits of the claim being assigned were not a relevant consideration for the Viscount". It then said that the November 2016 Judgment could "arguably" be distinguished on this point. The use of the word "arguably" introduced an element of ambiguity, but it is apparent from a fair reading of the judgment as a whole that the Royal Court did indeed regard itself as being entitled to distinguish this part of the November 2016 Judgment. It did so for four reasons: (i) It drew attention to the advanced stage which the three claims had reached, by contrast with the position in this case where the Claim had not been issued before the Declaration was made. (ii) It said that the decision of this court in the November 2016 Judgment was premised on the assumption that all the proceeds of the three claims would accrue to the benefit of creditors, whereas in this case Mr Booth had initially suggested that the Claim should be assigned to him "unconditionally" and since then his position had only moved as far as offering a proportion of any recoveries to the Viscount for the benefit of creditors. (iii) The Royal Court said that it could not be right for the Viscount, as a public authority, to assign to Mr Booth a claim which was frivolous in the sense of being hopeless, futile or misconceived. (iv) Finally, the Royal Court said that the application in the present case was

being made after Mr Booth's discharge. 90. Before addressing these four reasons, we would observe that, if the November 2016 Judgment were (contrary to our understanding) interpreted as propounding a rule of law requiring the Viscount to disregard the merits of any claim when considering whether to assign it, then it would be difficult to see how the Royal Court could have distinguished that

ruling.

The proposition set out in para. 45 of the Judgment below (i.e. the Royal Court's understanding of what this court meant in para. 31 of the November 2016 Judgment) is a statement of legal principle. Either this court laid down that legal principle, or it did not. If it did lay down that proposition as a principle of law, then it would only have been open to the Royal Court not to follow it if there were a jurisprudential basis for the Royal Court not to apply the case-law of this court. 91. So far as that question is concerned, it was suggested to us that this court is not bound by its own previous decisions, and indeed that the Royal Court is not strictly bound by any decision of this court either, at least on issues relating to customary law. These are contentious issues on which it would be unwise to express any views in the absence of detailed argument in a case where the issue needs to be decided. That is not this case. For the reasons given above, we do not consider that this court was laying down any statement of legal principle in para. 31 of the November 2016 Judgment. As a result, the question whether the Royal Court would have been entitled, by reliance on the four points identified above, to distinguish that ruling does not arise. In the circumstances, we will say nothing further on the subject, save for this: the four reasons given by the Royal Court in para. 45 of the Judgment below ostensibly for 'distinguishing' the ruling in the November 2016 Judgment are, on analysis, reasons for concluding that this court did not lay down any legal principle in para. 31 of that judgment in the first place. That is, in our judgment, the correct interpretation of the November 2016 Judgment. Notwithstanding what is said in para. 45 of the Judgment below, the Royal Court's ruling on this point is perhaps better read as a recognition that this court was not purporting to lay down any rule of legal principle, rather than as reasons for accepting that there was such a legal principle and then seeking to distinguish its application on the facts of this case. (iii) Should this court overturn the Royal Court's refusal to intervene? 92. It became apparent in the course of oral argument that Mr Booth's real point was that, on the facts of this case, the Viscount ought not to have considered the apparent merits of this Claim to the extent that she did. In other words, it was accepted on behalf of Mr Booth that the Viscount was not entirely precluded from considering the merits of the Claim; but the argument was that, once it was accepted (as it must be) that the Order of Justice pleaded a claim against Reynolds which discloses a recognisable cause of action, it was not appropriate for the Viscount then to examine the likelihood of success in any detail for the purpose of deciding whether to assign the Claim. On Mr Booth's case, any such review of the merits should properly be left to the trial court, as suggested in para. 31 of the November 2016 Judgment. 93. Before dealing with the substance of that argument, it is important to recognise the nature of the decision that this court is called upon to make. Self-evidently, we are not sitting in judgment on a strike-out application by Reynolds. In other words, the question in this appeal is

not whether this court considers, on the material currently available, that the Claim is bound to fail. Rather, the question is whether the Royal Court was 'wrong' (in the sense described in para. 62 above) in reaching the conclusion that the Viscount was not 'wrong' (in the sense described in para 57 above) in refusing to assign the Claim to Mr Booth. That being the nature of the inquiry, this court's judgment is being formed essentially at two stages of removal from any substantive consideration of the underlying merits of the Claim against Reynolds. 94. It is also important at the outset to recognise the true nature and full extent of the decision taken by the Viscount which was under challenge before the Royal Court. There are, in particular, two aspects of her decision that are worth emphasising. (i) The first is that the Viscount's decision was not simply that the Claim was (in the language used in para. 31 of the November 2016 Judgment) 'unmeritorious'. Rather, as noted in para 45 above, her decision was that the Claim was frivolous and to some extent vexatious. Indeed, the Royal Court described the Viscount's decision as having been taken on the basis that the Claim was "hopeless": *ibid.*, paras 53 - 54. Indeed, that was Mr Booth's own characterisation of the Viscount's decision: his evidence in support of the present claim (para. 20(f) of his affidavit dated 27 July 2021) was that the reason why the Viscount had refused to assign the Claim to him "was because it had no merit" (emphasis added). (ii) The second aspect of the Viscount's decision which needs to be emphasised is that her refusal to assign the Claim was not based only on her assessment of its merits. As noted in para. 45 above, she also considered that it was inconsistent with the *désastre* regime as a whole for Mr Booth to be discharged from all provable liabilities but then to be able to issue proceedings in order to pursue a cause of action which pre-dated the Declaration, and to do so substantially for his own benefit. 95. These two aspects of the Viscount's decision are effectively the two faces of a single coin. Either the Viscount is entitled to regard the Claim as hopeless, in which case she had no business assigning it to Mr Booth and thereby allowing him to harass Reynolds: or the Viscount was entitled to consider that the Claim had some real value, in which case she was entitled to reach the conclusion that Mr Booth had no business seeking to profit from it in the circumstances of this case. 96. On the first issue (i.e. that in para 94(i) above), it is (or should be) common ground that the Viscount's decision in fact fell within the category of cases contemplated in para. 29 of the November 2016 Judgment - that is, where "the Viscount considered that there were no circumstances in which [the Claim] could succeed". And, as noted in para. 93 above, the question in this court is not whether we agree with the Viscount's assessment that the Claim against Reynolds was "hopeless", but whether we are entitled to rule that the Royal Court was 'wrong' in holding that the Viscount was not 'wrong' in taking that position. The short answer is that we consider the Royal Court was not 'wrong' to conclude that the Viscount was not 'wrong' in regarding the Claim as hopeless. Whilst emphasising again that this is not a judgment on a strike-out application, and as such this court is not itself making a definitive ruling on the merits of the Claim, we consider that the Royal Court was fully entitled to take into account the fact that the Viscount had, in turn, been fully entitled to take into account the fact that there were fundamental problems with the Claim: (i) It is self-evident that any property valuation involves an exercise of judgment: it is not an exact science, and any attempt in 2022 (or later, whenever the trial takes place) to prove negligence by reference to valuations as at 2011 and 2012, would be singularly problematic at the best of times. (ii) In seeking to make good his claim against

Reynolds for negligently valuing both properties, Mr Booth would have had to confront the fact that he had previously and repeatedly sought to persuade the court in the earlier stages of the *désastre* that those valuations were correct and reliable. He would accordingly have to explain away the inconsistency in his arguments. (iii) Mr Booth's problems in that regard were compounded by the fact that the Reynolds valuations of both King's Oak and Beaumont Hill House were supported by contemporaneous valuations by other firms that were in the same order of magnitude. (iv) The valuation of King's Oak by Reynolds was provided in the context of a refinancing in 2011, not in the context of a forced sale in 2016. (v) Mr Booth had not sought to rely on the Reynolds valuation of King's Oak in the course of the earlier proceedings in the *désastre*, and indeed his pleaded position had previously been that he relied on the CBRE valuation instead. (vi) To the extent that Mr Booth sought to contend in the Claim that he relied on the Reynolds valuations, the fact was that he is not merely qualified as a Chartered Surveyor, but he was also a practitioner who relied, in his business's marketing material, on his own experience and expertise in the field of valuation. That would be deployed against him in relation to any arguments of negligence or reliance, because it would be said against him that he, as an expert, must have agreed with the Reynolds valuations at the time. (vii) The court had, in the course of the *erreur* proceedings, made clear findings that Mr Booth did not rely on any of the 2011/13 valuations as the basis for entering into the transactions with Investec or Mr and Mrs Le Cornu. Although those earlier rulings were not made in proceedings to which Reynolds was a party, and as such no issue estoppel might formally arise, nevertheless the Royal Court in this case was entitled to take the view that the Viscount had been entitled to take the view that any claim in negligence that might now be brought against Reynolds would constitute a collateral attack on those earlier rulings. (viii) The Reynolds valuation of King's Oak was prepared for and addressed exclusively to Fairbairn, and its express terms precluded any other party relying on it. (ix) In the event, no lending was made by Fairbairn, so it was difficult to see how Mr Booth could now contend that any relevant reliance was placed on the Reynolds valuation of King's Oak, even if it had been addressed to him. (x) The March 2013 valuation of Beaumont Hill House post-dated the bulk of the borrowing, which had been incurred in early 2012. (xi) Whilst the valuation of the same property in January 2012 was "in the order of" £1.3 million, Mr Booth had in fact been able to acquire the property for only £1 million. (xii) In contrast with the position regarding King's Oak, when these proceedings were issued there was no retrospective valuation of Beaumont Hill House as at early 2012 that even ostensibly impugned the Reynolds valuation. (xiii) The valuations of Beaumont Hill House produced in 2016 reflected its then deteriorated condition and were not obviously reflective of its true value four years earlier. (xiv) All of the Reynolds valuations had been procured in the context of Mr Booth seeking to refinance his existing borrowings, not for the purpose of incurring any new liabilities. (xv) In all the circumstances, Mr Booth's insolvency had been caused by his inability to service his borrowings, not by the provision of any valuation (negligent or otherwise) from Reynolds. 97. In support of his argument on this issue, Advocate Mière pointed out that litigation is always uncertain. Specifically, he invited us to take into account the fact that the Viscount had decided (quite reasonably, so the court held) not to pursue the three claims, whereas in the event two of them had generated significant settlement payments. On that basis, he submitted that it was inappropriate for the

Viscount to conduct a detailed examination of the merits of the Claim and thereby to pre-judge decisions which should properly have been left to the trial court. 98. In dealing with this line of argument, we should make clear that we derive no assistance from the outcomes achieved in the three claims. It is striking that the only one of the three that was fought through to trial was dismissed. The settlement payments that were made in the other two cases could easily have been nuisance payments, reluctantly made for the purpose of getting rid of a hopeless claim. In other words, the practical experience of those three assignments could in reality illustrate the very vice which Advocate Mière acknowledges should be avoided - namely, the harassment of defendants with hopeless claims. 99. Advocate Mière did, nevertheless, make a broader and more compelling point which must not be ignored. Between the two extremes of obviously hopeless claims and obviously unanswerable ones, there will be the overwhelming majority of cases in which it cannot be said with any high degree of certainty whether the claim will succeed. In those cases, it may be inappropriate for the Viscount to expend too much effort and resources in investigating and/or taking external advice on the likely prospects of success in order to decide whether to assign a claim. If, for example, the Viscount is offered a substantial up-front payment in consideration for the assignment of a cause of action vested in him under Article 8 of the 1990 Law, he may well consider that it is in the interests of creditors to accept that payment without conducting a detailed investigation into the merits. The Royal Court expressly acknowledged as much in para. 44 of the Judgment below, and rightly so. 100. Advocate Mière relied in this regard on a passage from Dessain and Wilkins, at para. 5.14.2.1, which draws attention to the potential advantages of an assignment where, for example, there is a difference of opinion between the Viscount and the debtor as to the likely prospects of success of an action or proposed action. We do not disagree. The Viscount undoubtedly has a power to assign causes of action vested in him under Article 8. The debate in this appeal concerns the extent to which the Viscount can and should investigate the merits of any claim before reaching his decision whether to assign. 101. It is, in that context, important to keep in mind that the circumstances facing the Viscount from one case to another will be varied and unpredictable. Within the broad category of cases in which the outcome of any actual or proposed litigation is uncertain, there will obviously be a range of different degrees of uncertainty, and different degrees of complication. The Viscount's handling of any particular case will inevitably need to be responsive to those particular features. For example, if there is a claim which turns on a short point of contractual interpretation, it may well be appropriate for the Viscount to take external legal advice on the likely prospects of success before deciding what to do. On the other hand, if there is a claim which is likely to turn on complex issues of law, or matters requiring expert evidence, or disputed issues of fact which depend on witness credibility, then it is unlikely that the Viscount would need to explore in detail the likely prospects of success before deciding whether to assign the claim, if a suitably beneficial offer is made by a proposed assignee. 102. In short, it would be inappropriate for this court to be unduly prescriptive with regard to the discharge by the Viscount of his functions in a *désastre*. As a matter of general practice, the court should respect the Viscount's judgment, recognising both the fact that he is a public official discharging a public function with access to both a specialist team and also professional external advice, and also the fact that litigation is a blunt instrument for resolving disagreements over the kind of evaluative judgments that the Viscount is called

upon to make in the course of performing his duties. 103. All we can and need to say is that, in the circumstances of this particular case, there was a wealth of material readily available to the Viscount from the previous litigation in this particular insolvency for the purpose of making an informed assessment of the likely prospects of the Claim without having to conduct any new or detailed investigations. It would have been perverse of the Viscount not to consider that material, and the Royal Court did not go wrong in declining to interfere with her decision to do so. Furthermore, since the Viscount chose (entirely reasonably) to undertake that exercise, it cannot now be persuasively argued that the Royal Court was wrong in refusing to overturn the Viscount's evaluation of that material: the accumulation of reasons listed in para 96. above provide a more than adequate basis for the Judgment below. 104. Before leaving this issue, we should also mention that both sides in this appeal addressed the court by reference to certain materials drawn from England and Wales. In particular, we were referred to an Opinion written by English Counsel, Richard Fisher QC and Dr Riz Mokhal, which sought to draw an analogy between the function of the Viscount in the context of a *désastre* and that of the Official Receiver ("OR") when acting *ex officio* as a trustee in a bankruptcy in England and Wales. On the back of that analogy, the authors of the Opinion drew attention to para. 37.98 of the Technical Guidance for Official Receivers (updated as at 29 June 2021), along with the decision of Morgan J in *LF2 Ltd v. Supperstone*

[2018] EWHC 1776 (Ch) , and the judgment of Browne-Wilkinson J (as he then was) in *Re Papaloizou*

[1999] BPIR 106. We are indebted to the parties for bringing this material to the court's attention, and for their detailed submissions on it. There are undoubtedly certain similarities between the functions of the Viscount in a *désastre* and those of the OR in personal and corporate insolvencies. As a result, we do not consider that the Royal Court was wrong to consider this material and to obtain assistance from it. By refraining from quoting its content, we would not wish to discount its value. Nevertheless, we do not found our judgment on any comparison between the two regimes. Rather, we have based this judgment on first principles and on the customary law, the legislation and the case-law of this jurisdiction. 105. On the second issue mentioned in para. 94 above, i.e. the point about inconsistency within the *désastre* regime which compliance with Mr Booth's request would generate, we consider that the Royal Court was not 'wrong' in holding that the Viscount was not 'wrong' to take this into account. Contrary to Advocate Mièrè's submissions, this point has nothing to do with the size of the insolvency, nor does it reflect any kind of moral disapproval of Mr Booth simply on the basis of his insolvency. Rather, it is no more than a reflection of the fact that in these proceedings he is seeking to make a personal gain from an asset that existed before the *désastre* was declared, while to that extent denying the benefits of the Claim to the creditors. In our judgment, it was entirely reasonable to regard that as being antithetical to the *désastre* regime. In particular, the Royal Court was entitled to conclude that, if Mr Booth could require an assignment of the Claim in this case, it could produce a significant adverse result in other cases by encouraging other debtors not to comply fully with their obligations under Article 18 of

the 1990 Law, by suppressing the existence of assets during the course of a *désastre* in the hope of securing an assignment after their discharge. That would clearly be repugnant to the whole regime. 106. Finally, before concluding this discussion of Mr Booth's challenge to the Royal Court's ruling, we should mention one other point that was raised on the papers, but not pursued in oral argument. Mr Booth contended, in para. 7 of the Notice of Appeal, that the Royal Court erred in concluding that the Viscount had made a decision not to assign the Claim in circumstances where her position in correspondence had been either neutral, or that she had no power under the 1990 Law to make an assignment following Mr Booth's discharge. It is true that, when Mr Booth first asked the Viscount to assign the Claim unconditionally, she initially questioned in correspondence whether she had power to do so. Nevertheless, by the time the proceedings were issued and Mr Booth's position had shifted to one in which any proceeds of recovery would be shared with the Viscount, the basis of her decision was that summarised in para. 45 above: in short, she acknowledged that she had the necessary power, but declined to exercise it for a combination of reasons. 107. In summary, our conclusion on the main point in the appeal is that there is no proper basis for this court to overturn the decision of the Royal Court refusing to interfere with the Viscount's decision not to assign the Claim to Mr Booth. CONCLUSION and DISPOSAL 108. For the reasons given in this judgment, the appeal is dismissed. There is no principle of law that the Viscount must disregard the merits of a claim when deciding whether to assign it in the course of a *désastre*, and that was not the ratio of the November 2016 Judgment. On the facts of this case, the Royal Court was not 'wrong' (in the sense described in para. 62 above) in holding that the Viscount was not 'wrong' (in the sense described in para 57 above) in refusing to order the Viscount to assign the Claim to Mr Booth. 109. We direct the parties to agree any consequential orders. Failing such agreement within fourteen days of this judgment being delivered, we propose to dispose of any disputed issues on the papers and we invite the parties, within seven days of the expiry of that fourteen-day period, to agree any necessary directions for written submissions in that regard. *Authorities Booth v Viscount and Anor*

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