

JERSEY / JUDGMENT

# Booth -v- The Viscount [2016] JCA 218 (24 November 2016)

[2016] JCA 218

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Court of Appeal 24 November 2016 Before : W. J. Bailhache, Esq., Bailiff, President; Miss Clare Montgomery, Q. C., and David Anderson, Esq., Q. C. Between Alan Paul Booth Representor/Appellant And The Viscount of the Royal Court of Jersey Respondent/Respondent IN THE MATTER OF THE REPRESENTATION OF ALAN PAUL BOOTH (EN DESASTRE) (NO 2) Mr Booth appeared on his own behalf. Advocate D. R. Wilson for the Respondent.

## judgment

anderson ja:

## Introduction

1. This is the judgment of the Court, to which all members have contributed. The appellant, who was declared en désastre on 16 October 2015, appeals against the refusal of the Royal Court ( Booth-v-Viscount

[2016] JRC 086 , Sir Michael Birt, Commissioner and Jurats Olsen and Clapham) to interfere in the Viscount's conduct of the désastre. 2. At issue on this appeal are three pieces of litigation ("the claims") which the appellant had commenced prior to the désastre and which the Viscount determined not to pursue. 3. The position in April 2016 was said by the Royal Court to be that: "...in the absence of any recovery from the three claims, there is little prospect of recovery for unsecured creditors and there is no cash within the désastre to fund any litigation on the part of the Viscount." The Viscount informed the Court that the financial position of the désastre has further deteriorated since then, because of a reduced value attributable to realisable immovable property and the incurring of further costs by the Viscount. The Viscount has sought to minimise those costs by appearing personally at a number of hearings. We were told that the Viscount's costs of this appeal and the relevant advice will have to be met by the taxpayer. 4. The Royal Court held that: (i) The decision of the Viscount not to proceed with any of the three claims could not possibly be characterised as one to which no reasonable Viscount could come. (ii) The Viscount was barred from assigning the claims back to the appellant because of a prohibition contained in the Code of Laws that was enacted by an Order in Council of 1771 in order to establish the statutory law of the Island ("the Code of 1771"). (iii) If no such bar had existed, the

Viscount would still have been justified in refusing to assign the claims back to the appellant, bearing in mind in particular the costs liability that would fall on the taxpayer if the claims were unsuccessful. 5. The first of those conclusions is not challenged in the Notice of Appeal. The appellant however maintains his position that he should have been permitted to pursue his claims. He therefore takes issue with the Royal Court's conclusions at (b) and (c) above. In relation to both points he raises arguments, not made to the Royal Court, founded on the European Convention on Human Rights ("ECHR"), as given effect by the Human Rights (Jersey) Law 2000 ("the Human Rights Law"). The claims 6. The claims brought by the appellant are summarised at paragraphs 10-23 of the judgment of the Royal Court. They are, in short summary: (i) A claim against Collas Crill for an alleged negligent failure to protect the appellant's investment in Bravura Investments Limited ("Bravura"), a property company in which the appellant and his late wife purchased a 50% shareholding in 2009 but which caused them financial difficulties when it failed to make a payment due to them in July 2011. The claim (which Collas Crill had applied to strike out) asserted negligence in particular by failing to establish that the Appellant had not been registered as a shareholder in Bravura. (ii) A claim against Zenith Trust Company Limited ("Zenith"), arising out of the operation between 2000 and 2002 of a tax avoidance scheme designed by the appellant and known as an ITPM scheme. The claim alleges that Zenith is required to account for the value of the appellant's interest in the ITPM scheme. Claims for breach of trust and negligence were struck out in 2014, leaving a contractual claim that was to come to trial in March 2016. (iii) A claim against Mr Bults, who like the appellant had been involved in Zenith, for repayment of a loan in the sum of approximately £174,000 made in 2005. The claim is defended by Mr Bults on the basis that the loan was repaid when the appellant took the proceeds of sale of a property in which Mr Bults owned a half share. The legal test 7. The legal test to be applied by the Royal Court when reviewing decisions of the Viscount in a *désastre* was expressed by Calcutt JA in *Eves v The Viscount*

[1988] JLR 192 (24 September 1998, Jersey Unreported 192) as follows: "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 ..." That test was applied in *Booth v The Viscount*

[2016] JRC 049 (Clyde-Smith, Commissioner, paras 14-19) and by the Royal Court in the judgment under appeal (para 26). 8. The formulation of Calcutt JA is an expression of the traditional approach to the review of discretionary decisions by public authorities on rationality grounds. More recent formulations of the principle, though broadly to the same effect, use different and we think preferable language: we have in mind what has been described on good authority as the increasingly common formulation of whether the decision falls "within the range of reasonable responses" open to the decision-maker: see *De Smith's Judicial Review*, 7th edn. (2015), 11.024. 9. In addition, different grounds of review may

require a more intrusive approach on the part of the Royal Court. Thus, in particular: (i) Where a public authority, including for these purposes the Viscount, has acted illegally (e.g. beyond the limits of its power, on the basis of irrelevant considerations or without taking into account relevant considerations) or on the basis of procedural impropriety (e.g. in breach of statutory procedures or the rules of natural justice), it is for the court to say so in accordance with the well-known principles set out in *Council of Civil Service Unions v Minister for the Civil Service*

- [1985] AC 374 . (ii) Where a public authority is exercising a discretion to which the Human Rights Law applies, for example because of its effects on property declared to be *en désastre* , rationality review is likely to be insufficient. While the standard of scrutiny will depend on the circumstances, the law generally speaking requires: "an exacting analysis of the factual case advanced in defence of the measure, in order to determine (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community" ( *Bank Mellat v HM Treasury* (No. 2) )
- [2013] UKSC 39 ; [2014] 2 AC 700, per Lord Sumption at para 20, adopted by the Royal Court (Beloff, Commissioner) in *Larsen v Comptroller of Taxes*
- [2015] JRC 244 , para 97). The Viscount's decision not to proceed with the claims 10. The Royal Court came to the clear view that the Viscount's decision not to proceed with the claims was a reasonable one. That conclusion is not challenged on this appeal, and we do not question either the decision of the Viscount on this issue or the conclusion of the Royal Court. 11. The reasons of the Royal Court were set out in a confidential annex to the judgment, its circulation intended to be restricted to the parties to this case because, in the words of the confidential annex itself, "it was inappropriate that the potential defendants should hear of any weaknesses in the cases". 12. In the event, the Judicial Greffe erroneously sent a copy of the confidential annex to the law firms acting for the defendant to each of the three claims. Two of those firms (Appleby, acting for Zenith, and Bedell Cristin, acting for Mr Bults), confirmed that they neither read the confidential annex nor forwarded it to their clients before deleting it. The third (Mourant Ozannes, acting for the law firm Collas Crill) stated that it forwarded the confidential annex to its client but that neither firm read the confidential annex before it was deleted. 13. That episode is a reminder of the practical difficulties that not infrequently ensue when the circulation of legal documents, including judgments, is restricted on an ad hoc basis. It points to the desirability of avoiding recourse to confidential annexes to judgments save where it is really necessary. We do not however criticise the Royal Court for issuing a confidential annex in this case. That course ensured that the appellant, at least, understood the reasons for the Royal Court's conclusion. At the same time, the Royal Court sought to protect the appellant's interests by not disclosing to the defendants to the claims

any specific vulnerabilities that may have been identified in the legal advice sought by and given to the Viscount in relation to their prospects of success. 14. We would simply underline, for future reference, that the open justice principle requires the reasoning behind a judicial decision to be published (and not merely shown to the parties), save in cases where an exception is strictly necessary: see *Jersey Evening Post Limited v Al Thani*

[2002] JLR 542 . Such openness serves the purpose of promoting public understanding of and confidence in the administration of justice: see generally *A v British Broadcasting Corporation*

[2014] UKSC 25 ;

[2015] 1 AC 588 , per Lord Reed at paras 23-57. The need to protect the appellant's privilege in the legal advice commissioned by the Viscount may well have been a sufficient reason for the course taken by the Royal Court. But as is apparent for example from the courts' treatment of strike-out applications, there is no general duty to protect a plaintiff from adverse judicial comment on the merits of a pending claim. In a case where the court has formed a view of its own, which need not be attributed to privileged legal advice, it should not be shy about stating that view in an open judgment. The Code of 1771 15. The relevant provision of the Code of 1771 states: "Personne ne pourra contracter pour choses ou matières en litige" (translated by the Royal Court in *Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited*

[2013] (2) JLR 22, the leading case on the provision, as "no person may contract for things or matters in litigation"). 16. The Royal Court held in *Barclays Wealth* at para 40 that the relevant provision was intended to replicate the effect of an Ordinance of 1635 which had been introduced to prevent maintenance and champerty. The Court recalled that the historical concerns that gave rise to the development of the doctrine of champerty, namely the risk of corruption of justice if powerful people took over litigation, had diminished with the establishment of the modern, independent judiciary, and noted that facilitating access to justice had become an extremely important public policy objective. The third-party funding agreement in *Barclays Wealth* was held not to contravene the relevant provision of the Code of 1771. Rather, as the Royal Court held at para 28, "the natural and ordinary meaning of the provision is that it is a prohibition on assignment of a matter in litigation". 17. In the judgment under appeal, the Royal Court built on that comment to advance the general proposition that the provision "prohibits the assignment of a claim where litigation in respect of the claim has already started" (para 31). It held that this general prohibition applied to all three claims, which in the words of the provision itself are *matières en litige*. The Royal Court concluded that: ".. the Viscount in a *désastre* may not assign a claim which is in the process of litigation (*en litige*), nor may this Court direct the Viscount to do so." Implicit in that conclusion was that the prohibition in the Code of 1771 operates even in a situation, such as that which arises in the present case, in which no possible considerations of maintenance and champerty arise. 18. Having had the benefit of professional argument from only one of the parties to the litigation, we do not,

in the circumstances, attempt a definitive ruling on the meaning and import of the relevant provision of the Code of 1771. We must however record our disagreement with the proposition that the Code of 1771 operated as a legal bar to the Viscount allowing the appellant to pursue the claims in this case. We have come to that conclusion on the basis both of the wording of the relevant provision and of its purpose. 19. So far as the wording is concerned, the relevant provision relates to contracts for things in litigation. But under the Bankruptcy (Désastre) (Jersey) Law 1990 ("the Désastre Law"), the property of a debtor vests in the Viscount not by virtue of any contract but by operation of law (Article 8). It was not suggested to us that it would have been necessary for the Viscount to enter into contractual relations with the appellant for the purposes of returning the claims to him. 20. So far as the purpose of the relevant provision is concerned, we have difficulty in understanding how it could extend to a case such as this one, in which no consideration arises in relation to champerty or maintenance. Indeed Advocate Wilson frankly and in our view correctly accepted, in the course of oral argument, that the circumstances of the present case do not fall within the mischief addressed by the relevant provision of the Code of 1771. Accordingly, even if it were possible to interpret the word "contracter" as applicable to the entirety of the powers of the Viscount to disclaim or deal with property in désastre, we can see no reason in law or in policy to do so. 21. We therefore conclude that the Code of 1771 did not operate as a bar to the return of the claims to the appellant. 22. Though we have disagreed with the conclusion of the Royal Court on this point, we endorse the recommendation that it made by way of postscript (para 39), to the effect that the relevant provision of the Code of 1771 should be referred to the Jersey Law Commission. For the reasons given in *Barclays Wealth*, the field of third-party funding is a complex one in which different interests need to be accommodated and in which public policy priorities have changed significantly since 1771. The law of Jersey would benefit from the consideration of these issues on a principled basis, and from clear recommendations for how they should be resolved in modern conditions. The Viscount's decision not to release the claims 23. The Royal Court concluded at para 36 that even if it was wrong about the effect of the Code of 1771, the Viscount's refusal to release (or as the Royal Court expressed it, assign) the claims to the appellant would still not have been a decision that no reasonable Viscount could have taken. 24. We express no conclusions on the method or methods by which return of the claims to the appellant might have been effected at the relevant time. Consideration would no doubt have been given to the power of disclaimer in Article 15 of the Désastre Law, which appears from Article 1 to be potentially applicable to things in action, as well as to Article 26(g) of the Law, which provides for expedient arrangements to be made with respect to certain claims made on the Viscount (e.g. for the return of property). We are conscious also that the Désastre Law (as recorded in its long title) is designed to "amend and extend", rather than simply to replace, the pre-existing law relating to désastre. Elements of the customary law therefore survive: *The Viscount of the Royal Court of Jersey v Pitman*

[2014] JLR 063, para 18. But we heard no substantial argument on these issues, which do not arise for decision on this appeal since it was not submitted to us that there was no available mechanism for return of the claims. 25. The issue before us is whether, on the footing that the Code of 1771 does not operate as a bar, the Viscount's refusal to return the claims to the appellant was reasonable. Our starting point is that the claims were the property of the appellant prior to the *désastre* and that regardless of whether the Human Rights Law applies (as to which, see further below), it is incumbent on the Viscount to demonstrate that she had reasons of substance for keeping the appellant out of that property. Three such reasons were suggested to us. 26. The first reason, particularly relied upon by the Royal Court, was the suggested risk that were the Viscount to be responsible for returning the case to the appellant, a third party costs order might be sought against her by a successful defendant to one or more of the claims. In the words of the Royal Court (para 36): "One can foresee a successful defendant making a strong case that he has been forced to incur substantial expenditure in defending a claim brought by a penniless plaintiff in circumstances where the only reason that this has occurred has been the decision of the Viscount to assign the claim. ... As there will clearly be no funds within the *désastre* to meet any adverse costs order, any such order would ultimately fall on the taxpayer." 27. We consider that factor to be of no real weight. Article 48 of the *Désastre* Law provides that the Viscount shall not be liable in damages for anything done in the discharge of her functions under the Law, unless it is shown to have been done in bad faith. While that Article does not extend to costs, it is indicative of the reticence that we would expect any court to display in relation to the placing upon the Viscount (and thereby upon the public purse) of financial burdens, including third party orders for costs, in consequence of decisions made in the conscientious discharge of her duties under the Law. That is particularly the case when that decision is to return to an appellant a possession (including, in this context, a pending legal claim) which was his property and which the Viscount has determined not to make use of for the purposes of satisfying the creditors in the *désastre*. 28. The second reason that was advanced to us for not exercising the discretion to assign (or to disclaim) is the interest of all parties in finalising the *désastre*. 29. It appears to us that any difficulties that would have been caused to the Viscount by allowing the claims to be returned to the appellant are more apparent than real. If the Viscount considered that there were no circumstances in which the claims can succeed, she would not need to contemplate exercising her powers to give notice under Article 9 to secure the benefit of the claims for the creditors. She would therefore be entitled to proceed with the finalisation of the *désastre* in the ordinary way. 30. On the other hand, if the Viscount foresaw the possibility of the appellant obtaining property by virtue of the claims so that an Article 9 claim may arise, she would nonetheless be entitled to proceed to distribute the assets and declare a final dividend under Article 36. By Article 38, the appellant would remain liable for the outstanding debts proved in the *désastre*. If the appellant's litigation proved to be protracted, the Viscount could in those circumstances apply to extend the period for an order of discharge beyond 4 years under Article 40(2). It follows in our judgment that the disruption caused by the transfer of the claims to the

appellant would be minimal. 31. The third reason suggested to us was that to assign or disclaim the claims would have caused unnecessary prejudice to the defendants to the claims by subjecting them to unmeritorious litigation. The Royal Court has of course determined

- without challenge in this Court - that the Viscount acted reasonably in determining not to pursue the claims herself. We express no view as to the strength or otherwise of the claims. But if they are 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. After all, 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. 32. We therefore hold, applying ordinary principles of Jersey public law, that the Viscount (1) was not barred by the Code of 1771 from returning the claims to the appellant and (2) that the grounds advanced (in the alternative) for her refusal to do so are irrelevant considerations and/or unreasonable. Human rights Article 1 of the First Protocol 33. We have determined this appeal in the appellant's favour without reference to the various human rights arguments raised by him. The most substantial of those arguments, as it seems to us, is the suggestion that his claims constitute "possessions" which should have been returned to him pursuant to Article 1 to the First Protocol ("A1P1") to the ECHR. 34. Because that argument was not the subject of developed submissions by either party, and because it has not proved necessary for us to deal with it in order to dispose of this appeal, we express no conclusions on it. 35. Advocate Wilson did however refer us to *David McNulty v The Commissioner for Her Majesty's Revenue and Customs*

[2012] UKUT 174 (TCC) , in which Arnold J described it as "self-evident" that the vesting of the bankrupt's estate in the trustee in bankruptcy under section 306 of the Insolvency Act 1986 "involves a direct interference with the bankrupt's rights under Article 1 of the First Protocol and, to the extent that they are engaged, his rights under Article 8 ECHR", albeit that he considered the vesting itself to be "prescribed by law, necessary and proportionate in the pursuit of legitimate purposes, namely the protection of creditors and the orderly management of personal insolvency" (para 44). 36. We record simply that it seems to us well arguable that in determining whether to return the claims to the appellant, A1P1 remained engaged, with the consequence that the Viscount as a public authority was subject to the requirement to act in accordance with the principles summarised earlier in this judgment by reference to the *Bank Mellat* case. Article 37. It was further contended by the appellant that the unavailability of legal aid for this appeal (but not for the hearing before the Royal Court, at which the appellant was represented) is a breach of the principle of equality of arms guaranteed in civil cases by Article 6(1) of the ECHR. 38. The appellant was refused legal aid by a letter from the *Bâtonnier Substitut* dated 11 May 2016, on the basis that the likelihood of success was low. It is submitted on behalf of the Viscount that there is nothing to suggest that the appellant exercised the right of appeal referred to in the *Bâtonnier Substitut*'s letter. 39. Article 6(1) provides as follows: "In the

determination of his civil rights and obligations ... everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial hearing established by law." Though Article 6(1) makes no express reference to legal aid, it was established in the case of *Airey v Republic of Ireland*

(1979) 2 EHRR 305, para 35, that "Article 6 para. 1 may sometimes compel the State to provide for the assistance of a lawyer when such assistance proves indispensable for an effective access to court either because legal representation is rendered compulsory, as is done by the domestic law of certain Contracting States for various types of litigation, or by reason of the complexity of the procedure or of the case." 40. The principles to be derived from the case law of the European Court of Human Rights were recently summarised by the English Court of Appeal in the following terms: "The general principles established by the ECtHR are now clear. Inevitably, they are derived from cases in which the question was whether there was a breach of article 6(1) in proceedings which had already taken place. We accept the following summary of the relevant case-law given by Mr Drabble: (i) the Convention guarantees rights that are practical and effective, not theoretical and illusory in relation to the right of access to the courts (*Airey* para 24, *Steel and Morris* para 59); (ii) the question is whether the applicant's appearance before the court or tribunal in question without the assistance of a lawyer was effective, in the sense of whether he or she was able to present the case properly and satisfactorily (*Airey* para 24, *McVicar* para 48 and *Steel and Morris* para 59); (iii) it is relevant whether the proceedings taken as a whole were fair (*McVicar* para 50, *P,C and S* para 91); (iv) the importance of the appearance of fairness is also relevant: simply because an applicant can struggle through "in the teeth of all the difficulties" does not necessarily mean that the procedure was fair (*P,C and S* para 91); and (v) equality of arms must be guaranteed to the extent that each side is afforded a reasonable opportunity to present his or her case under conditions that do not place them at a substantial disadvantage vis-à-vis their opponent (*Steel and Morris* para 62)." ( *R (Gudanaviciene) v Director of Legal Aid Casework*

[2015] 1 WLR 2247 , para 46). 41. The principle that legal aid may be restricted where the prospects of success of the proceedings are weak (as the Deputy Bâtonnier judged them to be in the present case) is well accepted. As the European Court of Human Rights said in *Gnahoré v France* , judgment of 19 September 2001, para 41: "it is obvious that a legal-aid system can only operate if machinery is in place to enable a selection to be made of those cases qualifying for it". To assess prospects of success in advance is an inherently uncertain process, and in view of the judgment of the Royal Court we see no grounds on which to criticise the assessment of the Bâtonnier Substitut in this regard. 42. Applying those principles in their totality, we find no violation of Article 6(1) in the present case. It is necessary to have regard to the fairness of the procedure as a whole, and as is clear from the outcome of this appeal, the appellant has suffered no disadvantage by representing himself in this phase of the proceedings. We do not mean by those comments to pre-judge any future application for legal aid that may be made by him.

## Conclusion

43. We grant this appeal on the basis that the Viscount was not barred by the Code of 1771 from returning the claims to the appellant, and that the grounds advanced (in the alternative) for her refusal to do so are irrelevant considerations and/or unreasonable. We remit the matter to the Viscount for consideration of how to proceed in the light of this judgment. Authorities Booth-v-Viscount

[2016] JRC 086 . European Convention on Human Rights. Human Rights (Jersey) Law 2000. Eves v The Viscount

[1988] JLR Notes 2b 1988/192. Booth v The Viscount

[2016] JRC 049 . De Smith's Judicial Review, 7th edn. (2015). Council of Civil Service Unions v Minister for the Civil Service

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[2002] JLR 542 . A v British Broadcasting Corporation

[2014] UKSC 25 ;

[2015] 1 AC 588 . Barclays Wealth Trustees (Jersey) Limited v Equity Trust (Jersey) Limited

[2013] (2) JLR 22. Bankruptcy (Désastre) (Jersey) Law 1990. The Viscount of the Royal Court of Jersey v Pitman

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Prepared on 24 October 2026 · Esheria