

JERSEY / JUDGMENT

Booth v Viscount and Anor

[2022] JRC 062 (08 March 2022)

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judgment

the commissioner: 1. By his Order of Justice dated 7 th May 2021, as amended, the Plaintiff ("Mr Booth") seeks a direction from the Court that the First Defendant ("the Viscount") revest in him a cause of action against the Second Defendant ("Reynolds Surveyors") for alleged negligence in the provision of property valuations. Mr Booth is a chartered surveyor who was declared en désastre on 16 th October 2015. 2. Mr Booth and his late wife owned a property in St Peter known as "King's Oak" on which they had built a substantial house with two cottages, the work being completed in April 2005. By May 2011 debts secured against King's Oak totalled 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 re-finance King's Oak and initially he proposed to do this with a loan from Fairbairn Private Bank Limited ("Fairbairn") for whom he procured a valuation from Reynolds Surveyors dated 10 th May 2011 of £4.4 million. 3. The lending by Fairbairn did not proceed and instead Investec Bank (Channel Islands) Limited ("Investec") granted Mr and Mrs Booth a facility of £2.95 million by letter dated 28 th July 2011, to be secured on King's Oak on condition that it had a minimum market value of £4.4 million. Investec commissioned a valuation from CBRE dated 25 th August 2011, which valued King's Oak at £4 million, causing Investec to reduce the facility offered to £2.8 million. It proceeded to lend that sum which was registered as a first charge on King's Oak on 2 nd 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. 4. In early 2012, Mr Booth proposed acquiring another property called Beaumont Hill House in St Peter for development and procured a letter from Reynolds Surveyors dated th January 2012 expressing the opinion that its market value would be "in the order of" (i.e. approximately) £1.3 million. The letter noted that the property had lacked any real maintenance work for a period of time, resulting in it now being in a tired and poor condition and quickly deteriorating. 5. Mr Booth acquired Beaumont Hill House on 10 th February 2012 for £1million (less £20,000 for contents) from Jersey Home Loans with an initial borrowing from the vendor of £1 million (plus a further £100,000 one week later) charged over the property. On the 17 th 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 charge on Beaumont Hill House and a second charge on King's Oak, enabling Mr Booth to pay off the loan due to Jersey Home Loans.

Reynolds Surveyors produced a valuation report for Beaumont Hill House on 4 th March 2013 giving a 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 th April 2013 for a loan of £165,000 and the second on 27 th September 2013 for a loan of £90,741. The Order of Justice states that Mr Booth spent some £300,000 on improving the property. 6. Mr Booth's financial position deteriorated, and he was unable to meet the payments due to Investec, as well as to Mr and Mrs Le Cornu, and judgment was obtained against him by Investec on 20 th February 2015 in the sum of £2.91 million. On the 27 th March 2015 Investec obtained an Acte Vicomte chargé d'écrire and on the 2 nd June 2015 gave notice that it would be applying for an adjudication of renunciation in respect of King's Oak. Mr Booth applied for a remise de biens which was refused by the Court on 17 th July 2015. The secured creditors at that stage comprised Investec for £2.9 million secured by a first charge over King's Oak and Mr and Mrs Le Cornu for £2.3 million secured by a first charge over Beaumont Hill House and a second charge over King's Oak, a combined total of £5.2 million. The Viscount acting on behalf of the Jurats who were reporting to the Court on Mr Booth's application for the Remise, obtained reports from Le Gallais and Gaudin & Co assessing the value of King's Oak in the region of £2.6m and £2.75m respectively and Beaumont Hill House (then undergoing a major renovation project) in the region of £800,000 and £850,000 respectively. The combined value of the two properties between £3.4m and £3.6m was insufficient to clear the secured claims. These valuations were not accepted by Mr Booth. 7. On 16 th October 2015 the Court had two applications before it, the first an application by Mr Booth to be declared en désastre and the second an application by Investec for an adjudication of renunciation. The Court acceded to Mr Booth's application declaring him en désastre, a decision that was appealed unsuccessfully by Investec, for the reasons set out in the judgment of the Court of Appeal of 27 th January 2016 (Investec Bank (Channel Islands) Limited v (A. P.) Booth [2016](1) JLR 101). 8. Following the désastre , the Viscount and Investec jointly procured a valuation from Wills Associates, Chartered Surveyors, of King's Oak, which in their report of 21 st March 2016 they valued at £2.4 million. Wills Associates also retrospectively valued King's Oak at £2.3 million as at August 2011, nearly half the valuations given in 2011 by Reynolds Surveyors and CBRE. 9. The Viscount then took advice on the marketing of both properties. Le Gallais advised that Beaumont Hill House had a value of £800,000 and suggested an asking price of £925,000 and Gaudin & Co. advised that it had a value of £850,000 with 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. 10. Le Gallais advised on 5 th April 2016 that King's Oak should be marketed for £2.85 million with the aim of achieving a price of perhaps £2.6 million and Thompson Estates advised on 6 th April 2016 that King's Oak 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 th April 2017 it was reduced again to £2.3 million. 11. We note in this respect the range of possible prices that the agents thought might be achieved on the sale of King's Oak from £2

million at the lowest to £3 million at the highest, which shows, as the Royal Court commented later, that any valuation is at best an expression of judgement and opinion. 12. Mr Booth, in reliance on the valuations obtained in 2011 and 2012, maintained that the Viscount was marketing both properties at substantially below their true market value. Mr Booth applied by way of representation to the Court to challenge the decision of the Viscount to accept the best offer received for Beaumont Hill House of £800,000. The Court upheld the decision of the Viscount to sell the property for that sum for the reasons set out in its judgment of 25 th February 2016 (Booth v Viscount (en désastre)

[2016] JRC 049) and the property was subsequently sold for that sum. The purchaser then developed it into two properties selling Beaumont Hill Heights for £900,000 on the 6 th November 2018 and Beaumont Hill House for £1,625,000 on the 25 th September 2019. The cost incurred by the purchaser in the development to achieve those sale prices is not known. 13. The Viscount then applied to the Royal Court for authority to sell King's Oak for £1.85 million, being the best offer received, which application was opposed by Mr Booth. The Court upheld the decision of the Viscount for the reasons set out in its judgment of 19 th December 2017 (Viscount v Booth

[2017] JRC 215) and King's Oak was sold for that sum. 14. On the date of the désastre , there were three sets of proceedings before the Royal Court brought by Mr Booth, which, pursuant to Article 8 of the Bankruptcy (Désastre) (Jersey) Law 1990 ("the Bankruptcy Law") vested in the Viscount. The Viscount decided not to continue any of these actions or to assign them to Mr Booth so that he could continue them personally. The Viscount's decision was upheld by the Royal Court on 19 th April 2016 (Booth v Viscount (En Désastre)

[2016] JRC 086) but overturned by the Court of Appeal for the reasons set out in its judgment of 24 th November 2016 (Booth (A. P.) v Viscount

[2016] (2) JLR 473). 15. Those three causes of action were returned to Mr Booth by way of an assignment on 30 th November 2016 unconditionally, save for an obligation on his part to keep the Viscount informed of the progress of the claims and any awards made in his favour. There was no obligation upon Mr Booth to pay the whole or any part of any award to the Viscount for the benefit of the creditors. There is no mention in the judgments of the Royal Court or the Court of Appeal as to the terms upon which these causes of action were to be assigned to Mr Booth, but in our view, it was implicit that they would be pursued for the benefit of the creditors, whose unsecured claims totalled some £3.1 million. 16. Two of the claims resulted in a settlement. The claim against Mr Bults was ultimately unsuccessful and the Viscount's understanding is that he incurred substantial legal fees, in the region of £200,000, in resisting the claim which are still unpaid by Mr Bults. 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 Bankruptcy Law, which provides: "9 After-acquired property (1) 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." 17. A process of negotiation then followed, and we were informed that it was agreed that 38.5% of the settlement received in respect of one claim and 34.6% of the other would be paid by Mr Booth to the Viscount. The Viscount therefore received £95,000 for distribution to the priority and unsecured creditors after deduction of the Viscount's expenses and fees. These small shares agreed by the Viscount may reflect the fact that the assignment of the actions to Mr Booth was made unconditionally and the difficulty in arguing that the settlement received constituted after-acquired property, the actions having been on foot on the date of the *désastre*. 18. Mr Booth then claimed that the loan agreements with Investec and Mr and Mrs Le Cornu, should be set aside and the security discharged on the grounds that they were entered into "en erreur" as to the value of the secured properties. By letter dated 11 th April 2017 the Viscount decided to reject that claim and she also decided not to further investigate the causes leading up to Mr Booth's bankruptcy. The Viscount applied to have those decisions reviewed by the Royal Court, and they were upheld for the reasons set out in the Court's judgment of 12 th September 2018 (*Viscount v Booth (A. P) (en désastre)* and *Investec Bank (Channel Islands) Limited*

[2018] (2) JLR 253) and by the Court of Appeal for the reasons set out in its judgment of 2 nd July 2019 (*Booth (A. P) v Viscount and Investec Bank (Channel Islands) Limited*

[2019] (2) JLR 1). 19. On 3 rd January 2020, the Court made an order of discharge pursuant to article 41 of the Bankruptcy 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 owed to unsecured creditors whose claims had been admitted, of which £1.8 million (59.2%) was still owed to Mr and Mrs Le Cornu and £1.0 million (31.5%) was still owed to Investec, the sale proceeds of the two properties being insufficient to meet the total of their claims. 20. On 26 th November 2020, Mr Booth sent Reynolds Surveyors a letter before action, alleging negligence in the valuations provided by it 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. We will refer to this as "the Claim". 21. Reynolds Porter Chamberlain LLP, solicitors, responded on 10 th March 2021, denying the allegations of negligence on the part of Reynolds Surveyors, but pointing out that Mr Booth had no standing to bring any claim, any cause of action having vested in the Viscount, pursuant to Article 8 of the Bankruptcy Law. 22. On 12 th March 2021, Mr Booth telephoned the Viscount's office advising of his intentions 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 th March 2021 stating that nothing in the Bankruptcy Law suggested that any property re-vested in Mr Booth by operation of law or otherwise when he was discharged. 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 a claim after his discharge that had vested in the Viscount, due to the declaration. The bankruptcy proceedings were now closed. 23. Advocate David Steenson, acting for a short period for Mr Booth, wrote on 28 th March

2021 inviting the Viscount to assign the claim to Mr Booth, citing the Court of Appeal decision of 24 th November 2016. 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 revest the Claim in him and against Reynolds Surveyors, alleging negligence. 24. No answer has yet been filed by Reynolds Surveyors as the question of the assignment has logically been taken as a preliminary issue but suffice it to say that negligence is firmly denied. Advocate Hurry described the Claim as hopeless, frivolous and vexatious brought in the hope of pressuring a nuisance payment at the whim of a bankrupt against whom there appears to be little or no prospect of recovering costs. 25. The original Order of Justice sought a direction that the Viscount revest the Claim in Mr Booth unconditionally. When the preliminary issue came before the Court on 10 th November 2021, it became clear that he would be prepared to share any award achieved in the Claim with the Viscount, for the benefit of the creditors and anticipated a discussion to take place between him and the Viscount to negotiate the terms as had occurred on the last occasion, albeit after the event. 26. The matter was adjourned, therefore, so that Mr Booth could put his proposals in detail to the Viscount for her consideration. Mr Booth also informed the Court that he had obtained an opinion from English counsel on the merits of the claim against Reynolds Surveyors, and without waiving privilege over that advice, he agreed to provide a copy of that advice confidentially to the Court and to the Viscount. 27. Advocate Wilson prepared a summary of Mr Booth's proposals which Mr Booth confirmed as accurate, the terms of which are not necessary to set out in this judgment, save to say that Mr Booth was to receive over half of any net recovery with the balance going to the Viscount for the benefit of the creditors. Position of Mr Booth 28. In late 2017, Mr Booth learned from Investec that it had made a claim against CBRE over the valuation of King's Oak, which was settled in January 2018, on terms that are confidential. In his view, once the Viscount became aware of this, she should have investigated the possibility of Mr Booth having a claim against Reynolds Surveyors for its valuation of King's Oak but did nothing. Because of what he describes as the Viscount's attitudes generally towards realising his assets, he took the matter no further during the désastre, but made the Viscount aware of his intention to do so, which he says he confirmed to her verbally on 3 rd January 2020, following his discharge. He assumed the Claim must have been released to him. 29. The Claim still exists, and he wishes to pursue it. He relied in particular on the authority of the Court of Appeal decision of 24 th November 2016 overturning the Viscount's decision not to return to him the three actions then on foot before the Court. On the issue of the merits of the Claim, he referred to this passage from the Court of Appeal's judgment (Booth v The Viscount

[2016] JCA 218) at paragraph 31: "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." 30. On the strength of this he argued that the merits of the Claim was no concern of the Viscount and therefore of this Court; it would be a matter for the Court dealing with the Claim. 31. Mr Booth had offered the Viscount under half of any award achieved in the Claim as this was better than the terms that had been agreed with the Viscount over the previous claims that had been assigned back to him. 32. He also referred to this passage from Jersey Insolvency and Asset Tracking by Dessain and Wilkins, 5 th Edition, at paragraph 5.14.2.1: "5.14.2.1 Assignment of Rights of Action In the event that the Viscount decides not to bring or progress any right of action or legal proceedings on behalf of a debtor or a debtor's property (cf General Powers of the Viscount at 5.3.5) it would be open to him, in principle, to assign such rights to a third party or even to the debtor himself or herself (where the debtor is an individual)." ... "An assignment of a right of action by the Viscount to an en désastre debtor would amount to a reassignment to the debtor in that the debtor's property vested in the Viscount at the time of the declaration (See: The Rôle of the Viscount and the Vesting of Assets at 5.3.1). Such a reassignment may be a useful option where (e.g.) the debtor feels there to be a valuable right of action but the Viscount does not share the debtor's optimism. In such circumstances, a reassignment may well be offered to the debtor on terms. The terms generally specify that: a. The debtor must arrange the financing of the action; and b. If the action succeeds, the debtor must pay into the désastre the net recovery (after deduction of all reasonable costs and expenses). Where a right of action has been reassigned to a debtor, as above, but the attendant litigation has not been determined prior to reviewing whether the debtor qualifies for discharge from bankruptcy, the Viscount may apply to the Royal Court for an order duly discharging the debtor but subject to any net recovery (in a successful action) being paid to the Viscount for the benefit of the creditors whose claims are admissible in the désastre)...." 33. The creditors would receive a share of any award at no risk to them. Position of the Viscount 34. The Viscount maintained her decision not to assign the Claim to Mr Booth notwithstanding the terms offered for a number of

reasons:

- (i) There was no requirement under the Bankruptcy Law to return assets to a discharged former bankrupt, particularly in circumstances where creditors have suffered a significant shortfall. (ii) She did not consider that doing so would sit easily with the principles of bankruptcy law. Mr Booth, having been discharged from significant amounts of debt, was now seeking to exploit an alleged asset that was not fully explored or realised during the

bankruptcy. (iii) The Claim was frivolous and to some degree, vexatious. There were no clear and certain benefits of the assignment to the creditors, but to the extent that any monies might be recovered, Mr Booth would receive the greater share. The legal test 35. The legal test to be applied by the Royal Court when reviewing decisions of the Viscount in a *désastre* was refined by the Court of Appeal in its judgment of 24 th November 2016 as to whether the decision falls within the range of reasonable responses open to the decision maker. Quoting from paragraphs 7 - 9 of that judgment: "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, J. A. in *Eves v Viscount* (6) 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 Viscount* ([2016] JRCO49, at paras 14-19) and by the Royal Court in the judgment under appeal ([2016] JRCO86 at para. 26). 8. The formulation of Calcutt, J. A. 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 (De Smith, *Judicial Review*, 7 th ed., para. 11.024 (2013).) 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 Civil Service* (5) (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.'" 36. We will apply that formulation. Decision 37. The potential of a claim against Reynolds Surveyors was not disclosed by Mr Booth to the Viscount at the outset of the bankruptcy pursuant to Article 18 of the Bankruptcy Law. Mr Booth relies on his email of 25 th November 2015 to the Viscount's Officer as placing the Viscount upon written notice of a possible claim against Reynolds Surveyors in the context of King's Oak: "As if the situation were not confusing

enough, if the Chartered Surveyor's opinion [Reynolds Surveyors and CBRE] is proved to be incorrect then the mortgages provided by Investec, predicated on the value of £4 million provided by CBRE in August 2021 and by Advocate and Mrs Le Cornu predicated on valuations provided by Reynolds Chartered Surveyors in 2012/2013 must also be incorrect. As those mortgages were both provided within the 5 year period you are allowed to investigate, from a financial perspective, in connection with the *désastre* then it would seem prudent to also investigate these, as well as the repayment by me to Eret Limited funded by the Investec mortgage. Lastly, if the mortgage provided by Investec is based on unreliable information then presumably the judgment obtained by them, in February of this year, also warrants review? As a consequence of the above further issues would arise whereby, if the estate agent's opinions are proven correct, an argument arises regarding potential professional negligence by the Chartered Surveyors in having placed higher values on the properties than should have applied. This eventuality would also have a direct bearing on the outcome of the *désastre*." 38. It is not at all obvious from this that Mr Booth had in mind a claim against Reynolds Surveyors for the valuation provided to Fairbairn for a lending that never took place. His argument appeared to relate to the lending made by Investec, on the basis of the CBRE valuation, and by Mr and Mrs Le Cornu, on the basis of the second valuation by Reynolds Surveyors, arguments which were developed into his application to have the loan agreements for both properties set aside on the grounds of *erreur*. We observe in passing that the second valuation by Reynolds Surveyors was in fact procured after the loan of £1.7 million made by Mr and Mrs Le Cornu - see paragraph 5 above. The Viscount's Officer responded on 11 November 2015 as follows: "Lastly, we do not believe that there is any benefit for your creditors in incurring further expense to assess whether the valuations that have been obtained in the past for either property were correct or not. This is largely matter for the lenders, who would have relied on the valuations in deciding whether they had sufficient security to make the loan." 39. There is no evidence of Mr Booth following this up with the Viscount before his discharge and after he received the Wills valuations on 21 st March 2016, which is when he said the truth dawned on him. The Viscount has no memory of this potential claim being raised with her by Mr Booth and says that she first became aware of his intention to commence proceedings in March 2021, shortly before the proceedings were issued. 40. As to the approach of the Viscount to this issue generally, she has obtained an opinion from Richard Fisher QC and Dr Riz Mokal as to the analogous position under English law. In their opinion of 21 st July 2021, they advise that the Viscount's closest counterpart in England and Wales is the Official Receiver, acting *ex officio* as a trustee in bankruptcy. The Official Receiver's decisions concerning causes of action in a bankruptcy estate fall under the Official Receiver's "managerial duty" to get in, realise and distribute the estate. The Official Receiver's overriding duty is to exercise his professional judgement in what he believes to be the best interests of the creditors. This translates to a duty to take reasonable steps to obtain a proper price for the assets in the estate including causes of action, based on the circumstances as the Official Receiver reasonably perceives them to be. The English Court would only interfere with the Official Receiver's decisions if persuaded that the Official Receiver had acted in bad faith or so

perversely that no trustee properly advised or properly instructing himself would have so acted, not dissimilar to the test applied here. 41. The Official Receiver Guidance provides at paragraph 37.97: "Assignment (back) to the bankrupt The bankrupt may request the assignment of a cause of action (back) to him/her where the official receiver, as trustee, decides not to (or is unable) to take it on (by settlement or litigation). The official receiver has the power to assign a right of action back to the bankrupt, but this should not be an 'automatic' action. For one thing, the official receiver should consider if a better offer may be possible and, for another, the official receiver should consider the rights of the defendant (even if the offer from the bankrupt is a good one). Considering the rights of the defendant The official receiver should not assign a frivolous claim (one that is unlikely to succeed), and should exercise their power to assign with circumspection where to do so would, for example, leave the defendant open to vexatious litigation (in short, this is litigation brought for the sake of bringing litigation or litigation with no realistically achievable aim) at the whim of a bankrupt, a person against whom a successful litigant may have no opportunity to recover their costs. Before putting a bankrupt 'back in the saddle', the official receiver, as trustee, should bear in mind the consequences on the other parties in litigation of doing so." 42. Counsel considered this to be a broadly accurate statement of the legal position under English law. They referred to a helpful recent summary of the approach and authorities in this area as set out in the decision of Morgan J in *LF2 LTD v Supperstone*

[2018] EWHC 1776 (Ch) , a decision made in the context of a possible assignment of a cause of action by the administrator (i.e. in corporate insolvency). They said it should be acknowledged that the danger of the assignee being unable to meet adverse costs may be more acute in a bankruptcy context, but subject to that point, the principles identified were in their view equally applicable to the bankruptcy case: "65. A viable claim by the company against a third party is an asset of the company. A claim which is arguably viable, is a potential asset of the company. In principle, an administrator ought to be ready to investigate whether such an asset should be preserved and pursued. Of course, there may be obstacles in the way of doing so. The administrator may have no funds with which to take legal advice. In such a case, it may be open to the body of creditors to provide the necessary funds. 66. If the administrator has no funds to investigate a possible claim against a third party and he receives an offer from a potential assignee of the claim to pay for an assignment, that offer will potentially constitute an asset of the company. The administrator should normally wish to preserve and pursue that asset. If it is clear to the administrator that the claim would be hopeless and that the potential assignee is bent on pursuing a hopeless claim in order to harass the third party, then the administrator should normally decline to assign the hopeless claim. The administrator is an officer of the court and the court expects him to behave honestly and fairly. In the same way as the court would not direct an assignment of a hopeless claim where the court was of the view that the assignee's intention was to use the hopeless claim to harass a third party, then the administrator might well take the same view as to his own participation without finding it necessary to seek a direction from the court. 67. But there will be other cases. One such

case is where the administrator does not have a clear view that the proposed claim would be vexatious and he is offered a sum of money for the assignment of the claim. In such a case, the administrator should be prepared to obtain a proper payment for the assignment. If it is not clear that the offer reflects the true value of the cause of action then the administrator may well be advised to conduct some process of inviting rival bids or to hold an auction of the cause of action. The receipt of a sum of money for the claim would be likely to benefit someone, whether it is the administrator (as a contribution to this expenses) or the creditors. 68. There may also be practical considerations and time pressures which the administrator has to take into account. If the administrator is considering whether the company has a potential claim and there is a high risk that the limitation period for the claim may be about to expire, the administrator may have to take immediate action to protect a potential asset of the company. The administrator may have to cause the company to issue a protective claim form or even to conduct some rapid negotiations to obtain the best available offer for an assignment of the cause of action." 43. Counsel also referred to this part of the judgment of Browne-Wilkinson J in the case of *Re Papaloizou*

[1999] BPIR 106, 112: "But in general the policy of the bankruptcy legislation is for the trustee - and not anyone else - to get in the assets of the bankrupt and for that purpose to decide whether causes of action should be pursued, if necessary with funds provided for that purpose by the creditors in the bankruptcy. Before abdicating this responsibility by putting the bankrupt back in the saddle, the trustee should bear in mind the consequences to the other parties in litigation of so doing. My present view is that it should not be done unless clear and certain benefits are obtained for the creditors." 44. Counsel considered that these authorities supported the proposition that a relevant consideration for the Viscount in granting an assignment back to the bankrupt may be whether the assignment in the particular circumstances of the case (likely because of the lack of merit of the claim) undermines the bankruptcy process in the case at hand, and more generally. As observed by Morgan J, in the passage cited above, as an officer of the Court, consideration can and should be given to factors such as whether an assignment will lead to a defendant being harassed by a wholly unmeritorious claim. However, whilst this may be a factor which carries weight where a claim is considered to be wholly lacking in merit, it is likely to be of less relevance (or given significantly less weight) in circumstances where the merits position is less certain, and the claim otherwise has value. In this sense, the precedential effect of the decision in relation to Mr Booth is therefore of some relevance, provided that the decision in each subsequent case is still made on its merits and precedent is not being used as being such as to fetter or eliminate the discretion which otherwise exists. 45. These authorities were not placed before the Court of Appeal, which cited no authority in its judgment of the 24 th November 2016 for the proposition that the merits of the claim being assigned were not a relevant consideration for the Viscount. The decision of the Court of Appeal is, of course, binding on this Court, but it is a decision that can arguably be distinguished for the following reasons: (i) The judgment of the Royal

Court of 19th April 2016 gives detail at paragraphs 11-23 of the three actions that Mr Booth wished to have assigned back to him, and it is clear that they were well advanced. In the claim against Collas Crill, pleadings had been exchanged and a strike out application issued by Collas Crill and adjourned in the light of the *désastre*. The claim against Zenith had survived in part after two strike-out applications. The claim against Mr Bults had been on foot since early 2015. It is not surprising that in these circumstances, it was felt preferable for the Court seized of those claims to make orders as to their merits. (ii) The Court of Appeal decision, as with the first instance decision before it, was premised upon the creditors receiving the whole of the benefit of any award. In the case before us, the Viscount is being offered terms under which the majority of the benefit will go to Mr Booth. It is difficult to see how the Viscount can consider and negotiate such terms without having regard to the merits of the Claim. (iii) It cannot be right for the Viscount, an executive officer of the Court, to agree to assign back to a former bankrupt a cause of action that is frivolous in the sense of being hopeless, futile or misconceived (see *Bonney v A. G.* [2021] JRC 095 at paragraph 11). This was not an issue addressed by the Court of Appeal. (iv) This application is being made after Mr Booth's discharge releasing him from all provable debts. 46. It is implicit in the extract from Jersey Insolvency and Asset Tracking referred to by Mr Booth that the authors were considering an assignment during the course of the bankruptcy (i.e. before discharge) and we note they were of the view that the whole of the benefit of any award, after deduction of reasonable costs and expenses, would be paid into the *désastre*. 47. The Court was addressed in detail by Advocate Hurry as to the merits of the Claim which as previously stated he submitted was hopeless, frivolous and vexatious. The Court is concerned, however, with the decision of the Viscount, which involved her own assessment on legal advice of the merits of the Claim. Advocate Wilson addressed the Court in detail on the Viscount's view of the merits of the Claim, but leaving aside whether Mr Booth has a claim in contract or tort, issues of breach of duty, limitation and the remoteness of the damages being claimed, for the purpose of this application there appears to be an insurmountable problem of causation in relation to King's Oak. 48. There are findings of the Royal Court in its judgment of 12 th September 2018 and of the Court of Appeal in its judgment of 2 nd June 2019 on the " *erreur* " application which bind Mr Booth. The *erreur* application was made by Mr Booth on the basis that he and Investec made a mutual mistake as to the value of King's Oak based on the valuation received from CBRE (paragraph 43 of the first instance decision). There is no suggestion that Investec had any awareness of the earlier valuation prepared by Reynolds Surveyors for Fairbairn. He made the same claim in respect of the lending by Mr and Mrs Le Cornu. Quoting from paragraph 55

- 60 of the first instance judgment (the first respondent being Mr Booth and the second respondent Investec): "55 It may be that the CBRE valuation was wrong but the purpose of the valuation was not to provide the first respondent with any understanding in connection with the contract but rather to provide comfort to the second respondent that its security held sufficient value. The first respondent is experienced in property and is indeed a

chartered surveyor. He has maintained that the valuations were correct and indeed he himself procured a valuation on an earlier occasion of King's Oak in a similar sum. This was a re-mortgaging situation and a relatively modest proportion of the borrowing overall was additional. We have no doubt that had CBRE or any other valuer suggested a radically lower valuation for King's Oak at the time of borrowing, this would have been met with strenuous rebuttable by the first respondent. Be that as it may, however, the first respondent wished to borrow further money and was content to grant security over King's Oak. We do not find credible the suggestion that a lower valuation with which he undoubtedly, in our view, would have disagreed, would have persuaded him not to take on the small additional borrowing to secure an interest advantage. Moreover, we are satisfied that the substance of the transaction between the first and second respondents was that of lending and borrowing and there was no *erreur* about any aspect of that. There was no fundamental mistake about the core nature of the contract or the quality of the thing contracted for whether one is considering the facility or the granting of the judicial hypothec. The transaction which the first respondent seeks to impugn was to our mind ancillary to the core contract which is clear and certain as to its terms. A lack in the valuation is a matter between the lender and the valuer, it seems to us, and not, in these circumstances, the borrower. The second respondent has not, of course, sought to impugn the borrowing or the security on the grounds of *erreur*. In our judgment the valuation of King's Oak neither operated on the mind of the first respondent at the material time nor was the level of the valuation a matter that was to the very substance of the transaction. Any valuation is at best an expression of judgment and opinion." 49. The Court of Appeal summarised Mr Booth's contentions in this way at paragraph 19: "19 Mr Booth represented himself on the appeal, as he had done below. He stated 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. If the valuation was wrong, the loan was wrong. He accepted that he had in fact borrowed from Investec, and owed them the amount of the loan and interest; but if the security was set aside he would get peace of mind, and his unsecured creditors, who had trusted him, would get something back. Investec had compromised a claim against CBRE and so had recovered something on account of the erroneous valuation, but neither he nor his creditors had benefited from that recovery, even though Mr Booth had paid for the valuation. However, the mere fact that CBRE had settled Investec's claim showed that there was a problem with the valuation. That problem affected Mr Booth too; both he and Investec had relied on the valuation, and that amounted to a sufficient *erreur*. Otherwise, where was the equality? 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....." 50. The Court of Appeal's decision is set out at paragraphs 37 - 41: "37 As to stage four, the stipulation as to the value of King's Oak was for the benefit of Investec, not Mr Booth: it was designed to give Investec comfort that its security would cover the amount of the loan. 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. As I have said, the Royal Court's conclusion (2018 (2) JLR 253, at para. 59) was that 'There was no fundamental mistake about the core nature of the contract or the quality of the thing contracted for whether one is considering the facility or the granting of the judicial hypothec.' I agree with that conclusion and with the Royal Court's decision. The claim against Mr and Mrs Le Cornu raised the possibility that their charges would be avoided because of a unilateral mistake made by Mr and Mrs Booth, there being no evidence that Mr and Mrs Le Cornu knew of the valuation of King's Oak. However, for the reasons I have given, Mr Booth's mistake about the value of King's Oak is not sufficient to result in the avoidance of the transaction. His suggestion that the second charge taken by Mr and Mrs Le Cornu over King's Oak (and indeed the first charge they had over another property belonging to him and his late wife) were vitiated by his mistake must fail for the same reasons, ... For the sake of completeness, I refer to Mr Booth's complaint that Investec had apparently been able to obtain compensation from CBRE, whereas he had no claim in respect of what he said was a negligent valuation that he had paid for. The obvious difference, however, is that Investec could justifiably claim to have suffered loss as a result of the valuation, since it had lent more than it would have done had the true value been known and was left without adequate security, but Mr Booth suffered no loss at all. 51. The Royal Court and the Court of Appeal also upheld the Viscount's decision not to investigate further the causes of Mr Booth's *désastre*, the Court of Appeal saying this at paragraph 40: "40 Mr Booth's second ground of appeal, that the Viscount had failed adequately to investigate the causes of his bankruptcy, was barely developed in his oral submissions before us. From his skeleton argument produced for the appeal, it appears that his main complaint (apart from setting aside the Investec security on the ground of *erreur*) related to the Viscount's handling of the sale of King's Oak and her undue reliance on the Wills' valuation in setting the sale price of that property. There is nothing in this complaint: the Viscount obtained directions from the Royal Court as to the sale, and Mr Booth cannot now seek to go behind the court's decision as to how the sale should be conducted. The Viscount did consider if she should seek to set aside the Investec security and obtained legal advice on that matter, but in the light of the advice - and rightly, having regard to the outcome of this appeal - she decided that she should not attempt to do so. In all other respects, she properly conducted investigations into the financial state of Mr Booth's *désastre*. She was not obliged to investigate why it was that Mr Booth had come to overextend himself to such a degree that he was unable to avoid bankruptcy, since to do so would produce no benefits to his creditors. There is no question of any breach of Mr Booth's convention rights." 52. These decisions of the Royal Court and the Court of Appeal are conclusive of the following: (i) Mr Booth's concern was to obtain re-financing from Investec, and the value of King's Oak was not essential to him or determinative of his decision to borrow. (ii) The CBRE valuation was for the benefit of Investec and not Mr Booth. (iii) Investec may have sustained a loss as a result of the valuation being incorrect, but Mr Booth suffered no loss at all. (iv) The valuation of King's Oak neither operated on the mind of Mr Booth nor did it go to the substance of the transaction. 53. It was the borrowing from Investec that led to the bankruptcy proceedings

against him as he was unable to meet the repayments, and it follows from these findings that the valuation prepared by Reynolds Surveyors for an earlier lending that did not proceed, even if negligent (which is denied), had no causative effect whatsoever. Put simply it was irrelevant. In the Viscount's view, the claim in respect of the King's Oak valuation is therefore hopeless. 54. As for Beaumont Hill House, there would seem to be no question for the purpose of this application that Mr Booth had a contract with Reynolds Surveyors to provide the January 2012 valuation letter, but leaving aside other issues, the issue of breach of duty and causation appear equally insurmountable: (i) Whilst Reynolds Surveyors' valuation was in the order of £1.3 million, Mr Booth was able to purchase the property for £1 million (and borrowing £1.1 million from the vendor on the security of it), reflective, no doubt, of its deteriorating condition. The Order of Justice describes it as being in a distressed condition requiring improvement. (ii) When purchased on 10 th February 2012 it was, as Reynolds Surveyors reported, quickly deteriorating and whilst some work was carried out, by the time of the désastre it was described in this way at paragraph 10 of the judgment of the Royal Court dated th February 2016: "10 Both agents referred to the amount of work that was needed to complete the property as a family home; quoting from the Le Gallais report:- 'Condition The property is currently in a poor state of semi-construction and is a building site part of which are exposed to the elements. A redundant liner swimming pool has been back filled with rubble and all of the gardens and surrounding land is very overgrown. It appears that some wiring and plumbing work has been first fixed but it is difficult to accurately see to what extent.' The property's poor state was more than evidenced in the set of photographs provided to us by the Viscount." The judgment continued at paragraphs 11

- 13 as follows: "11 The Viscount marketed Beaumont Hill House through Le Gallais at an asking price of £925,000 with the property first being advertised in the Jersey Evening Post on 4 th December 2015 but viewings had commenced in the week of rd November 2015. On th December 2015, the Viscount received an offer of £850,000 (negotiated up by Le Gallais from an initial offer of £800,000). It was a cash offer, not subject to any survey, with early completion. Le Gallais advised the unfinished nature of the project had made it difficult for other interested parties to take on or secure a mortgage. There was now quite a lot of water ingress from the flat roofs coming down and through the unfinished areas of the floor coming up and they were not confident that any of the major lenders would allow a mortgage on a property in this condition. A sale at this price had been agreed by the secured creditors, who had a first charge over the property in the sum of some £2.3M. On the day of the hearing, the proposed purchaser revised his offer down to £800,000, citing issues with the boundaries of the property, the cost of connecting the property to the main drains (estimated at between £39,000 and £45,000) and problems with the Planning and Building Control Departments who apparently have little record or knowledge of the semi constructed extensions on the site. Modifications may therefore be required both in relation to these extensions and to the main property. The agent was concerned that the longer the sale was delayed the more chance of further issues with the property coming to light. The

representor submitted that these problems were exaggerated." (iii) The Viscount expressed it this way in paragraph 33 of her first affidavit: "It seemed clear to me that, notwithstanding any earlier valuations, at the time of the Declaration the value of Beaumont was much less than it may have been before the refurbishment commenced. Its very much unfinished state meant that its sale value was much lower than Mr Booth's expectations, as few purchasers were willing to take on (or were able to fund) the scale of work required to bring it to a modern and habitable standard." (iv) A valuation had also been obtained from a quite separate firm NSP, Chartered Surveyors, on 19 th April 2012 of £1.38 million and £1.75 million on completion of the property, which is consistent with the valuation produced by Reynolds Surveyors. (v) Any claim against Reynolds Surveyors would have to be founded on independent expert evidence that the value of Beaumont Hill House in January 2012 was materially lower than £1.3 million and no such expert evidence has been procured by Mr Booth. He appears to have commenced these proceedings without it. It is difficult to see how a retrospective valuation could now be procured, bearing in mind the building has been developed and sold off as two separate units, but there is, of course, an independent contemporaneous valuation namely that of NSP which is entirely supportive of the valuation given by Reynolds Surveyors. (vi) As to causation, if the valuation was too high, how much lower should it have been? That is impossible to say without expert evidence. In the Viscount's view the claim in respect of the Beaumont Hill House valuation is also hopeless.

55. In part of the hearing from which Advocate Hurry was excluded, the Court was addressed by Advocate Wilson on the confidential legal opinion that Mr Booth had obtained as to the merits of the Claim. Mr Booth had not provided the instructions given by him to counsel, but in any event there was nothing in the opinion to cause the Viscount to review the conclusions she has reached on legal advice as to the merits of the Claim.

56. The cause of Mr Booth's bankruptcy seems to the Court self-evident. Put simply he had over borrowed and could not meet the instalments due to his secured lenders. He explained the position in his affidavit of 16 th October 2015 in support of his application to be declared en désastre :

"3. The reason for my current financial difficulties is that in 2011 my then legal advisors Messrs Collas Crill, who were acting for me in respect of my business interests generally and, in particular, in respect of a transaction with a specific company (Bravura Investments Limited) 'Bravura', a company registered in Jersey, failed to ensure that I had been made a registered shareholder in Bravura to which I had lent £276,000.00. The agreement reached with Bravura was that, in exchange for lending them the money I was to be made a shareholder of the company and receive £1,000,000.00 which was to happen upon the company selling properties (17 apartments). When the company failed to pay the mortgage on the properties (situated in Newquay) I was not notified as I had not been registered as a shareholder. The result was that I did not receive the £1,000,000.00 and was obliged to take a larger mortgage out on my own property and my financial position began to deteriorate. There are ongoing proceedings in respect of my action against Collas Crill for professional negligence."

57. Generally, it is for the Viscount to pursue causes of action that vest in her pursuant to a declaration en désastre for the benefit of the creditors. Applications for an assignment of a cause of action should be dealt with in the course of the bankruptcy and

before the discharge of the bankrupt and we do not accept that Mr Booth raised the issue of the Claim before his discharge in clear terms. The documentary evidence does not support his contention that he did so, and it would not have been at all obvious to the Viscount that a negligence claim lay against Reynolds Surveyors for the valuation procured for a lending by Fairbairn which did not proceed or indeed for the valuation of Beaumont Hill House bearing in mind the circumstances set out above. There was certainly no application to the Viscount for an assignment of the Claim at any time before his discharge. 58. Our task is to determine whether the decision of the Viscount not to assign comes within the range of reasonable responses open to her. It was reasonable, in our view, for the Viscount on legal advice to regard the Claim as hopeless or futile for the reasons set out above. It would be inappropriate and ill befitting of the office of Viscount for her to assign such a claim, allowing Mr Booth to pursue what would be in essence a nuisance claim, the majority of any nuisance payment if any that was achieved going to Mr Booth. 59. The Viscount must have a discretion as to whether to assign a cause of action back to a bankrupt and to overturn the Viscount's decision on the facts of this case would be to create an unfortunate precedent, potentially making more difficult the exercise of that discretion in the future. The Viscount has a legitimate concern that such a precedent may discourage bankrupts from disclosing fully and timeously causes of action that may exist at the time of the bankruptcy in the expectation that they can be assigned back to them after discharge or even not to disclose such causes at all. 60. It is the case that the Viscount has not consulted the two creditors, namely Investec and Mr and Mrs Le Cornu, who represent 90.8% of the unsecured claims, over whether they might wish to pursue the Claim. It is one thing for them to pursue their own claims, as CBRE appears to have done, but quite another to pursue the claim of their debtor involving the difficulties referred to above and facts of which they would have had no direct knowledge. Being realistic it can in our view be safely assumed that they would not be willing to do so. Furthermore, it would not be appropriate for the Viscount to pursue a nuisance claim herself. 61. In all of these circumstances, we find that the decision of the Viscount not to assign the Claim is within the range of reasonable responses open to her and we decline, therefore, to intervene and direct her to make that assignment. 62. Finally we should mention that in its judgment of 24 th November 2016 the Court of Appeal recorded at paragraph 36 that it was arguable, although the point did not arise on the appeal, that in determining whether to return a claim to a bankrupt, his rights under Article 1 of the First Protocol of the ECHR ("AIP1") were engaged, with the result that the Viscount as a public authority was subject to the requirement to act in accordance with the principles summarised in paragraph 9(ii) of its judgment (set out above). AIP1 provides that every person is entitled to the peaceful possession of his possessions. In general, the protection given by AIP1 only applies to "existing possessions"- see *Marckx v Belgium*

[1979] 2 EHRR 330 . 63. No argument was advanced by Mr Booth under AIP1, but we would comment that a bankrupt's discharge under Article 41 of the Bankruptcy Law leaves unimpaired the right of the creditors to prove in the bankruptcy for any debt from which the bankrupt is released and this against the assets vested in the Viscount. By virtue of

Article 8 the Viscount becomes the owner of all of the property of the bankrupt, including causes of action, at the date of the declaration, save for certain exceptions and it is difficult to see how that property now owned by the Viscount can be regarded as the " existing possessions " of Mr Booth. Authorities Investec Bank (Channel Islands) Limited v (A. P.) Booth

[2016] (1) JLR 101. Booth v Viscount (en désastre)

[2016] JRC 049 . Viscount v Booth

[2017] JRC 215 . Bankruptcy (Désastre) (Jersey) Law 1990. Booth v Viscount (En Désastre)

[2016] JRC 086 . Booth (A. P.) v Viscount

[2016] (2) JLR 473. Viscount v Booth (A. P) (en désastre) and Investec Bank (Channel Islands) Limited [2018] (2) JLR 253. Booth (A. P) v Viscount and Investec Bank (Channel Islands) Limited

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