

JERSEY / JUDGMENT

# Booth v Viscount and Anor

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Costs. [2022]JRC192 Royal Court (Samedi) 16 September 2022 Before : J. A. Clyde-Smith OBE., Commissioner, sitting alone. Between Alan Paul Booth Plaintiff And The Viscount of the Royal Court of Jersey First Defendant And David O. Reynolds Surveyors Limited trading as Reynolds Chartered Surveyors Second Defendant The Plaintiff appeared in person. Advocate D. R. Wilson for the First Defendant. Advocate S. A. Hurry for the Second Defendant.

## judgment

the Commissioner: 1. On 8th September 2022 I heard applications as to costs arising out of the decision of the Court given by its judgment of 8th March 2022 and published as Booth v Viscount and Anor [2022] JRC 062 (“the Substantive Judgment”), a decision which is under appeal. 2. By way of a preliminary issue, the Court declined to intervene in the decision of the First Defendant (“the Viscount”) not to assign to the Plaintiff (“Mr Booth”) a cause of action in negligence against the Second Defendant (“Reynolds Surveyors”). 3. Both the Viscount and Reynolds Surveyors applied for their costs of and incidental to the preliminary issue on the standard basis because they say they were the successful parties and that costs should follow the event. Mr Booth resisted the making of any orders for costs against him or in the alternative argued that any award should be substantially curtailed. 4. I will take the Substantive Judgment as read and will not set out the background. I was referred by counsel to the guidance given by the Court in Watkins v Egglisshaw [2002] JLR 1: “a) The court’s overriding objective in considering costs is, as in everything else, to do justice between the parties.

- b) In many cases, that objective will be fulfilled by making an award of costs in favour of the ‘winning’ party, where a ‘winner’ is readily apparent. In any event, the ‘follow the event’ rule can be a useful starting point.
- c) It is a mistake, however, to strain very much to try to label one party as the ‘winner’ and one as the ‘loser’ when the complexity or other circumstances of the litigation do not readily lend themselves to analysis in these terms.
- d) The discretion as laid down in art.2 of the Civil Proceedings (Jersey) Law 1956 is a wide one and ought not to be treated as fettered by any particular supposed rule or practice, other than that the discretion should be exercised judicially and broadly in accordance with the guiding principles referred to in re Elgindata (2)(5) and A.E.I v Phonographic Performance (1).

- e) It is, accordingly, open to the court to have regard to any and all considerations that may have any bearing on the overriding objective of doing justice. Its task is to take an overview of the case as a whole (*Bank of Credit & Commerce Intl. v Ali (No 4)* (3), per Lightman, J.). The new Civil Procedure Rules governing civil litigation in the English courts provide that the court ‘must have regard to all the circumstances’ and then go on to spell out certain matters that such circumstances include, the ‘conduct of all the parties’ being one and ‘whether a party has succeeded on part of his case, even if he has not been wholly successful’ another (Civil Procedure Rules, para 44.3(4)).
- f) It is implicit in this that, even though a party would otherwise be regarded as having been ‘successful’ justice may require that cost should not automatically follow the event.” 5. On the face of it, the Viscount and Reynolds Surveyors have a strong argument for the award of costs in their favour. The Court declined to direct the Viscount to assign the cause of action to Mr Booth, which remains vested in the Viscount, leaving Mr Booth no standing to pursue it against Reynolds Surveyors. 6. One might question why Reynolds Surveyors played any substantive part in the preliminary issue which was essentially between Mr Booth and the Viscount, but I accept that the consent order of 29th June 2021 did give Reynolds Surveyors a role in the filing of evidence and skeleton arguments and attending the hearing. It was of assistance to the Court in ensuring the factual matrix was accurate and, for example, its involvement led to an accurate copy of the King’s Oak valuation being procured for the Court. Advocate Hurry addressed the Court on the merits of the cause of action, although as the Court pointed out at paragraph 47 of the Substantive Judgment, it was concerned with the Viscount’s assessment of the merits in making her decision. 7. A clear warning as to his potential liability as to costs was given to Mr Booth by the English lawyers acting for Reynolds Surveyors in these terms: “5.1 You do not have standing to bring a claim against our client. Even if it is found that you do (which is not accepted) liability is denied. You have failed to provide sufficient information or evidence regarding the claim, including any expert evidence, and it is clear that any breach has not caused you to suffer loss. 5.2 We are confident that your claim will fail and strongly recommend that you do not pursue this meritless claim any further If you do, we consider the claim will be liable to be struck out and we will pursue you for our client’s costs on the indemnity basis. Should you pursue your claim, we reserve, also, the right to draw the court’s attention to this letter.” 8. In seeking an assignment of the cause of action, Mr Booth was relying on the decision of the Court of Appeal reported as *Booth v The Viscount* [2016] (2) JLR 473, where the Court of Appeal stated, in effect, that the merits of a cause of action were a matter for the Court before whom the cause of action would be litigated, and not a matter for the Viscount. 9. The Court felt able to distinguish the decision of the Court of Appeal for the reasons set out in paragraph 45 of the Substantive Judgment, but it did so with the benefit of opinions of English counsel procured by the Viscount on the analogous position under English law citing English authority, which had not been placed before the Court of Appeal.

10. Advocate Wilson submitted that Mr Booth should have anticipated the decision of the Court of Appeal being distinguished in this way and pointed out that although Mr Booth was a litigant in person, he did have the benefit of legal advice in bringing the proceedings and in the drafting of the Order of Justice. Indeed, as stated in paragraph 23 of the Substantive Judgment, Advocate Steenson, acting for Mr Booth, contacted the Viscount on 28th March 2021, inviting the Viscount to assign the cause of action, citing in very firm terms the Court of Appeal decision.
11. Mr Booth is now aged 71 and is a discharged bankrupt. He lives, in his words, a hand to mouth existence where he can as a chartered surveyor, and he informed me that he passed the means test for qualifying for Legal Aid in relation to his appeal. Under that means test, as I understand it, Legal Aid will not be granted if the applicant either has personal capital above £50,000 or personal income above £33,000. It is fair to observe that a person who qualifies for Legal Aid will therefore be a person of limited means.
12. I was informed that in very approximate terms, the Viscount had incurred costs with Advocate Wilson's firm of some £66,000 and Reynolds Surveyors have incurred costs with Advocate Hurry's firm of some £45,000, which Advocate Hurry pointed out would not include the costs of his English instructing solicitors. These are, of course, costs charged at the commercial rates of firms concerned and would be reduced on taxation. Disbursements are not included. Even so, the amounts if costs are awarded are likely to be substantial.
13. Counsel submitted that the means of Mr Booth was not a relevant factor for me to take into account, citing the authority of the Court of Appeal decision in *Flynn v Reid* [2012] (2) JLR 226, where Beloff JA said this at paragraph 40: "40 In my view, costs awards should be based on two major considerations: the merits of the case (as adjudicated upon by the court) and the conduct of the parties in the litigation (as appraised by the court). These are not the only considerations. A court may, for example, properly decline to make a costs order which might aggravate the relationship between the parties and for that reason be undesirable in the public interest or one which would be futile because the party against whom it would otherwise be made is impecunious. But, save it may be in exceptional cases (whose existence or extent we do not need to consider in these proceedings), the means of the parties are, in our view, outwith the matrimonial field, not relevant. No one after all is compelled to bring a claim or to defend one. The potential exposure to costs, if unsuccessful, is itself a salutary discipline against maintaining from either perspective an untenable position."
14. The Court of Appeal in *Flynn v Reid* was concerned with cost capping, but the following passage from paragraph 43 of the judgment is also helpful: "... There are all kinds of familiar devices which prevent what may be seen subjectively, or even objectively, as harsh treatment of a party with slender means when the insult of costs is added to the injury of an adverse holding. The successful party (especially for example a large corporation) may regard seeking a costs order against an individual of limited means as unnecessary, futile, or even, in terms of its own reputation, damaging. The court may itself encourage clemency. Awards

made may not be enforced. Indeed, the Court has the power to attach to an award of costs a proviso that it is not to be enforced without leave of the court, something done on at least one occasion by this court (see *Costs Orders Against Legally Aided Parties*, 9 Jersey Law Review at 2-6 (2005)). (In England this is sometimes called a ‘football pools order’ which recognized the possibility that the indigent litigant may by some future stroke of good fortune acquire sufficient means to discharge his cost obligation).”

15. Both sides made complaints about the conduct of the other in these proceedings, but in my view, there is nothing in the conduct of the parties that has any bearing on the issue of costs. I start from the premise that the Viscount and Reynolds Surveyors are the winning parties, and that as a starting point, costs should follow the event in the usual way.
16. I am concerned with the costs of the preliminary issue, namely the assignment of the cause of action and in this, Mr Booth relied on the authority of Court of Appeal judgment in *Booth v Viscount* that the merits of the cause of action was not an issue for the Viscount to take a view on, an authority binding on the Royal Court. The merits of the cause of action was a key factor in the decision of the Viscount. It is not reasonable to suggest, in my view, that Mr Booth should have predicted the way in which the Royal Court would distinguish the two cases, both involving assignments of causes of action by the Viscount. In seeking an assignment, he was not maintaining an untenable position. In my view, justice dictates that his reliance on this Court of Appeal decision should be taken into account in considering the extent to which costs should be awarded against him.
17. I am also concerned with the possibility that any costs ordered in favour of the Defendants could be rendered futile in that enforcement might render Mr Booth impecunious and drive him once again into bankruptcy. At the same time, it would not be fair for no order for costs to be made at all because by bringing these proceedings, Mr Booth has forced the Defendants to incur legal costs. I therefore intend to order that any award should not be enforced without the prior leave of the Court.
18. I therefore order: (i) Mr Booth to pay the Viscount and Reynolds Surveyors one half of the costs they have incurred of and incidental to the preliminary issue on the standard basis, to be taxed if not agreed, and (ii) that award is not to be enforced against Mr Booth without the prior leave of the Court.
19. I make this final observation in relation to costs. Advocate Hurry made reference to the costs of his instructing English solicitors. The survey, which is at the heart of this case, was carried out by Reynolds Surveyors, a Jersey incorporated company carrying on business in Jersey, over a property situated in Jersey. Whilst this will be a matter for the taxing master if not agreed, I question whether it is reasonable for a local defendant to justify instructing an English firm of solicitors who would, in turn, instruct Jersey lawyers, both running up costs in the conduct of the matter. This is quite separate to the potential use of English counsel for the provision of advice in an area of law which is very similar in the two jurisdictions. Authorities *Booth v Viscount and Anor* [2022] JRC 062. *Watkins v Egglisshaw* [2002] JLR 1.

Booth v The Viscount [2016] (2) JLR 473. Flynn v Reid [2012] (2) JLR 226.

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