

JERSEY / JUDGMENT

Booth -v- Zenith [2017]

JRC 098B (28 June 2017)

[2017] JRC 098B

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judgment

the master:

Introduction

1. This judgment contains my detailed written reasons in respect of the defendant's applications:- (i) requiring the plaintiff to make available certain documents in respect of which privilege has been claimed; (ii) seeking to strike out parts of paragraph 78 of the plaintiff's witness statement; and (iii) seeking to strike out paragraphs 80 and 82 of the plaintiff's witness statement on the basis that the paragraphs complained about amounted to either pleadings or submission and should not form part of the plaintiff's witness evidence. General Background 2. The general background to the dispute is set out at paragraphs 2 to 9 of an earlier judgment in this matter reported at Booth-v-Zenith Trust Company Limited

[2014] JRC 231 which I adopt. 3. The plaintiff's complaint was summarized in paragraph 10 of the 2014 judgment as follows:- "The plaintiff's complaint 10. In summary the plaintiff's complaint was that he entrusted the benefit of the ITPM System to the defendant, requiring the defendant to account for the value of the plaintiff's interest in the ITPM scheme. The amount claimed by the plaintiff is not clear and in particular whether he is claiming twenty per cent of gross revenues of the scheme or twenty per cent of any surplus of income over expenditure. The plaintiff also alleges that the defendant has failed to account to the plaintiff in contract for monies expended during the defendant's administration of the companies. It is not disputed that the claim for an account in contract is a matter for trial." 4. Otherwise

judgment

- [2014] JRC 231 concerned whether or not the plaintiff should be able to allege breach of trust against the defendant on the basis of fraud or dol . These allegations were struck out but I did allow the plaintiff 28 days to make an application to make certain allegations in misrepresentation. 5. The second judgment in this matter is dated 29 th June, 2015, reported at Booth-v-Zenith Trust Company Limited
- [2015] JRC 142 where the defendant sought to strike out the plaintiff's claim for an enquiry into damages. 6. The 2015 judgment stated at paragraphs 9 to 13 as follows:- "9. Insofar as the plaintiff was claiming a surplus of income over expenditure, I agreed with Advocate Cushing that what was being claimed was the profits the offshore companies should have made. The plaintiff was therefore claiming reflective loss because he was in effect claiming a loss of dividends which the offshore companies would have declared in his favour. In reaching this view I assumed, without deciding the point, that the plaintiff had a separate cause of action based on duties owed to him personally by the defendant and that arguably a breach of such duty or duties had occurred. However, in light of the plaintiff's own words in his skeleton argument referred to above, that he was seeking to recover those sums that ordinarily would have been retained by the offshore companies, I reached the view that this part of his claim had to be considered a claim for reflective loss and therefore breached the principles set out in Freeman v Ansbacher cited above. 10. However, this was not the end of the matter. In the plaintiff's oral submissions, he made it clear he was putting his claim on two alternative bases as I have set out above. This was the first time I had understood this to be the case; I observe in passing that at paragraph 10 of my judgment of 24th November, 2014, reported at Booth-v-Zenith Trust Company Limited
- [2014] JRC 231 , I had indicated it was not clear to me what loss the plaintiff was claiming. 11. Having heard from the plaintiff, it is now clear to me that the plaintiff is claiming 20% of gross revenues representing his intellectual property rights in the ITPM System out of any surplus of income over expenditure. This is consistent with the wording of the agreement made on 18th July, 2003, set out at paragraph 21 of the 2014 decision. 12. This claim is advanced on the basis that it was a personal obligation of the defendant to account for such monies to the plaintiff on the basis that it was the defendant who was operating the ITPM System through its administration and day to day control of the offshore companies. Advocate Cushing also fairly accepted in reply that such a claim would not be covered by the reflective loss principle, a concession in my view he was right to make. 13. Accordingly, I ruled that the plaintiff's claim for an account in paragraph 56 of the order of justice should be limited to 20% of the gross revenues of the offshore companies in accordance with the plaintiff's intellectual property rights, by reference to the matters pleaded at paragraphs 7, 13, 18(b), 30(c) and 33(j) of the amended order of justice, out of any surplus of income over expenditure arising out of the ITPM System." 7. Although directions were given to progress this matter to trial, this did not happen due to the

plaintiff being declared en désastre which led to proceedings being stayed until the judgment of the Court of Appeal reported at Booth v The Viscount

- [2016] JCA 218 . 8. Following the judgment of the Court of Appeal in Booth v The Viscount , the Viscount by a notice dated 30 th November, 2016, assigned the present claim (and two other claims) back to the plaintiff on certain terms. 9. Further directions were therefore given by me on 21 st March, 2017, to progress this matter to trial. Pursuant to paragraph 5 of the Act of Court dated 21 st March, 2017, the parties were directed to arrange a hearing before me to deal with any outstanding discovery or pleadings issues. It is this direction that has led to the present applications. The discovery application 10. This issue concerns certain documents withheld from inspection by the plaintiff on the grounds that they either contained or referred to legal advice provided by Crill Canavan and others to entities that I have described in the two previous judgments as the offshore companies. 11. Advocate Cushing argued that, privilege could not vest in the plaintiff and any claim for privilege was that of the offshore companies. In support of this argument he cited Garvin Trustees Limited v The Pensions Regulator
- [2014] UKUT B8 (TTC) a decision of the Upper Tribunal Tax and Chancery Chamber dated 31 st October, 2014, which Advocate Cushing described as having the equivalent status of a judgment of the English High Court. Paragraph 24 of the judgment states as follows: "24. The authorities demonstrate that privilege is simply the right to resist the compulsory disclosure of information: see B v Auckland District Law Society
- [2003] 2 AC 736 at paragraph 67, per Lord Millett. In the House of Lords case of Three Rivers DC v Bank of England (No 6) [2004] 3 WLR 35 1274 Lord Scott of Foscote observed at paragraph 24 of his speech that the concept arises out of a relationship of confidence between lawyer and client so that confidentiality of the document concerned is an essential requirement. He went on to say in paragraph 26: "...legal advice privilege gives the person entitled to it the right to decline to disclose or to allow to be disclosed the confidential communication or document in question. There has been some debate as to whether this right is a procedural right or a substantive right. In my respectful opinion the debate is sterile. Legal advice privilege is both. It may be used in legal proceedings to justify the refusal to answer certain questions or to produce for inspection certain documents. Its characterisation as procedural or substantive neither adds to nor detracts from its features." "This passage highlights another important feature of the right, namely that it is for the person who is entitled to the right to assert it and a third party is not so entitled even if he has possession of the documents concerned." 12. Advocate Cushing therefore asserted that the plaintiff was a third party who was not entitled to claim privilege and who simply had possession of the documents concerned. 13. In this case the offshore companies have been dissolved. Advocate Cushing therefore referred me to paragraph 33 of Garvin Trustee Limited as follows:- "33. My starting position is that the Company itself cannot assert any right to privilege as it no longer exists. Miss Agnello took me to a passage from the speech of Lord Hoffman in Wight and others v Eckhardt

[2004] 1 AC 147 where he neatly described the effect of a company's dissolution on its assets and liabilities at paragraph 27 as follows: "The winding up leaves the debts of the creditors untouched. It only affects the way in which they can be enforced. When the order is made, ordinary proceedings against the company are stayed (although the stay can be enforced only against the creditors subject to the personal jurisdiction of the court). The creditors are confined to a collective enforcement procedure that results in a *pari passu* distribution of the company's assets. The winding up does not either create new substantive rights in the creditors or destroy the old ones. Their debts, if they are owing, remain debts throughout. They are discharged by the winding up only to the extent that they are paid out of dividends. But when the process of distribution is complete, there are no further assets against which they can be enforced. There is no equivalent of the discharge of a personal bankrupt which extinguishes his debts. When the company is dissolved, there is no longer an entity which the creditor can sue. But even then, discovery of an asset can result in the company being restored for the process to continue. Applying this reasoning to the position here, as Miss Agnello submits, just as any proceedings brought against the Company would be a nullity, so would any attempt to assert privilege by the Company be a nullity. As Lord Hoffman envisaged, if the Company is to assert any rights it has to be restored to the register to do so, a process that cannot now be undertaken due to the expiry of the time limit provided for in Section 1030(4) of the 2006 Act." 14. Advocate Cushing next argued that confidentiality was no bar to a claim for inspection pursuant to an order of the Court which overrode any claim for confidentiality unless privilege could be established, which was not the case here. 15. Furthermore, the plaintiff in his witness statement provided for trial had made reference to the advice at paragraphs 55 and 61-63. He could not on the one hand make reference to documents in his evidence and on the other not produce the relevant advice. 16. The plaintiff in response argued that the documents were irrelevant because of my decision in 2015 striking out his claim for breach of trust referred to above. If I were to order disclosure, it should therefore be on the basis that he should be allowed to pursue his claims for breaches of trust. However, as I had ruled that such claims could not be pursued because they were out of time, and no fraud could be established, then the plaintiff should not be required to provide disclosure relating to irrelevant legal advice. 17. The plaintiff's claim was for a personal account as permitted by the 2015 judgment. The possibility of the offshore companies bringing proceedings against the defendant was irrelevant to this claim and so discovery of legal advice relating to such proceedings was irrelevant. 18. In relation to confidentiality, while the plaintiff accepted that an order for discovery would override confidentiality, he was concerned that such advice might cause difficulty for those who participated in the scheme. 19. Advocate Cushing in response argued that the factual matrix underpinning the claim for an account was very much in issue. Paragraph 46 of the order of justice set out that the plaintiff and Mr Bults feared that how the defendant was proposing to wind down the scheme was unlawful. Paragraph 34 of the answer in response set out a positive case in relation to administration of the ITPM System. 20. In relation to the discovery application, I granted the defendant's application

for the following reasons:- (i) Firstly, I was satisfied that the documents were relevant both by reference to the pleadings referred to above and because they were referred to in the plaintiff's witness statement, also as set above; (ii) Secondly, the documents were not privileged. I reached this view because any claim for privilege was that of the offshore companies, not the plaintiff personally. (iii) In addition, the plaintiff had referred to the content of the advice in making use of it in his witness statement. Accordingly, I concluded that use of the material also required disclosure applying *Vilsmeier v AI Airports Int Ltd & PI Power Int. Ltd*

- [2014] (1) JLR Note 26. (iv) Any duty of confidentiality owed by the plaintiff to the offshore companies, was overridden by an order for disclosure. (v) In relation to the plaintiff's argument that if I ordered disclosure he should be permitted to pursue his breach of trust claim, I did not accept this argument. Firstly, I have already ruled that the breach of trust claim is out of time unless fraud can be established, which judgment has not been appealed. Secondly, inspection of those documents has been ordered because I am satisfied they are relevant and the claim for privilege cannot be made. The fact that such documents are relevant to issues which I have previously decided are fit for trial and disclosable, does not permit the plaintiff to revive claims previously struck out. Paragraph 78 of the plaintiff's witness statement 21. Paragraph 78 of the plaintiff's witness statement provides as follows:- "It is my belief that, as a consequence of Mr Russell/ZTC's actions, the sum of £666,847.81 has disappeared between transfer of funds from Adler Bank in April 2002 to receipt of funds in RBSI in Jersey in March 2003; a further sum in excess of £100,000, based on simple interest calculations, that would normally have accrued on the sum that left Adler Bank for the period between monies leaving Adler Bank and arriving at RBSI Jersey, has also gone missing; the security arrangements that ZTC should have protected loans provided by the offcos to Mr Bults were not enforced with the consequence that when the property Mr Bults has built on the site, purchased using the loans from the offcos, was repossessed by Jyske Bank in Gibraltar for non-payment of mortgage, the asset of £762,000 was lost and, finally, substantial and wholly unnecessary costs were incurred in order to address, and rectify the irregular and unauthorised administration and management activities carried out by Mr Russell/ZTC's of the offcos." 22. I have underlined the parts of paragraph 78 which the defendant seeks to strike out. 23. The defendant's complaint in relation to the latter part of paragraph 78 is that it introduces two new causes of action as follows:- (i) the defendant should have taken steps to put in place certain security arrangements for monies advanced to Mr Bults and its failure to do so meant that the sums advanced to Mr Bults of £762,000 were lost; (ii) The defendant had caused the plaintiff to incur costs to address alleged irregular and unauthorised administration of the offshore companies. 24. Advocate Cushing argued that the plaintiff should not be allowed to introduce new causes of action into his witness evidence which had not been pleaded. 25. The plaintiff argued that the witness statement was simply an amplification of what was set out in the order of justice. He suggested he was entitled to seek an account of what had happened to monies received by the defendant. This was

simply him seeking such an account. He also clarified he was not seeking to recover any costs incurred in respect of winding up the companies after the defendant ceased to be involved. All he was seeking was the account. 26. The decision I have reached is that those parts of paragraph 78 to which objection was taken by the defendant should be struck out. The issue in relation to loans advanced to Mr Bults which were not secured is more than the taking of an account. It is an allegation that the defendant was under a duty to take certain steps and failed to do so; it is therefore either an allegation of breach of negligence, breach of contract or breach of trust. This goes beyond the account I permitted in 2015. There is a difference between the taking of account and asking for someone to explain what they did with certain monies and whether an entity acted in breach of duty in how they dealt with those monies. The relevant part of paragraph 78 referring to funds advanced to Mr Bults falls into the latter category and does not form part of the present proceedings. To have allowed them to remain would have caused confusion at trial and would have been unfair on the defendant. 27. In reaching this decision I made it clear to the plaintiff that, if he chose to do so, he was free to make an application to amend in respect of the matters struck out at paragraph 78. However, I suggested he obtained legal advice before doing so to consider who was entitled to assert such claims and whether they were claims vested in the plaintiff or the offshore companies. Secondly, I asked him to consider whether any such claims were time barred because I was informed that the monies referred to in paragraph 78 were advanced in 2004. Generally amendments will not be allowed where they are arguably out of time (see *Bagus Inv. Ltd v Kastening*

[2010] JLR 355 and *Neal v Kelleher*

[2016] JRC 051 paragraphs 67 to 76). 28. Finally, in respect of the remainder of paragraph 78 and the reference to costs incurred by the plaintiff and Mr Bults in winding up the offshore companies, I also struck out this part of the witness statement because such costs were not being claimed by the plaintiff. I considered it would only cause confusion if there was a reference to such costs when this was not an issue that was being pursued at trial. Paragraphs 80 to 82 of the plaintiff's witness statement 29. In support of his argument that paragraphs 80 to 82 of the witness statement should be struck out, Advocate Cushing argued that these paragraphs contained matters of submission, argument and opinion. 30. In support of his argument Advocate Cushing referred me to *JD Wetherspoon Plc v Harris & Ors*

[2013] EWHC 1088 where the Court, in striking out significant parts of a witness statement, stated at paragraphs 39 to 41 as follows:- "39. Mr Goldberger would not be allowed at trial to give oral evidence which merely recites the relevant events, of which he does not have direct knowledge, by reference to documents he has read. Nor would he be permitted at trial to advance arguments and make submissions which might be expected of an advocate rather than a witness of fact. These points are made clear in paragraph 7 of Appendix 9 to the Chancery Guide (7th ed), which is as follows: 'A witness statement should simply cover

those issues, but only those issues, on which the party serving the statement wishes that witness to give evidence in chief. Thus it is not, for example, the function of a witness statement to provide a commentary on the documents in the trial bundle, nor to set out quotations from such documents, nor to engage in matters of argument. Witness statements should not deal with other matters merely because they may arise in the course of the trial.' "40. Nor would Mr Goldberger be permitted to give expert opinion evidence at the trial. A witness of fact may sometimes be able to give opinion evidence as part of his or her account of admissible factual evidence in order to provide a full and coherent explanation and account. That is what, it would appear, Master Bowles recognised when he refused the first Defendant's application to adduce expert evidence on market practice. It is what the first Defendant has done in his witness statements. Mr Goldberger, however, has expressed his opinions on market practice by way of commentary on facts of which he has no direct knowledge and of which he cannot give direct evidence. In that respect he is purporting to act exactly like an expert witness giving opinion evidence. Permission for such expert evidence has, however, been expressly refused.

41. I recognise, of course, that these rules as to witness statements and their contents are not rigid statutes. It is conceivable that in particular circumstances they may properly be relaxed in order to achieve the Overriding Objective in CPR r.1 of dealing with cases justly. I can see no good reason, however, why they should not apply to Mr Goldberger's witness statement in the present proceedings." 31. He also referred me to my recent decision in *Neal v Hawksford Trustees Jersey Limited*

[2017] JRC 083 where I gave permission to the parties to issue an application to challenge any parts of a witness statement that either contained opinion evidence or submission applying the remarks in *Minories Finance v Arya Holdings*

[1994] JLR 149 at 172 lines 15 to 20. In *Minories* the Court of Appeal expressed the hope that "affidavits will be confined to evidence of facts (or of opinions, where those are relevant and admissible) and that affidavits will no longer include comments, submissions, arguments and other irrelevancies which should find no place in any affidavit submitted to the courts of Jersey." 32. In respect of this application, having considered paragraphs 80 to 82, I agreed with Advocate Cushing for the reasons he gave. However I explained to the plaintiff that the work carried out by him would not be wasted in respect of these paragraphs. This was because they were matters that might well be included in skeleton arguments or used orally at trial in making submissions. They should not however form part of a witness statement which should solely focus on evidence of fact. Costs 33. In light of the fact that the defendant was successful in its applications I ordered the plaintiff to pay the defendant's costs on the standard basis. Given the *en désastre* of the plaintiff, I did not order a summary assessment, therefore leaving assessment of these costs over until determination of the plaintiff's claim or other resolution of these proceedings. *Authorities Booth-v-Zenith Trust Company Limited*

[2014] JRC 231 . Booth-v-Zenith Trust Company Limited

[2015] JRC 142 . Booth v The Viscount

[2016] JCA 218 . Garvin Trustees Limited v The Pensions Regulator

[2014] UKUT B8 (TTC). Vilsmeier v AI Airports Int Ltd & PI Power Int. Ltd

[2014] (1) JLR Note 26. Bagus Inv. Ltd v Kastening

[2010] JLR 355 . Neal v Kelleher

[2016] JRC 051 . JD Wetherspoon Plc v Harris & Ors

[2013] EWHC 1088 . Neal v Hawksford Trustees Jersey Limited

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