

JERSEY / JUDGMENT

Representation of Powell

[2018] JCA 099 (01 June 2018)

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Court of Appeal 1 June 2018 Before : James W. McNeill, Q. C., sitting as a Single Judge IN THE MATTER OF THE REPRESENTATION OF CAROLINE ELIZABETH POWELL NEE CHAMBERS AND IN THE MATTER OF THE LOI (1839) SUR LES REMISES DE BIENS Mrs Powell (on her own behalf) for the Representor.

judgment

M c neill JA:

Introduction

1. Mrs. Powell seeks to appeal a judgment of the Royal Court dated 20 April 2018 Representation of Powell

[2018] JRC 073 (Clyde-Smith, Commissioner, with Jurats Olsen and Sparrow) and has lodged a Notice of Appeal. In a judgment dated 21 May 2018 (unpublished) the learned Commissioner indicated that, when the judgment of 20 April 2018 was handed down, there had been some discussion as to whether the decision was interlocutory or final. As the advocate for one of the secured creditors thought that it was arguable that the determination was interlocutory, the court indicated to Mrs Powell, as a matter of caution, that she should first make an application to the Commissioner for leave to appeal, and for a stay. In his judgment of 21 May the learned Commissioner indicated that, to the extent that his leave was required, it was refused for the reasons there given. 2. For the reasons which I shall give later in this judgment, I consider the decision of 20 April to have been an interlocutory decision and, accordingly, that Mrs. Powell has no right of appeal without leave of the Royal Court, which has been refused, or of this court.

Background

3. On 18 September 2015 a creditor of Mrs. Powell obtained judgment against her in the Royal Court in the sum of £223,846.34 together with interest. On 30 October 2015 the creditor applied for an Acte Vicomte chargé d'écrire which was served on 17 November 2015. The judgment debt was not satisfied and Mrs. Powell's immoveable and moveable property was

judged renounced on 22 April 2016, the Royal Court ordering that a *dégrèvement* take place pursuant to the Loi (1880) sur la propriété foncière . 4. Mrs. Powell applied shortly thereafter for a Remise de Biens and, notwithstanding a Jurats' recommendation to the contrary, the Court, after a hearing on 16 December 2016, resolved that the Remise would be granted and duly appointed conducting Jurats. Judgment to that effect was given on 31 January 2017 (Representation of Caroline Elizabeth Powell, nee Chambers

[2017] JRC 022B). 5. In August 2017 the Remise came back to the Royal Court for reconsideration due to the elapse of six months since the grant. Notwithstanding the views of the secured creditors that the request by Mrs. Powell for an extension of time should be refused, the Royal Court was prepared to grant a six month extension. In doing so, however, the Royal Court took pains to explain to Mrs. Powell the reality of the position with which she was faced. The learned Deputy Bailiff did so with clarity and precision and in straightforward language. He stated: "26. We were quite satisfied from a consideration of all that she said to us that the Debtor was well aware of the differences between the two bankruptcy processes, but we explained in simple terms that under the *dégrèvement* process the control of the sale of her property was a matter for the creditors, acting through attorneys, whereas on a remise the process of sale was managed by the Jurats. This in effect both gave more time for the realisation of her property and provided a more objective process in that the Jurats would have regard not only to the legitimate interests of the secured creditors but also the interests of the unsecured creditors and of the Debtor herself. When faced with the request for the assurance that she would cooperate with the Jurats in allowing potential purchasers to view the property, the Debtor said she really had no choice and she agreed. We formed the conclusion that she knew that from the outset but had simply been trying to secure further delays, which actually would not work in her best interests anyway, even if consistent with her wish not to see [the property] sold." 6. The six month extension of the Remise duly expired on 31 January 2018. The Jurats made a report dated 16 February 2018, setting out the circumstances which had come to pass and which surrounded the fact that the Jersey property had not been sold. A copy of that report was sent by the Viscount to Mrs. Powell by hand on 23 February 2018 and the date of 11 April 2018 was duly fixed for the Royal Court to receive that report. 7. The hearing duly took place on 11 April 2018 and, as recorded by the learned Commissioner in the judgment dated 20 April 2018, the essence of the discussion at those proceedings was that Mrs. Powell wished a further extension of the Remise . At paragraph 16 of the judgment it was stated: "Mrs. Powell attended the hearing at 10am on 11th April 2018, and sought an adjournment so that a new date could be fixed; there was no form or application on her part before the Court. It transpired that her appointment at the hospital was at 2pm that day. She informed the court that the purpose of the adjourned hearing would be to enable her to challenge aspects of the Jurats' second report and expose irregularities in the conduct by the Jurats of the Remise and in the conduct of the Viscount. It would, she said, be her chance to put the facts before the Court. That process, she said, would demonstrate that there were exceptional circumstances justifying an extension of the Remise for a

further period, she suggested, of three months. She accepted that if there was such an extension granted, the Jersey property would have to be sold, but subject to a caveat that it must be for the right price. Despite expressing concern over her ability to deal with legal issues, she indicated that this further hearing would essentially be factual, and that she would be able to represent herself." 8. For the reasons given in the judgment of 20 April, the Royal Court took the view that there was nothing before it capable of being adjourned. The Remise had failed, and Mrs. Powell had made cession générale . Not only had the advocates for the creditors indicated that consent would not be forthcoming from the creditors, but the Royal Court took the view that any extension would have to have been granted before 31 January 2018 in order to avoid the cession générale becoming unconditional. Procedure on Appeal 9. Following a refusal of leave to appeal by the Royal Court, the matter comes before me, sitting as a single judge of the Court of Appeal, for consideration as to whether Mrs Powell's application relates to an interlocutory matter. If it does, leave is required from this court as the Royal Court has refused leave. If it does not, Mrs Powell is entitled to appeal to this court at this time: see Article 13(1)(e) of the Court of Appeal (Jersey) Law 1961 , as revised. 10. In her Notice of Appeal, Mrs Powell sets out as proposed grounds of appeal some 19 individual, numbered paragraphs. They cover suggestions that she had been misled into misunderstanding the nature of the hearing on 11 April, that she lacked full capacity to conduct the hearing because of the effect on her of her health and that there had been procedural irregularities. Only one paragraph goes to the legal basis for the judgment of 20 April: in paragraph 11 the appellant wishes to argue that there was an arguable case for extension of the Remise because of exceptional circumstances and without there being any need for consent by the creditors. She also suggested that consent to an extension might be able to be implied. She wished the extension in order to avail herself of the opportunity to respond to the Jurats' report. Discussion 11. Recent consideration in this jurisdiction as to identifying the distinguishing marks between interlocutory decisions and final decisions has been given by the Royal Court (Clyde-Smith, Commissioner, sitting alone) in AG v Rosenlund and Another

[2015] JRC 190 . As in the approach taken in Planning and Environment Committee v Lesquende

[2003] JLR 15 (Birt, DB) the learned Commissioner considered that Jersey should continue to follow the English Law approach as it has developed over the years both in that jurisdiction and elsewhere. 12. The learned Commissioner in Roselund considered a spread of authorities both in England and Wales and further afield and found that the principle in law which could be drawn from them was that, where a matter that would otherwise have formed part of a trial is decided as a preliminary issue, the consequent order is to be treated as final, and not as interlocutory. As he indicated, it would be unfair to deny an automatic right of appeal simply because a matter for trial that would normally be decided at trial was decided as a preliminary issue: see paragraph 14. 13. The authorities to which the Commissioner referred were (i) Salaman v Warner

[1891] 1QB 734 (especially at 736, Fry LJ), (ii) White v Brunton

- [1984] 1QB 570 (especially at 573, Sir John Donaldson MR), (iii) *Holmes v Bangladesh Binman Corp*
- [1988] 2 Lloyd's LR 120 (especially at 124, Bingham LJ), (iv) the advice of the Board of the Judicial Committee of the Privy Council on appeal from New Zealand in *Strathmore Group Limited v Fraser*
- [1992] 2AC 172, (especially at 178, Lord Templeman),
- (v) a decision of the Court of Appeal of the Bahamas in *Crawford & Company International v Crawford (Bahamas) Limited*
- [2010] Civ App no 97 and (vi) a decision of the Court of Final Appeal of the Hong Kong SAR in *Shell Hong King Limited v Yeung Wai Man Kiu Yip*
- [2003] HKCU 757 (especially at paragraphs 26 to 33, Chan PJ). Reference was also made to The Rules of the Supreme Court White Book 1999 Order 59, Rule 1A(3) 14. I agree with the learned Commissioner as to the principle which can be drawn from those authorities. I refer only to two passages quoted by him: because they express the principle in a more general fashion, a point which I consider to be of assistance in the present matter. "Instead, a broad common sense test should be applied, asking whether (if not tried separately) the issue would have formed a substantive part of the final trial." (Holmes, Bingham LJ) "A judgment or order shall be treated as final if the entire cause or matter would (subject only to any possible appeal) have been finally determined whichever way the court below had decided the issues before it." (The Rules of the Supreme Court White Book 1999 Order 59, Rule 1A(3)) 15. It is immediately noteworthy that each of the authorities referred to by the learned Commissioner dealt with trials, split trials or preliminary issues. The same can be said for the various authorities referred to in each, with the exception of *In re Riddell* 20 Q. B. D. 512 (referred to in Salaman). *Riddell* dealt with the question as to whether an order for dismissal for want of prosecution was a final judgment potentially engaging the Bankruptcy Act. It was held not to be so: there could be a new action so the issues between the parties had not finally been determined. 16. The discussion in those authorities as to trials, split trials and preliminary issues only translate to the field of Bankruptcy or *désastre* with care. Bankruptcy is a process involving numerous elements, some of which may be procedural and some of which may involve investigations into facts or the application of law to facts. Examples of the latter might be whether insolvency is shown, whether there is a liquidated claim, the value of a liquidated claim, whether assets had been wrongfully removed or diverted and whether there should be orders for contributions in respect of wrongful or fraudulent trading. But once the law on bankruptcy is engaged, there is, overall, a single process through which the rights of the creditors in the property of the bankrupt have to be determined. Indeed, in complex instances, the process may not be completed prior to the bankrupt being found entitled to discharge. 17. In the present case, the issue which arose before the Royal Court related to the Remise. As was made clear by the Royal Court over thirty years ago in *In the matter of*

the remise de Biens of Barker, on the representation of Barker

[1987] JLR 4 (Tomes DB, with Jurats Perrée and Hamon) at page 16, a Remise is a privilege or indulgence and, if the Remise process of sale has not been successfully concluded within a year that failure operates, as a matter of law, as the personal cession and renunciation by the debtor of all his property to his creditors and a dégrèvement ensues: *Le Maitre v de Feu*, Royal Court (1850), 171 Ex. 508. The indulgence will have been allowed, sometimes after contested proceedings, but the fundamental entitlement of the creditors to have charge of the disposal of the property re-emerges after the failure of the Remise. As a consequence, as the Royal Court in Barker confirmed, even where extensions may be considered, the extension of a Remise beyond the period of twelve months will not be granted against the will of creditors. 18. Applying the approach in respect of trials to the bankruptcy process, the question in my judgment becomes whether the issue which was the subject of the determination below would have formed a substantive part of the final determination of the bankruptcy process: cf the passage from Holmes quoted in paragraph 14 above. In the present case it is clear that it would not. As a matter of law, the failure of the Remise process to conclude within a year resulted in the personal cession and renunciation by the debtor of all her property to her creditors and the dégrèvement ensues process ensues. 19. That process is ongoing. The purpose of the hearing of 11 April was to receive and consider the Jurats' report and, if necessary, to identify appropriate further procedure. Mrs Powell sought an adjournment for the purpose of making further submissions as to why a further extension of the Remise should be granted. In dealing with that application the Royal Court was not determining any issue which could remotely be viewed as substantive: it was merely confirming that the due process of law was to take its course and indicating that there was no opportunity for a further extension. As such it was not a final determination as to the rights as between Mrs Powell and her creditors in regard to what had been her assets; it was interlocutory in the sense of dealing with a procedural issue at an interim stage on the route to the conclusion of the dégrèvement process. 20. In these circumstances an appeal can only proceed with leave of the Royal Court, which has been refused, or by this court. I shall therefore deal with the application on the papers and order that Mrs Powell makes written submissions to this court, to be lodged with the Greffier by noon on Tuesday 12 June, indicating her reasons as to why leave should be granted. The creditors will have until noon on Friday 15 June to lodge answers and Mrs Powell may lodge any reply by noon on Thursday 21 June. Authorities Representation of Powell

[2018] JRC 073 . *Loi (1880) sur la propriété foncière*. Representation of Caroline Elizabeth Powell, nee Chambers

[2017] JRC 022B. Court of Appeal (Jersey) Law 1961. *AG v Rosenlund and Another*

[2015] JRC 190 . *Planning and Environment Committee v Lesquende*

[2003] JLR 15 . *Salaman v Warner*

- [1891] 1QB 734 . White v Brunton [1984] 1QB 570. Holmes v Bangladesh Binman Corp [1988] 2 Lloyds LR 120. Strathmore Group Limited v Fraser
- [1992] 2AC 172. Crawford & Company International v Crawford (Bahamas) Limited [2010] Civ App no 97. Shell Hong King Limited v Yeung Wai Man Kiu Yip [2003] HKCU 757. The Rules of the Supreme Court White Book 1999. In re Riddell 20 Q. B. D. 512. Bankruptcy Act 1883. In the matter of the remise de Biens of Barker, on the representation of Barker
- [1987] JLR 4 . Le Maitre v de Feu, Royal Court (1850), 171 Ex. 508. Page Last Updated: 07 Jun 2018
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