

JERSEY / JUDGMENT

Viscount v Booth and Investec Bank [2018] JRC 170 (12 September 2018)

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judgment

the deputy bailiff: 1. Mr Alan Paul Booth ("the First Respondent") was declared en désastre on 16 th October, 2015. The Viscount applies to this Court to review two of her decisions made in the course of that désastre neither of which is accepted by the First Respondent. 2. The first decision that the Court is asked to review is that contained in the Viscount's letter to the First Respondent of 11 th April, 2017, ("the April 2017 letter") in which she recorded her decision that his transactions with Investec Bank (Channel Islands) Limited ("the Second Respondent") and others should not be set aside and their security disputed on the grounds that they were entered into "en erreur" . The second is the Viscount's decision not further to investigate the causes leading up to the First Respondent's bankruptcy.

Background

3. This matter comes before the Court by a slightly circuitous route. The First Respondent presented a representation to the Court on 10 th November, 2017, seeking amongst other things that certain loan contracts entered into between him and the Second Respondent and others and the judicial hypothecs granted by him in favour of the Second Respondent and others should be declared void ab initio . 4. That representation was dealt with before the Master and, on the basis of the Viscount's confirmation that she would make the application currently before the Court, the Master ordered that the proceedings commenced by way of representation be discontinued. 5. At the time of his declaration of désastre the First Respondent owned two properties known respectively as King's Oak and Beaumont Hill House. The Second Respondent held a first ranking judicial hypothec over King's Oak to secure a loan. Loans were also made by a Mr and Mrs Le Cornu who held a first ranking judicial hypothec over Beaumont Hill House and a second ranking hypothec, after the Second Respondent, over King's Oak. Mr and Mrs Le Cornu have taken no part in these proceedings. 6. The sales of both properties have, during the course of the désastre, been completed. The net proceeds of sale of Beaumont Hill House have been paid to Mr and Mrs Le Cornu as first ranking secured creditors. The gross proceeds of sale of King's Oak, some £1,807,500, are held by the Viscount pending the outcome of this current application. 7. At the date of the declaration of désastre the debt due to the Second Respondent was

approximately £3,067,000. The Second Respondent has received no distribution to date. 8. In October 2016 the First Respondent met with the Viscount and indicated that he believed that he had a claim based in *erreur* relating to his loan contracts and hypothecs with the Second Respondent and with Mr and Mrs Le Cornu. 9. The First Respondent subsequently wrote to the Viscount explaining that claim. The Viscount took legal advice and reached the view that the First Respondent's claim was unlikely to succeed and wrote the April 2017 letter explaining her reasons. 10. The conduct of the *désastre* and indeed the sale of the various properties had been the subject of applications before the Court by the First Respondent. We do not in this judgment need to consider them in any detail. We are asked only to consider the First Respondent's claim that his contracts with the Second Respondent and Mr and Mrs Le Cornu (or the security) should be set aside by reason of *erreur* and his application that the Viscount should be required to investigate further the causes for his *désastre*. 11. We have had the benefit of an affidavit from Ms Belinda Cave of the Viscount's Department of 23rd February, 2018, giving us information about the history of the *désastre* and the financial position. She informs us that, since the beginning of the *désastre*, the Viscount has expended some £47,148 in external legal fees seeking advice on matters relating to the *désastre* which have exhausted the funds available from the movable bankrupt estate and, together with other expenses, have resulted in a deficit of approximately £46,000. A sum of money has, however, been received by virtue of a settlement reached by the First Respondent in a claim outside of the *désastre* but this will not, together with the costs to be incurred in connection with the *désastre*, be sufficient to secure a surplus. We were informed that if the First Respondent's claim to have the security of the Second Respondent and Mr and Mrs Le Cornu declared void *ab initio* succeeds, this will not change the outcome for the First Respondent personally and he will derive no personal benefit. Were the Second Respondent's security found to be void *ab initio* there would be some £144,104 available for distribution for the unsecured creditors but the value of the unsecured claims would substantially exceed this sum. The nature of the Court's review 12. Article 31 of the Bankruptcy (*Désastre*) (Jersey) Law 1990 provides that:- "Proofs of debts to be examined and admitted or rejected (1) The Viscount may admit or reject proof of a debt in whole or in part. (2) Before admitting or rejecting proof of a debt the Viscount shall examine the proof and any statement opposing the admission of the debt. (3) Before admitting or rejecting proof of a debt the Viscount may require further evidence in support of, or in opposition to, its admission. (4) The Viscount may reject in whole or part any claim for interest on a debt if the Viscount considers the rate of interest to be extortionate. (5) If the Viscount rejects proof of a debt in whole or in part the Viscount shall serve notice of rejection in the manner prescribed by the court on the person who provided the proof. (6) If the Viscount rejects a statement opposing admission of a debt in whole or in part the Viscount shall serve notice of rejection in the manner prescribed by the court on the person who provided that statement. (7) If a person upon whom notice has been served in accordance with paragraph (5) or paragraph (6) is dissatisfied with the decision of the Viscount and wants the decision reviewed by the court he or she must, within the time prescribed by the court, request the Viscount to apply to the court for a date to be fixed for

the court to review the decision. (8) The Viscount shall comply with a request made in accordance with paragraph (7)." 13. The correspondence between the Viscount and the First Respondent culminating in the April 2017 letter has been treated as a decision made by the Viscount in respect of which the First Respondent seeks a review under Article 31(7) and (8). 14. The nature of the review that the Court conducts in these circumstances has been confirmed in the case of *Re Amy*

[2013] 2 JRC 193 in which Bailhache, Deputy Bailiff (as he then was) delivering the judgment of the Court considered the approach that the Court should take in the light of the decision of the Court of Appeal of *Shirley v Deputy Viscount*

[1999] JLR 256 and said, at paragraph 21:- "We think we are bound by the Court of Appeal's decision in *Shirley v Deputy Viscount*, and we apply it. Accordingly although the statute describes the application to the Court as being for a review of the Viscount's decision, it is in effect an appeal at large. Even if we had not regarded ourselves as bound by the decision of the Court of Appeal, we would have reached the same

conclusion.

The Viscount is the executive officer of the Court, and in administering the *désastre*, is doing so in that capacity. It is clear to us that when questions arising out of the Viscount's administration are referred to the Court, the Court has a free discretion to exercise unless there should be express statutory provision to the contrary." 15. At paragraph 29 of the judgment in *Amy*, the Court gave additional helpful guidance:- "29. We uphold the Viscount's determination. We do so because:- (i) The Viscount contends through Advocate Wilson that he took a pragmatic view of the claims in relation to legal fees. While it is true that it might have been open to him to deny those claims and to bring himself a claim for the assessment of damages for wrongful advice, that would have required an investment of funds which were simply not available to him. With only some £65,000 in the pot to split between the unsecured creditors, it would have been irresponsible for the Viscount to embark upon potentially costly litigation which, if unsuccessful, would have left the public of the Island to subsidise some further litigation in this matter. We have not seen all the material upon which no doubt the Viscount based that decision, but it does not seem to us to be unreasonable, in the circumstances to conclude it was not in the interests of creditors to challenge claims for legal fees on the grounds of allegedly negligent advice. (ii) The nature of the process under the review is that the burden of proof lies on the party who requires the matter to come to court for a review. In the case of a creditor whose claim has been denied, the creditor must establish his claim. In the case of a creditor who objects to another creditor's claim, the objector must establish the objection. Advocate Fogarty has made various submissions which might have been justifiable if she had put together the paperwork to support them. She did not and the objection fails. We simply do not have the information to reach a conclusion that the Viscount's assessment was incorrect." 16. It is clear from these words that the Viscount is entitled to take a pragmatic view in connection with a *désastre* and, further, that the burden of proof in this case lies upon the First Respondent as he has sought to have the Viscount's determination

reviewed by this Court. The transaction between the First Respondent and Second Respondent 17. The loan made by the Second Respondent to the First Respondent is evidenced by a facility letter dated 25 th July, 2011, in which the Second Respondent made available to the First Respondent and his late wife a facility in the sum of £2.95 million subject to certain conditions precedent. 18. One of the conditions required there to be an appropriate valuation of King's Oak by a valuer approved by the Second Respondent valuing the property at £4,400,000. 19. The First Respondent and his late wife accepted the offer from the Second Respondents by letter dated 28 th July, 2011. 20. The Second Respondent procured a valuation of King's Oak for the purposes of valuing their security which was prepared by CBRE and dated 25 th August, 2011. The CBRE valuation valued King's Oak at £4 million. Given the level of the CBRE valuation the Second Respondent reduced the facility to £2.8 million. 21. The First Respondent had previously obtained a valuation with regard to King's Oak in May 2011 by Reynolds Chartered Surveyors which had valued the property at £4.4 million. 22. An acknowledgement and bond were signed by the First Respondent and his late wife on 2 nd September, 2011 and on the same date they signed a document acknowledging their indebtedness. These documents were executed for the purposes of affording the Second Respondents security for its lending in the usual way. The loan was drawn down. 23. It is perhaps of relevance to note that when the First Respondent signed the acceptance of the facility letter the CBRE valuation did not at that point exist. Furthermore, the exercise being undertaken by the First Respondent was a refinancing exercise. Loans totalling £2.62 million were already secured over King's Oak and the borrowing from the Second Respondent was to a large extent an exercise in repaying those loans in order to secure more advantageous interest terms. As the First Respondent informed us, it "made sense to re-mortgage" . The additional sum secured on King's Oak was approximately £200,000. 24. It was as a result of the First Respondent's default on the loan that the Second Respondent took steps to enforce its security by dégrèvement, which was opposed by the First Respondent, who successfully applied for a declaration that his assets be declared en désastre. 25. It is perhaps also of relevance to note that at all material times the First Respondent was qualified as a chartered surveyor and held himself out as having experience in valuing residential/commercial property. 26. On the 15 th December, 2017, King's Oak was sold as we have said for the sum of £1,807,500. 27. It can be seen, therefore, that at the time the facility was granted King's Oak may not have had the value that both the First and Second Respondents thought that it did, although those values were supported by contemporaneous valuations. 28. In essence, as we understand it, the First Respondent's claim in erreur is simply that both he and the Second Respondent were mistaken as to the value of King's Oak and he would never have borrowed the money from the Second Respondent had he been aware of the true value. He, and so he would argue, the Second Respondent, were in erreur and the contract should be set aside as void ab initio . The Law on erreur 29. In the judgment of the Court of Appeal in *Marett v Marett and O'Brien*

[2008] JLR 384 , at paragraphs 55 - 64 inclusive the Court said this:- "55 As noted above, Advocate Sinel submits that there was no consent, under Jersey law, and therefore no enforceable compromise agreement. This is not the time for a detailed analysis of the Jersey law of contract-for some of the difficulties in relation to this topic see Kelleher, *The Sources of*

Jersey Contract Law, 3 Jersey Law Review, at 1-21 (1999). The general principles can be taken from the helpful summary in Advocate Sinel's contentions on this issue (to which there was no objection by Advocate O'Connell). There are four elements necessary to constitute a contract under Jersey law: (i) capacity; (ii) consent; (iii) cause; and (iv) objet. Ignoring capacity, which is not in issue, the Jersey law of contract determines consent by use of the subjective theory of contract (see Pothier, *Treatise on the Law of Obligations or Contracts*, transl. Evans, para. 4, at 4; para. 91, at 53; para. 98, at 59 and Appendix V, at 35 (1806) and Selby

- v. Romeril (34) . And see Mobil Sales & Supply Corp. v. Transoil (Jersey) Ltd (24) and La Motte Garages Ltd. v. Morgan (14) (which must now be considered per incuriam on this specific point in the light of Selby
- v. Romeril). It follows that, "for a contractual theory based on the subjective intention of the parties, a mistake is the principal obstacle to a valid contract" (Sefton-Green, *Mistake, Fraud & Duties to Inform in European Contract Law*, at 72 (2005)). Consent is prevented, amongst other things, by erreur/error (Pothier, *Traité des Obligations*, paras. 17-20, at 13-16 (1827 ed.); Domat, 1 *The Civil Law in its Natural Order*, book 1, title, 1, at 53-54 (Strahan transl., 1722); French Civil Code, arts. 1109-1110). In turn, erreur may be of two kinds: erreur obstacle (erreurs that prevent the meeting of minds necessary to constitute a contract's creation and cause a contract to be a nullity absolue) and erreur vice du consentement (a defect of consent where there is consent/meeting of minds but consent is impeachable for some other reason and which causes a contract to be a nullity relative: as to which see French Civil Code, arts. 1109 and 1118). Steelux Hldgs. Ltd. v. Edmonstone (née Hall) (36) is recent Jersey authority for the proposition that a vice du consentement (and, a fortiori, erreur obstacle) will render a contract void ab initio, that is to say, it never existed. Erreur vice du consentement is said to be relevant in this case. As to erreurs obstacle, such erreurs may themselves be of three kinds: erreur sur la nature du contrat (mistake as to the nature of the agreement, e.g. gift v. for value); erreur sur l'objet (mistake as to the subject of the agreement); and erreur sur l'existence de la cause (mistake as to the basis or purpose of the agreement). Each of these erreurs obstacle will prevent the subjective meeting of minds that is fundamental and necessary to the existence of consent and the creation of a contract under Jersey law. Returning to erreurs vice du consentement, these erreurs are of two kinds: erreur sur la personne and erreur sur la substance. Cause is the basis of or the reason for the contract. It is thus constituted by the interdependence of promises or the mutual performance of obligations. Hence, where the basis upon which a party enters an agreement (the cause) either fails or never comes to pass at all, the agreement is, according to Jersey law, null (Pothier, *op. cit.*, paras. 42-46, at 24-28; Domat, at 35; and French Civil Code, art. 1131). Objet is a party's obligation of performance under a contract (Pothier, *op. cit.*, para. 53, at 32; French Civil Code, art. 1126). It is what a party promises to do under the contract by way of performance/discharge of his or her obligations. If there is to be objet under a contract, the promised performance must be: (i) certain; (ii) possible; and (iii) lawful. As to certainty, the promised performance must be sufficiently certain if this

particular requirement is to be satisfied (see Selby

- v. Romeril (34) , where the contract failed because the objet was not defined or was uncertain). Alternatively, objet must be capable of determination (see Groom
- v. Stock (8) (employee's right to bonus unenforceable because no means provided for its determination)). But if, in Jersey law terms, mutual mistake may be unnecessary to invalidate a consent order (at least in relation to any underlying contract) and the question is whether or not there was a vice du consentement, then, in my opinion, there was no such defect, no such vice in this case. There was no mistake as to the subject matter of the agreement or as to its principal terms. There may have been a misunderstanding by TP as to the consequences or ramifications of the agreement but that, in my view, is not enough. In my view, the order by consent in this case satisfied the requirements of the Jersey law of contract." 30. On the basis of the analysis above it is clear that the First Respondent is not arguing that there was an " erreur obstacle" not in terms of erreur as a vice du consentement or that there was an "erreur sur la personne" . He is instead arguing that there is an "erreur sur la substance" . If there was such an erreur sur la substance in this case it could amount to an erreur vice du consentement. 31. Certain extracts from Pothier in his Traité des Obligations in which he deals with erreur were contained within the materials lodged with the Court but were not referred to in argument. 32. We think that the following extracts, all of which are to be found in Partie I, Chapitre I, under the heading De l'erreur are of interest. 33. In paragraph 17 Pothier says:- "L'erreur est le plus grand vice des conventions: car les conventions sont formées par le consentement des parties; et il ne peut pas y avoir de consentement lorsque les parties ont erré sur l'objet de leur convention; ..." 34. And then, at paragraph 18:- "L'erreur annule la convention, non seulement lorsqu'elle tombe sur la chose même, mais lorsqu'elle tombe sur la qualité de la chose que les contractants ont eu principalement en vue, et qui fait la substance de cette chose. C'est pourquoi si, voulant acheter une paire de chandeliers d'argent, j'achète de vous une paire de chandeliers que vous me présentez à vendre, que je prends pour des chandeliers d'argent, quoiqu'ils ne soient que de cuivre argenté; quand même vous n'auriez eu aucun dessein de me tromper, étant dans la même erreur que moi, la convention sera nulle, par ce que l'erreur dans laquelle j'ai été détruit mon consentement; car la chose que j'ai voulu acheter est une paire de chandeliers d'argent; ceux que vous m'avez présentés à vendre étant des chandeliers de cuivre, on ne peut pas dire que ce soit la chose que j'ai voulu acheter..." And later in the same paragraph:- "Il en est autrement lorsque l'erreur ne tombe que sue quelque qualité accidentelle de la chose. Par exemple, j'achète chez un libraire un certain livre, dans la fausse persuasion qu'il est excellent, quoiqu'il soit au-dessous du mediocre: cette erreur ne détruit pas mon consentement, ni par consequent le contrat de vente; la chose que j'ai voulu acheter, et que j'ai eue en vue, est véritablement le livre que le libraire m'a vendu, et non aucune autre chose; l'erreur dans laquelle j'étois sue la bonté de ce livre ne tomboit que sue le motif que me portoit à l'acheter, et elle m'empêche pas que ce soit véritablement le livre que j'ai voulu acheter: or nous verrons dans peu que l'erreur dans le motif ne détruit pas la convention; il suffit que les parties n'aient pas erré sue la chose qui en fait l'objet, et in eam

rem consentierint." 35. In the case of Selby -v- Romeril

[1996] JLR 210 the Court found it helpful, in identifying the requirements for a valid contract under Jersey law to have regard to the French Civil Code as assisting in interpreting the modern customary law. The Second Respondent drew our attention to Article 1110 of the French Civil Code which says:- "L'erreur n'est une cause de nullité de la convention que lorsqu'elle tombe sur la substance même de la chose qui en est l'objet. Elle n'est point une cause de nullité, lorsqu'elle ne tombe que sur la personne avec laquelle on a intention de contracter, à moins que la considération de cette personne ne soit la cause principale de la convention." Which he translates as saying:- "Erreur is a ground for annulment of an agreement only where it rests on the very substance of the thing which is the object thereof. It is not a ground for annulment where it only rests on the person with whom one has the intention of contracting, unless regard to/for that person was the main cause of the agreement." 36. We also note with interest the examples in the notes that appear under Article 1110 (Dalloz Code Civil 1986-87) as follows:- "1. L'erreur de l'une des parties sur la valeur d'une chose ne peut entraîner la nullité du contrat, sauf le cas où la lésion est admise comme une cause de rescision..." "2. L'erreur sur la substance s'entend non seulement de celle qui porte sur la matière même dont la chose est composée, mais aussi, et plus généralement, de celle qui a trait aux qualités substantielles (authenticité, origine, utilisation, etc.) en considération desquelles les parties ont contracté...." ... "8. L'erreur de droit ou de fait, qui porte, non pas sur la cause de l'obligation, mais seulement sur les motifs qui ont déterminé le consentement, ne vicie pas, en principe, le consentement, et est, dès lors, sans influence sur la validité de la convention...." 37. We translate the phrase "erreur sur la substance" as encompassing "fundamental mistake" which in our judgment is a fundamental mistake as to the nature of the thing contracted for or its essential qualities. 38. We should note that the reference by the Court of Appeal in *Marett* above to a subjective approach to contract has been the subject of further comment in case law in Jersey. In *Calligo Limited v Professional Business Systems CI Limited*

[2017] JRC 159 this Court preferred an objective approach to contractual analysis in some respects and followed the dicta in the Court of Appeal in *Home Farm Developments Limited and others v Le Sueur and others*

[2015] JCA 242 . That approach met with criticism in a subsequent case before this Court and it is fair to say that that question, the subjective or objective approach, at this stage remains to be definitively determined. 39. It is not necessary to enter into an exercise to determine whether in this instance the contractual position between the First and Second Respondents must be analysed on a subjective or objective basis as, in our view, the answer is the same in either case. Argument of The First Respondent 40. In his skeleton argument, amongst other things, the First Respondent refers to the fact that the Second Respondent has made a claim against CBRE regarding the August 2011 valuation and has settled that claim. This, he argues, indicates that the Second Respondent must feel that it had received an erroneous valuation and therefore entered into the transaction as a result

of a mistake. As the First Respondent has no recourse against CBRE, he says that his only method of resolution is to seek to render the mortgage contract void as a consequence of the erroneous valuation. 41. He argues, therefore, as a result of the inaccurate valuation, that both the First Respondent and the Second Respondent have made "what amounts to a mutual mistake" and that that mistake was compounded with regard to Beaumont Hill House. The First Respondent argues that because the properties have been sold at substantially lower values than even the Viscount's advisers had put forward, it means that the *désastre* is unable to recover what should be due which the First Respondent attributes to a desire on the part of the Viscount to dispose of the properties quickly without regard to their proper value. Further in his skeleton argument, the First Respondent raises a number of complaints in connection with the way the Viscount has dealt with the *désastre* and with regard to the involvement by the Second Respondent. He points, amongst other things, to the fact that the Viscount and the Second Respondent secured a joint valuation of King's Oak by Wills and this of itself created a conflict of interest. He also raises concerns that this resulted in the production of two separate reports, one for the Viscount and one for the Second Respondent. He is concerned in some manner that the preparation of the Wills report for the Second Respondent would have been used in their claim against CBRE. 42. We do not see anything of concern on the production of a jointly commissioned report from a professional valuer. As we understand it, the report was commissioned to provide a current valuation and also a retrospective valuation for the Second Respondent. In any event the duties of the author of the report remain the same whether it is produced as a result of a single or joint instruction. 43. In essence, so it seems to us, the First Respondent's argument turns on the fact that neither he nor the Second Respondent would have entered into the transaction had they understood that King's Oak in fact had a value that is reflected in the more recent valuations and not that of CBRE. As the First Respondent says in his skeleton argument:- "In this matter the very substance of the agreement is based on the valuation provided by CBRE on King's Oak ... Had the properties not achieved those valuations then none of the contracts would have been entered into."

Argument of the Second Respondent 44. The Second Respondent's main submission is that the First Respondent's analysis is flawed because it does not recognise the nature of the transaction. What the First Respondent seeks to do, and indeed he confirmed so to us, was to attack the security created by way of the judicial hypothec. This is characterised by the Second Respondent as an ancillary contract. 45. In addition, the Second Respondent argues that if the agreements were to be declared void *ab initio* it would be necessary for both of the parties to be restored to the position they were in before the transactions were entered in to. The First Respondent, who received the benefit of the loan advanced by the Second Respondent would be obliged to repay the money advanced but would not be in a position to do so. 46. The Second Respondent further argues that the facility agreement between itself and the First Respondent and his wife was binding when they signed the facility letter. The agreement was therefore complete and binding before the CBRE valuation was obtained. 47. The Second Respondent argues, therefore, that the CBRE valuation could not be an operative event in the formation of the facility agreement as the

First Respondent did not rely on it and no relevant erreur could have arisen. 48. Further, the Second Respondent argues that: (a) The nature of the facility agreement was clear, a bank agreed to advance money to a borrower; (b) The objet of the facility agreement was clear which was provision by the Second Respondent of a loan in the amount of £2.8m; (c) It could not be argued that there was an erreur on qualité or substance of the transaction - it was about the loan of money; (d) The securitisation of that loan was not the "objet" of the facility agreement - it was a condition of it; and (e) The performance was certain, possible and lawful and in terms of the facility agreement the cause was for the First Respondent to borrow money and for the Second Respondent to lend it and for the First Respondent to pay interest. 49. Furthermore, so the Second Respondent argues, the securitisation of that loan by a charge over King's Oak was ancillary to the loan itself and the valuation obtained was a matter of comfort for the Second Respondent and not for the First Respondent. The April 2017 letter 50. The Viscount's response to the First Respondent's claims concerning erreur was set out at some length in the April 2017 letter. We do not quote the letter in full but in essence the letter contains the following:- (a) The Viscount confirms that she has written the letter after careful consideration of the First Respondent's claim and after having taken legal advice. (b) That advice is to the effect that it is doubtful that a misapprehension of the "true" value of King's Oak or Beaumont Hill House would be sufficient to give rise to an erreur such as to avoid the relevant contracts. (c) A property value in a valuation is not a definitively ascertainable or measureable quality. It is a matter of judgment and opinion. (d) It would be difficult to persuade the Court that valuations were in fact the "substance" of the agreement. The substance was the loan agreement made to the First and Second Respondent, the valuations being a matter of comfort for the lender. (e) It would be necessary to demonstrate that the First Respondent's mistake as to the valuation was the determining factor in the conclusion of each of the contracts. (f) King's Oak already had a substantial borrowing secured upon it. The sum borrowed from the Second Respondent was significantly lower than the CBRE valuation. (g) The First Respondent has a long career as a chartered surveyor and upheld the valuations of the properties in Court as a result of his professional knowledge. For those amongst other reasons any mistake or erreur would not be excusable. 51. The Viscount concludes "as you would remain insolvent, and unable to repay your debts, I can see no way in which your bankruptcy would be set aside or significantly impacted in a positive way by such proceedings". 52. As we have said we have not set out at length the contents of the Viscount's letter. In our view, it is a letter that is considered and sets out cogent reasons for the view that the Viscount has taken refusing to challenge or disallow the Second Respondent's claim (and indeed that of Mr and Mrs Le Cornu) on the basis of erreur. 53. In her argument before us, the Viscount drew our attention to certain features of the CBRE valuation of 25 th August, 2011. Firstly, it makes it clear that the report is prepared for valuation for loan security purposes and, at paragraph 21 of the Standard Definitions and Reservations under the heading "Confidentiality/Third Part Liability" the valuation says:- "Our valuations and reports are strictly confidential to the party to whom they are addressed, or their other professional advisers, for the specific purpose to which they

refer. No third parties may rely upon our valuations and report and no responsibility whatsoever is accepted to any third parties for the whole or part of their contents without our written approval." Conclusion on the first issue 54. It is, of course, for the First Respondent to persuade us that the Viscount was wrong and in the light of the argument that we have heard he has not discharged that burden. 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. 56. 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. 57. 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. 58. 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. 59. 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. 60. 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 judgement and opinion. 61. For the reasons set out in the Viscount's letter and advanced in argument before us to which we have made reference above, we do not think that the Viscount's decision is open to attack and we uphold it. Viscount's duty to investigate 62. The First Respondent also asks the Court to review the adequacy of the Viscount's investigation in to the causes of his *désastre*. What, then, are the Viscount's duties in that regard? 63. In Jersey Insolvency and Asset Tracking (5th edition) the learned authors say at paragraph 5.3.2.11 under the heading "Duty to investigate" the following:- "As stated, the Royal Court has held that coextensive with the Viscount's duty to protect and realise the debtor's property is a duty requiring him to investigate the circumstances giving rise to the *désastre* (see: *Jobas Limited v Anglo Coins Limited* 1987-88 JLR 359). Not surprisingly, a liquidator in a creditor's winding up seems to be under a coextensive duty to investigate all the assets of a

company being wound up (see: *Hotel Beau Rivage Company Limited v Careves Investments Limited* 1985-86 JLR 70 at p75 - admittedly a case which addressed the position in a voluntary winding up under the then applicable *Loi 1861 sur les Sociétés à Responsabilités Limitées* as amended ...) 64. In *Jobas Limited v Anglo Coins Limited and others* (1987-88 JLR 359) at page 366 the Court, at line 15 said this:- "In *Viscount of Royal Ct. v Woodman* (1972 JJ at 2086) the court said this: 'On July 27th 1971, a company called 'Le Val Construction Co. Ltd' was declared by one of its creditors to be 'en désastre'. The Act of the Royal Court granting that declaration had for effect to assign all the company's assets to Her Majesty's Viscount, the plaintiff, whose duty it became to investigate the company's affairs, realise its assets and to distribute the proceeds of that realisation among the company's creditors according to law. The court recognised, therefore that the system of *désastre* had further evolved and that the Viscount was under a duty to investigate the debtor's affairs. Whilst the court must be careful not to usurp the functions of the legislature - and the enactment of a new Bankruptcy Law is clearly a matter of that body - the common law does not stand still but evolves with the times and 'in accordance with the needs of society.' 65. In her affidavit Ms Cave informs us of the steps that the Viscount has taken within the *désastre*. In brief they are as follows:- (a) The advertisement as required in the law giving notice of the declaration was duly filed; (b) A meeting was held with the First Respondent to discuss his assets; (c) The First Respondent was provided with and has completed a questionnaire relating to his assets and liabilities on which the Viscount has largely relied; (d) Information gathering letters were sent to various banks and to UK based creditors; (e) A review was conducted in the public registry with regard to immovable property; (f) A search was conducted at the Driver and Vehicle Standards Department to identify vehicles; (g) A search was conducted with Jersey Harbours Marine Leisure Centre and Jersey Coastguard to identify any vessels that may belong to the First Respondent; (h) A search was conducted with the Jersey Financial Services Commission to identify any companies or registered business names in connection with the First Defendant; and (i) The First Respondent was asked to provide details of his income and expenditure on a quarterly basis. 66. In addition, of course, there has been the normal claims procedure that has been followed in this case. 67. We understand these to be the standard investigations that the Viscount would normally take in connection with a *désastre*. 68. The Law is silent as to whether or not the Viscount has a duty to investigate but we can well see that in certain circumstances it would be appropriate, perhaps where there was a particular class of creditors, for the Viscount to expand her investigation beyond that necessary to realise the debtor's assets and to distribute the proceeds of that realisation among the company's creditors according to law. Generally speaking however, such an investigation will simply be that necessary to enable the Viscount to discharge her primary function of getting in the assets and distributing them according to law. It will not normally extend in our view to an investigation of the detailed financial dealings of any debtor to identify with precision precisely what went wrong and when. A more general assessment will normally suffice and it would often not be cost effective, or indeed in the interests of creditors, to carry out a detailed investigation.

Conclusion

69. The fact is that in this case the claims in this désastre exceed the available assets by some considerable margin and that is true whether or not the claims of the Second Respondent and Mr and Mrs Le Cornu remain secured or otherwise. 70. The First Respondent has in fact been given leave to pursue certain items of litigation outside the désastre and these are no longer within the control of the Viscount. 71. In our view, no further investigation will be for the benefit of the creditors in the désastre nor indeed for the financial benefit of the First Respondent. In our judgment the Viscount does not need to carry out any further investigations. 72. In conclusion, therefore, we affirm the Viscount's decision as contained in the April 2017 letter and we do not direct the Viscount to carry out any further investigation with regard to the désastre. Authorities Bankruptcy (Désastre) (Jersey) Law 1990. Re Amy

[2013] 2 JRC 193 Shirley v Deputy Viscount

[1999] JLR 256 Marett v Marett and O'Brien

[2008] JLR 384 Selby -v- Romeril

[1996] JLR 210 Calligo Limited v Professional Business Systems CI Limited

[2017] JRC 159 Home Farm Developments Limited and others v Le Sueur and others

[2015] JCA 242 Jobas Limited v Anglo Coins Limited and others (1987-88 JLR 359) Viscount of Royal Ct. v Woodman (1972 JJ at 2086) Page Last Updated: 04 Oct 2018 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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