

JERSEY / JUDGMENT

W -v- JFSC [2016] JRC 184 (11 October 2016)

[2016] JRC 184

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judgment

the master:

Introduction

1. This judgment represents my written reasons for refusing an adjournment of the final hearing for this matter listed for Monday, 17 th October, 2016, with a time estimate of three days.

Background

2. The relevant background to this matter is set out in a judgment of Commissioner Clyde-Smith in the present proceedings at W-v-JFSC

[2015] JRC 017 at paragraphs 4 to 8 which provides as follows:- "4. I describe the background, as I understand it to be, taken from the information supplied by the Commission but I make no findings in that respect. As a consequence of the need for anonymisation, the description will be brief. Consistent with the judgment of the Master and the parties, I will refer to the board of commissioners as "the Board" and to those full-time directors and employees of the Commission who are not members of the Board as "the Executive".

5. Production notices were issued by the Commission to the trust company concerned ("the Trust Company") and its affiliates, pursuant to Article 32(1)(a) of the Financial Services (Jersey) Law 1998 ("the Financial Services Law") covering a very wide range of matters, as a consequence of which the Commission received over ten thousand documents for review. It also conducted interviews with some fifteen individuals, exercising its powers under Article 32(1)(b) of the Financial Services Law. There were two interviews of W conducted by the Executive lasting some two days each in advance of which he was provided with an interview bundle of documents extracted by the Executive from the documents received pursuant to the production notices.

6. A draft of the final report into the Trust Company (in so far as it related to W) was provided to him before being finalised. Thereafter the decision making process in respect of W (as with the Trust Company) followed that set out in the Commission's guidance note of 27th May, 2009, (and as revised on 5th August, 2011,) which comprised, following a Preliminary Review, four stages:- Stage 1 - disclosure and verification of information. Stage 2 - Review Committee. Stage 3 - Board - first meeting. Stage 4 - Board - second meeting.
7. Pursuant to that process, a draft Individual Criticism Paper was prepared by the Executive and disclosed to W for his review and verification of the factual information contained within it. The process culminated in the decision of the Board taken at its Stage 4 second meeting to give directions to W and issue a public statement, against which decision he is now appealing.
8. It is fair to say that throughout this process W and from the time they were instructed, his advocates, Sinel's, were requesting not only extensions of time to respond to the Executive but also sight of all the documentation held by the Commission pursuant to the production notices and transcripts of the interviews of all of the other individuals involved, which the Commission regarded as restricted information and therefore was unable to provide. That remained the position of the Commission in the application made by W to the Master for discovery of documentation over and above that provided by the Commission in the two affidavits sworn by Mr John Clark Averty, Deputy Chairman of the Commission, pursuant to Rule 15/3(1) of the Royal Court Rules 2004; the first of which set out generic matters in respect of the Commission's powers and procedures and the second of which concerned the particular case of W." 3. In view of the fact that what has led to the present application is the current state of health of the appellant, it is also right to record that there have been a number of earlier adjournments of this matter because of the health of the appellant. By paragraph 3 of an Act of Court of 10 th March, 2016, in relation to the question of the appellant's health I made the following order:- "3. by no later than 5pm Wednesday, 4 th May, 2016, Dr Powell shall provide to the Court and to the Respondent an update on the Appellant's medical condition addressing the following issues namely, whether the Appellant is able:- a. to instruct a lawyer to represent him in respect of his administrative appeal against a decision of the Respondent to issue public statements about the Appellant and certain conclusions the Respondent had reached about the Appellants conduct; b. to instruct a lawyer to prepare a substantive affidavit in response to the affidavits filed by the Respondent in the administrative appeal; c. to prepare himself without legal representation, an affidavit to respond to the affidavits filed by the Respondent; d. whether legally represented or not, to take part in a final hearing to determine his appeal; e. whether the Appellant would be able to conduct such proceedings himself." 4. As a result of this order, Dr Powell a Consultant Neurologist advised that the appellant was able to provide an affidavit but was not able to devote more than two to three hours a day in doing so. Accordingly, by an Act of Court dated 11 th May, 2016, I gave the appellant until 19 th August, 2016, to file his substantive affidavit in support of his appeal. This deadline was ultimately extended by one week with the respondent's affidavit in reply being filed on 16 th September, 2016, which was

complied with. I also provided for skeleton arguments to be exchanged by Monday, 10 th October, 2016. The respondent is able to meet this obligation; the appellant is not. 5. The affidavit ultimately filed by the appellant ran to 119 paragraphs and comprised two lever arch files of exhibits. The appellant also filed an affidavit from a Mr Martin Bowen comprising of 25 paragraphs and one lever arch file of exhibits. 6. In reply, Lord Eatwell, the current chairman of the respondent, filed an affidavit of 169 paragraphs and 58 pages together with 109 pages of exhibits. Within his affidavit he recorded that Mr John Averty former Deputy Chairman of the respondent had previously filed six affidavits in relation to this matter together with one affidavit filed by Mr Paul Le Marrec, an employee of the respondent. 7. It is also right to record in relation to this case that I ordered the respondent to provide some discovery in this matter as reported at U V and W-v-JFSC

[2014] JRC 202 where I stated at paragraph 36:- "When the Royal Court comes to consider these appeals, although the appeals are to be heard separately, at present it is intended they are heard consecutively immediately after each other and by the same judge and jurors to ensure consistency. While consistency is obviously desirable, it also means that the Royal Court will be in possession of more material than the appellants. While I have no reason to doubt that both the Board when it made its decisions, dealt with each appeal on the merits separately from any other decision, and the Royal Court when it hears the appeals will also do so, I am of the view that neither individual commissioners nor members of the Royal Court can separate out their knowledge of material they have read relating to appeals concerning the same financial services business and the roles of various individuals within it. It is clear that an extensive investigation has taken place covering a number of years and the roles of individuals in that business. The decisions taken cannot be said to be anything other than complex. In my judgment it is potentially unfair, given that this is an appeal alleging unreasonableness on the part of the Board's decision including unfairness and inconsistency, for the appellants not to be placed in the same position as the Board, and the Royal Court as far as can be achieved. I therefore have reached the view that there should be disclosure to each of the appellants of minutes of each stage of the respondent's decision making process, minutes and notes of deliberations of the Board of any relevant Board decisions relating to any of the appellants or other persons, the ICP for each appellant and other persons where public statements have been made, and the final statement to be issued . I accept that disclosure of notes of deliberations may lead to disclosure of some information supplied in confidence. I consider this is outweighed in this case by the importance of allowing each appellant to be aware of what the Board took into account when reaching its decision in this complex case." (Emphasis added) 8. Appeals to the Royal Court and the Court of Appeal on behalf of the appellant against the above decision were dismissed. In this judgment I also gave the appellant permission to bring further applications for specific discovery provided that any such application was made on a much more limited and precise basis (see paragraph 41). No such application has been made to date and no specific category of missing documents has been identified. However, subsequent to my decision on discovery, the appellant

obtained information from the liquidators of the Financial Services Group with which the present appeal is concerned. 9. I have referred to the above directions because as far as I am aware all affidavits permitted to be filed by directions given by me previously have now been filed and all discovery ordered to be provided has been provided; the appellant also has had access to documents provided to him by the liquidators. Finally there are no outstanding procedural applications in particular for discovery in relation to this appeal. The parties' contentions 10. Advocate Sinel contended by reference to an affidavit sworn by the appellant's wife that he was unable to obtain instructions on the affidavit of Lord Eatwell filed on behalf of the respondent. His client was type 1 diabetic, suffered from epilepsy, has serious digestive problems described as primary sclerosing cholangitis and ulcerative colitis, has inflammatory bowel disease, had lost two stone, had suffered two broken vertebrae and was on steroids. The steroids could also affect the management of the appellant's diabetes and cause a number of psychological side effects. These symptoms were set out in a letter from Dr Rees a Consultant Gastroenterologist and Physician who saw the appellant on 14 th and 15 th September, 2016, pursuant to a routine appointment. On 15 th September, 2016, the appellant was also diagnosed with Crohn's disease, which led to the steroids being prescribed. 11. Paragraph 10 of the affidavit of Mrs W also deposed that at a consultation with Dr Rice, a Diabetic Consultant, on 26 th September, 2016, it was found that the appellant's long-term blood sugar levels had been significantly raised compared to normal. Finally, the affidavit exhibited a letter addressed to me from Dr Powell who reported that the appellant was in the process of changing medication for his epilepsy. 12. Advocate Sinel also contended this was a case which his client was taking seriously and this was not a delaying tactic. His client had produced a lengthy affidavit and obtained documents from the liquidator, which his client had considered at length. An affidavit had also been obtained from a third party. 13. There was also no prejudice to the respondent as the appellant had offered an undertaking not to carry out any financial services business within Jersey. 14. The appellant's case was also unusual because the appellant was challenging the whole approach of the respondent. His client was challenging the facts relied on by the respondent, the behaviour of the respondent's employees and the conclusions reached. 15. Advocate Sinel therefore needed instructions on how to respond to the affidavit of Lord Eatwell to prepare a skeleton argument and oral submissions and on certain tactical decisions including whether or not he should apply for cross-examination. His client by reference to the medical evidence was simply not in a position to give such instructions. In the absence of instructions Advocate Sinel could not proceed and was left in an impossible position. 16. Advocate Lacey in response contended that no undertaking had been accepted or agreed by the respondent. 17. In terms of the facts to this case they were clear. All relevant evidence had been filed and all documents the respondent was required to disclose by the court had been disclosed. 18. Furthermore Sinels had been involved since 2013 and at each stage of the respondent's process. They were therefore fully familiar with this matter. 19. The final hearing should therefore progress on the basis of skeleton arguments and oral submissions. This was principally a matter for the lawyers of the respective parties to

prepare. 20. As far as cross-examination was concerned, this required exceptional circumstances or an exceptional reason (see *Volaw & Corporate Services & Anor v Controller of Taxes*

[2013] (2) JLR 499). In any event, even if cross-examination was ordered of Mr Averty or Lord Eatwell, she did not intend to cross-examine the appellant. 21. Advocate Lacey was also critical of the medical evidence now relied upon. She pointed out that the final paragraph of the opinion from Dr Rees stated "I have been asked to let you know as he is due to give evidence in the near future which clearly may be an issue." However, the appellant is not due to give evidence. There is no medical evidence indicating he could not otherwise take part in the appeal or provide any necessary instructions. She further contrasted the letter from Dr Rees with the degree of specification required by paragraph 3 of the Act of Court of 10 th March, 2016, referred to above and suggested that the same level of detail had not been provided. 22. In relation to the letter from Dr Powell, Advocate Lacey observed that this letter was not based on any consultation but simply followed a call by the appellant and Mrs W. The conclusions Dr Powell had expressed were therefore only based on a phone call and not any personal examination of the appellant. His conclusion "It is my feeling that given all that is happening with his health it would not be appropriate for him to participate in this legal process and at present he does not have the stamina or cognitive ability to fully contribute to the legal proceedings" could not be relied upon because it did not follow any assessment of the appellant's current condition. 23. Advocate Lacey also reminded me that the Commission's decision had been made in June 2014. There was therefore a public interest in ensuring that this appeal was disposed of and while there had been delays for various reasons including at times the appellant's health, it remained important for the appeal to be determined sooner rather than later. Decision 24. The starting point for refusing the appellant's request for an adjournment is the nature of the appeal. In my decision concerning the appellant's discovery application in this matter reported at

[2014] JRC 202 , at paragraphs 22 to 28 I set out why this was an administrative appeal. I also referred specifically to paragraph 54 of the decision of the Court of Appeal in *Volaw* referred to above which includes the following statement:- "Any affidavit evidence from the appellant should be concise and only entertained if it purports to contain some truly dispositive point. Cross-examination should only be permitted if the appeal (recollecting the limited nature of the issue involved) truly turns on some point that can only be resolved by such method. It must be borne in mind by the court that the Comptroller has issued his notice as part of an investigation and that he himself is not obliged to conduct any sort of mini-trial. Nor, in our view, should a court be tempted down that slippery path." 25. At the first sentence at paragraph 34 of the discovery judgment, I stated "I accept Advocate Lacey's submissions that an appeal against the decision of the respondent, which is undoubtedly an administrative decision, should not be turned into a trial." 26. Commissioner Clyde-Smith in dismissing the appeal against my decision reported at

- [2015] JRC 017 noted that Advocate Sinel did not take issue with the legal principles to be applied to the issue of discovery in an administrative appeal. 27. He also warned at paragraph 42 as follows:- "42. With respect to Advocate Sinel's submission that because of the serious nature of the findings of the Commission against W set out in the proposed public statement, the appeal, out of fairness, was bound to turn into a quasi criminal trial, with the Commission in the guise of prosecutor and with extensive cross-examination of witnesses, the Court of Appeal in Volaw has made it clear that the Court should not be tempted down this slippery path. Leave has I believe been granted by the Bailiff under Practice Direction RC05/25 for the appeal to be allotted more than half a day but it still remains subject to the requirement that such appeals are dealt with primarily by means of affidavit evidence and that leave to cross-examine deponents may only be granted in exceptional circumstances ." (Emphasis Added). 28. In refusing leave to appeal Commissioner Clyde-Smith's decision, the Court of Appeal in its judgment reported at W-v-JFSC
- [2015] JCA 060 , stated at paragraph 24 as follows:- "24. In our judgment the Commissioner was entirely correct to emphasise that the role of the Royal Court, when hearing the appeals, is not to conduct, or be tempted to conduct, a quasi-criminal trial or otherwise, but to consider, in the context of the appeals being from an administrative body, whether the decisions arrived at by the Respondent were reasonable or not. We are satisfied that the Commissioner was correct to apply the law as he did in his judgment. We do not understand the submission that he should not have relied upon the three authorities referred to in para 16 above, given that it is quite apparent from para 14 of the Commissioner's judgment that Advocate Sinel did not take issue with the legal principles to be applied to the issue of discovery in an administrative appeal, but rather to the application of those principles to the instant case, and from para 22 did not suggest to him that any of the principles in those authorities were not applicable in the instant case. And, we might add, Advocate Sinel relied upon the authorities of Interface and Anchor Trust in his written submissions to the Commissioner dated 19 December 2014 - see tab 20 of Bundle 1 before us." 29. In addition to the Interface and Anchor Trust decisions referred to at paragraph 24 of the Court of Appeal decision, the third relevant authority referred to by the Court of Appeal on the nature of the appeal was the Volaw case referred to above. 30. It is quite clear therefore that the present appeal is an administrative appeal and should not be turned into a mini trial. I have referred to this expressly because Advocate Sinel considered that he had a right to cross-examine until I drew to his attention to the Volaw case. When I asked him to justify why cross-examination was required or should be permitted, he essentially repeated the same arguments that he had relied upon as to why the broad discovery he had previously sought was required. In my judgment Advocate Sinel is still trying to turn this case into a mini trial notwithstanding the observations of all the courts that dealt with the applications for discovery referred to above. That approach was and remains incorrect. 31. What is therefore required at this stage is the drafting of skeleton arguments and oral submissions. My general experience, both as Master and

previously as a practitioner before the Courts of Jersey, allows me to conclude that the primary individual upon who such a task falls is the advocate and/or a party's legal team rather than a client. The skill of drafting skeleton arguments and preparing oral submissions is that of the lawyer. It is a critical task for the lawyer because it involves the ultimate skill of an advocate namely how best to present a party's case both in writing and orally to persuade a court to find in favour of the lawyer's client. That is not to say that a client will not have input in relation to or review the contents of a skeleton argument. A client may well also discuss with an advocate what the advocate intends to submit orally to the court. However the primary responsibility for such work rests with the advocate and not with the client. 32. At this stage of any action, the advocate should also be completely familiar with all the material relevant to the case. In this case, as set out above, the respondent has filed a significant number of affidavits; the appellant has also filed detailed affidavits. There is extensive documentation exhibited to the affidavits. By the time the matter comes before a Court, the advocate's professional obligation requires him/her to know the detail of all this material. While this may appear obvious, it explains why in the present case Advocate Sinel should be in a position to analyse the affidavit of Lord Eatwell filed in response and test it by reference to his knowledge of the affidavits and documents in his possession. That is not to say that any conclusions reached might not be reviewed with the appellant and there may be specific questions Advocate Sinel may raise with the appellant. However, I am not satisfied that Advocate Sinel is unable to act without instructions given my general experience of how responsibilities for a case are allocated at this stage of an instruction. For the sake of completeness I should add that Advocate Sinel's general instructions are clear, namely to pursue the appeal and he has both a detailed notice of appeal which his client must have approved or be taken to have approved and also detailed affidavits filed on the appellant's behalf. There is therefore a significant body of evidence from which Advocate Sinel can work and which means that the requirement to take instructions is not by any means as extensive as Advocate Sinel has suggested. 33. The other aspect of this part of my decision I should refer to expressly is the question of cross-examination. As noted in the judgments in this matter to which I have referred, and in Volaw there is no right to cross-examination. Commissioner Clyde-Smith noted this expressly in the extract from his judgment at paragraph 42 which I have set out above. 34. Furthermore, in Volaw express reference was made to Royal Court Practice Direction RC5/25, which makes it clear that any application for cross-examination in an administrative appeal must be sought no later than 7 days in advance of any hearing. Practice Direction RC05/25 was also referred to in paragraph 42 of Commissioner Clyde-Smith's judgment. Yet no application has been made. While Advocate Sinel contended that this was because he could not obtain instructions, the analysis of whether or not cross-examination should be sought and the reasons for it is much more a matter for the legal adviser than the client, even if it is the client's ultimate decision. 35. In this case I am also not satisfied that exceptional circumstances exist. While the matter is ultimately for the trial judge, I consider I am entitled to form a view on whether or not cross-examination is likely to be granted in deciding whether or not to grant an adjournment. In my judgment

just as in the discovery application, Advocate Sinel is still trying to take the court down the slippery path of conducting a trial. This was the only reason advanced for cross-examination. The view I have reached is that the arguments put before me are unlikely to persuade the Royal Court to permit cross-examination and therefore it is not a factor that supports granting the adjournment requested. 36. In relation to the medical evidence, I of course accept that the appellant has health issues which are serious. However, the only medical evidence based on a recent assessment of the appellant is by Dr Rees whose only specific conclusion is that the appellant at present is unable to give evidence. However, Advocate Lacey does not seek to cross-examine the appellant as she made it clear expressly in response to questions from me. If it were the case that cross-examination was required, I might have reached a different view. However, in the absence of a requirement for cross-examination (assuming the Royal Court agreed), and in light of my conclusions above as to the respective roles of the appellant and Advocate Sinel, I was not persuaded that the specific conclusion of Dr Rees was sufficient to persuade me to grant an adjournment. 37. In relation to the evidence of Dr Powell, he had not seen the appellant but simply spoken either to him or to Mrs W (it is not clear) and expressed a view on this basis. Again this was not sufficient to persuade me to grant an adjournment. 38. Neither letter goes to the level of detail required by paragraph 10 of the act of court of 10 th March, 2016, and in particular neither letter addresses whether the appellant is able to give instructions or whether he could take part by attending a final hearing (without giving evidence). 39. Furthermore there is no evidence from the appellant. The appellant does not therefore indicate his own position. Yet the medical evidence filed does not say he is unable to explain his position. Furthermore, the extent of any communications between Advocate Sinel and the appellant and/or Mrs W was not clear. While it is not necessary for Advocate Sinel to refer to the content of any legal advice, Advocate Sinel was not clear as to whether discussions with either the appellant or Mrs W had taken place, what communications had taken place in writing and what response had been received. I have referred to this lack of clarity because the chronology of events is not clear. In particular, it appears that the appellant saw Dr Rees before the affidavit of Lord Eatwell was filed. I do not know what communication took place after the affidavit was filed. I also do not have any up-to-date explanation from either the appellant or Mrs W of how the appellant current is rather than how he was nearly three weeks ago. 40. In relation to the question of undertakings, this was dealt with by Commissioner Clyde-Smith in his judgment reported at JFSC-v-W

[2015] JRC 094 at paragraphs 22 and 23 where he stated as follows:- "22. It is not satisfactory for the Commission to be told that it should rely on undertakings from W not to involve himself in financial services within the Island or to be told by W that through such undertakings, there are currently no regulatory risks. The issue of undertakings was considered in Secretary of State for Trade and Industry v Carr

[2005] EWHC 1723 (Ch) , a case concerning the filing of written evidence in disqualification proceedings before the commencement of criminal proceedings and where a stay was refused. Richards J said this at paragraph 49:- While taken together these factors have some force, I accept Mr Davis-White's submission that it would not be right to order a stay of the disqualification proceedings on case management grounds. Such proceedings are brought in the public interest and they serve an important purpose. The public interest is best served by such proceedings being brought to a conclusion as soon as reasonably practicable. While Mr Carr's proposed undertaking is designed to achieve as much as possible of the effect of a disqualification order, Mr Jones accepts that it achieves less than an order. For example, breach of the undertaking would be a civil contempt of court with a maximum penalty of two years' imprisonment, while breach of a disqualification order is an offence punishable by a maximum of five years' imprisonment. There is no public register on which the undertaking could appear. While Mr Carr is willing to give an undertaking to be personally liable for debts as provided by s.15 of the 1986 Act as if a disqualification order had been made, there can be no similar liability imposed on his associates (cf. s.15(1)(b)). Moreover, if a respondent is to be prohibited from acting as a director, the public is entitled to know as early as reasonably practicable the grounds on which he has been found unfit." "23. In the same way, the public in Jersey is entitled to know that the Commission has decided to bar W from involvement in the financial services industry as early as reasonably practicable and the grounds upon which he has been so barred. The same applies to regulators in the jurisdictions outside Jersey, where W appears to be conducting financial services businesses, with whom the Commission is permitted, under Article 8(3) of the Financial Services Commission (Jersey) Law 1998 to exchange information." 41. Accordingly, the offer of an undertaking is not a factor which I should take into account in support of the application for an adjournment. 42. I also agree with Advocate Lacey that the question of reaching a conclusion to this appeal is something I should take into account. While this appeal has not progressed for a number of reasons including the health of the appellant, it is the case that over two years have elapsed since the respondent made its decision to make a public statement. At paragraph 24 of Commissioner Clyde-Smith's decision in this matter reported at

[2015] JRC 094 in the context of refusing a further stay of the proceedings on the basis of a criminal investigation Commissioner Clyde-Smith said this:- "24. There is some force in Advocate Lacey's submission that any delay in bringing into effect its regulatory decisions, save as envisaged by statute or by established case law, by a stay of the appeal proceedings, let alone an indefinite stay, could operate to:- (i) Place at risk for an extended period investors and the public as a whole; (ii) Damage and undermine the Commission's ability to discharge its statutory functions and duties; and so (iii) Damage the confidence placed in the Commission by members of the Island's finance industry, investors, the public and sister regulators around the world; and so (iv) Undermine Jersey's reputation as a leading offshore jurisdiction in financial and commercial matters. There is therefore a strong public interest in W's appeal being determined as expeditiously as possible." 43. In my

judgment these comments apply just as much to the present application as they did to the question before Commissioner Clyde-Smith. 44. Taking all these matters together I was not satisfied it was appropriate to grant an adjournment and the application was therefore refused. 45. I did however extend the time limit to prepare a skeleton argument mainly because Advocate Sinel candidly informed me that no steps had been taken to prepare a skeleton argument at all due to a lack of instructions. It was clear that a skeleton was not going to be filed in accordance with the deadline I had previously set and I therefore extended the time for filing of skeleton arguments until close of business Wednesday, 12 th October, 2016. 46. I further gave Advocate Sinel liberty to apply to me to renew his application for an adjournment before the date set for trial to allow his client an opportunity to address the concerns about the medical evidence set out in this decision. In particular, I made it clear that any renewed application should deal with the ability of the appellant to give instructions and to attend any final hearing but without giving evidence. The giving of instructions should be in the context of the primary responsibility falling on Advocate Sinel to prepare written and oral submissions with the appellant's role being to approve the approach taken or to answer any specific matters not covered by the material already in Advocate Sinel's possession. I further indicated I would hear such an application on two hours' notice. Authorities W-v-JFSC

[2015] JRC 017 . U V and W-v-JFSC

[2014] JRC 202 . Volaw & Corporate Services & Anor v Controller of Taxes

[2013] (2) JLR 499. W-v-JFSC

[2015] JCA 060 . JFSC-v-W

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