

JERSEY / JUDGMENT

W- -v- JFSC [2016] JRC 199 (01 November 2016)

[2016] JRC 199

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judgment

the master:

Introduction

1. This judgment represents my written reasons for granting an adjournment of the final hearing for this matter listed for Monday, 17 th October, 2016, with a time estimate of three days. This judgment follows on from my judgment dated 11 th October, 2016, reported at W-v-JFSC

[2016] JRC 184 when I refused an earlier application for an adjournment. However, in my earlier decision, permitted the appellant liberty to renew his application for an adjournment at paragraph 46 as follows:- "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." 2. Subsequent to my decision I received from Advocate Sinel, on behalf of the appellant, letters from Dr Rees dated 11 th October, 2016, and from Dr Powell also dated th October, 2016. 3. Dr Rees suggested that the Court appoint an independent reviewer because he was the appellant's consultant with on-going responsibility as of care and was concerned he had no expertise and was going to be placed in a position of making judgments. 4. The letter from Dr Powell in the final paragraph states as follows:- "Regarding the specific question raised in your previous letter I do not feel that he has the cognitive ability necessary to instruct a solicitor on complex matters of a legal nature, in addition I don't think he is physically capable for attending court for whole days at a time, given that he currently needs to sleep every afternoon.

From a neurologist perspective I would hope that his drug side effects would be minimised when he has switched medication and stabilised on a single antiepileptic drug which should be done by the end of 2016. I would therefore support the application for an adjournment of the legal proceedings until this time." 5. It was primarily on the basis of this letter, that an adjournment was sought by Advocate Sinel. 6. An unsworn but approved affidavit with an undertaking to swear and file the same in due course was also provided by the appellant's wife. Paragraph 3 of that affidavit states as follows:- "3. This Appeal and the involvement of the Jersey Financial Services Commission ("JFSC") have had a devastating effect on our lives, we both want it concluded but W is not in a position to deal with it at present. He is keen for all parties to understand that should this adjournment request be successful then he is adamant that when the new court date comes around his options are very simple,

- i) he will be well enough to partake and will do so ii) he is not well enough to partake but will ignore medical advice and continue the case iii) he is not well enough to partake and with much regret and frustration will withdraw his appeal. He recognises that his health can only take so much and hopes this latest challenge is just bad timing rather than anything more significant. Clearly the above will also impact his ability to "instruct lawyers" and therefore option (ii) comes with the risk of his legal team needing to stand down, as they have previously, as they may not have a client that is able to instruct them." 7. At paragraph 7 Mrs W also deposed that provision had been made to place Sinels funds and to pay the adverse costs of the respondent awarded to date. Advocate Lacey confirmed these costs had been paid just before the hearing, which sum was a not insubstantial figure. Parties' contentions 8. Advocate Sinel contended that he could not take forward a strategy in relation to this case without input from his client. This was in the context of this case being a complex dispute. This was not a case of his client simply suffering from stress. His client had serious medical issues which meant that he was unable to give instructions. The situation was therefore very different from the analysis in a number of different English cases where adjournments were sought. In this case his client lacked cognitive ability to give instructions. 9. This lack of a cognitive ability was said to be significant because if the appeal is dismissed, it will have a significant effect on the professional and personal life of the appellant. He would never be able to work in financial services again. Any such finding might also affect his ability to raise funds either for any other services future venture or for his personal needs. Given the serious nature of any findings against the appellant, his client had a right under Article 6 of the European Convention of Human Rights to be present in court and to follow what was happening. 10. Advocate Sinel also criticised the adequacy of the reasons filed by the respondent and indicated that one of the issues he wished to explore with his client was whether to make an application for better reasons; his client might also wish to make an application for specific discover, or to file further affidavit evidence. Those decisions could not be made until the affidavit of Lord Eatwell had been received. Now that the affidavit had been received, Advocate Sinel could not take instructions on the affidavit because of the appellant's health. 11. He also reminded me of the serious nature of the criticisms of the

appellant in the proposed public statement. 12. The affidavit of Lord Eatwell also gave rise to new issues in relation to the ANLA calculations of the financial services business and a particular company which I will refer to as "H" which issues Advocate Sinel stated he could not address without input from his client. 13. Advocate Sinel also argued that every appeal case was fact specific which is why in this case the hearing had been set down for three days. It was therefore a hearing far removed from the standard administrative appeal. He therefore sought to distinguish the observations found in paragraph 54 of *Volaw & Corporate Services & Anor v Controller of Taxes*

[2013] 2 JLR 499 referred to in my previous judgment, because every case was different.

Ultimately, in view of the serious criticisms of the appellant what was required here was effectively a rehearing. He also drew to my attention the fact that in England a specific trial tribunal have been established where appeals in a decision of the Financial Services Authority were reheard by a tribunal. 14. His client was serious about the appeal having engaged and produced his affidavit and having paid fees and costs. 15. Finally Advocate Sinel was personally concerned about his own position and whether he would be acting unethically including in breach of the English bar, code of conduct if he proceeded when his client could not give him instructions. He stated that he could not go any further and it was not appropriate to require him to act without instructions. 16. Advocate Lacey in response was critical of how late in the day both adjournment applications were brought. The lateness of the application was therefore an attempt to present the respondent with a *fait accompli* which was not the appropriate way to proceed. Any problem in terms of not being able to proceed should have been raised much earlier and as soon as possible and should not have been left as late as the present application. 17. She expressed real surprise that no draft skeleton or outline submissions had been produced. She also repeated the submissions made in the course of the previous hearing that she felt that what was required largely fell on Advocate Sinel rather than on the appellant. Advocate Sinel had his instructions to appeal and had received major input by reference to the appellant's substantive affidavit. She reminded me that the appellant had also addressed the respondent at length before the Board's decision and had answered all questions put to him as well as being taken through the proposed public statement on a line by line basis. All this was recorded in a transcript available to Advocate Sinel. The public statement had also had been altered and modified in light of the appellant's submissions to the Board. 18. In relation to the suggestion that there might be further applications for reasons, for specific discovery or to file further evidence, she pointed out this was the first time any such suggestion had been raised. Since 11 th May, 2016, the parties had been proceeding on the assumption that all that was required subsequent to the respondent filing its affidavit in reply was the preparing of trial bundles and skeleton arguments. There had been absolutely no intimation of any further applications being required, notwithstanding that Advocate Sinel had come back on record in July of this year. 19. Advocate Sinel had failed to identify what was needed to respond to Lord Eatwell's affidavit, what further documents might be needed or why further evidence was required. Such matters were for

him to analyse. 20. In relation to the Article 6 point, Advocate Lacey argued that the appellant had had a full hearing before the Board and therefore his presence was not necessary at the appeal. 21. The appeal was also not a complete rehearing because the Royal Court could only intervene if it found that the respondent's decision was unreasonable i.e. the appeal was therefore concerned with errors of law, failing to have regard to relevant information or taking into account irrelevant information or reaching a decision that was perverse. 22. In respect of the appellant's inability to attend trial for the whole of a day, no approach had been made to ask for alternative arrangements or to suggest how he could attend. The Court would have been sympathetic had such an approach had been made in good time. It was also not suggested that the appellant could not travel from the medical evidence provided and in any event the appellant had attended Jersey to prepare his affidavit. 23. Advocate Lacey also reminded me of her concern about delay. Decision 24. Advocate Sinel in his bundle for this application had included the decision of *Cummins v Howlands (Furniture) Limited*

[2014] (2) JLR Note 18 which sets out the factors whether or not to grant adjournments of a trial which states as follows:- "Civil Procedure-adjournment-factors to be considered When considering whether to grant an adjournment of a trial, the following matters should be taken into account: the importance of the proceedings and their likely adverse consequences to the party seeking the adjournment; the risk that that party might be prejudiced in his conduct of the proceedings if the adjournment is refused; the risk of prejudice to the other party if the adjournment is granted; the convenience of the court; the interests of justice generally in the efficient dispatch of court business; the desirability of not delaying future litigants by adjourning early and thus leaving the court empty; and the extent to which the party seeking the adjournment has been responsible for creating the difficulty which has led to the application (*T. S. Engr. Ltd. v. Bisson*, 1996 JLR N-3, applied; *States Greffier v. Les Pas Holdings Ltd.*, 1998 JLR N-3, applied; *Mitchell v. News Group Newspapers Ltd.*,

[2014] 1 WLR 795 , not followed; *Denton v. T. H. White Ltd.*,

[2014] EWCA Civ 906 , not followed). In exercising its discretion, the court should have regard to the conduct expected of parties in litigation, e.g. that it is the plaintiff's obligation to take the necessary steps to bring his case to trial (to the extent that the Civil Procedure Rules reverse that responsibility, they do not provide valuable guidance in Jersey) and that the defendant is obliged to comply with case management directions and not to waste time with procedural games (*In re Esteem Settlement*, 2000 JLR N-41, applied; *Viera v. Kordas*, 2014 (1) JLR N [15], referred to)." 25. In relation to the application, there is clearly a risk of prejudice to the respondent if there is any further delay in conclusion of this appeal. Any adjournment is also not convenient to the court or the efficient dispatch of court business because of the lateness of the application. In this case the court will be left empty. The appellant is also responsible for the lateness of the application in not having raised the medical problems he was suffering as soon as possible and not having provided adequate

medical evidence in respect of the previous application. 26. Against that, if an adjournment is refused and the appeal dismissed as a consequence because the appellant could not appear that would have serious consequences for the appellant. In this case the relevant medical evidence before me is that of Dr Powell who has since the last adjournment application met the appellant and has reassessed him. It is in light of this reassessment that he has given his opinion that the appellant at present is unable to give instructions in complex legal matters. It is also his opinion that the appellant could not attend a hearing for a full day given his medical condition. 27. The view I reached, not without hesitation, is that because of serious nature of the criticisms made against the appellant that I had to proceed on the assumption that the appellant has a right to be present at the final hearing. This is because while the appellant will not be giving evidence, the Royal Court, if it were minded to reject the appeal, could well be making findings adverse to the appellant. These would affect his professional life and could affect his private life for the reasons given by Advocate Sinel. In the short time in which I had to consider the adjournment application which had to be decided, my limited reading in relation to the right to be present at a civil trial suggested that, where significant findings might be made against a party which could affect his personal or professional reputation, he would ordinarily have a right to attend. In particular, I refer to paragraph 4.6.28 of Human Rights Law and Practice whose general editors include Lord Lester Q. C. and Lord Pannick Q. C. who are extremely experienced and well known practitioners in the field of Human Rights. I therefore concluded I had to proceed on the assumption that, if I required the trial to proceed in the absence of the appellant who is too ill based on the medical evidence to take part effectively, there was a significant risk of a breach of Article 6 occurring. It was for this reason and this reason alone that I granted the adjournment application. I was also not satisfied that the appellant's attendance before the Board was sufficient to address this point. The right granted by Article 6 is to attend before a court and attendance before an administrative body alone is not sufficient to discharge the right to be present under Article 6

- (see 4.6.23 of Human Rights Law and Practice). 28. It therefore follows that I was not satisfied with the other arguments advanced by Advocate Sinel for the following

reasons.

29. Firstly, this is not a full blown trial and any attempt to suggest it is by saying that every case is fact specific was not a basis to grant an adjournment. 30. Secondly I was not impressed with the suggestion that further applications might be made at this stage either for specific discovery or for better reasons or to file further affidavit evidence. My decision in relation to discovery in this matter was made on 23 rd October, 2014, the judgment of the Royal Court dismissing the appeal is dated 23 rd January, 2015, with the Court of Appeal refusing leave to appeal by its judgment dated 11 th March, 2015. The appellant has therefore had eighteen months either to make applications for specific discovery or for better reasons. Yet, the appellant has failed to do so. 31. Thirdly the appellant has at no time suggested or intimated

that any such applications might be made. It has allowed the Court and the respondent to proceed on the assumption that the only other steps required after the filing of an affidavit in reply were the exchange of skeleton arguments and production of trial bundles. There was no indication that neither the appellant or Advocate Sinel were reserving their position until receipt of the affidavit of Lord Eatwell to issue other applications. 32. Fourthly, I remain of the view that the primary responsibility for progressing the case forward at this stage remains with Advocate Sinel rather than the appellant. The appellant has given his general instructions namely to proceed with an appeal. The affidavit of Mrs W has confirmed this instruction. The appellant has also produced a lengthy affidavit. While Advocate Sinel is under a duty to advise his client, the principal advice to be given concerns an update on the prospects of success. In relation to whether or not to make any further procedural applications to apply for cross-examination, the analysis to be carried out is that of Advocate Sinel. His responsibility to his client is to explain the risks of pursuing one option over another. 33. Accordingly, while I granted the adjournment, I did so on certain terms. In respect of those terms, I make the following observations. Before doing so I also wish to record that had the appellant not paid the costs of the respondent, I would have also ordered such costs to be paid as a price for granting the adjournment. What payment of these costs however does indicate is that the appellant is able to give some instructions, because ultimately he must have authorised the payment of the respondent's costs as well as payment of fees to Advocate Sinel. The appellant must also have authorised the observations contained in paragraph 3 of Mrs W's affidavit which I have set out above. I refer to this expressly because these observations make it clear that the appellant wants to proceed to a resolution of the appeal and to a final hearing. The terms I ordered to be imposed took this desire into account. 34. The first requirement I included was that any applications for specific discovery or for better reasons or to file any further affidavit evidence had to be issued in the sense of a date fix appointment had to take place before close of business Friday, 28 th October, 2016. Such applications are primarily matters for Advocate Sinel based on my observations of his role and the extent of his knowledge set out in my previous judgment. The role of his client at this point is whether or not he wishes the application to be made; the principal consequence for the client and his risk is primarily one of costs if the application is unsuccessful. I accept there may be some limited factual questions Advocate Sinel might want to ask in relation to whether or not to make such an application, but I remain of the view that any such questions will relate to specific facts only given the knowledge Advocate Sinel should have of the case at this stage. Accordingly, I ordered that, if no applications were issued (including a date fix hearing taking place) within the time limit I had stipulated, then the appellant would not be permitted to make any further applications after the date specified in my order. 35. In relation to the preparation of trial bundles, I gave the appellant until 11 th November, 2016, to agree and prepare trial bundles. Ultimately, this is an administrative task which falls on Advocate Sinel and his firm. It is not a task as far as I am aware that requires any input from the client. It is really a matter between counsel for the parties to the dispute to ensure that all relevant evidence and authorities are before the Court in a form that is manageable for all parties and the Court

when the matter comes to a hearing. If trial bundles are not prepared within the time allowed I gave the respondent express permission to apply to strike out the appeal. 36. Finally, in terms of skeleton arguments I ordered these to be exchanged by close of business Friday, 2 nd December, 2016. If the appellant was not ready to exchange by this time then the appeal, absent any other order in the interim, would be struck out automatically without further order. I made this order for a number of

reasons.

Firstly, as set out above and in my last judgment, I consider that the primary task of producing a skeleton falls upon the advocate rather than on the client. I accept a client may wish to approve a skeleton and there may be certain factual issues set out in the skeleton that an advocate would wish to reconfirm with a client. However, the primary burden still falls on the advocate rather than the client whose role is limited. Secondly, the appellant through Mrs W's affidavit has made it clear that he wants to progress this matter, either by the appeal taking place irrespective of his medical condition or he will withdraw his appeal. The order I have made in relation to skeleton arguments is consistent with this approach. Thirdly, this appeal has not progressed in accordance with the timeframe normally expected or anything like it. The requirement of skeletons to be exchanged, failing which the appeal will be struck out, therefore imposes a discipline on the parties to allow the appeal to progress to a conclusion. The filing of skeletons will also allow the trial judge at a pre-trial review to determine whether or not to permit cross-examination, because the skeleton argument should identify particular areas of the evidence where it is said such cross-examination is required. 37. As far as costs are concerned, while the appellant had successfully obtained an adjournment, given that the appellant was seeking the indulgence of the court at the last minute I ordered the appellant to bear his own costs. As far as the respondent's costs were concerned, the respondent resisted the application for entirely understandable reasons. In doing so however as a public body it did not act in bad faith or unreasonably, in fact quite the opposite. Accordingly I was satisfied that the just order as far as the respondent was concerned was the respondent's costs in the appeal i.e. it would recover its costs if it successfully resisted the appeal. 38. Finally, I made it clear that at the pre-trial review hearing the parties should explore with the trial judge what practical arrangements might be necessary to enable the appellant to attend trial. Authorities W-v-JFSC

[2016] JRC 184 . Volaw & Corporate Services & Anor v Controller of Taxes

[2013] 2 JLR 499 . Cummins v Howlands (Furniture) Limited

[2014] (2) JLR Note 18. Human Rights (Jersey) Law 2000. Page Last Updated: 02 Nov 2016 BAILII:
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