

JERSEY / JUDGMENT

W -v- JFSC [2017] JRC 040A (07 March 2017)

[2017] JRC 040A

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judgment

the commissioner: 1. This judgment represents my decision on a number of matters which were raised at the pre-trial review ("PTR") held on 23 rd February, 2017.

Background

2. The background to these proceedings has been set out in a number of previous judgments of the Master, this Court and the Court of Appeal. For convenience, reference can be made to the recent judgment of the Master, W-v-JFSC

[2016] JRC 231A ("the December judgment") at paras 3 - 24. It is not necessary to repeat these for the purposes of this judgment. 3. In the December judgment, the Master made decisions in three separate areas: (i) He directed the Respondent to file an affidavit by 27 th January, 2017, giving further and better particulars of the reasons for its decision as set out in detail in para 121 of the December judgment. (ii) He granted the Appellant leave to amend the grounds of appeal in certain respects. (iii) He rejected the Appellant's application for wide ranging discovery but did agree to order discovery of communications between the Respondent and the Trust Company prior to the commencement of the investigation and which arose out of supervisory visits carried out in the ordinary course of the Respondent's supervisory role. 4. The Chairman of the Respondent, Lord Eatwell filed an affidavit dated 2 nd February, 2017, in response to the order referred to at (i) of the preceding paragraph. 5. Although no summons seeking any order was filed in anticipation of the PTR, Advocate Sinel supplied a draft order shortly before the hearing which set out what he was seeking. That document read as follows: "1. In consequence of the Respondent's failure to comply with paragraph 1 of the Act of Court dated 19 December 2016 ("Act of Court"), the Respondent is to comply with the Act of Court and in any event is to provide reasons for its decision ("Decision") to issue a public statement in the terms that it did in respect of the Appellant; 2. The Respondent provide a detailed, composite stand-alone statement setting out: (i) What is alleged to have been done wrong by the Appellant either by omission and/or by way of commission and when and how; (ii) How the Appellant's conduct lacked competence and integrity; and (iii) The basis of the findings of fact which it has made relative to the Appellant and which it relies upon; 3. The Respondent comply with Royal Court Rule 15/3(1); 4. The Respondent provide a list

verified by affidavit of all the documentation and testimonies which it has relied upon in making its Decision including the correspondence with [Ms P] referred to in Advocate Lacey's letter dated 22 February 2017; 5. Pursuant to Practice Direction RC 05/25 leave be granted to cross-examine Mr John Averty, Lord Eatwell and Mr Paul Le Marrec on the contents of their affidavits." 6. I shall consider the topics raised by the draft directions and further matters raised by Advocate Sinel at the hearing in turn. Draft Directions 1 - 3; further reasons 7. Advocate Sinel submits that Lord Eatwell's affidavit does not comply fully with the Master's order. The Appellant was entitled to know the reasons for the decision and Lord Eatwell's affidavit still did not give him the reasons to which he was entitled. The Court should therefore make orders in terms of draft directions 1 - 3. 8. Having considered Advocate Sinel's oral submissions to me in support of this request, I do not think it right to make any order for the production of further

reasons.

I would summarise my reasons for so concluding as follows: (i) The Master gave detailed directions at para 121 of the December judgment as to the matters where further reasons were required. However, he emphasised (correctly) at para 114 that the Respondent was not being asked to come up with new reasons to support its decision. Thus he said at para 114:- "... I am not asking the respondent to formulate now any additional reasons or conclusions above and beyond those already reached. How far the respondent is able to address the matters where I have found that reasons need to be explained and the facts relied upon set out is a matter for the respondent and its advocates. To the extent that the respondent at this point in time is unable to provide any further reasons, then this should be made clear in its affidavit, including setting out why it is unable to expand any further at this point in time. It will then be for the Royal Court at the substantive hearing of the appeal to evaluate the response contained in the affidavit." (ii) It is clear that the Respondent (through Lord Eatwell) has understood and accepted this point. Thus Lord Eatwell emphasised in the affidavit that, although the final report on the Trust Company ("the Trust Company Report") and the Individual Criticism Paper ("ICP") concerning the Appellant were fully in the minds of the Board at the time as were the written and oral submissions made by or on behalf of the Appellant, that was two and a half years ago and the Board's recollection now of its decision making process would inevitably diminish. He emphasised at para 6 that he was not seeking to give any new or supplemental reasons. This point was repeated at para 23 where, with reference to the public statement, he said as follows: "... The public statement does not particularise breaches of particular sub-sections of the TCB Code by [the Trust Company] and does not seek to link them to each finding against [W] personally, beyond the breach of all seven fundamental principles by [the Trust Company] which was relied upon generally. At the time it took its decision, the Board did not conduct an exercise in relating each finding that it made against [W] personally to an underlying breach by [the Trust Company] of a particular section of one of the seven fundamental principles. Given that it did not conduct this exercise at the time it took its decision, to do so now would be artificial and inappropriate and would mean entering into an exercise of seeking to construct further, fresh and additional

reasons and attributing them to the Board retrospectively." (iii) The affidavit goes on to address each of the sub-paragraphs of paragraph 121 of the December judgment in turn and to give any clarification of reasons that the Respondent felt able to give. Advocate Sinel was very critical of the affidavit and submitted that in a number of respects, it gave no further information about the Respondent's reasons than had been given previously. (iv) I do not accept that the Respondent has failed to comply with the Master's order. The Master was very clear that he did not wish the Respondent to come up with further and better reasoning after the event and the affidavit of Lord Eatwell complies faithfully with that guidance. To the extent that Advocate Sinel considers the reasons of the Respondent to remain deficient, he will be able to develop these points on the hearing of the appeal; and if the Court agrees with him, this will be a matter for the Court to take into account when deciding whether to allow the appeal. In my judgment, the matter of reasons has been taken as far as it can. As Advocate Lacey said 'it is what it is' and the appeal will be considered on the basis of the reasons so far put forward by the Respondent with such consequences as may follow if the Court agrees that the reasons are inadequate. 9. For these reasons, I decline to make any order along the lines of draft directions 1

- 3. Draft Direction 4 - list of documentation and testimonies relied upon by the Respondent 10. I have to say that I originally understood draft direction 4 to be seeking disclosure of the documentation and testimonies referred to. I would not have been willing to make an order for such disclosure. The Appellant has made a number of applications for wide ranging discovery which has been rejected up to the level of the Court of Appeal. A more limited application was made before the Master but, for the most part, rejected by him in the December judgment. No appeal was brought against that judgment and I would not have been willing to reconsider the matter at such short notice (and without a summons or skeleton argument) as part of a PTR. However, Advocate Sinel emphasised that all he was seeking was a list of such documents and testimonies, not the documents or testimonies themselves. 11. Advocate Lacey submitted that it was already clear what the Board of the Respondent had relied upon. A full list of documents had been annexed to one of the affidavits of Mr John Averty, the Deputy Chairman, and Lord Eatwell's latest affidavit had emphasised that the Board had been relying upon the Trust Company Report, the ICP and the responses of the Appellant. 12. In my judgment it is not necessary and would not be proportionate to require the Respondent at this late state to prepare the list required by Advocate Sinel and I therefore decline to make an order in terms of the first part of draft direction 4. 13. The second part of draft direction 4 refers to correspondence with Ms P as referred to in Advocate Lacey's letter of 22 nd February, 2017. This relates to a debenture. Advocate Sinel submits that this is a critical document because it shows that there was security for certain liabilities referred to in the documentation whereas (he submitted) the executive of the Respondent had questioned various witnesses on the basis that the liabilities were unsecured and then relied on the responses in preparing its reports. It was the Appellant's case that the Respondent had been in possession of the debenture but had not put it in the relevant information packs whereas the Respondent denied that it had received the debenture. On 22 nd February, 2017, Advocate Lacey had written to say that a

further search had located the debenture as one of numerous attachments to an email dated 11 th July, 2012, from Ms P of the Trust Company to the Respondent's investigating officers. It followed that the Respondent had been in possession of the debenture at least from that date. 14. Given this late development and given the importance which the Appellant places on the debenture, I think it reasonable and proportionate to order that the Respondent file an affidavit disclosing the email from Ms P referred to in Advocate Lacey's letter together with the attachments. 15. As the nature of the attachments was not available at the hearing of the PTR, I also grant the Respondent liberty to apply in the event it wishes not to disclose any of the attachments on the grounds of confidentiality or otherwise. Disclosure of the email and attachments must be made within 14 days of today's date, but if the Respondent seeks to withhold any of the attachments and applies on or within the 14 day period, there will be a stay on the order to disclose that attachment until the Court has ruled on the matter. Draft direction 5 - cross-examination 16. Advocate Sinel applied for leave to cross-examine Mr John Averty and Lord Eatwell on the contents of their affidavits. He did not proceed with the application to cross-examine Mr Paul Le Marrec. 17. Advocate Sinel emphasised that the consequences for the Appellant resulting from the decision of the Respondent were extremely serious. He would be publicly branded as someone who was dishonest ("most serious lack of integrity") and incompetent ("incompetence was of the most serious kind"). The decision effectively banned him from performing any role in the finance sector. Given these consequences, he was entitled to cross-examine the representatives of the decision maker (Mr Averty and Lord Eatwell) in order to expose weaknesses in their fact finding and reasoning. Their affidavits were inconsistent with the facts (e.g. the 'one minute meeting' of the Board) and he also wished to cross-examine them about Mr A's allegations of how the Respondent had treated him. This all went to the integrity of the members of the Board of the Respondent. 18. In *W v Jersey Financial Services Commission*

[2015] JRC 017 Clyde-Smith, Commissioner, having referred to the well-known observation of the Court of Appeal in *Volaw Trust and Corporate Services Limited v Comptroller of Taxes*

[2013] (2) JLR 499 at para 54 about the Court not being tempted down the slippery path of conducting a sort of mini trial, summarised the position at para 43(iv) by saying: "The issue for the Court in the substantive appeal will be whether the subject decision was reasonable in all the circumstances of the case. The Court must be careful, therefore, not to be tempted down the slippery path of allowing W's appeal to be turned into a quasi criminal trial with the Commission in the guise of prosecutor." 19. This observation was specifically endorsed by the Court of Appeal when hearing the application for leave to appeal from Commissioner Clyde-Smith's decision, *W-v-JFSC*

[2015] JCA 060 at para 24 when it said: "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." 20. In *Volaw*, the Court of Appeal also emphasised

that the procedure in relation to administrative appeals is akin to that for judicial review. Thus at para 54 the Court said inter alia: "... We recommend that the court should, absent truly exceptional circumstances, discourage any attempt for the appeal to be turned into a trial, with full deployment of lay or expert witnesses, whether testifying orally or on affidavit." 21. And later in the same paragraph: "... 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." 22. In relation to judicial review, it is well established that only in very exceptional cases is cross-examination of affidavit evidence allowed. Thus in *Bubb v Wandsworth LBC*

- [2011] EWCA Civ 1285 , Lord Neuberger MR at paras 24 and 25 said as follows: "24. I accept that it is, as a matter of principle, open to a judge, hearing a judicial review application, to permit one or more parties to adduce oral evidence. That was made clear by Lord Diplock in his speech in *O'Reilly -v- Mackman*
- [1983] 2 AC 237 , 282H to 283A. However, for reasons of both principle and practice, such a course should only be taken in the most exceptional case. As its name suggests, judicial review involves a judge reviewing a decision, not making it; if the judge receives evidence so as to make fresh findings of fact for himself, he is likely to make his own decision rather than to review the original decision. Also, if judges regularly allow witnesses and cross examination in judicial review cases, the court time and legal costs involved in such cases will spiral. 25. In the overwhelming majority of judicial review cases, even where the issue is whether a finding of fact should be quashed on one or more of the grounds identified by Lord Bingham, there should be no question of live witnesses...." 23. Advocate Sinel referred to the case of *R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs*
- [2012] EWHC 2115 where the judge directed cross-examination of two witnesses whose account of what had happened at a meeting was disputed. In my judgment that was simply an example of one of the exceptional cases where cross-examination may be allowed. 24. In my judgment, this is not a case where cross-examination is essential in order to allow the Court to deal with the matter fairly and justly. I do not see anything exceptional about it, albeit that it is clearly a complicated case with serious consequences for the Appellant. Advocate Sinel did not identify any limited or specific aspect upon which he wished to cross-examine. In essence he asserted that he wished to cross-examine in order to expose what the Appellant saw as the weaknesses in the reasoning of the decision and the procedure which the Respondent followed. He wished for example to cross-examine about the inconsistency between the existence of the 'one minute decision' and what was said in the affidavits about the care and time which the Board of the Respondent had devoted to the decision. 25. In my judgment, such matters can be dealt with perfectly satisfactorily by way of submission, as is normally the case. I see nothing exceptional about this case and I bear very much in mind the warning of the Court of Appeal in both *Volaw* and the present case about the dangers of allowing an administrative appeal to turn into a form of mini

trial. I therefore reject the application for leave to cross-examine Mr Averty and Lord Eatwell. Application to file affidavits by the Appellant and Mr A 26. At para 118 of the December judgment, the Master gave leave to the Appellant to file an affidavit in response to any reasons provided in the Respondent's further affidavit concerning its decision to issue the public statement. However he did not give leave to the Appellant to file a further affidavit in response generally to that to be filed by the Respondent. He ordered that leave would be required for such an affidavit in response. 27. Although Advocate Sinel did not refer to any such application in the draft directions supplied before the PTR, he did enclose a draft further affidavit from the Appellant which went beyond responding on the topic of the public statement and confirmed at the PTR that he wished to apply for leave to file that affidavit. 28. I do not think that the Appellant's affidavit takes matters very much further but in all the circumstances I give leave for him to file an affidavit within 7 days in the form of the draft produced to me and I give leave to the Respondent, if it so wishes, to file an affidavit in response within 14 days of the filing of the Appellant's affidavit. Such affidavit must of course be limited to matters raised by the Appellant in his affidavit. 29. In like manner, Advocate Sinel applied at the hearing for leave to file an affidavit by Mr A. Mr A was a fellow director of the Trust Company and was also subject to directions and a public statement on the part of the Respondent. 30. His affidavit falls into two parts. The first part (paras 1 - 17) deal with points which he made in respect of the Trust Company Report. He believes that this shows that the executive of the Respondent took no notice of points made to it. The remainder of his affidavit deals with criticisms of the way in which the Respondent dealt with him in relation to the investigation of his own conduct and the preparation of the ICP and eventual decision in relation to him. 31. Advocate Sinel explained the lateness of this affidavit by saying that until recently, Mr A had not been willing to sign an affidavit, (although parts of it had been drafted a long time ago), because he understood that doing so might amount to a breach of Article 37 of the Financial Services (Jersey) Law 1998 . 32. Given the fact that Lord Eatwell's latest affidavit has made it clear that the Respondent was relying very substantially on the Trust Company Report, I think it is only fair to the Appellant that those parts of Mr A's affidavit which deal with that report should be admitted. 33. However, I am not willing to give leave to admit the remainder of the affidavit. Advocate Sinel argued that this was material evidence in that it showed the Respondent treating Mr A unfairly in very much the same manner as the Appellant contended it had treated him. It was therefore a form of similar fact evidence which would assist the Appellant's case. 34. I do not consider that it is proportionate or necessary in the interests of fairness to admit Mr A's evidence on this second aspect. The Court must judge the fairness of the procedure followed by the Respondent and the reasonableness of its decision by reference to what it did in connection with the Appellant. It is not directly relevant whether it reached a reasonable or fair decision or followed a fair process in relation to a different person. For example, one of the points Advocate Sinel wishes to make is that, having taken a long time to prepare its own material, the Respondent gave the Appellant an unduly short period to comment on the draft documents produced by the Respondent, whether the Trust Company Report or the ICP.

That will be a matter for the Court to assess by reference to facts of the Appellant's case. As I understand it, there is no dispute as to when it was supplied to him and the period by which he was asked to respond. The Court can reach a view on that. It adds nothing to be told that Mr A also feels that in his case he was given insufficient time. 35. It would also be the case that, if Mr A were allowed to adduce evidence as to the facts and procedure of his own case, this would widen yet further the area of investigation. The Respondent would no doubt wish to file a detailed affidavit in response, with possibly an affidavit in reply from Mr A; and all this in respect of a collateral matter. 36. For these reasons, I give leave for Mr A to file an affidavit in the form of paragraphs 1 - 17 of the affidavit before me provided it is filed within 7 days, but I refuse leave for him to file an affidavit dealing with any additional matter. I give leave for the Respondent to file an affidavit in reply (if it wishes) within 14 days of the filing of Mr A's affidavit. Other matters 37. I gave directions for the filing of amended skeleton arguments in the light of the further affidavits and material prepared since they were drafted. I also directed that the parties must produce an agreed chronology for the Court. 38. I also pointed out that it was desirable that the Court should have the opportunity of pre-reading all that the parties suggest should be pre-read so as to ensure that the four days allocated to the appeal are sufficient. I was given a reading list by Advocate Sinel for the PTR. Fortunately I was not sitting the day before the PTR. However, despite spending the whole of that day and a few hours on the day of the PTR attempting to read the material listed by Advocate Sinel, I only had time to skim read most of the documents and had no time to look at the authorities on the list at all. Both parties agreed that the Court hearing the appeal would need to spend some three to five days reading the material prior to the hearing. It is unfortunate that the Judicial Secretary was not alerted to this by either party as administrative arrangements need to be made to ensure that the members of the Court have such time available. I have since alerted her and she will do her best to accommodate the need for pre-reading time although it is not yet assured. I direct that the parties submit an agreed essential reading list at the same time as the Court bundles are filed, together with an agreed estimate of the time required to read the material on that list. Authorities W-v-JFSC

[2016] JRC 231A . W v Jersey Financial Services Commission

[2015] JRC 017 . Volaw Trust and Corporate Services Limited v Comptroller of Taxes

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

[2015] JCA 060 . Bubbs v Wandsworth LBC

[2011] EWCA Civ 1285 . R (on the application of Bancoult) v Secretary of State for Foreign and Commonwealth Affairs

[2012] EWHC 2115 . Financial Services (Jersey) Law 1998. Page Last Updated: 16 Mar 2017 BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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