

Katherine Louise Arthur v HM Attorney General

Jurisdiction:	Jersey
Judge:	J. A. Clyde-Smith, Jurats Fisher, Sparrow, Clyde-Smith, Commr.
Judgment Date:	01 August 2016
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Text

[2016] JRC 132

ROYAL COURT

(Samedi)

Before:

J. A. Clyde-Smith, Esq., Commissioner, and Jurats Fisher and Sparrow

In the Matter of the Proceeds of Crime (Jersey) Law 1999

And in the Matter of a Saisie Judiciaire in Respect of the Ralisable Property of Richard David Arthur

Between
Katherine Louise Arthur
Applicant
and
Her Majesty's Attorney General

First Respondent

and

The Viscount
Second Respondent

and

Richard David Arthur
Third Respondent

and

Mrs Maureen Brunker
Fourth Respondent

and

Faircliff Property Limited
Fifth Respondent

Advocate S. B. Wauchope for the Applicant.

A. J. Belhomme, **Esq., Crown Advocate the Attorney General.**

The Deputy Viscount and the Viscount appeared in person.

Advocate N. Miere for the Third Respondent.

Advocate J. M. Renouf for the Fourth Respondent.

Advocate M. P. Boothman for the Fifth Respondent.

Authorities

Proceeds of Crime (Jersey) Law 1999.

Jersey Evening Post Limited v Al Thani and four others [\[2002\] JLR 542](#).

In re Charles Barnett [\[2014\] JRC 141A](#).

[Buttle v Saunders](#) [1952] All ER 193.

Cowan v Scargill [1984] 2 All ER 1150.

Property — saisie judiciaire in respect of realisable property of Richard David Arthur.

THE COMMISSIONER:

1 On 20th June, 2016, the Court sat to consider an application by the applicant ("Mrs Arthur") to vary the terms of the *saisie judiciaire* granted by the Court on 20th May, 2015, under Article 16 of the Proceeds of Crime (Jersey) Law 1999 ("the Proceeds of Crime Law") over the realisable property of her husband, the third respondent ("Mr Arthur").

2 The order of the Court in so far as it is relevant provided as follows:-

"1 A saisie judiciaire be granted in respect of all the realisable property held by Richard David Arthur (whether movable or immovable, vested or contingent) which without prejudice to the generality of the foregoing, includes:

(a) A freehold property at Old Cadet House, Mont Mallet, St Martin JE3 6DS;

...

3 The Viscount be authorised to take possession of and, in accordance with the Court's directions, to manage or otherwise deal with the said realisable property;

4 the Viscount be permitted to obtain such professional advice and to employ such services as are reasonably necessary to comply with the instant Order and to deal with all matters arising in relation to it and to meet and discharge all disbursements, costs, fees and charges so arising from the said realisable property."

3 On 11th August, 2015, the Court made the following further orders:-

"Whereas ...

And whereas the said realisable property included a freehold property known as Old Cadet House, Mont Mallet, St Martin JE3 6DS .

And whereas paragraph 3 of the saisie judiciaire provided that the Viscount be authorised to take possession of and, in accordance with the Court's directions, manage or otherwise deal with the said realisable property .

Now this day, the Court, pursuant to the said paragraph 3 of the saisie judiciaire, ordered:-

1. that the saisie judiciaire be varied to permit the Viscount to sell and/or market the realisable property known as Old Cadet House ("the Property"), Mont Mallet, St Martin JE5 6DS, and that the

Viscount be permitted to negotiate a reasonable sum for any estate agent's commission and professional and conveyancing services;

2. that the Viscount shall take account of (but not be bound by) the views of Katherine Arthur as to the choice of estate agent(s) to be used to market the Property and as to whether any offers received in respect of the Property should be accepted;

3. that the Viscount inform the said Katherine Arthur forthwith of any offers received by the Viscount or the estate agent(s) for the purchase of the Property;

4. that the Viscount be permitted to sell the Property and do all things necessary to give effect to the sale of the Property provided always that the property is sold for an amount equal to or greater than the sum of £3,050,000, (three million and fifty thousand pounds Sterling);

5. that the net proceeds of sale of the Property, which by virtue of the saisie judiciaire vest in the Viscount as soon as the Property is sold, shall be paid by the purchaser or the purchaser's lawyer directly to the Viscount;

6. that from the net proceeds of sale of the Property the Viscount shall pay the said Katherine Arthur the sum of £30,000 forthwith;

7. ...

8. that the said Katherine Arthur shall have liberty to apply with respect to the distribution of the net proceeds of sale of the Property.”

- 4 Pursuant to this order, the Viscount obtained advice from two firms of estate agents as to the value and potential sale price of Old Cadet House (which we will now refer to as “the property”) and in February, 2016 proceeded to market the property through two firms of estate agents. An offer to purchase the property was received in April 2016 and having been increased slightly, was accepted by the Viscount in the sum of £3,415,000. The property was then removed from the market and it was anticipated that it would be sold in late June or early July.
- 5 Following the acceptance of that offer, a further offer was received to purchase the property for £3,600,000. It was a cash offer, but subject to survey and title. The purchaser was prepared to enter into a pre-sale agreement and make a non-refundable deposit of 10%.
- 6 The Viscount considered this further offer, but decided it would be unreasonable to renege on the offer that had already been accepted. Quoting from the Viscount's letter of 5th May, 2016:-

"I can assure you that the offer which was passed to us by Gaudin & Co on 3 May 2016 has been considered very carefully. After lengthy discussion, however, we have concluded that we will not proceed with that new offer for the following reasons:

1. As you say, we have already accepted, some weeks ago, an offer from another purchaser. We believe that the purchaser is fully committed to the purchase and has increased his offer on more than one occasion. Acting in reliance on our acceptance of his offer, the purchaser has expended cost and effort in carrying out appropriate investigations into the property and is fully aware of the issues that relate to it. We consider that it would be neither reasonable nor ethical at this stage to withdraw from the transaction and allow that purchaser to be "gazumped" by a later, slightly higher bid. This would not be an appropriate course of action for the Viscount.

2. The property had already been removed from the market. While the new purchaser has indicated an offer which is notionally higher at this stage, we consider that once the purchaser carries out further detailed investigations into the property, there is every likelihood that they will make price reductions and that, ultimately, the price settled upon may very well turn out to be significantly less than is currently proposed."

- 7 Mrs Arthur sought a direction from the Court to the Viscount that there was no legal or moral impediment to her making appropriate inquiries of the further offer and that she should be directed to accept that offer if she considered it represented the best reasonably achievable price for the property. She also sought an increase in the amount payable to her out of the net proceeds of sale from £30,000 to £100,000.
- 8 There are three charges registered on the property totalling £1,176,000 in terms of capital (to which outstanding interest has to be added) but it can be seen that on the basis of the offers made there is a substantial equity. The difference between the two offers is £185,000.

In private

- 9 The person who had made the first offer initially attended the hearing with his estate agent. Advocate Wauchope, for Mrs Arthur, applied for the hearing to be in private.
- 10 The general principles of the Court sitting in private are set out in the case of *Jersey Evening Post Limited v Al Thani and four others* [\[2002\] JLR 542](#) and can be summarised as follows:-

(i) The power to hear proceedings in private derives from the Court's inherent jurisdiction;

- (ii) An in private order is only granted in exceptional circumstances;
- (iii) The burden lies with the party applying for the hearing to be in private to prove that this is the only way in which justice can be achieved;
- (iv) The question to be asked is whether the paramount objective of securing that justice be done would really be rendered doubtful if an in private order is not made;
- (v) The question turns on necessity not convenience; and
- (vi) Potential embarrassment or the preference of the parties is not a sufficient reason to justify a hearing in private.

- 11 Advocate Wauchope feared that if Mrs Arthur's application was heard in public, it was very likely to frustrate the order made by the Court on 11th August, 2015, and her application. It cannot, he said, assist the Viscount in the execution of her duty to obtain the best reasonably achievable price for the property if details of the offers that the Viscount has received, the identities of the potential purchasers and the valuations that the Viscount has obtained are discussed in open Court; in this case in the presence of one of the prospective purchasers.
- 12 Mrs Arthur's application was supported by the Viscount, Advocate Miere for Mr Arthur, Advocate Renouf for Mrs Maureen Bruncker (Mrs Arthur's mother and an unsecured creditor) and Advocate Boothman for Faircliff Property Limited (a secured creditor). Crown Advocate Belhomme rested on the wisdom of the Court but commented that the reasons put forward by Mrs Arthur were not particularly exceptional in his view.
- 13 The Court was involved in the process of giving directions to its own Chief Executive Officer, for the sale of the property in furtherance of the Viscount's duty to obtain the best price she reasonably could (see paragraph 7 of *In re Charles Barnett* [\[2014\] JRC 141A](#)). That process necessitates candid discussion with the Viscount and the convened parties as to the prospects of obtaining the best price, the valuations that have been received, and the offers that had been obtained. To do that in open Court and, as in this case, in the actual presence of one of the prospective purchasers, would be highly prejudicial to that objective. No vendor selling an asset into a market would volunteer to that market the advice it had received as to the value of the asset being sold, offers it had received and the price it might be minded to accept.
- 14 To obtain the best price was of importance, not only to the victims of the crimes alleged against Mr Arthur (for which he has not yet been tried) but also to Mrs Arthur and her children. Justice requires that the best price to be obtained and justice could not be secured by conducting the hearing in public.
- 15 For these reasons the Court granted Advocate Wauchope's application and ordered that

the hearing proceed in private, inviting the person who had made the first offer and his estate agent to leave the Court.

- 16 The point was made that the marketing of the property had already been influenced by the registration of the Act of 11th August, 2015, in the Public Registry by which the Viscount was given a minimum selling price for the property of £3,050,000.
- 17 It seems to this Court that in future directions given by the Court to the Viscount for the marketing and sale of any assets should be restricted to those parties properly interested therein.

Property vested in the Viscount

- 18 In Mrs Arthur's affidavit and in the various skeleton arguments it was acknowledged that the property had actually been purchased by Mr and Mrs Arthur jointly and for the survivor. The application for the *saisie judiciaire* had stated, in error, that Mr Arthur held the entirety of the freehold.
- 19 The Court had proceeded, therefore, on the basis that the whole of the title vested in the Viscount, who was then directed to sell, taking into account the views (only) of Mrs Arthur. Furthermore, Mrs Arthur had acceded to directions that allowed the Viscount to retain the whole of the proceeds of sale, only releasing £30,000 to her.
- 20 How this went unchallenged for so long is difficult to understand, although it would have come to light in due course when whoever purchases the property would undoubtedly require Mrs Arthur to be a party to the sale, so that the whole title would vest in the purchaser. Crown Advocate Belhomme agreed, as did all of the parties, that the only title which could vest in the Viscount pursuant to the *saisie judiciaire* was the title that Mr Arthur actually held, namely a joint interest.
- 21 The Viscount does not therefore hold the title to the whole property, but holds it jointly with Mrs Arthur. The marketing and sale of the property is something which they must undertake together, but it is for Mrs Arthur to decide what price she will accept for her joint interest and on the sale she will be entitled to one half of the net proceeds.
- 22 This entirely alters the balance of power, so to speak, between the Viscount and Mrs Arthur, although Advocate Wauchope rightly recognised that the property must be sold cooperatively without delay. Advocate Boothman made it abundantly clear that the *dégrèvement* proceedings commenced by his client company, which the *saisie judiciaire* had interrupted, would recommence if there was no sale by the end of August. His client company's patience was at an end. If Mrs Arthur did not cooperate with the Viscount in a sale, the only option open to the Viscount would be to initiate licitation proceedings and any

sale ordered by the Court pursuant to such proceedings would be conducted by way of public auction, which would not be in the interest of either party.

- 23 Crown Advocate Belhomme agreed to prepare an Act of Court correcting the errors contained in the previous Acts of Court in relation to the title that has actually vested in the Viscount, to be registered in the Public Registry, where the previous Acts had been registered.
- 24 This recognition of what property had actually vested in the Viscount made the directions sought by Mrs Arthur redundant and the Court did not therefore have to go on to determine whether the Viscount had been correct in considering it unreasonable and unethical to entertain the further higher offer; all offers had to be accepted by both the Viscount and Mrs Arthur.

- 25 In relation to the second offer that was received, the Viscount said this:-

“The obligation to accept a higher offer (“Gazumping”): The Viscount is a public official who regularly sells property in various roles. We are not akin to a trustee who, as a rule, operates privately and without recourse to the Court. If the Viscount were to be seen to be able to “gazump” it would make it very difficult for the Viscount to achieve the best price from future purchasers as there would be a severe adverse implication in the public perception of the integrity of the Viscount. Purchasers may not trust the Viscount to complete the transaction. As an officer of the Court, the Viscount must operate to high moral standards, even where she is not legally obliged to take any course of action.”

- 26 Shortly before the hearing and by analogy to the position of a trustee, the Court had drawn the parties' attention to the following two English cases:-

(i) In [*Buttle v Saunders*](#) [1952] All ER 193, the trustees had received a higher offer for a property just as the contract and counterpart were being engrossed. Indeed, the purchaser, a Mrs Simpson, had signed her part and one of the trustees had also signed. The trustees felt themselves to be in a position of great embarrassment and honour bound to proceed with the proposed sale to Mrs Simpson. No other motive appeared to have actuated them. Wynn-Parry J said this:-

“The first claim in the statement of claim is for a declaration that the trustees are not entitled to sell the premises except for the best price reasonably obtainable. ...

It has been argued on behalf of the trustees that they were justified in the circumstances in not pursuing the offer made by Canon Buttle and in deciding to go forward with the transaction with Mrs Simpson.
It is true that persons who are not in the position of trustees are entitled, if they so desire, to accept a lesser price than that which they might obtain

on the sale of property, and not infrequently a vendor, who has gone some lengths in negotiating with a prospective purchaser, decides to close the deal with that purchaser, **notwithstanding that he is presented with a higher offer**. It redounds to the credit of a man who acts like that in such circumstances. Trustees, however, are not vested with such complete freedom. They have an overriding duty to obtain the best price which they can for their beneficiaries. It would, however, be an unfortunate simplification of the problem if one were to take the view that the mere production of an increased offer at any stage, however late in the negotiations, should throw on the trustees a duty to accept the higher offer and resile from the existing offer. For myself, I think that trustees have such a discretion in the matter as will allow them to act with proper prudence. I can see no reason why trustees should not pray in aid the common-sense rule underlying the old proverb: 'A bird in the hand is worth two in the bush.' I can imagine cases where trustees could properly refuse a higher offer and proceed with a lower offer. Each case must, of necessity, depend on its own facts. In regard to the case now before me, my view is that the trustees and their solicitors acted on an incorrect principle. The only consideration which was present to their minds was that they had gone so far in the negotiations with Mrs Simpson that they could not properly, from the point of view of commercial morality, resile from those negotiations. That being so, they did not, to any extent, probe Canon Buttle's offer as, in my view, they should have done."

(ii) *Buttle* was cited in *Cowan v Scargill* [1984] 2 All ER 1150, which was concerned with restrictions on investment powers of a pension fund to accord with the Mineworkers' Union policy. Sir Robert Megarry V-C, said this:-

"This leads me to the second point, which is a corollary of the first. In considering what investments to make trustees must put on one side their own personal interests and views. Trustees may have strongly held social or political views. They may be firmly opposed to any investment in South Africa or other countries, or they may object to any form of investment in companies concerned with alcohol, tobacco, armaments or many other things. In the conduct of their own affairs, of course, they are free to abstain from making any such investments. Yet under a trust, if investments of this type would be more beneficial to the beneficiaries than other investments, the trustees must not refrain from making the investments by reasons of the views that they hold .

Trustees may even have to act dishonourably (though not illegally) if the interests of their beneficiaries require it. Thus where trustees for sale had struck a bargain for the sale of trust property but had not bound themselves by a legally enforceable contract, they were held to be under a duty to consider **and explore a better offer that they received, and not to carry through the bargain to which they felt in honour bound: see [Buttle v Saunders](#) [1950] 2 All ER 193.** In other words, the duty of

trustees to their beneficiaries may include a duty to ‘gazump’, however honourable the trustees. As Wynn-Parry J said (at 195), trustees ‘have an overriding duty to obtain the best price which they can for their beneficiaries’. In applying this to an Official Receiver, Templeman J said in [Re Wyvern Developments Ltd \[1974\] 2 All ER 535 at 544](#), [\[1974\] 1 WLR 1097 at 1106](#) that he –

‘must do his best by his creditors and contributories. He is in a fiduciary capacity and cannot make moral gestures, nor can the court authorise him to do so.’”

- 27 In the very short time available to the Viscount she expressed concern with her role being equated to that of a trustee, accountable to beneficiaries under the provisions of the [Trusts \(Jersey\) Law 1984](#) (“the Trusts Law”) and, for example, under a duty pursuant to Article 21 to preserve and enhance the trust property.
- 28 She rightly pointed out that her role is to manage and deal with the property vested in her in accordance with the directions of the Court. Article 16 provides:-

“16 Saisies judiciaires

(1) ...

(2) ...

(3) ...

(4) (a) all the realisable property held by the defendant in Jersey shall vest in the Viscount:

(b)

(c)

and the Viscount shall have the duty to take possession of and, in accordance with the Court’s directions, to manage or otherwise deal with any such realisable property; and any specified person having possession of any realisable property may be required to give possession of it to the Viscount.”

- 29 Similarly, under Article 17, when it comes to the realisation of property vested in the Viscount then the Court may empower the Viscount to realise it in such manner as the Court may direct.
- 30 The concern in relation to the Trusts Law is misplaced as Article 59(1) provides that nothing in that law shall abridge or affect the powers, responsibilities or duties under any

provisions of law of the Viscount.

- 31 We agree that the Viscount should not act in a way which undermines the public perception of the integrity vested in the holder of that office, a perception that would extend to the Court itself, as the Viscount is the Court's Chief Executive Officer. However, the Viscount has assets vested in her which she is holding for the benefit of others and in that sense is a trustee. It therefore seems to us that in relation to this ethical issue, some assistance can be gleaned from the above cases.
- 32 The difficulty in her position in this case was that whilst she felt ethically bound to the first prospective purchaser whose offer she had accepted; he was under no obligation to her either ethical or legal. He could have withdrawn from the purchase at any stage prior to passing contract.
- 33 The difference between the two offers was £185,000, which meant some £92,500 to Mrs Arthur; a substantial sum. Is it just for her to be denied the potential of such a sum because the Viscount feels ethically bound to a prospective purchaser who has no obligation at all to the Viscount?
- 34 We acknowledge that negotiations of this kind are difficult, and as said in *Buttle*, it would be an unfortunate simplification of the problem to take the view that mere production of an increased offer at any stage would throw on the Viscount a duty to accept the higher offer and resile on the existing offer. Each case will depend on its own facts and the Viscount is always able to obtain further directions from the Court should any issue of difficulty arise, but we express the view that the second offer received by the Viscount in this case was one which, in the interests of justice, should at least have been probed.
- 35 We offer the suggestion that in order to avoid the Viscount being perceived as going back on her word, it may be prudent, in future and in appropriate cases, for it to be made clear to any prospective purchaser whose offer the Viscount is minded to accept, that until such time as the purchaser actually acquires the property or becomes legally bound so to do, the Viscount may be under a duty to consider any better offers that may be made in the meantime.