Viscount v ACJ Air Conditioning Jersey Ltd ((in Liquidation); acting through its joint liquidators Dermot Joseph Boylan and Adrian John Denis Rabet)

Jurisdiction:	Jersey
Judge:	Sir Michael Birt, Birt
Judgment Date:	22 August 2019
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Text

[2019] JRC 165

ROYAL COURT

(Samedi)

Before:

Sir Michael Birt, **Commissioner, sitting alone**

In the Matter of Rockingham Investments Limited (En Désastre) — Costs

Between
Viscount
Applicant
and
ACJ Air Conditioning Jersey Limited (in liquidation; acting through its joint liquidators

Dermot Joseph Boylan and Adrian John Denis Rabet)
First Respondent

and

Building and Technical Services Limited (in liquidation; acting through its joint liquidators
Dermot Joseph Boylan and Adrian John Denis Rabet)
Second Respondent

and

David Mabbs
Third Respondent

The Viscount in person.

Advocate J. D. Garrood **for the First and Second Respondents**.

The Third Respondent in person

Authorities

In the matter of Rockingham Investments Limited [2019] JRC 082.

Bankruptcy (Désastre) Jersey Law 1990.

Insolvency (England and Wales) Rules 2016.

Watkins v Egglishaw [2002] JLR 1.

Jersey Financial Services Commission v AP Black (Jersey) Limited, [2007] JLR 1.

An Advocate v Disciplinary Committee of the Law Society, (sub-nom *Re MM*) [2011] JLR 12.

Volaw Trust and Corporate Services Limited v Comptroller of Taxes, [2013] (2) JLR 203.

Bradford Metropolitan District Council v Booth [2000] COD 338.

Booth v Viscount [2016] (2) JLR 473.

Trusts (Jersey) Law 1984. Companies (Jersey) Law 1991

Costs — order relating to costs incurred

THE COMMISSIONER:

1 This judgment is a sequel to the judgment in *In the matter of Rockingham Investments Limited* [2019] JRC 082 and concerns the costs of the application giving rise to that judgment.

2 Rockingham Investments Limited ("Rockingham") is a Jersey company which is en désastre. The liquidators of the First Respondent ("ACJ") lodged a claim in the désastre which was rejected by the Viscount. The liquidators then exercised their right under Article 31(7) of the Bankruptcy (Désastre) Jersey Law 1990 ("the Law") to require the Viscount to refer the matter to the Court for review ("the Application").

3 In the judgment referred to above ("the Judgment") the Court overturned the Viscount's rejection of ACJ's claim and directed that the claim be admitted in the désastre in the sum of £445,443. The Second Respondent had lodged a claim as an alternative, but this did not fall for consideration in view of the Court's decision.

4 The liquidators now seek an order that ACJ's costs incurred in connection with the Application should be paid by the Viscount out of public funds rather than out of the assets of the désastre. They also seek an order that the Viscount's own costs in connection with the Application should rank after payment of ACJ's claim. This is because the assets of Rockingham are unlikely to be sufficient to pay the whole of ACJ's claim after deduction of the Viscount's costs.

5 Counsel were unable to refer me to any previous authority concerning the costs of an application for review under Article 31(7) of the Law where the Viscount's decision has been overturned and I therefore need to consider the proper approach.

The applicable principles

6 The legislative framework for proving claims in a désastre and seeking a review of the Viscount's decision in respect of claims is contained at Articles 30 and 31 of the Law, which are in the following terms:-

> ***"30. Creditors to prove***
>
> ***(1) Unless exempted by Rules made under Article 2, every creditor shall prove the creditor's debt at the time and in the manner prescribed by the court*** .
>
> ***(2) A creditor shall bear the cost of proving the debt unless the court decides otherwise*** .
>
> ***(3) Every creditor who has lodged a proof shall be entitled to see and examine the proofs of other creditors at a time fixed by the Viscount in accordance with Rules made under Article 2*** .

(4) A creditor may from time to time amend or withdraw the creditor's proof and every such amendment shall be subject to the same formalities as the original proof .

31. Proofs of debts to be examined and admitted or rejected

(1) The Viscount may admit or reject proof of a debt in whole or in part .

(2) Before admitting or rejecting proof of a debt the Viscount shall examine the proof and any statement opposing the admission of the debt .

(3) Before admitting or rejecting proof of a debt the Viscount may require further evidence in support of, or in opposition to, its admission .

(4) The Viscount may reject in whole or part any claim for interest on a debt if the Viscount considers the rate of interest to be extortionate .

(5) If the Viscount rejects proof of a debt in whole or in part the Viscount shall serve notice of rejection in the manner prescribed by the court on the person who provided the proof .

(6) If the Viscount rejects a statement opposing admission of a debt in whole or in part the Viscount shall serve notice of rejection in the manner prescribed by the court on the person who provided that statement .

(7) If a person upon whom notice has been served in accordance with paragraph (5) or paragraph (6) is dissatisfied with the decision of the Viscount and wants the decision reviewed by the court he or she must, within the time prescribed by the court, request the Viscount to apply to the court for a date to be fixed for the court to review the decision .

(8) The Viscount shall comply with a request made in accordance with paragraph (7).” [Emphasis added]

7 The Viscount submitted that Article 30(2) applied to the costs of a review under Article 31(7) on the basis that, where the Viscount has rejected a proof of claim, the review is part and parcel of the creditor proving the claim.

8 Advocate Garrood demurred. He pointed out that the procedure for proving claims in an insolvency in England and Wales was fairly similar to the procedure for proving claims under a désastre, but that the Insolvency (England and Wales) Rules 2016 (“the English Rules”) drew a clear distinction between costs incurred in proving the debt in the first place and costs incurred in respect of any appeal against rejection of proof of a claim. Rule 14.5(a) of the English Rules dealt with the former and was in similar terms to Article 30(2) in that it provided:-

“14.5 Unless the court orders otherwise:-

(a) each creditor bears the cost of proving for that creditor's own debt, including costs incurred in providing documents or evidence under Rule 14.4(3) …"

9 Rule 14.8 provided for an appeal against a decision in respect of a proof of debt and Rule 14.9 dealt with the costs of such an appeal. It specifically provided that the official receiver was not to be personally liable for costs incurred in respect of any appeal and that an office holder other than the official receiver would not be personally liable for such costs unless the court ordered otherwise. He argued that, by analogy, Article 30(2) should be confined to proving the claim before the Viscount and did not extend to costs incurred in challenging the Viscount's decision via a review under Article 31(7).

10 I think that limited assistance is to be derived from the English Rules. Désastre is a development of the customary law and the Law is not the same or in similar terms to the general insolvency legislation in England and Wales. Nevertheless, as it happens I conclude that the Law achieves the same outcome on this point as the English Rules. I think the more natural construction of Article 30(2), in the context in which it appears, is that it is concerned only with proof of the claim before the Viscount rather than with litigation arising as a consequence of the Viscount's decision in respect of proof of a claim. I therefore do not consider that Article 30(2) governs the awarding of costs on a review under Article 31(7).

11 The Viscount submitted that, quite apart from Article 30(2), I should not award costs against her unless her decision fell outside the range of reasonable decisions. Advocate Garrood appeared to argue in his written submissions that the ordinary principles of costs in civil cases (as articulated in cases such as *Watkins v Egglishaw* [2002] JLR 1) should apply and accordingly the starting point was that costs should follow the event, with the liquidators being the clear 'winners' in this case. However, I understood him to modify this submission somewhat during the course of the hearing and to accept that the Court was unlikely to order the Viscount to pay costs unless she had behaved unreasonably.

12 Having considered the written and oral submissions of the parties, it is my view that, although the Court has a general discretion to award costs in connection with a review under Article 31(7), it should in general not award costs against the Viscount (so that they are payable out of public funds) unless the Viscount's decision or her conduct in relation to the review itself is unreasonable. I summarise my reasons for so concluding in the following paragraphs.

13 First, I refer to the general approach to the award of costs in cases involving a public body exercising a public function established in cases such as *Jersey Financial Services Commission v AP Black (Jersey) Limited*, [2007] JLR 1; *An Advocate v Disciplinary Committee of the Law Society*, (sub-nom *Re MM*) [2011] JLR 12; and *Volaw Trust and Corporate Services Limited v Comptroller of Taxes*, [2013] (2) JLR 203. These cases all

adopted the principle laid down by Lord Bingham CJ in *Bradford Metropolitan District Council v Booth* [2000] COD 338 in the following terms at 340–341:-

> ***"I would accordingly hold that the proper approach to questions of this kind can for convenience be summarised in three propositions:-***
>
> ***1) Section 64(1) confers a discretion upon a magistrates' court to make such order as to costs as it thinks just and reasonable.*** That provision applies both to the quantum of the costs (if any) to be paid, but also as to the party (if any) which should pay them .
>
> ***2) What the court will think just and reasonable will depend on all the relevant facts and circumstances of the case before the court.*** The court may think it just and reasonable that costs should follow the event, but need not think so in all cases covered by the sub-section .
>
> ***3) Where a complainant has successfully challenged before justices an administrative decision made by a police or regulatory authority acting honestly, reasonably, properly and on grounds that reasonably appear to be sound, in exercise of its public duty, the court should consider, in addition to any other relevant fact or circumstances, both (i) the financial prejudice to the particular complainant in the particular circumstances if an order for costs is not made in his favour; and (ii) the need to encourage public authorities to make and stand by honest, reasonable, and apparently sound administrative decisions made in the public interest without fear of exposure to undue financial prejudice if the decision is successfully challenged."***

14 The position was conveniently summarised by Pitchers, Commissioner in *Re MM* at para 13 in the following terms:-

> ***"Therefore, in summary, the mere fact that the appeal was successful is not a starting point.*** Among the factors for the court to consider in making an order that is just and reasonable are the financial prejudice to the appellant if no order for costs is made and the need to support the Law Society in bringing regulatory proceedings in the public interest where it has taken sound and reasonable decisions even though ultimately the proceedings have been unsuccessful. An order for costs may be appropriate where the proceedings, though brought in good faith, were "a shambles from start to finish" and the Society's conduct, though not in bad faith, was unreasonable."

The Commissioner held that the disciplinary proceedings in that case were properly described as 'a shambles' from start to finish and made an award of costs against the Law Society for that reason.

15 Secondly, in *Booth v Viscount* [2016] (2) JLR 473, the Court of Appeal, commenting on the view of the Royal Court below that there was a risk of the Viscount being ordered to pay

costs in the circumstances of that case, said this at para 27:-

> ***"We consider that factor to be of no real weight.*** Article 48 of the Désastre Law provides that the Viscount shall not be liable in damages for anything done in the discharge of her functions under the Law, unless it is shown to have been done in bad faith. While that article does not extend to costs, it is indicative of the reticence that we would expect any court to display in relation to the placing upon the Viscount (and thereby upon the public purse) of financial burdens, including third party orders for costs, in consequence of decisions made in the conscientious discharge of her duties under the Law."

16 Thirdly, the reticence referred to by the Court of Appeal would appear to be consistent with the approach adopted in England and Wales in relation to appeals against the decision of a liquidator/trustee in bankruptcy or similar officer (referred to in the English Rules as an 'office-holder'). Rule 14.9(1) of those Rules provides that, where there is an appeal to the court against a decision of the official receiver to reject (or admit) a claim by a creditor, the official receiver will not be personally liable for the costs of any other party in connection with that appeal and Rule 14.9(2) provides that any other office holder is not to be personally liable for any such costs 'unless the court orders otherwise'.

17 Whilst of course the English Rules have no application in this jurisdiction, it is of interest that the policy decision underlying the English Rules is that the official receiver should never be ordered to pay such costs and that any other office holder should only be liable for costs if the court orders otherwise. The Viscount argued that her position is akin to that of the official receiver. I do not have any evidence before me as to the exact status and nature of the official receiver, although it is clear that he is an officer of the Insolvency Service who, amongst other functions, may be appointed as a trustee in bankruptcy or liquidator of an insolvent company if no private sector insolvency practitioner is appointed. Whilst one cannot draw too much from the position in England and Wales, it does, in my judgment, lend some support for a general approach of reticence in ordering the Viscount to pay costs in respect of a review under Article 31(7).

18 Fifthly, whilst it is clear from Article 59(1) of the Trusts (Jersey) Law 1984 ("the Trusts Law") that the Trusts Law has no application to the Viscount's duties and responsibilities under the Law, it is of note that a trustee only loses his right to be indemnified out of the trust fund if he has behaved unreasonably. It seems to me that the policy considerations which underlie that position are equally applicable to the Viscount conducting a désastre. The Viscount is charged with administering the assets of the person en désastre by getting in those assets and then paying out the creditors. During the course of conducting a désastre, she will be called upon to exercise her judgment on a number of matters where opinions may easily differ; for example when is the right time to sell an asset and for what price? In relation to creditors, she has to decide whether a creditor has proved his claim. This will often be a matter of some complexity and difficulty. In my judgment, provided she has considered the matter conscientiously and has reached a decision which is a reasonable one, it would not be right to penalise the public purse order in costs simply because, on a

review, the Court has reached a different decision. As the Court made clear in the Judgment at para 4, when conducting a review under Article 31(7) the Court reaches its own unfettered decision as to whether a creditor has proved his claim and there is no need for the Court to find the decision of the Viscount to have been outside the band of reasonable decisions before overturning her decision.

19 Putting these matters together, whilst the Court retains a general discretion as to costs in relation to an Article 31(7) review, an important factor to be taken into account is that the Viscount is a public officer undertaking a public function which is of the nature described in the preceding paragraph. The importance of that factor means that, in the ordinary course, it is unlikely that the Court will order the Viscount to pay the costs of a creditor who has been successful on such a review in the absence of some form of unreasonableness on the Viscount's part, either in relation to the original decision or in relation to the conduct of the review.

Application to the facts

20 Advocate Garrood submitted that the decision of the Viscount was unreasonable. Indeed at para 27 of his written submission, he seemed to go further and to argue that, because the Royal Court had overturned the Viscount's decision, it followed that the Viscount had not been acting in the conscientious discharge of her duties.

21 I unhesitatingly reject the latter submission. The fact that the Court has overturned the Viscount's decision says nothing about whether she considered it conscientiously. During the course of the main hearing, I was taken through the letters and other matters leading up to the Viscount's decision and it is abundantly clear that she considered the matter carefully, conscientiously and with an open mind before coming to her decision.

22 As to whether the decision was unreasonable, Advocate Garrood submitted that she made two elementary errors in concluding (i) that because the loan was expressed in the accounts as having no specified date of repayment, this did not indicate that it was repayable on demand (or at all) and (ii) that monies paid by Mr Mabbs to ACJ could be set off against the amount owed by Rockingham to ACJ.

23 It is true that the Court disagreed with the Viscount on both of these points but I do not consider her decision on either point should be categorised as unreasonable such as to visit an order for costs upon the public purse.

24 Turning to consider financial prejudice to the liquidators if an order for costs is not made in their favour, I accept that there will be some prejudice. The information before the Court at the time of the main hearing was that Rockingham's sole asset had been valued at £350,000 – £450,000. The liquidators claim is £445,443. Although ACJ is the only creditor, it is therefore likely that there will be a deficit. That deficit will be increased by the amount of

the costs (at the standard rate for taxation purposes) incurred by the liquidators in connection with the Application if an award of costs is not made in their favour. That increase will therefore be borne by the creditors of ACJ, which is in a creditors winding up because it is insolvent.

25 Nevertheless, I do not consider it right in the present circumstances to make an award of costs against the Viscount. There will always be some degree of prejudice to a creditor who is not awarded costs following an Article 31(7) review because he will have to bear himself the costs which would otherwise have been recovered from public funds via the Viscount.

26 In the present circumstances, where the Viscount has not been found by me to have acted unreasonably, I consider that the balance comes down in favour of not making an award of costs against the Viscount where she has acted conscientiously and reasonably in the exercise of her public function in conducting a désastre.

27 For the sake of good order I should record that, in his written submissions, Advocate Garrood referred me to Article 74 of the Companies (Jersey) Law 1991 (which requires a director to act honestly and in good faith with a view to the best interests of the company) and argued that this might be relevant in considering the nature of the duties owed by the Viscount when administering a désastre. However, the Viscount is not a director of a company which is en désastre and fulfils a very different role from the directors of a company. In the circumstances I did not derive any assistance from Article 74 of the 1991 Law.

28 I should also refer briefly to the fact that the liquidators also sought an order that their claim in the désastre should rank in priority to the Viscount's own costs insofar as those costs related to the Application. In the light of my decision that the Viscount should not be ordered to pay the costs of the Application, I do not consider it is open to me to make such an order for the following reasons:-

(i) Article 32 of the Law sets out the order in which the Viscount is to apply money she receives from the realisation of the property of a debtor. Article 32 is mandatory and the Court has no power to change the order of payment set out in that Article.

(ii) Pursuant to Article 32, the Viscount's costs are the first item to be paid. These are described in Article 32(1)(a) as follows:-

"… in payment of the Viscount's fees and emoluments and all costs, charges, allowances and expenses properly incurred by or payable by the Viscount in the désastre."

(iii) I accept that it is to be implied in Article 32(1)(a) that this only applies to reasonable costs, charges etc. because they have to be 'properly incurred'. However, given my decision that the Viscount acted reasonably in this case, it follows that, in principle, any costs which she incurred in connection with the Application were

'properly incurred' (subject to reasonable quantum) and accordingly must be paid ahead of any other claim in the désastre.

(iv) I therefore have no jurisdiction to grant the order requested by the liquidators on the facts of this case.

Claim for costs against Mr Mabbs

29 The liquidators requested an order that Mr Mabbs also be ordered to pay the liquidators' costs on the standard basis. This was on the ground that Mr Mabbs did not benefit from any public policy considerations affecting the position of the Viscount. He had argued that ACJ's claim should not be admitted. He had been unsuccessful on this argument and accordingly costs should follow the event in the ordinary way.

30 I do not consider it would be right to order Mr Mabbs to pay costs in this case. It was the Viscount who had taken the decision in question. The challenge was to the decision of the Viscount and she bore the primary responsibility for defending it. It is true that Mr Mabbs appeared to support the Viscount's decision. However, he had been convened so that the Court could have the benefit of any submissions which he could offer beyond those of the Viscount. In that respect his position was not unlike that of beneficiaries convened to a trustee application. I appreciate that, as set out in the judgment on the Application, the hearing was adjourned in order for Mr Mabbs to search for further sets of company accounts, which perhaps he should have provided before the hearing. However, there was no order for discovery and Mr Mabbs is a litigant in person who, if I may put it this way, is not in the first flush of youth. I think the fair outcome in his case is that there should be no order for costs. The result is that he will bear his own costs but the liquidators will not be able to recover costs from him.

31 There will be no order as to costs in relation to the costs hearing itself.