

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

ON MONTSERRAT

CASE MNIHCV 2009/0018

BETWEEN

BANK OF MONTSERRAT

Claimant

And

OWEN ROONEY

Defendant

APPEARANCES

Mr David Brandt for the claimant.

The defendant appeared in person (by skype).

2018: MARCH 28

RULING

On setting aside a mediation agreement

- 1 On 16.03.18 I set aside a mediation agreement signed on 16.02.11, promising reasons, which are these.
- 2 The defendant (Rooney¹) has been representing himself, living in California, appearing on skype, unable to afford a lawyer, after spending much money pursuing his land interests in Montserrat. These were the subject of a fraud during the noughties, where it is said a lawyer

¹ For the purposes of this ruling, the parties and others will be referred to as bracketed for ease of reading, with no disrespect intended by not writing out on each mention full names and titles or the legalese as to whether claimants or defendants.

named Warren Cassell pretended to be in charge of an estate Rooney co-owned, named Providence Estate, and Cassell sold off land, pocketing the money.

- 3 In the early 1990s, Rooney took out an overdraft with the Bank of Montserrat (the bank), protected by a caution in the land register against parcel 13/15/88, and did not pay it off, so that from 1993, it is said he owed \$23199.05ec, plus interest at 12% per annum (pa). In the intervening years there was the volcano crisis, 1995-7, so that the bank did not write to Rooney demanding monies, until attorney David Brandt wrote on its behalf on 24.02.09, demanding \$75103.46ec, at a time it seems the debt was statute barred, under **s4 Limitation Act cap 2.12**, (as revised on 01.01.02). The letter was sent to attorney Hogarth Sergeant acting on Rooney's behalf, who passed it on to Rooney, who replied by email direct to Anton Doldron at the bank, acknowledging the debt in these terms: *'I have been asking Mr Sergeant for over a year to make arrangements with the Bank of Montserrat to satisfy my indebtedness, which I fully acknowledge'*.
- 4 The debt being acknowledged, the bank can argue it is no longer statute barred, per Lawton J in **Busch v Stevens 1963 1 QB 1**, and so quickly began proceedings to recover it, filed on 30.07.09. In his defence filed on 06.07.10, Rooney asserted the debt statute barred 'after 12 years', meaning by 2005. On 12.11.10, Master Mathurin ordered standard disclosure. On 28.01.11, Master Lanns referred the matter to Camilla Watts for mediation. On 16.02.11, attorneys Sergeant and Brandt met with mediator Watts and signed a mediation agreement that Rooney should pay \$70000ec plus costs of \$14000, accruing interest at 4% pa. On 01.04.11, the mediation agreement was ordered into effect by Master Lanns.
- 5 Then, on 02.02.12, while Rooney was giving evidence in the Cassell fraud trial on Montserrat, before Redhead J, he was summonsed at the hand of attorney Brandt (incidentally, whose partner Cassell had been) at 08.30 to explain non-payment under the mediation agreement, and without representation agreed to pay at a rate of \$2500ec per month (pm).
- 6 Clearly, Rooney's indebtedness to the bank under court order flows directly from the mediation agreement of 16.02.11. However, closer analysis of this agreement and the history of matters raises serious concerns.

7 Rooney has filed copious materials, and has many different actions being litigated simultaneously in the High Court, Court of Appeal, and Privy Council. He is not well, growing elderly, with a heart condition. The material is poorly organised, and lacking the sifting and presentation skills of a lawyer is often, sadly, almost impenetrable verbiage, though well-intentioned. Having been given on 05.03.18 my email address to send me and the Montserrat registry a copy of an email in 2011 (see below, for 19.04.11), he later from 06.03.18 sent 12 emails cataloguing many grievances, copied to the over-arching registry of the Eastern Caribbean Supreme Court (ECSC) in St Lucia, supported with very many attachments, none copied to Counsel Brandt. There was a paperwork tsunami. He feels strongly about what has happened to his land, and the court has the impression he is obsessed with getting satisfaction, to the point it may be an illness affecting his already poor health, fighting on his own against what he believes is a conspiracy of lawyers and public officials, including attorneys Brandt and Sergeant, all of whom he thinks have collectively defrauded him.

8 On 17.01.11, in advance of the mediation agreement, filed as exhibit OW6 on 01.11.12, there is an email from Rooney to attorney Sergeant saying:

‘I am honestly at my wits end with you. You won’t listen to instructions. You disappear off the face of the earth for months at a time and can’t be contacted....The way you have mishandled these matters is appalling.’

9 Leaving aside the rights or wrongs of any dispute between Rooney and attorney Sergeant, it seems clear there was before the mediation agreement substantial unease on Rooney’s part toward Sergeant acting in his interests.

10 On 19.04.11, in light of the mediation agreement, he wrote to the then ECSC registrar in these terms:

From: Owen Rooney <ordgl@yahoo.com>
To: "kphulgence@eccourts.org" <kphulgence@eccourts.org>
Sent: Tuesday, April 19, 2011, 4:48:05 AM PDT
Subject: Please to not forget to ask the CJ

Dear Ms. Phulgence, Please do not forget to ask His Lordship about my case. I went to the ECCS’s website and such a mediation was improper because both parties to the suit must be present and not just their lawyers. Mr. Hogarth Sergeant whose gross

misconduct and negligence allowed this fiasco to happen is now the Acting Registrar in Montserrat. He must be recused. Thank you, Owen Rooney

- 11 The court-connected mediation rules do indeed say: *'All parties must attend the mediation session... A lawyer may not attend in place of a party.'* And on sight of the email of 19.04.11, Rooney does seem to have been complaining straight away about the agreement.
- 12 In these proceedings, the bank is trying to get permission to sell plot 13/15/88 to settle the debt declared by the mediation agreement, begging the question whether the agreement is valid, which begs what instructions Rooney gave his lawyer. To this end, Rooney has waived legal professional privilege, insisting attorney Sergeant was never instructed to act for him at the mediation, he did not even know mediation had been set down on 28.01.11, was not told of its outcome on 16.02.11, and only learned of it eventually from the court pursuant to the order of Master Lanns on 01.04.11, hence the email of 19.04.11.
- 13 I have therefore heard evidence from attorney Sergeant on 16.03.18. He told me on receiving attorney Brandt's letter of 24.02.09 he had told Rooney the debt was statute barred, but that Rooney 'wished to clear his name' on Montserrat (although it was not clear as to how at that time it was sullied); Master Mathurin had specifically ruled the debt was not statute barred as a result of Rooney acknowledging it on 27.02.09; in light of this, Rooney had agreed to his settling the debt in the mediation, and was only unhappy, refusing to agree to the award, when learning costs had been awarded to attorney Brandt.
- 14 When I asked attorney Sergeant whether there was anything in writing to corroborate what he said, he told me he had deleted all materials concerning Rooney from his hotmail account, after he had been asked to assist a police enquiry by what he said was 'the FBI', (but in fact was the Bermuda police). He has never deleted client materials before, and told me he did so because Rooney had been disparaging about him and his colleagues. Notwithstanding attorney Sergeant's excellent standing at the Montserrat Bar, and my making no findings adverse to him, nevertheless I do find this deletion of client records to be highly unusual.
- 15 Moreover, it is right to say as a result of an email attachment from Rooney on 08.03.18, there was indeed a Bermuda police report by one 'DS Hoyte' dated 30.11.15 suggesting there may

- well be irregularities in what had been happening to Rooney on Montserrat, though no formal investigation has followed.
- 16 On the one hand Rooney has been saying he gave no instructions; on the other, attorney Sergeant cannot show otherwise, having deleted materials following a police enquiry. Moreover, there is no record anywhere of Master Mathurin ruling the debt was not statute barred. Yet there ought to be somewhere a court ruling against, or correspondence showing surrender of, the limitation argument, and there is nought. Instead, attorney Sergeant without independent record gave up Rooney's pleaded defence when he met with attorney Brandt on 16.02.11.
- 17 In all the circumstances, I find I am deeply concerned, in the absence of a record of instructions and of Rooney from the mediation, about the mediation agreement of 16.02.11 truly reflecting agreement by Rooney. Moreover, even on his own version, attorney Sergeant says Rooney did not agree the costs, meaning he did in fact disagree. These features make me assess that on balance the agreement is not sustainable as an 'agreement', to be the bedrock to show indebtedness.
- 18 Counsel Brandt in these proceedings warns that the agreement can only be set aside by the Court of Appeal as it was given force by the Order of 01.04.11. I think not, under the authority of **Isaac v Robertson 1985 1 AC 97**, where Lord Diplock said there is a distinction between orders regularly obtained and irregularly obtained, saying that the former were the proper subject of an appeal, while in the case of the latter, application could be made to set aside. To this end he identified a category of orders of a court of unlimited jurisdiction, such as the High Court, which a person affected *'is entitled to apply to have set aside ex debito justitiae in the exercise of the inherent jurisdiction of the court without his needing to have recourse to the rules that deal expressly with proceedings to set aside orders for irregularity and give to the judge a discretion as to the order he will make'*.
- 19 In this case, I find the order was on balance irregularly obtained, and so I set it aside.
- 20 Therefore, there will have to be a trial on the issue of whether Rooney owes money to the bank, and I will offer directions when the matter comes on again on 28.03.18 after this

judgment is read. I should add that Rooney is aware that should he lose the action, he may end up owing more than under the mediation agreement, but nevertheless has sought it set aside.

21 There shall be no order as to costs.

The Hon. Mr Justice Iain Morley QC

High Court Judge

28 March 2018