

JERSEY / JUDGMENT

Holmes -v- Lingard [2017]

JRC 187 (07 November 2017)

[2017] JRC 187

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judgment

the commissioner: 1. On 25 th September, 2017, I sat to give directions on the following applications:- (i) an application by the defendants for damages and indemnity costs arising out of the imposition of interim injunctions at the instance of the plaintiff on 17 th March, 2014, and which were lifted by the Court on 27 th May, 2017, for the reasons set out in the Court's judgment of 29 th June, 2015, (Holmes-v-Lingard

[2015] JRC 141). I will refer to this as "the 2015 judgment". (ii) a cross-application by the plaintiff to show cause why the Court should not:- (a) declare that the sworn affidavit evidence of the first defendant ("Mr Lingard") and Mr Daniel Young relied on by the Court in its 2015 judgment is patently false and/or fabricated and/or misleading on its face; (b) refuse and/or stay the defendant's application for costs of and incidental to the 2015 judgment on the basis of the declaration above; (c) re-impose the interim injunctions on the basis of the declarations above on such terms as the Court deems just. 2. When the interim injunctions were lifted on 27 th May, 2015, the issue of costs was left over to the delivery of the Court's judgment, but when that was delivered on 29 th June, 2015, the defendants did not pursue an application for costs because they believed the litigation had been settled. 3. It would seem, however, that it had not been settled and the litigation has since steered a convoluted course which I will not seek to summarise in this short judgment, save to say that it is set out in some considerable detail in the Master's judgment of 21 st July, 2017. An appeal against that judgment is currently before the Royal Court, the Deputy Bailiff presiding. 4. As a matter of principle, it seems to me desirable that all of this litigation should be under the case management of the Master, and any appeals and final hearings before the same presiding judge of the Royal Court, so that all of the issues between the parties can be dealt with together. However, I accept that as the judge presiding over the Court dealing with the lifting of the interim injunctions in 2015, I am best placed to make any order as to costs arising out of that hearing. I also accept that the defendants are entitled to seek an order for costs. 5. At the end of the hearing on 25 th September, 2017, I reserved my decision and issued a draft judgment. In that draft, I proposed dealing with the application for costs substantively because I took the view following the hearing that I

was in a position, fairly, to do so. 6. This gave rise to an immediate response from the plaintiff by e-mail dated 4 th October, 2017, in which he stated that there had been a procedural mishap, in that the summonses had been listed for directions only. He had filed a skeleton argument on directions, but not on the substantive application for costs. 7. I had taken the plaintiff's cross applications and his oral submissions as constituting his position on the costs issue, but accepted that he may not have expected me to deal with that issue substantively. Therefore, when I sat on 5 th October, 2017, I did not hand down the draft judgment, and instead directed that the plaintiff provide his substantive submissions on costs in writing by 4pm on 11 th October, 2017, with the defendants having a right to respond by the close of business on 13 th October, 2017. It was agreed by the plaintiff and the defendants that the issue of costs could be dealt with on the basis of their further written submissions. 8. However, on 11 th October, 2017, shortly after the 4pm deadline, the Court received an e-mail from the plaintiff, saying that at the hearing on 5 th October, 2017, he did not properly recall the parties' unfixed summonses or comprehend that the Court deemed that the same were before the Court in their entirety. He said he also failed to account for the fact that he had intended to seek a stay inter alia . He therefore asked for directions that the parties re-issue their summonses, and confirm whether they remain content to adjudicate their respective summonses on the papers alone. 9. I was not prepared to order that the summonses be re-issued in this way, and gave the plaintiff a further extension to the close of business on 20 th October, 2017, to file his written submissions on costs. This he declined to do, informing the Court that he was seeking to appeal the 2015 judgment. 10. The issue of costs is not complicated. The plaintiff has had more than ample time to make further submissions but has declined to do so. Fairness to the defendants, who had successfully applied to have the interim injunctions lifted, dictated that I should proceed and make my determination on costs. 11. On reviewing the 2015 judgment, it is clear that the defendants should have their costs for successfully applying to have the interim injunctions lifted, but the issue is whether they should have their costs on the indemnity basis. 12. I have reminded myself of the principles to be applied in relation to indemnity costs as summarised by Beloff JA in *C v P-S*

[2010] JLR 645 at paragraph 11:- "We do not accept that it is appropriate to impose such a restrictive approach on the discretion of the Court to make an award of costs on the indemnity basis. The question will always be - is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising there will usually be some degree of unreasonableness? We do not consider that there is a need for a claiming party to show a lack of moral probity or conduct deserving of moral condemnation, or malicious or vexatious conduct." 13. The Court of Appeal specifically approved the observation of Page, Commissioner in *Pell Frischmann Engineering Limited v Bow Valler Iran Limited*

[2007] JLR 479 , when the Commissioner said at paragraph 25:- "At the risk of over-simplifying matters, the result of these English authorities may be said to be this: that the circumstances in which an award of indemnity costs may, as a matter of discretion, be ordered are less restrictive than they used to be; there must, *ex hypothesi*, still be something to take the case out of the ordinary, but the range of potentially relevant considerations ... is considerable, and need not involve any finding of a lack of moral probity; the test, in a word, is unreasonableness; the purpose of such an award is to achieve a fairer result for the party in whose favour it is made than would be the case if he were only able to recover costs on the standard basis; in the end, it is a question of what would be fair and reasonable in all the circumstances." 14. The Court lifted the interim injunctions for two reasons:- (i) A failure to give any notice of the application. The Court found that there had been no correspondence between the parties and no letter before action; no intimation, therefore, of either the claim or the application for interim injunctions. In the view of the Court, there was no justification for depriving the defendants of an opportunity to be heard on the application for the interim injunctions described by the Court as "a drastic invasion of their rights" (paragraphs 13 and 14). (ii) Material non-disclosure. The Court found that it was "manifest" that the plaintiff had failed in his duty to make full and frank disclosure (paragraph 23). 15. As the Court said, the imposition of injunctions constitutes a drastic invasion of a person's rights and the two failures found by the Court take the case firmly into the territory of indemnity costs. I do, therefore, order the plaintiff to pay the defendants' their costs of and incidental to their application to lift the interim injunctions on the indemnity basis. 16. As for the defendants' claim for damages, that must be pursued in the ordinary way, and I refer that back to the Master for directions to be given. Mr Lingard asked the Court for guidance in this respect as a litigant in person, but it is not for the Court to give guidance to parties as to how their claim should be pursued. 17. As for the plaintiff's cross summons, there has been no appeal allowed against the 2015 judgment as yet. The allegation that the evidence of Mr Lingard and Mr Young is false/fabricated/misleading seems to me to be a mere assertion. 18. Procedurally it is not open to the plaintiff at this stage to seek to re-open the 2015 judgment by issuing a cross summons seeking a declaration as to the evidence then before the Court. If he wishes to challenge the 2015 judgment, then he must do so by applying for leave to appeal out of time, which I understand he has done. 19. As for the plaintiff's application to have the interim injunctions re-imposed, that was premised upon the Court making a declaration that the evidence of Mr Lingard and Mr Young was false/fabricated/misleading and, for the same reason, therefore falls away. It is only the Court of Appeal, if leave to appeal is granted that can re-impose the interim injunctions. 20. Finally, in view of the time it has taken the defendants to bring this application for costs arising out of the 2015 judgment, I think it is fair that they should have their costs of this application on the standard basis. I therefore order the plaintiff to pay the defendants their costs of and incidental to this application for costs to be paid on the standard basis. 21. In summary: - (i) I order the plaintiff to pay the costs of the defendants of and incidental to their application to lift the interim injunctions on the indemnity basis. (ii) I

refer the issue of the defendants' claim for damages in respect of the imposition of the interim injunctions to the Master for directions to be given. (iii) I dismiss the plaintiff's cross summons for a declaration that the evidence of Mr Lingard and Mr Daniel Young is false/fabricated/misleading and for the re-imposition of the interim injunctions. (iv) I order the plaintiff to pay the costs of the defendants of and incidental to their summons for costs on the standard basis. Authorities Holmes-v-Lingard

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