

JERSEY / JUDGMENT

Holmes v Lingard and Ors

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Disclosure- detailed written reasons for refusing the plaintiff's application for further information [2018]JRC184 Royal Court (Samedi) 3 October 2018 Before : Advocate Matthew John Thompson, Master of the Royal Court. Between Shane Michael Holmes Plaintiff And Harry James Lingard First Defendant And HJL Holdings Limited Second Defendant Angel Fish Limited Third Defendant Mr S. M. Holmes appeared in person. Mr H. J. Lingard appeared in person.
CONTENTS OF THE JUDGMENT Paras 1.

Introduction

1-6 2. Decision 7-36

judgment

the MASTER:

Introduction

1. This judgment represents my detailed written reasons for refusing the plaintiff's application for further information. 2. What the plaintiff sought by his summons is as follows:- (i) Paragraph 1 of the summons related to which architect the sum of £20,000 referred to in a document dated 6th February, 2012 was paid and whether the payment was full and final settlement; (ii) The second request related to an email dated 24th June, 2014 from the first defendant to Mr Robertson which had been referred to in hearings leading to judgments reported at Holmes-v-Lingard [2015] JRC 226 and Holmes-v-Lingard and Others [2016] JRC 167. The plaintiff sought a copy of the original emails and the source data rather than a forwarded copy; (iii) The third application related to two emails from a Mr Sobey to Harry Lingard dated 18th April, 2012 and 23rd January, 2012. What was sought were again the original emails and the source data rather than the forwarded copies. 3. The first document was sought by the plaintiff to understand the defendant's case and/or counterclaim; 4. The second and third requests were sought to underpin the plaintiff's application for leave to appeal the judgment of the Deputy Bailiff reported at Holmes-v-Lingard and Others [2018] JRC 071B dismissing an appeal against my judgment dated 21st July, 2017 in this matter reported at Holmes-v-Lingard [2017] JRC 113, save that the Royal Court allowed an argument based on reflective loss to proceed to trial. I had already allowed a claim in unjust enrichment to proceed to trial. The Royal Court also agreed with this decision. 5. It is not necessary to set out the detailed procedural the history of this matter save to note that

although a general discovery order was made by me on 17th October, 2016, general discovery has not taken place because matters were overtaken by an appeal against my decision refusing a preliminary issue, and the strike out/summary judgment applications brought by the defendants resulting in my judgment in 2017 and the judgment of the Royal Court in 2018 referred to above. There also have been no witness statements exchanged. Notwithstanding the judgment of the Royal Court, the pleadings of the plaintiff also remain un-amended. 6. It is also right to record that on 16th July, 2018 the plaintiff made a criminal complaint against the defendants and against Mr Sobey and Mr Robertson. These complaints are under investigation. Decision 7. I refused the plaintiff's request for the following reasons. 8. Firstly, the application was brought under Rule 6/15 of the Royal Court Rules 2004, as amended, which provides as follows:- "6/15 Obtaining further information

- (1) The Court may at any time of its own motion or on application order a party to –
 - (a) clarify any matter which is in dispute in the proceedings; or
 - (b) give additional information in relation to any such matter, whether or not the matter is contained or referred to in a pleading.
 - (2) Paragraph (1) is subject to any rule of law to the contrary.
 - (3) Where the Court makes an order under paragraph (1), the party against whom it is made must –
 - (a) lodge his or her response with the Greffier; and
 - (b) serve it on the other parties, within the time and, if applicable, in the manner, specified by the Court."
9. Rule 6/15 was introduced by Royal Court (Amendment No.20) Rules 2017. The new Rule 6/15 replaced requests for further and better particulars, interrogatories and requests for further and better statement of case. The intended effect of Rule 6/15 (which is identical to an equivalent found in the Civil Procedure Rules) is that each party is required to make its case clear if its pleading does not do so.
10. Rule 6/15 should not however open the flood gates to numerous or lengthy requests. The court has previously rejected for further and better particulars in similar fashion. The court also rejected requests amounting to evidence as not being an appropriate way to proceed e.g. *Crociani & Anor v Crociani & Ors* [2015] JRC
177. Nor will requests that go beyond an understanding of a case be granted (e.g. see *Booth v Collas Crill* [2017] JRC 038). The touch stone is whether a party's pleading is understandable or not.
11. What the plaintiff was seeking in the present case however was not to understand the defence of the defendants; rather he sought specific documents. All the plaintiff's requests were therefore requests for evidence on particular issues. It is not appropriate to use Rule 6/15 in such a manner. The application on the basis of Rule 6/15 therefore failed.

12. I accept however, notwithstanding that the application was brought under Rule 6/15, that I possess the power to require a party to produce individual documents or categories of documents. Normally such a power is exercised where an application is made for specific discovery or where a pleading or affidavit refers to a document. Any specific discovery application must be supported by an affidavit setting out why the document is required, its relevance to any particular issue in a case and why the document exists or is likely to exist. No such affidavit was filed by the plaintiff in this case setting out his position as to why he required the documents or his view of the documents. While I comment on the individual requests later in this judgment, this failure to provide an affidavit on the part of the plaintiff meant that for none of the three categories of documents sought has the plaintiff set out his position. This lack of evidence was relevant to how I exercised the discretion vested in me as whether or not to require the defendants to produce documents.
13. In respect of the first request, there was therefore no evidence from the plaintiff setting out his position in respect of the request. The request arose out of a letter dated 6th February, 2012 which lists items making up a loan to Home Farm Developments Limited from the second defendant in the sum of £82,500.00. One of the items is an architect's bill of £20,000.
14. The letter is signed by Home Farm Developments Limited and is marked as being signed by Mr Holmes. However, Mr Holmes in submission did not admit that this document was genuine or that he had signed it. This is an illustration of where the plaintiff does not make his position clear because nowhere in any pleadings or affidavits filed to-date I am aware that the plaintiff disputed signing this document.
15. The plaintiff also does not set out his own position as to his understanding of what the document meant and who he considers any payments for architects' fees may have been made and if so to whom. This means I do not know what issue there may just be between the plaintiff and the defendants in respect of this payment. Nor do the pleadings to-date condescend to this level of detail. At best they put the defendants to proof that monies were loaned. .
16. In addition to not knowing the extent of the dispute between the parties and the plaintiff's position in respect of these architect's fees, general discovery has not happened in this case. What payments were made pursuant to the document dated 6th February, 2012 are matters that will be covered by any general discovery order. This application is therefore made in advance of any general discovery having taken place from both parties. Accordingly, it is also premature. Specific discovery applications should ordinarily follow on from a general discovery order.

17. Finally, in respect of this request I do not know why the plaintiff seeks this document at this stage. It is not relevant to the appeal. It may be relevant to the complaint made to the police. It is not appropriate however to use applications for specific documents in civil proceedings to provide evidence to the police. The police have their own powers to obtain documents and evidence and it is a matter for the police how those powers might be exercised in relation to any investigation.
18. To be fair to the plaintiff he made it clear that he was not seeking documents for this purpose. However I still have to take care in deciding whether or not to order production of documents why they are being sought and used.
19. For all the above reasons the plaintiff's first request is therefore refused.
20. In relation to the second request namely the email of 24th June, 2015, again no explanation was set out as to why these documents are relevant to any appeal or why they are required in advance of any general discovery order. The email referred to arose in the context of whether or not the plaintiff and the defendants had settled their differences which led to two judgments [2015] JRC 226 and [2016] JRC 167.
21. In the plaintiff's written submissions for the application, he stated that the documents were sought in order to plead fraud, conspiracy and perverting the course of justice against the first plaintiff and Mr Robertson. However, this is effectively an application for pre-action discovery. I have no power to order pre-action discovery. The correct route for the plaintiff is therefore either to await general discovery or possibly to seek pre-action discovery by way of application to the Royal Court for an order compelling Mr Robertson to produce the relevant document (applying *MacDoel Investments Limited v The Federal Republic of Brazil* [2007] JLR 201 and *New Media Holding Company LLC Capital Fiduciary Group Limited* [2010] JLR 272 and *Riba Consultaria Empresarial Ltda v Pinnacle Trustees Limited & 7 Ors* [2018] JRC 033A).
22. Again it is also not appropriate to make an order in civil proceedings to obtain evidence to support the criminal complaint.
23. In respect of third request, the two emails that relate to an issue referred to in my judgment striking out parts of the plaintiff's claim and the Royal Court's judgment.
24. The relevant extracts concern paragraphs 124 to 126 of my judgment where I stated as follows:- "On 20th January, 2012, by reference to paragraph 4 of the affidavit of Jason Sobey sworn on 13th May, 2014, Mr Sobey indicated he was contacted by the plaintiff by telephone who informed him that he was "trying to buy Hotel La Tour in Jersey a property owned by the third defendant." Mr Sobey deposed "he asked if I could assist in trying to find finance for the works of the property. He hoped to raise finance by pledging his own personal property portfolio. On this basis I conducted several companies including West Circle Capital Limited and Liquid Wealth Limited however the plaintiff was unable to verify the value of the properties so the funders were unwilling to help." On 21st January, 2012, by

email (exhibit 1 of Mr Sobey's affidavit) the plaintiff sent Mr Sobey what he described as a consolidated refinance proposal. The essence of this proposal, according to Mr Sobey, was that the plaintiff was proposing to combine his own property portfolio with Hotel La Tour to raise finance. Mr Sobey deposed "this was of great concern to him as during the conversation it became clear he did not have the authority of the first and second defendant to propose the same." On 23rd January, 2012, Mr Sobey emailed the first defendant (exhibit 3 to Mr Sobey's affidavit) and stated as follows:- "Harry as discussed I told Shane you were not interested in linking the finance. After speaking to Clint he cannot organise finance on Shane's property unless there was more equity on Shane's side which there is not. I do not understand how this can work he has all this debt outstanding. You would have to be bonkers to allow him to use Hotel La Tour as collateral for your deal. Unless he puts the £2.5 million in for his share of the project (raised by him) you would be mad to enter into anything with him. Hotel La Tour needs to be a standalone venture and will be straightforward to raise finance against. Currently anything the only thing Shane is bringing is debt and potential problems on projects you know nothing about."

25. This extract was one of twelve matters which I stated were inconsistent with the plaintiff's claim that he reached agreement with the first defendant in June 2011 as set out in the order of justice and which was struck out by me and confirmed by the Royal Court.
26. As noted above again no affidavit was filed by the plaintiff in respect of this part of his application. There was therefore no evidence before me as to the plaintiff's version of events as to what discussions took place between the plaintiff and Mr Sobey.
27. Furthermore, the plaintiff did not file any affidavit evidence relevant to this issue either in relation to the strike out hearing before me in 2017 or in relation to his appeal to the Royal Court in
2018. He could have done so. Yet the plaintiff on an appeal wishes to challenge these emails as being fabricated after the event for the purposes of perverting the cause of justice. This issue could have been raised either before me or before the Royal Court but was not. Mr Sobey's affidavit was produced in 2014. The emails were also expressly referred to in my judgment in 2017 as set out above. No explanation has been forthcoming as to why the issue now being raised was not raised at a much earlier stage.
28. The emails also only go to one part of my judgment; there were eleven other matters that were inconsistent with there being an issue for trial which the plaintiff does not challenge. In addition, the exchange of emails does not go to whether or not there was certainty of terms agreed which was the primary part of my decision, as confirmed by the Royal Court at paragraph 66, where the Deputy Bailiff stated as follows:- "66. In our view the Master was correct in his assessment of the evidentiary picture. On any impartial review of all of the documentation it seems to us that it is impossible to say with regard to Mr Holmes' assertion that an agreement was reached between himself and Mr Lingard as to when such an agreement was reached and what its terms were. We agree that the evidence supports the

fact that there was a very serious consideration given to an agreement and that its thrust was an arrangement for the development of La Tour. We do not, however, think that there is evidence to support the fact that an agreement in any of the terms specifically alleged by Mr Holmes was ever reached and accordingly we agree with the Master's view."

29. There is therefore presently no issue between the plaintiff and the defendants where the evidence of Mr Sobey is relevant. This is because both the Royal Court and I found that no agreement was concluded between the plaintiff and the first defendant because of a lack of certainty as to the terms agreed. The position of Mr Sobey is also not relevant to the claims that remain and therefore it is inappropriate to order discovery of a document where there is currently nothing in issue.
30. The lack of any affidavit from the plaintiff in respect of this application also matters for this reason. As noted at paragraph 124 to 125 of my decision in 2017, Mr Sobey deposed that he was approached by the plaintiff and that the plaintiff sent an email to Mr Sobey. The original email which the plaintiff now seeks therefore has a context. Yet there is no explanation before me from the plaintiff about that context and what he says his dealings were with Mr Sobey. This lack of explanation also counts against the plaintiff in ordering discovery at this stage of the original emails.
31. This is also an application for pre-action discovery where again I do not possess jurisdiction and where only the Royal Court can make such an order.
32. Again the concerns I have expressed above in relation to the application concerning Mr Robertson's email in respect of the criminal investigation also apply here. As the complaint has now been made, it is a matter for the police how far they exercise their powers to obtain documents they wish to see from anyone under investigation. I should add it is of course also a matter for the defendant whether he wishes to provide any documents to the police. Any such matter is for him and it is for him to obtain advice in respect of the complaint.
33. While the plaintiff says that the emails are forgeries, there is also no evidence or explanation as to why he says this is the case beyond the fact that the original emails have not been produced but only emails forwarding those emails.
34. For all these reasons the requests were therefore refused.
35. The plaintiff orally argued that he was entitled to the documents pursuant to Article 11 of the Civil Evidence (Jersey) Law 2003. Article 11 provides as follows:- "11 Proof of records of business or public authority
 - (1) A document which is shown to form part of the records of a business or public authority may be received in evidence without further proof.
 - (2) A document shall be taken to form part of the records of a business or public authority if there is produced to the court a certificate to that effect signed by an officer of the business or authority to which the records belong.

- (3) For the purposes of paragraph (2) –
- (a) a document purporting to be a certificate signed by an officer of a business or public authority shall be deemed to have been duly given by such an officer and signed by the officer; and
 - (b) a certificate shall be treated as signed by a person if it purports to bear a facsimile of the person's signature.
- (4) The absence of an entry in the records of a business or public authority may be proved by affidavit of an officer of the business or authority to which the records belong.
- (5) The court may, having regard to the circumstances of the case, direct that all or any of the provisions of this Article do not apply in relation to a particular document or record, or description of documents or records.
- (6) In this Article – “business” includes any activity regularly carried on over a period of time, whether for profit or not, by any body (whether corporate or not) or by an individual; “officer” includes any person occupying a responsible position in relation to the relevant activities of the business or public authority or in relation to its records; and “public authority” includes any public or parochial authority, statutory undertaking, States department and person holding office under the States or under Her Majesty; “records” means records in whatever form.”
36. There is no evidence from the plaintiff to show that these emails were part of the business records of any company rather than emails sent to the first defendant personally. Secondly, Article 11 is intended to make it easier to admit in evidence business records of a company by simplifying what is required to prove the authenticity of a company's business records. It is not a law that justifies pre-action discovery or gives a third party a right to any document (not being a public record or in the public domain) that might form part of the business records of a company. Authorities Holmes-v-Lingard
- [2015] JRC 226. Holmes-v-Lingard and Others [2016] JRC 167. Holmes-v-Lingard and Others [2018] JRC 071B. Holmes-v-Lingard
- [2017] JRC 113. Royal Court Rules 2004, as amended Royal Court (Amendment No.20) Rules 2017. Crociani & Anor v Crociani & Ors [2015] JRC 177. Booth v Collas Crill [2017] JRC 038. MacDoel Investments Limited v The Federal Republic of Brazil [2007] JLR 201. New Media Holding Company LLC Capital Fiduciary Group Limited [2010] JLR 272. Riba Consultaria Empresarial Ltda v Pinnacle Trustees Limited & 7 Ors [2018] JRC 033A. Civil Evidence (Jersey) Law 2003

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