

JERSEY / JUDGMENT

Holmes -v- Lingard and Others

[2016] JRC 167 (23 September 2016)

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judgment

the deputy bailiff: 1. This is an appeal from Shane Michael Holmes, the appellant, against a judgment of the Master of 11 th November, 2015, in which the Master struck out the appellant's claim against Harry James Lingard, HJL Holdings Limited and Angel Fish Limited (collectively the respondents). 2. This matter has taken a slightly unusual procedural course in that the appellant, at the end of the hearing of this appeal, sought and was granted leave by this Court to call a witness (whose affidavit had been deployed by the respondents) for the purpose of cross-examination. Accordingly we adjourned the application to allow the cross-examination of the witness in question, Mr Andrew Robertson ("Mr Robertson") within a narrow ambit relating to the affidavit that he had sworn. Mr Robertson gave evidence before us and was cross-examined and thereafter, due to time constraints, we invited both the appellant and the respondents to file their closing submissions by way of written argument which they have done. Following receipt of the supplementary contentions from the parties Mr Holmes sought to file further documentation in reply to the contentions made by the respondents. He did not seek leave nor did filing such material accord with the directions given by the Court and accordingly the Court did not read it. 3. We take the relevant background to this matter from an earlier judgment of the Master in this case, (Holmes-v-Lingard, HJL Holdings and Angel Fish Ltd

[2015] JRC 172) in which, at paragraph 2 of that judgment, the Master explains:- "2. In his Order of Justice Mr Holmes alleged that he and the First Defendant (Mr Lingard) had entered an agreement in June 2011 to develop Hotel La Tour which was owned by the third defendant Angel Fish Limited (Angel Fish), a subsidiary of the second defendant HJL Holdings Limited (HJL), which was in turn beneficially owned by Mr Lingard. As part of the alleged agreement Mr Holmes asserted that HJL was to make available what Mr Holmes described as "side funding" to enable certain project works to be undertaken on the hotel site. This funding would be secured over a separate development Mr Holmes was undertaking through his company Home Farm Developments Limited (Home Farm). 3. The Order of Justice alleges that Mr Lingard breached and repudiated this agreement in the autumn of 2012. The allegations included complaints that Mr Lingard made representations to induce Investec Bank to foreclose a loan facility made to Home Farm and to various estate agents

"with the deliberate intent to scupper the Home Farm purchase offers". 4. As a result of these breaches Mr Holmes claims the following: (i) the sum of £190,000 in respect of the direct costs and expenses incurred by Mr Holmes in the development; (ii) the sum of £900,000 being the uplift in value of Hotel La Tour bought by Mr Holmes as a consequence of his involvement in the development; and (iii) the sum of £686,000 being losses in expected sale values in the units being separately developed by Home Farm. 5. The Order of Justice also contained injunctions which were signed by W J Bailhache, Deputy Bailiff (as he then was) on 17th March 2014. On 27th May 2015 these injunctions were discharged by order of the Royal Court with reasons to follow. Those reasons have been handed down since the hearing of this matter and I refer to them where relevant. 6. On 20th April 2014 the defendants filed an answer (amended on 27th March 2015) which answer includes a counter-claim for repayment of certain unsecured loans set to be made to Mr Holmes between February and August of 2012. A brief reply to the counter-claim was filed on 21st May 2014." 4. It would unnecessarily burden this judgment to refer to the full background that gave rise to the Master's Judgment under appeal. In essence the matter before the Master, and hence this appeal, is whether or not a binding agreement had been reached by the parties to compromise the proceedings and what if any effect should be given to a document signed by Mr Holmes and Mr Lingard, dated 7 th July, 2015, ("the July 2015 agreement") which purports to be a settlement of these proceedings. 5. Essentially the July 2015 agreement has the following relevant elements:- (i) It is described as a "global settlement agreement". (ii) The plaintiff parties are identified as Mr Holmes, Home Farm Developments Limited and Strata Developments Limited; (iii) The defendant parties are described as Mr Lingard, HJL Holdings Limited and Angel Fish Limited; (iv) It is described as being in respect of actions which comprise the following:- (a) all matters currently pleaded in Court File 2014/095 including claims referred to in the affidavits filed in that action; and (b) all and any additional matters arising between [the parties] in connection with the building projects at La Tour Hotel ... the Home Farm site.... and any other contractual or other agreement or arrangement which has happened in respect of any other building project or proposal in Jersey...". (v) The fundamental terms were:- (a) The matter currently before the Royal Court numbered 2014/095 would be withdrawn and discontinued forthwith and a letter would be signed by all parties to that action and sent to the Court to that effect; (b) [the parties] would each bear their own costs; (c) Existing costs orders in respect of 2014/095 would not be enforced save for the provisions set out at (v) below; (d) The actions were settled on a full and final basis by the terms of the agreement; (e) The balance of funds held by Bedell Cristin subject to the terms of the consent agreement dated 25 th June, 2015, in the matter 2013/046 and 2013/0341 would be applied against the legal costs incurred by the defendant parties; (vi) The terms of the settlement agreement would be confidential but the parties might relay the fact that the settlement has been achieved to relevant third parties. (vii) It was signed by Mr Holmes for all of the plaintiff parties and Mr Lingard for all of the defendant parties. 6. The draft of the July 2015 agreement had been prepared by the legal adviser to the respondents. As part of the discussion as to its terms Mr Holmes had sought an additional clause seeking the setting

aside of previous judgments issued by the Royal Court in connection with the dispute between him and the respondents. On the morning of 7 th July, 2015, Mr Holmes sent an email to the respondents' legal advisers, again further articulating his wish that, while the judgments were presently a matter for public record, he wished to have them set aside "effectively wiping the slate clean". He confirmed "we are indeed writing to the Royal Court to withdraw and discontinue proceedings but we will not be disclosing the terms of the settlement... the terms may stay confidential between the parties." 7. The respondents' legal adviser replied indicating that there was no ability to remove judgments of the Royal Court and that they remain as a matter of public record. In an email in response Mr Holmes pursued this point and again the respondents' legal adviser maintained the position that it was not possible to set aside judgments and indicated that if terms could not be agreed by close of business that day then his clients would proceed with the case. 8. Mr Holmes' response to that was sent just before 1pm and he said "the setting aside of matter and matters subsequent so there is little point in delaying conclusion of the settlement at this point." He went on to invite the Respondents' legal adviser to "engross the settlement ready for signing." By email sent shortly before 4pm on the 7 th July Mr Holmes stated "I have delivered the signed agreement, could you please provide me with a copy of the signed agreement. After that the parties may deal with the letter to the Court." 9. On the same date the respondents' legal advisers produced a consent letter for the discontinuance of the proceedings and the Court was notified orally of that settlement. On 8 th July Mr Holmes sent a text to Mr Robertson where he stated "... can you please confirm that Harry has signed and sent back because I need to collect final copies so we can arrange a letter to Court to confirm settlement has been reached, thanks." 10. The matter then became rather more complicated. It is not disputed that on 11 th July Mr Holmes, Mr Lingard and Mr Robertson met. The purpose of that meeting, however, was disputed. It is Mr Holmes' contention that prior to signing the July 2015 agreement he had agreed through Mr Robertson that Mr Holmes would receive a deal worth £100,000 from Mr Lingard. The purpose of the meeting on 11 th July was to sort out that deal. According to Mr Lingard, however, the purpose of the meeting was for Mr Holmes to apologise to Mr Lingard in connection with the litigation and to explain that he had a number of documents which might be of interest to Mr Lingard in a collateral claim that Mr Lingard was proposing to make against a third party. 11. Mr Lingard's account of that meeting was set out in his affidavit that was before the Master as was Mr Robertson's account set out in his affidavit. We do not need to set out the detail of those accounts save to record that there is a significant measure of disagreement as to what was understood between Mr Holmes and Mr Lingard. 12. The July 2015 agreement was provided by Mr Lingard to the Court on 5 th and subsequently 20 th August, 2015. Prior to that, having been informed of the existence of the compromise by the Respondents' legal advisers, the Master, in issuing a judgment in draft for comment made an observation to the parties in an email of 3 rd August, 2015, expressing, subject to seeing a signed consent order, his delight that the matters had been resolved and asking whether or not the judgment should be published, which he was minded to do, if the effect of publication would be to compromise any

settlement that had been reached. 13. Mr Holmes replied to him by email of 4 th August, 2015, saying that in his view publication would compromise "the desired effect of the settlement. The parties desire to wipe the slate clean as far as reasonably practical and consent to set existing judgments aside rather than have further judgments published. I am dealing with the consent order today and would hope to conclude it this week." 14. The Master had a hearing on 13 th August, 2015, to hand down his judgment. The respondent's legal advisers appeared and indicated that there was a settlement which had been reached which was not conditional on whether or not the judgment was published. Mr Holmes, who also appeared, took the view that settlement was conditional on the parties' agreement that publication should not take place. However he raised no other issue than that at that time. The Master adjourned the hearing. 15. There then occurred an event which is in our view important to this appeal. On th August Mr Holmes met with Mr Robertson. Precisely what happened during the course of that meeting is contentious. Mr Holmes, unbeknown to Mr Robertson, recorded that meeting and produced for the Master and indeed before us what he stated was a transcript of that meeting. Mr Lingard and Mr Robertson dispute the completeness of that transcript and Mr Robertson disputes the conclusions that Mr Holmes sought to draw from the things said during that meeting. 16. Matters returned before the Master on 20 th August, 2015. He sets out what happened in his judgment at paragraph 72 et seq:- "72. At this hearing I confirmed that I was of the view that I could not remove matters already on the public record. As far as the draft security for costs judgment was concerned I accept that I had a discretion whether or not to publish it and, if I was minded to publish it, whether or not to do so on a redacted basis. 73. Mr Holmes then raised for the first time that settlement should be set aside on a different basis, namely that he had reached an agreement which was not recorded in the documents signed on 7th July and was to the effect that he would receive some form of financial compensation. 74. Ultimately I resolved in respect of this issue that I could adjudicate on whether or not a settlement had been reached. If it was clear that the settlement had been reached then I could strike out the Plaintiff's claim. I therefore gave directions for Mr Holmes to file an affidavit setting out all grounds relied upon as to why a settlement had not been reached and then allowing the defendant 7 days to respond with adjourning matters for 9th September 2015. I also released and published the security for costs judgment but with certain parts anonymised." 17. That adjudication was to the effect that a settlement had been reached between the parties and for the reasons set out in the Master's Judgment the proceedings should be struck out. The test for striking out 18. There is no difference between the parties as to the appropriate test for striking out proceedings. An application to strike out may be granted by the Royal Court pursuant to Rule 6/13 of the Royal Court Rules 2004 as amended. Rule 6/13 provides:- "(1) The Court may at any stage of the proceedings order to be struck out or amended any claim or pleading, or anything in any claim or pleading, on the ground that - (a) it discloses no reasonable cause of action or defence, as the case may be; (b) it is scandalous, frivolous or vexatious; (c) it may prejudice, embarrass or delay the fair trial of the action; or (d) it is otherwise an abuse of the process of the Court, and may make such consequential order as the justice of the case

may require. (2) No evidence shall be admissible on an application under paragraph (1) (a)." 19. It is clear that the Master took the view that in the event it could be concluded that a binding settlement had been reached between the parties but to allow such proceedings to continue would be both vexatious and an abuse of the process of the Court because the Court would be asked to adjudicate on a matter that had been resolved by agreement. We agree that it is completely clear that such an agreement has been reached then it would be appropriate to strike out the claim. If, however, that question turned on disputed fact then in our view the more appropriate course was for the agreement to be pleaded and perhaps dealt with as a preliminary issue. 20. The Court of Appeal has had occasion to consider the test for striking out in the recent judgment of *Home Farm Developments Limited v Le Sueur*

[2015] JCA 242 in which the Court, at paragraph 25, said this:- "The decision of the Royal Court in *Channel Islands and International Law Trust Company Limited -v- Pike* which was referred to by Mr Holmes, addressed the situation where an application to strike out had been made by particular defendants upon the basis of Rule 6/13 of the Royal Court Rules 1982. Those defendants relied on grounds which are equivalent to those now specified in paragraphs 1(b), 1(c), and 1(d) of Rule 6/13 of the 2004 Rules. In the course of argument *Tomes DB* was referred to the position in England by reference to what was then Order 18, Rule 19 of the Rules of the Supreme Court which was said to be very similar to the then Rule 6/13. He was also referred to the Supreme Court Practice 1998 (referred to as the White Book). In giving the reasons of the Royal Court, the Deputy Bailiff said (at [1990] JLR 37) by reference to paragraphs 18/19/1 of the White Book at p312: "In applying this rule it must be remembered that it is "not the practice of the civil administration of our courts to have a preliminary hearing, as it is in crime"...it is only in plain and obvious cases that recourse should be had to the summary process under this rule... the summary procedure under this rule can only be adopted where it can be clearly seen that a claim or an answer is on the face of it "obviously unsustainable"... the summary remedy under this Rule is only applied in plain and obvious cases when the action is one which cannot succeed or is in some way an abuse of process or the case is unarguable... the powers conferred by this Rule will only be exercised where the case is clear and beyond doubt..." 21. The Court then went on to say at paragraph 28:- "The test in an application to strike out was considered further by this court in the case of *Trant* (see *Trant -v- Attorney General and others*

[2007] JLR 231) to which we have already referred. In the course of his judgment, Beloff JA said this: "22. The test on an application to strike out is well established. It is only when it is plain and obvious that the claim cannot succeed that recourse should be had to the Court's summary jurisdiction to strike out. Particular caution is required in a developing field of law. Provided that a pleading discloses some course of action or raises some question fit to be decided by a judge, jurors or jury, the mere fact that a case is weak is not a ground for striking it out. These propositions are vouched for by a wealth of Jersey authority and brace and principles deployed by the Courts of the United Kingdom, see eg in *Re Esteem*

Settlement ... [2000] JLR 127 (we note en passant that a new regime, arguably more favourable to an application to strike out, has been introduced in England and Wales by the civil procedure rules). 23. On an application to strike out under sub-para (a) of R16/13(1) (that there is no reasonable cause of action) evidence is not admissible. The facts alleged in the Order of Justice must be taken as correct. However, where an application is made under sub-para (b) (scandalous, frivolous, or vexatious) or sub-para (d) (abuse of process), or where an application to strike out is made out under the inherent jurisdiction of the Court, evidence is admissible and may be considered by the Court. It follows that on this application, evidence was and is admissible." The Test on Appeal from the Master 22. The classic statement of the test, for an appeal from a decision of the Master, a Greffier substitute, is that set out in the case of *Murphy v Collins*

- [2000] JLR 276 , namely that the Court should exercise its own discretion and give such weight as it thought fit to the Greffier's exercise of discretion. 23. It was put to us that the law that governs the function of this Court on an appeal from the Master was set out in the case of *Downes v Marshall*
- [2010] JLR 265 . Although in its terms, that judgment expressed itself as applying only to appeals from the Family Registrar and not "with appeals from the Master of the Royal Court ... where different considerations may apply" it was argued before us that *Birt, Bailiff in Incat Equatorial Guinea Limited and others v Luba Freeport Limited*
- [2010] JLR 435 had favoured the test in *Downes* over the earlier test set out in *Murphy* . 24. The test in *Downes* is in the following terms:- "An appeal from the Family Registrar should only be allowed if there has been a procedural irregularity or if, in exercising his discretion, he has taken into account irrelevant matters, or otherwise arrived at a conclusion which the Court believes to be wrong. This test is not precisely the same test applied on appeal from this Court to the Court of Appeal. It reserves a wider discretion for this Court to intervene, but it places nonetheless greater weight on the Registrar's exercise of discretion. This test will, we think, establish the right balance. Sufficient weight is to be attributed to the Registrar's findings of fact and exercise of discretion to discourage litigants from seeking a fresh bite of the cherry. On the other hand this Court would have the power to intervene if it thinks that the Registrar has gone wrong to the extent that intervention is required in the interests of justice and fairness." 25. In *Incat* the Court was considering an appeal against the decision of the Greffier on taxation. At paragraph 19 of its judgment the Court said:- "19. In my judgment, the Court should apply the test in *Downes* on appeals against taxation. I summarise my reasons for so concluding as follows:- (i) One of the reasons for the decision in *Murphy* was that the jurisdiction was given to the court (or judge) had simply initially been delegated to the Greffier... (ii) In relation to most of the matters heard by the Greffier, that remains the position. The rules of court usually confer a power for "the court" to do something and save where it is not permitted under the rules, the matter is delegated to the Greffier. (iii) The position is rather different in relation to the taxation of costs. Rule 12/3 confers the power to tax costs

on the Greffier, not the Court. There is no question of any delegation. The primary responsibility for the taxation of costs is given to the Greffier pursuant to the Royal Court Rules. In those circumstances, it seems to be appropriate that a greater latitude should be given to the decisions of the Greffier than is perhaps given in other cases where there has been a delegation. (v) It seems to me the test established in *Downes* strikes the right balance in matters of taxation." 26. It is not clear to us that the principles applicable in *Downes* and *Incat*, where there is no delegation of the Court's powers but rather the Registrar or Greffier respectively are exercising an independent jurisdiction, apply in cases where, as here, the Master is exercising a delegated jurisdiction. We apply the test in *Murphy*. The Master has very substantial procedural expertise and experience and that a high measure of regard should be paid to his judgment and exercise of discretion in such procedural matters. 27. This was, of course, not what might be called a "standard" strike out application. 28. The norm for an application to strike out is where one party asserts against another that the claim or defence of that other party should be struck out either pursuant to Rule 6/13 of the Royal Court Rules or under the Court's inherent jurisdiction. This case is somewhat different. The Master's judgment does not touch at all upon the substance of the claim between the appellants and the respondents. It says nothing as to whether those claims are good or bad or could of themselves be struck out. The judgment is instead directed to whether or not an agreement had been reached to compromise those claims. 29. In such a case the Court is dealing with a collateral issue and not the substantive case. The effect of striking out on such an issue means that the substantive case would never be heard and would not have been considered against the threshold requirements of an application to strike out. It may, of course, in obvious cases be entirely appropriate to strike out a case on that basis but this seems to us to be a factor that calls for, if anything, a heightened level of caution. 30. The judgment of the Master was both comprehensive and thorough but in essence the question before him was a relatively straightforward one. Was there an agreement between the appellant and respondents for the compromise of the proceedings which was so clear that it could not be meaningfully challenged? Indeed the Master at paragraph 110 of his judgment says this:- "While this judgment is lengthy to explain what had led to the events of 5th August, ultimately the chain of events on 5th August is not complex, requires me only to consider a few documents and leads only to one inevitable conclusion. That conclusion is that whatever the arguments Mr Holmes might have had to challenge the written agreement signed on 7th July, by the end of 5th August there was clear agreement to withdraw the present action, and that this agreement did not depend on any further meeting or discussion between Mr Lingard and Mr Holmes. ..." 31. It is of course this "one inevitable conclusion" that the appellants challenge. In paragraph 95 of his judgment, the Master, having analysed a significant amount of the material before him, expresses himself in the following terms:- "I therefore have to proceed on the assumption that, prior to Mr Holmes signing the 7th July agreement, Mr Robertson, on Mr Lingard's behalf, did make some form of statement as alleged by Mr Holmes offering £100,000 deal or sweetener, even though this is disputed by Mr Robertson and Mr Lingard and the accuracy of the transcript

produced by Mr Holmes is also disputed by Mr Lingard. Accordingly as at 7th July 2015 it is arguable that the written agreement signed by the parties was predicated on the basis that an oral statement made by Mr Robertson with Mr Lingard's authority, that Mr Holmes would receive some form of deal or sweetener." And, at paragraph 97:- "97. However, for the purposes of this application I am of the view that, as at 7th July 2015, on the basis of what Mr Holmes states, he was told by Mr Robertson, Mr Holmes had an arguable case to set aside the agreement of 7th July 2015 on the basis that he entered into this agreement by mistake or more accurately an "erreur". Erreur is a well-known basis upon which contracts may be set aside. ...it is most likely the mistake that Mr Holmes was invoking would be categorised as an "erreur sur l'existence de la cause", i.e. a mistake as to the basis or purpose of his agreement with Mr Lingard." 32. That finding being made, it seems clear that the Master must also have found that whatever transpired between the July 2015 agreement and the 5 th August changed the position to mean that the agreement reflected in the July 2015 agreement was then effective and unassailable. This was, of course, a determination that the Master had to make on agreed documents and agreed

facts.

To the extent that it turned on a genuine factual dispute, then it could only be resolved by evidence before the Court. 33. As did the Master, it is important to set out the events of the 5 th August, 2015, in which a number of relevant communications took place:- (i) At 09:03hrs Mr Holmes texted Mr Robertson saying:- "If Harry wants I can meet him and his lawyer today to discuss the consent order for court and Hartigans". (ii) At 10:44hrs Mr Robertson replied forwarding a message from Mr Lingard saying:- "No, want all my papers first. Tell him if he does not hand over papers he will no longer mediate." (iii) Mr Holmes then responded by texting: "No consent order then." (iv) At 15:22hrs Mr Robertson, having first unsuccessfully tried to telephone Mr Holmes, then sent a text in the following terms:- "Hi, met with Harry can you call when free." (v) Mr Holmes then called Mr Robertson at 15:29hrs who was at that time with Mr Lingard. Mr Holmes spoke to Mr Lingard. He characterises that conversation to the effect that he re-iterated that the confidential agreement was confidential between the parties and that when he started to re-iterate his position on the consent order and Hartigans Mr Lingard said that he had to let his dog out and handed the phone back to Mr Robertson. (vi) At 15:48hrs Mr Holmes was copied into an email between Mr Lingard and his legal adviser which stated:- "Shane Holmes is refusing to sign and return the letter, he wants the attached to be signed and returned instead setting aside the number of existing judgments. In principle I have no objection to this provided that it does not impact on existing costs orders that have allowed me to claim the money that was held in escrow by Hanson Renouf or otherwise affect me in any way." (vii) By this time Mr Holmes had prepared a consent order and signed it. We do not need to set out the draft consent order in full. We merely observe that it was not in the same terms as the July 2015 agreement in that it required the setting aside of a number of previous judgments of the Court. (viii) At 16:36hrs Mr Holmes emailed a copy of what he had just then sent to the Master and at 17:02hrs Mr Lingard emailed Mr Holmes saying:- "Let's see what he says, can you find me the emails or

letter I need for my solicitor who is here today to deal with Hartigans I need to know what was said about getting permission from houses about." (ix) At 17:06hrs the Master indicated to Mr Holmes that whilst it was possible to withdraw the present proceedings he could not make an order to undo what had already been decided by the Royal Court. (x) At 19:53hrs Mr Holmes replied to Mr Lingard's email saying:- "Agreed, but you will understand that I conflicted from engaging in any other the matter until the Court has officially withdrawn and discontinued case 2014/095. Hopefully that will happen this week and then I will contact you." (xi) Mr Lingard replied at 2029hrs:- "You keep the file, I will pay Hartigans for photocopies." 34. It is clear and is indeed set out in the judgment of the Master that it was Mr Holmes' position that as at 5 th August he was still awaiting details of the deal or "sweetener" that he was expecting to receive from Mr Lingard which, so Mr Holmes would argue, was an important although unwritten part of the agreement between himself and Mr Lingard for the compromise of the proceedings. Mr Holmes' contention was that it was only on 18 th August, 2015, that he appreciated what was being offered, namely a share of the proceeds of litigation, and he was not interested in that offer. 35. The Master deals with the extent to which things changed between his determining of the position on 7 th July, 2015, and the end of 5 th August, 2015. He notes, at paragraph 100 of his judgment that Mr Holmes had produced the consent order to discontinue proceedings that he wished Mr Lingard to sign and that that draft had been signed by Mr Holmes. At paragraph 101 of his judgment the Master reflects the fact that Mr Holmes as at 5 th August was still contending that the publication of the Master's judgment on security for costs would compromise the settlement and he stated that he was dealing with a consent order that day and hoped to conclude it that week. The Master also says:- "Mr Holmes at no time sought to qualify what I was being told to say there was still other matters to be resolved before proceedings could be withdrawn or discontinued." 36. The Master then went on in his judgment of paragraph 102 to reflect the fact that Mr Holmes argued that he could not give such a qualification because he would be referring to without prejudice correspondence and discussions. The Master rejected that argument indicating that it was perfectly proper for parties to say what other steps needed to be taken or agreed before the Court can discontinue proceedings without revealing what those steps are. He also reflects his view that Mr Holmes' position was inconsistent with the email from Mr Lingard to his advocate sent on 5 th August which of course made no reference to matters other than Mr Holmes' desire to see various judgments of the Court set aside. The Master points out at paragraph 104 that Mr Holmes' confirmation sent to Mr Lingard's legal adviser that the consent order had been sent to the Court is also inconsistent with his suggestion that everything was still conditional upon further agreement being reached with Mr Lingard. The Master says, correctly, that Mr Holmes had said no such thing either to the Court or to Mr Lingard's lawyer in communications that were before him. At paragraph 107 of his judgment the Master says this:- "In my judgment there is no doubt that this was the position that Mr Holmes and Mr Lingard had arrived at by the end of 5th August. Mr Holmes in his final email of 5th August did not say to Mr Lingard that he wanted to talk to him before the Court withdrew proceedings. He did not ask for a meeting in that email. He also did not ask to meet Mr Lingard after 5th August 2015. Assuming in Mr Holmes' favour that he believes some form of deal was still forthcoming, by the end of 5th August 2015, Mr Holmes in his own email accepted and agreed that the Court was going to

withdraw proceedings on the basis of the consent order he had drafted and signed asking the Court to do so and which Mr Lingard had agreed. He was not waiting by the time of the email for any further response from Advocate Gardiner. He was waiting for me to withdraw and discontinue the case." 37. There is nothing unreasonable in the Master's interpretation of the messages and documentation before him. It may very well be that that interpretation is entirely the correct one. However, it is Mr Holmes' position, on oath, that there was an understanding that a certain deal would be made and that he did not agree to withdraw the proceedings without it. Indeed it may be argued that in providing his own consent order, which he signed, which contained terms which were not reflected in the July 2015 agreement was itself an indication that Mr Holmes did not consider the July 2015 agreement as reflecting all of what had been agreed. It may be, however bizarrely, that Mr Holmes did believe he was not able to make reference to further conditions that applied to his agreement to discontinue the proceedings. Ultimately that is a matter that could only be determined by the court making a finding on the evidence. 38. Mr Holmes and Mr Lingard had signed a consent order of 4 th August, 2015, withdrawing the proceedings. That consent order did not reflect the July 2015 agreement as it contained a provision for the cancellation of earlier judgments. 39. The 4 th August consent order was, so Mr Holmes asserts, superseded by his draft consent order of 5 th August. Mr Robertson's evidence 40. As we have explained above we heard from Mr Robertson on oath. We gave leave to call and cross-examine Mr Robertson on the matter of the transcript tendered by the appellant, limited to the accuracy of the transcript, how the discussion between Mr Robertson and Mr Holmes took place, and what was meant by Mr Robertson's comments or sounds that he made during that discussion that appear in the transcript. Mr Robertson disputed before us that the transcript was fully accurate and painted a picture that Mr Holmes orchestrated his interview to procure from Mr Robertson answers or comments that supported Mr Holmes' contention that there had been a collateral agreement or understanding between himself and Mr Lingard for a benefit to Mr Holmes as part of reaching the July 2015 agreement. 41. We make no comment or observations about either Mr Robertson's answers or demeanour but in our view it was appropriate to allow the appellant the opportunity to cross-examine Mr Robertson not only on the conversation between the appellant and Mr Robertson in August 2015 and what broadly might or might not have been agreed between Mr Holmes and Mr Lingard. 42. In effect Mr Holmes is arguing that the July 2015 agreement does not reflect the entirety of the agreement between the parties. This was an issue which turned upon, potentially, the contested evidence of Mr Holmes personally, Mr Lingard and Mr Robertson as well as upon the contemporaneous documentation. The documentation may well have supported the Master's interpretation, and in our view it did, but the Master did not have the benefit of full evidence and indeed could not in the exercise of a jurisdiction to strike out have determined issues of fact that were in dispute and could only be resolved by oral evidence. 43. We note that in *Home Farm Developments Limited v Le Sueur* (cited above) the Court at paragraph 49 said this:- "He is, however, on the evidence before us, able to put forward an arguable case on rectification. Rectification is very different from *erreur*. Rectification requires that both parties have either reached an agreement or have a continuing common intention which has not been correctly reflected in the written agreement. The Court can in those circumstances rectify the written document to reflect the true agreement reached

between the parties. That is essentially what Mr Holmes is asking the Court to do in relation to the settlement agreement, although his pleading does not say so. For this reason we would allow the appeal but on strictly limited terms and subject to strict conditions to which we will revert at the conclusion of our judgment." 44. We are not blind to the fact that in that case Mr Holmes was advancing a very similar argument to the argument that he advances in this case. 45. In Home Farm Developments Limited the Court, at paragraph 29, also said this:- "Applying these principles to the circumstances of the present case, the Appellants Order of Justice should be struck out only if we are satisfied, based upon the conclusions which we can draw from the relevant documents and facts which are not in dispute, that any trial of the issues would be unnecessary because the claim would inevitably fail. In doing so, we acknowledge that in the particular circumstances of this case, a distinction may be made between paragraphs 1(b) which refers to a claim or pleading which is "scandalous, frivolous or vexatious" and paragraph 1(d) which refers to "abuse of process." Whilst the former expression might, as the Deputy Bailiff referred to in Pike suggest a degree of opprobrium < > about what has been plead, for example, the making of unjustified allegations of outrageous conduct or the unreasonable inclusion of a solicitor as a defendant, we do not consider that the expression "abuse of process" necessarily carries the same connotation. In the context of striking out, we consider that a claim or pleading may be said to be an abuse of process where, after applying the test set out in Trent, the conclusion can be reached that to allow the proceeding to continue would be an unnecessary waste of the court's time because at the end of any trial the result would inevitably be that the claim would fail." And, at paragraph 37(a) reviewing an email:- "...we consider that the true meaning and significance of an informal email ... together with any possible internal inconsistencies or anomalies within it, can only be properly explored at trial." And at paragraph 50:- "Nevertheless we must bear in mind that our task is not to conduct the trial, and for the reasons we have given this is a case where the facts ought to be determined after full disclosure and with the benefit of cross-examination." 46. It is clearly the case that much of the analysis carried out by the Master in his judgment is analysis of correspondence in the form of emails or texts that could only be characterised as informal and the authors of which, for the most part, were not lawyers. Mr Holmes argues for one interpretation which may or may not be an interpretation favoured by a trial court. What it does seem to us to indicate clearly, however, that, as the Court of Appeal said in Home Farm these are matters that "can only be properly explored at trial." 47. The Master could not of course have had this evidence before him and because he was not in a position to make any determination as to disputed fact or find for one party or another on the basis of oral evidence. That is quintessentially a function of the Royal Court sitting with the benefit of Jurats. 48. We have every sympathy with the position of the Master who after a most careful and thorough analysis of the documentation reached the position that there was a concluded and unimpeachable agreement to withdraw the proceedings which should lead him to strike out those proceedings. 49. That notwithstanding, having heard the evidence of Mr Roberson and reviewed again the contentions of Mr Holmes, we cannot say at this point that it was so clear that an agreement, certain in all its fundamental terms, had been reached by the appellants and the respondents for the compromise of the proceedings, that the proceedings should be struck out. 50. With some reluctance, because we do not in any sense fault the Master's analysis of the documentation before him, conclude that

this was not such a case in which an order to strike out a claim, on the basis of a collateral compromise agreement which was in dispute, should have been made. 51. In the circumstances we allow the appeal and order that costs should be left over for determination by the trial court. Authorities Holmes-v-Lingard, HJL Holdings and Angel Fish Ltd

[2015] JRC 172 . Home Farm Developments Limited v Le Sueur

[2015] JCA 242 . Murphy v Collins

[2000] JLR 276 . Downes v Marshall

[2010] JLR 265 . Incat Equatorial Guinea Limited and others v Luba Freeport Limited

[2010] JLR 435 . Page Last Updated: 13 Oct 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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