

JERSEY / JUDGMENT

Holmes -v- Lingard and Others

[2017] JRC 150 (18 September 2017)

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judgment

the master: 1. This judgment represents my reasons for refusing to order a payment on account of costs, following on from my substantive judgment in this matter dated 21 st July, 2017, reported at Holmes-v-Lingard

[2017] JRC 113 where I granted summary judgment: (i) in respect of the plaintiff's claim that he reached agreement with the first defendant in June 2011; and (ii) ruling that losses claimed in respect of alleged interference in sales of units at the development of Home Farm, were losses the plaintiff could not pursue. 2. In relation to the plaintiff's claim in unjust enrichment, he was permitted to claim the objective market value of services rendered save that he could not claim any uplift in value to Hotel La Tour for those services. 3. When the summary judgment decision was handed down, I made the following costs orders set out at paragraphs 8 and 9 of the Act of Court of 21 st July, 2017, as follows:- "8. The Plaintiff shall further pay the costs of and occasioned by his withdrawal of the stay application on the standard basis, such costs to be taxed if not agreed; 9. The plaintiff shall pay 75% of the Defendants' costs of and occasioned by the applications determined by the judgment handed down and paragraphs 1 and 2 of this order on the standard basis, such costs to be taxed if not agreed." 4. The order at paragraph 8 arose because, as set at in the judgment handed down, the plaintiff had at the eleventh hour withdrawn his application for a stay. 5. When the judgment was handed down the defendants wanted a payment on account of costs which led to the order at paragraph 11 of the Act of Court as follows:- "11. if the Defendants wish to apply for any payment on account of costs either in respect of the costs covered by this order or previous costs orders in the Defendants favour, the Defendants shall issue a separate application for such a payment, with any such an application to be accompanied by a schedule of the costs claimed and identifying the payment on account sought." 6. The defendants have subsequently issued such an application. The plaintiff in response issued an application to stay the costs order pending an appeal by the plaintiff which appeal is due to be heard on 5 th and 6 th October, 2017. 7. The first defendant argued that the plaintiff had lost and therefore should pay his costs and so should make a payment on account. In particular, the plaintiff had not argued that he could not pay

despite being directed to file an affidavit if he wished to do so. 8. The first defendant also contended that any order requiring a payment on account of costs should carry a sanction because otherwise it would be simply be ignored by the plaintiff. The first defendant therefore asked for a stay of the proceedings until payment was made and furthermore asked for an "unless order" that the plaintiff's claim to be struck out in its entirety if the plaintiff failed to pay any costs ordered within 7 days. Without such a sanction the plaintiff would not pay any costs he was ordered to pay. 9. The plaintiff in response contended he had not filed an affidavit setting out his financial position because he did not know what costs were being claimed. In addition, as he was exempt from paying court fees, this meant the Viscount had concluded that the plaintiff could not pay any costs. 10. He further argued that he had thought he was not required to make a payment on account until costs had been taxed. 11. In relation to quantum of the bill, the plaintiff was concerned that some of these costs related to costs incurred prior to the present applications being issued at the beginning of 2017. 12. In relation to the request for an unless order, this had not been asked for in the defendants' summons and so such sanction should not be granted because it had not been asked for. 13. He also argued that any payment on account of costs should be stayed because he had strong prospects of success in relation to the appeal for the reasons set out in his notices of appeal, which in summary were as follows:- (i) There was evidence that the first defendant had agreed with the plaintiff in April 2012 to pay 10% of the sale proceeds in the event that Hotel La Tour was developed pursuant to a scheme known as the Godel scheme, which the plaintiff argued was supplemental to the agreement between them; (ii) The plaintiff challenged the authenticity of the different other versions of the agreement relied upon in the judgment under appeal; (iii) In relation to the sum of £282,000, recorded in written agreements as being loaned to Home Farm, the plaintiff argued by reference to paragraph 13(2) of his notice of appeal that, had the first defendant taken Home Farm Developments Limited as agreed, he would have recovered any money advanced out of the equity in the remaining units. In particular, the notice of appeal stated that the secured charges "would be expunged by the foregoing share transfer of Home Farm in or around March 2012". Both in oral submission and in response to an earlier draft of this judgment, the plaintiff was not clear on whether the funds went to Home Farm, were used for his benefit or for Hotel la Tour or a combination of all three. (iv) That the principle of reflective loss did not apply where a wrongdoer had prevented a company from pursuing its cause of action. 14. I record also that the plaintiff in his notice of appeal challenged the various procedural decisions I have made preventing him from addressing me at the hearing on certain arguments because he regarded this as unfair. 15. The plaintiff also indicated that he was asking the court for discovery and cross-examination to contend to show that the first defendant had deliberately fabricated evidence. This was a matter where the Royal Court had reserved its judgment. 16. Finally, the plaintiff argued that there was a costs order in his favour in relation to security for costs and he had also been successful in resisting an appeal to order a preliminary issue where he was entitled to a costs order in his favour. Until there had been an overall accounting of what was due no payment on account should be ordered. 17. The first

defendant in reply contended that:- (i) Any costs orders would lead to a balance in his favour as he was applying to Commissioner Clyde-Smith for a costs order and a payment on account of costs in relation to Commissioner Clyde-Smiths' judgment discharging the injunctions. No order had been made because it had been thought that the parties had settled their differences on a drop-hands basis. He was therefore now making that application. (ii) Otherwise in relation to the grounds of appeal the plaintiff was altering his story. His grounds of appeal were therefore weak. (iii) The plaintiff was also being evasive about what had happened to funds advanced by the first defendant to Home Farm. However, as far as the first defendant was concerned the funds were transferred to Bois Bois. Where they went after that was a matter between the plaintiff and Bois Bois. (iv) The plaintiff also failed to explain why he signed loaned documents for Home Farm acknowledging that money had been received and was due. 18. The starting point for my decision was that ordinarily where a payment on account of costs is sought the usual order is to require such a payment - see *Crociani v Crociani & Ors*

[2014] (1) JLR 503 at paragraphs 16 to 20 applied for example in *MacFirbhisigh & Ching v C. I. Trustees & Executors Limited*

[2016] JRC 156 . 19. There was therefore no basis for the plaintiff's suggestion that a payment on account of costs followed a taxation. The principle of a payment on account is because a successful party is entitled to recuperate monies expended. In *Mars UK Ltd v Teknowledge Ltd*

[1999] 2 Costs LR 44 cited in *Crocian i* the English High Court stated as follows:- "Where a party has won and has got an order for costs the only reason that he does not get the money straightaway is because of the need for a detailed assessment. Nobody knows how much it should be. If the detailed assessment were carried out instantly he would get the order instantly. So the successful party is entitled to the money. In principle he ought to get it as soon as possible. It does not seem to me to be a good reason for keeping him out of some of his costs that you need time to work out the total amount. A payment of some lesser amount which he will almost certainly collect is a closer approximation to justice." 20. The plaintiff has been involved in sufficient disputes before the Royal Court and me to be aware of this principle and to understand that a payment on account does not follow a taxation. I was not therefore persuaded by this argument by the plaintiff. 21. I was also not persuaded that the plaintiff should be permitted to argue he could not pay any costs order made in his favour. In an email to both parties dated 17 th August, 2017, sent because there was disagreement between the parties about how their summonses should be heard, I stated as follows:- "c. If Mr Holmes wishes to argue that he cannot afford to meet any costs order then he must file an affidavit also by 1pm on Friday, 25 August 2017. This affidavit should set out his current financial position with sufficient detailed to explain his living and also addressing the points made at paragraphs 53 and 62 to 67 of my judgment in this matter reported at

[2015] JRC 172 . If no affidavit is filed I shall proceed on the assumption that Mr Holmes can meet any payment on account of costs if I decide to make such an order." 22. The suggestion that the plaintiff did not file an affidavit because he did not know what amount of costs was being claimed flies in the face of this order which was expressly sent to the plaintiff. The plaintiff furthermore responded to the email asking for the hearing date and the date for the filing of skeletons to be varied because of a clash with a directions hearing before the Royal Court in relation to the appeal. He did not however make any observation in relation to the above extract or suggest that he should file any such affidavit only once the amount of costs had been quantified by the defendants. 23. I also reached the view that I regarded the merits of the appeal as weak for the following reasons:- (i) Any agreement made by the first defendant in April 2012 that he should pay the plaintiff something is relevant evidence to the claim in unjust enrichment for the market value of services rendered by the plaintiff. It does not however add any certainty to show the terms of the agreement the plaintiff claims was reached in June 2011. It is also not clear what is meant by a supplemental agreement in this case and how this agreement interrelated with the agreement said to have been reached in June 2011. (ii) In relation to the plaintiff's challenge to versions of events relied upon, at paragraphs 102 and 103 of the judgment, I referred to a draft provided by the plaintiff which was different from the June 2011 agreement set out in the order of justice. At paragraph 113 I referred to a memorandum of advice from the plaintiff's legal adviser which also was different from the agreement pleaded as having been agreed in June 2011. This document also refers to any side loan being dealt with separately and at paragraph 114 to any heads of terms not being binding; those are versions which are inconsistent with the plaintiff's pleaded case and yet they emanate from him or his adviser. (iii) In relation to the suggestion that I had given insufficient weight to the pleading that the charges and capital claimed against Home Farm in the sum of £282,500 remained in dispute, in paragraph 24 of the amended order of justice, the plaintiff argued that this funding would be repaid out of sales of the properties to be built at Hotel La Tour out of the plaintiff's share. Yet the plaintiff now seeks to argue a different case namely that the secured charges were to be expunged by a transfer of Home Farm as part of the agreement said to have been reached in June 2011. This is not the case contained in either the order of justice or the proposed amended order of justice. I also note that in the first proceedings brought by Home Farm referred to at paragraph 10 of the judgment, Home Farm did not dispute that monies had been lent to it. In particular, it was not argued that monies were not advanced to Home Farm or that the charges had been expunged. I also note that the charges were signed by the plaintiff on behalf of Home Farm Developments Limited. Despite these written documents, the plaintiff, as the first defendant observed, in response to questions I posed about what happened to funds advanced of £282,000 was vague as to whether funds were loaned to Home Farm, to him or were applied for Hotel la Tour. 24. The plaintiff argued that the first defendant owed a fiduciary duty and duties of good faith and trust to Home Farm and the plaintiff and also that any duties arising from a judicial hypothec relationship should be treated by the court as equivalent to the utmost good faith doctrine applicable to insurance contracts. 25. In

my judgment, I am not persuaded that a lender of funds owes a fiduciary duty to a borrower. A fiduciary duty involves owing an obligation of loyalty (see *Bristol and West Building Society v Mothew*

[1998] Ch 1 approved in Jersey in the decision of *In the Matter of the ELO and R Trust*

[2008] JLR 360 . Indeed a lender does not have a duty of care to a borrower - see *Toothill v HSBC*

[2008] JLR 77 at paragraph 37 as follows:- "37 A bank and a borrower are on the opposite sides of the contract. The bank owes no duty (whether in contract or in tort) to advise the borrower (or guarantor) either on their financial position or on whether they should take independent legal advice. The bank is entitled to have regard only to its own interests. It is under no duty to advise the borrower (or guarantor) on whether the loan is sensible or appropriate from the borrower's point of view. As *Warne & Elliott, Banking Litigation*, 2nd ed. (2005) put it (para. 3-007, at 107): "The O'Brien principle is concerned with notice and not with duty. It does not place any duty on a bank either to advise the guarantor or to advise the guarantor to seek independent legal advice. The bank owes no contractual or tortious duty to the guarantor to arrange any such private meeting or to advise the guarantor to take independent legal advice. Accordingly, it does not conflict with the long line of decisions which hold that there is no such duty." 26. I also considered that the duty utmost good faith is one peculiar to insurance contracts and does not apply to a contractual relationship generally. 27. I accept that an implied term of good faith might be owed as a matter of Jersey law (see *Haden-Taylor v Canopus Underwriting Limited*

[2015] 1 JLR 224 at paragraphs 126 to 139). An arguable implied term of good faith however still appears to me to be a matter between Home Farm Developments Limited as the borrower and the first defendant as lender. The possible existence of such an implied term does not amount to evidence that the plaintiff and the first defendant reached agreement in June 2011 as alleged by the plaintiff. An implied term does not prove express terms but may only arise where there is a contractual agreement. 28. Home Farm also continued to exist until October 2015 and was a plaintiff in proceedings against the first defendant and in the other proceedings. I do not therefore see why any actions of the first defendant prevented Home Farm from pursuing the first defendant on the basis of the tort of interfering with contractual relations. 29. Ultimately however the plaintiff's contentions are matters for the Royal Court on an appeal, but I considered I was entitled to form an assessment of the likely view of the merits of the appeal in light of the competing submissions of the parties and the plaintiff arguing his grounds of appeal were strong. As I regarded the merits are weak, this was not a basis to refuse to order a payment on account of costs. 30. However, I ultimately decided not to order a payment on account of costs because of the submission by the plaintiff that there was one costs order in his favour in respect of the security for costs application which led to the security for costs judgment dated 20 th August, 2015, reported at *Holmes-v-Lingard*

- [2015] JRC 172 . The plaintiff also successfully resisted an appeal against the decision of mine to refuse to order a preliminary issue leading the Royal Court's judgment at Holmes-v-Lingard and Others
- [2017] JRC 012 . The plaintiff is entitled to ask for a costs order in his favour having successfully resisted an appeal. 31. The first defendant does have another judgment in his favour namely the judgment of Commissioner Clyde-Smith dated 29 th June, 2015, reported at Holmes-v-Lingard
- [2015] JRC 141 . At present an application for costs has been made as well as a payment on account of costs. No application was made previously because the first defendant thought he had resolved his differences with the plaintiff. At this stage however it is not right for me to prejudge what order the Royal Court might make on any such application, even if the effect of such an order, if made, will be significant because the defendants had legal advice at that stage. 32. I therefore reached the view that at this stage it was premature to order a payment on account of costs when the overall costs position between the plaintiff and the first defendant in relation to this litigation was not known. In reaching this view, I took into account that the defendants were not asking for a significant sum and were also content for the monies to be paid into court pending the outcome of any appeal. This was not therefore a case where the defendants were contending that they needed costs incurred to be paid. Rather the application was my judgment brought partly as a matter of principle and partly because there is clearly ill feeling between the plaintiff and the first defendant in relation to the litigation between them. 33. For these reasons I therefore refused to order a payment on account of costs. In view of this conclusion it was not necessary to decide whether any sanction should be imposed to compel payment as asked for by the first defendant. 34. I also made no order as to costs in relation to the application for a payment on account of costs because, while the first defendant had not succeeded in its application, I did not agree with a number of the reasons advanced by the plaintiff in opposition to the application. Authorities Holmes-v-Lingard
- [2017] JRC 113 . Crociani v Crociani & Ors
- [2014] (1) JLR 503. MacFirbhisigh & Ching v C. I. Trustees & Executors Limited
- [2016] JRC 156 . Mars UK Ltd v Teknowledge Ltd
- [1999] 2 Costs LR 44 . Bristol and West Building Society v Mothew
- [1998] Ch 1 . In the Matter of the ELO and R Trust
- [2008] JLR 360 . Toothill v HSBC
- [2008] JLR 77 . Haden-Taylor v Canopuis Underwriting Limited
- [2015] (1) JLR 224. Holmes-v-Lingard
- [2015] JRC 172 . Holmes-v-Lingard and Others

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