

JERSEY / JUDGMENT

Home Farm Developments Limited and Others -v- Le Sueur [2015] JCA 242 (25 November 2015)

[2015] JCA 242

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Court of Appeal (Unknown) 25 November 2015 Before : Jonathan Crow, QC., President Robert Logan Martin, QC. and Sir Michael Birt, QC. Between

- (1) Home Farm Developments Limited
- (2) Strata Developments Limited
- (3) Shane Holmes Plaintiffs/Appellants And Jamie Le Sueur Defendant/Respondent Between Jamie Le Sueur Plaintiff/Respondent And Shane Holmes Defendant/Appellant Leave to appeal was granted by the Deputy Bailiff sitting as a single judge on the 2 nd July 2015 Mr Holmes appeared for the Plaintiffs/Appellants. Advocate M. H. D. Taylor for the Defendant/Respondent.

judgment

the president: This is the judgment of the Court

INTRODUCTION

1. This is an appeal against two decisions of the Royal Court, Commissioner Clyde-Smith sitting with two jurors. The decisions concerned (i) an appeal by the Appellants against a decision of the Master to strike out claims made by them on the basis that the claims were scandalous, vexatious and an abuse of process, and (ii) summary judgment given by the court on a claim brought by the Respondent ("Mr Le Sueur") against the Third Appellant ("Mr Holmes"). 2. The decisions relate to two separate proceedings. The first is an Order of Justice served by the Appellants dated the 4th February 2013 (Court File 2013/52) in which the Appellants claim awards of special damages and consequential damages against Mr Le Sueur based upon his alleged breach of contract, duty and authority. By Summons dated the 7th January 2014, Mr Le Sueur sought the striking out of that Order of Justice upon the basis that it was scandalous, frivolous or vexatious and otherwise an abuse of process. In a judgment dated the 26th March 2014 (Home Farm Developments Limited and Others-v-Le Sueur

[2014] JRC 079), the Master struck out the Order of Justice. The Appellants appealed against that striking out and in a judgment dated the 21st May 2015 (Home Farm Developments Limited and Others-v-Le Sueur

[2015] JRC 110), the Commissioner sitting with two jurats dismissed that appeal. 3. The second proceeding is an Order of Justice served by Mr Le Sueur (Court File 2014/156) in which he sought judgment against Mr Holmes for payment under a promissory note. On the 21st May 2015, the same Commissioner and jurats gave summary judgment by Act of Court against Mr Holmes in accordance with that Order of Justice, but without giving any reasoned judgment. 4. The Appellants have sought to appeal against the judgments of the Royal Court in terms of what is now an amended Notice of Appeal dated the 9th November 2015.

BACKGROUND

5. The circumstances which have led to these two sets of proceedings are described in the judgments of the Master and the Commissioner. We will not repeat all the detail. In outline, the background may be summarised as follows. In 2009, Mr Holmes decided to undertake a development project on land at Home Farm, Grouville. He established two companies, namely the First Appellant ("Home Farm Developments") and the Second Appellant ("Strata"). For the purposes of carrying out the development, the property was acquired by Home Farm Developments and the building work was to be undertaken by Strata. 6. Mr Le Sueur was engaged in property development which he pursued through two companies, namely Manor Homes Limited ("Manor Homes") and Tower Capital Management Limited ("Tower Capital"). In general, Manor Homes was responsible for the construction work involved in such projects and Tower Capital was responsible for providing associated financial and accountancy services. 7. On the 9th September 2010, Home Farm Developments and Manor Homes entered into a Consultancy Agreement under which Home Farm Developments was referred to as the "Customer" and Manor Homes was referred to as the "Consultancy". Neither Mr Holmes nor Mr Le Sueur was a party to the Consultancy Agreement although Mr Le Sueur was named as the "Executive" upon whom certain responsibilities were placed on behalf of the Consultancy. The nature of the financial arrangements between the parties is described by the Master and the Commissioner in their judgments. In particular, Home Farm Developments had access to loans which were secured on the property at Home Farm and funds were provided under the direction of Mr Holmes to Strata. Payments to creditors in connection with the development were then made out of the bank account of Strata by Tower Capital, who provided signatories for this account. The payments which were made included payments to Manor Homes who were stated in the Consultancy Agreement to be entitled to specified remuneration in respect of the provision of services. 8. The relationship between Mr Holmes and Mr Le Sueur began to deteriorate in about 2011. On the 13th March 2012, Sinels who were advocates acting for all of the Appellants, sent a letter on their behalf addressed to Mr Le Sueur at Manor Homes which described itself as a "pre-action letter" ("the Sinels letter"). The Sinels letter referred to the

Consultancy Agreement and it alleged that Manor Homes was in breach of its authority and duty under that Agreement because it had used its authority over the bank account to settle its own fees instead of paying third party creditors. It was said that the Consultancy Agreement did not permit Manor Homes to pay monies to itself. The Sinels letter claimed immediate repayment of the sum of £103,562.70 from Manor Homes to Strata. 9. There were then extended negotiations between the parties leading to a succession of abortive settlement agreements. By that stage, a number of Strata's creditors were represented by a debt collection company, Cashback Limited ("Cashback"). In an email dated the 29th May 2012 addressed to Mr Le Sueur, Mr Holmes confirmed the terms of a "settlement agreement" which provided for payment of £50,000 to be made to Strata in settlement of its claim for "£103k", which was to be payable in specified proportions to Cashback and to other creditors of Strata. On the 30th May 2012, Mr Le Sueur sent an email to Mr Phil Boots of Cashback which repeated in almost identical terms the agreement which Mr Le Sueur said he had reached with Mr Holmes. On the 31st May 2012, Mr Holmes and Mr Le Sueur signed an agreement ("the Settlement Agreement") which was expressed to be made by Mr Holmes on his own behalf, and also on behalf of Home Farm Developments and Strata, and by Mr Le Sueur on his own behalf, and on behalf of Manor Homes and Tower Capital. In summary, the Settlement Agreement stated that it replaced in whole a number of specified earlier agreements between the parties and it provided in five clauses for the parties to fulfil certain obligations including payment by Mr Le Sueur of the sum of £45,000 to creditors of Strata (a sum of £5,000 having already been paid). In connection with that payment, it also provided that £20,000 was to be regarded as a loan to Mr Holmes and that Mr Holmes had provided a promissory note dated the 25th April 2012 as evidence of that debt. It is that promissory note which is the subject of the summary judgment dated the 21st May 2015. The existence and terms of the Settlement Agreement and the preceding emails are central to the issues with which this appeal is concerned and we refer to them in more detail below. LEAVE TO APPEAL 10. The Appellants initiated this appeal by a Notice of Appeal dated the 18th June 2015. Article 13(1)(e) of the Court of Appeal (Jersey) Law 1961 provides that no appeal shall lie "without the leave of the Court ... from any interlocutory matter or interlocutory judgment" (subject only to exceptions which are not relevant to this case). In *Planning & Environment Committee v Lesquende Ltd*

[2003] JLR 15, the Deputy Bailiff (Birt DB as he then was) held that a decision was interlocutory if the nature of the application was such that it would not determine the proceedings whichever way it was decided. That decision was upheld by this Court: see the judgment of Southwell JA at *Planning & Environment Committee v Lesquende Ltd*

[2003] JLR Note 8. 11. In this case, it appeared that both the strike-out application and the summary judgment application were interlocutory, which would mean that the rulings of the Commissioner could be appealed only with leave. By a judgment dated the 2nd July 2015, (*Home Farm Strata and Holmes-v-Le Sueur*

[2015] JCA 146A) Le Cocq DB sitting as a single judge of this Court extended the time for service by the Appellants "of the notice of appeal" and he did so in respect of both the appeal against the strike-out (Court File 2013/52) and the appeal against summary judgment (Court File 2014/156). It appears to us that that judgment may be construed as having impliedly given leave to appeal to this Court. However, in order to avoid any uncertainty, we notified the parties at the outset of the hearing that leave should be taken as having been given either by the Deputy Bailiff or by this Court. THE SUBSTANTIVE JUDGMENTS BELOW 12. In support of his strike-out application before the Master, Mr Le Sueur presented four arguments. The first was that Strata did not exist, having been dissolved; the second was that Mr Holmes had no contractual relationship with Mr Le Sueur; the third was that Mr Le Sueur was not a party to any contract with Home Farm Developments (other than being named as the "Executive" in the Consultancy Agreement); and the fourth was that the only agreement to which the Appellants and Mr Le Sueur were parties was the Settlement Agreement which prevented any litigation in respect of the development at Home Farm. In response, Mr Holmes contended first that the test applicable to striking out was a high one; secondly that Strata could be reinstated; thirdly that the Settlement Agreement was conditional upon Mr Le Sueur securing a settlement with the creditors represented by Cashback; fourthly that there had been a shareholders agreement between Mr Le Sueur and Mr Holmes which Mr Le Sueur had breached by not settling matters with creditors prior to the Settlement Agreement; and finally that Mr Le Sueur had "held various positions of trust authority and duty with the plaintiffs" in respect of which he was in breach. Further, Mr Holmes contended before the Master that the Settlement Agreement should be set aside because Mr Le Sueur had failed to fulfil his obligation to agree terms for full and final settlement with Cashback. 13. The Master decided that the question whether the Order of Justice should be struck out depended upon the Settlement Agreement and the exchange of emails dated the 29th and 30th May 2012. He held that the terms of the Settlement Agreement were clear and that they prevented any further proceedings in relation to the development at Home Farm. He noted that the Appellants were repeating the allegations contained in the Sinels letter. The Master found that the emails referred to, along with other emails, were consistent with the final balances due to creditors of Cashback being agreed between Mr Holmes and Cashback and this was contrary to the argument that it was for Mr Le Sueur to procure full and final settlement. The Master concluded that there was no basis upon which he could conclude that Mr Le Sueur had breached any agreement, and he decided that the Order of Justice should be struck out. In respect of the other grounds put forward by Mr Le Sueur, the Master stated that, had he been minded not to strike out the Order of Justice, he would have given Mr Holmes time to take steps to reinstate Strata. He agreed that there was no evidence that there had been any contract between Mr Holmes and Mr Le Sueur or Manor Homes. In relation to the suggestion by Mr Holmes that there had been a shareholders agreement, the Master noted that this argument appeared to be raised on the basis that Mr Le Sueur was a shareholder in Home Farm Developments but that fact alone did not create a shareholders agreement and there was no evidence otherwise that one had been created.

The Master also found that although Mr Le Sueur had been a 50% shareholder in Home Farm Developments, that had only been by way of security because he had given certain guarantees in respect of the borrowings of the company and Mr Le Sueur no longer had any interest in it. In addition, Mr Holmes had accepted that there was never any shareholders agreement in relation to Strata. The Master observed that the essence of Mr Holmes' complaints was that Mr Le Sueur had failed to procure that creditors of Strata withdraw their claims. Even if there had been a shareholders agreement in respect of Home Farm Developments, that could not have placed Mr Le Sueur in breach of duty if he failed to procure the withdrawal of claims against Strata. Further, the Appellants had in any event withdrawn all of the allegations set out in the Sinels letter. Finally, the Master noted that it had emerged that a relative of Mr Le Sueur had taken an assignment of loans drawn down by Home Farm Developments. This was said by Mr Holmes to benefit Mr Le Sueur because he was released from guarantees that he had given. The Master observed that Mr Holmes had been aggrieved by this but the fact that a relative of Mr Le Sueur had chosen to assist him by taking over the loans was not relevant to the question of whether the Order of Justice should be struck out. 14. In their appeal to the Royal Court, the Appellants accepted that the Settlement Agreement had settled all of the claims made in the Sinels letter but they contended that that settlement was limited to claims arising between Home Farm Developments and Manor Homes under the Consultancy Agreement. Mr Holmes argued that the Consultancy Agreement had been what he described as a "side agreement" and that the Order of Justice was concerned with obligations incurred personally by Mr Le Sueur under what was described as "the Bargain". This comprised an alleged agreement between Mr Holmes and Mr Le Sueur jointly to secure the finance necessary to carry out the development at Home Farm which Mr Le Sueur would supervise. Mr Holmes argued that they had jointly incorporated Home Farm Developments for this purpose and that it was beneficially owned by them in equal shares. Mr Holmes argued that it was an implied term of the Bargain that he and Mr Le Sueur each owed a duty to ensure that the performance of the Bargain was not undermined and that nothing was to be done in relation to the loans which favoured either party to the disadvantage of the Bargain or the other party. Mr Holmes accepted that there had been no shareholders agreement and argued that the Bargain was an agreement which had been entered into orally. The Commissioner referred to the conclusions of the Master on the breach of authority and duty alleged by the Appellants and he and the jurats found that the conclusions of the Master remained correct even after taking into account further evidence filed by the Appellants. 15. The Commissioner dealt with a number of further arguments advanced by Mr Holmes. First, Mr Holmes had submitted that the Appellants had been deprived of an opportunity to submit affidavit evidence before the Master. The Commissioner found that because the Master had allowed an adjournment of the hearing before him for a week, the Appellants had had time to respond to the affidavit evidence filed on behalf of Mr Le Sueur. Secondly, it was claimed that the Master had been misled by Mr Le Sueur's evidence into believing that Mr Le Sueur was not a party to any agreement nor held any personal obligations, that Mr Le Sueur had no interest in Home

Farm Developments or Strata, that the Bargain was limited to the Consultancy Agreement, that the relationship commenced in 2010, and more generally that the agreement had come to an end and been compromised by the Settlement Agreement. The Commissioner and jurats found nothing to support an allegation that the Master had been misled.

Thirdly, Mr Holmes relied upon what was said by the Master in a judgment dated the 4th December 2014 (Home Farm Developments Limited and Ors v Le Sueur

[2014] JRC241) which related to an application by Mr Le Sueur for security for costs. It was suggested that this indicated that in light of the further evidence which had been submitted by Mr Holmes, the Royal Court might take a different view, but the Commissioner stated that none of the new evidence detracted from the central point that any personal claims arising out of the underlying complaint about the payment of fees to Manor Homes had been settled by the Settlement Agreement. Fourthly, the Commissioner agreed with what had been said by the Master that the assignment of loans by Mr Le Sueur was not relevant to the issue whether the Order of Justice should or should not be struck out. 16. The Commissioner and jurats dismissed the appeal and at \$29 of his judgment the Commissioner said this:- "In conclusion, we agree with the Master that these proceedings are both scandalous and vexatious and an abuse of process and that no amendment to the Order of Justice can be made to cure this. The appellants have one ground of complaint, namely the use of the bank mandate of Strata Developments to pay the fees of Manor Homes and Tower. They took advice from Sinels, who wrote to Mr Le Sueur at Manor Homes, demanding the repayment of the sums involved, referring to the consequential losses that might flow and expressly reserving their rights of action against Mr Le Sueur personally. All of the matters raised in that letter and in relation to the development of Home Farm were then compromised in the Settlement Agreement to which all of the parties involved in the development, but specifically including the appellants and Mr Le Sueur, were parties. Mr Holmes now accepts that this agreement was effective, but argues that it was limited to the claims brought by Home Farm Developments against Manor Homes; that is manifestly not the case. The proceedings that were issued in 2013 replicated almost word for word the Sinels' letter, but made no reference to the Settlement Agreement. Mr Holmes now alleges some kind of bargain between him and Mr Le Sueur (to which there was no reference in either Sinel's letter or the Order of Justice), giving rise to a direct cause of action but even if there was some kind of agreement to give rise to such duties, it would have been covered by the Settlement Agreement which extended to any personal claims against Mr Le Sueur." 17. Before leaving the decisions of the lower courts, it is to be noted that in a judgment dated the 1st September 2015 (Home Farm Developments and Others-v-Le Sueur

[2015] JCA 180), the Deputy Bailiff refused an application on behalf of Mr Le Sueur that the Appellants provide security for costs in respect of this appeal. Although the Deputy Bailiff concluded that he did not believe that the merits of the appeal were strong, he could not say that it was "doomed to failure". He balanced the interests of the Appellants against the possibility that by making an order for security for costs he might shut out the appeal, and

he decided in the exercise of his discretion that he should not order that security for costs be provided. THE CONTENTIONS OF THE PARTIES 18. In the amended Notice of Appeal, the Appellants ask this Court to set aside what are referred to as "two judgments" of the Royal Court as well as the judgment of the Master. The two "judgments" of the Royal Court in fact comprise the judgment of the Commissioner on the strike-out application and the order made on the summary judgment application (in respect of which there was no judgment as such). The Appellants also ask this Court to order that the appeal should operate as a stay of execution of the judgments of the courts below and that the Appellants should be permitted to amend their Order of Justice. 19. In the Amended Notice of Appeal, the Appellants set out fourteen grounds of appeal which may be summarised and grouped as follows. The first relates to matters which the Commissioner is said not to have taken into account, or to which he is said to have given insufficient weight. These concern suggested errors of fact in the Master's judgment, reliance upon affidavit evidence for Mr Le Sueur, the suggested inability of the Appellants to have submitted affidavit evidence, and a failure to consider affidavit evidence for the Appellants. The second aspect of the appeal is that the Appellants contend that the Settlement Agreement should be treated as vitiated as a result of misrepresentation, innocent or otherwise, in respect of material terms, and because it was apparent that the Settlement Agreement was ambiguous, resulting in there having been no consent between the parties to the Agreement. Thirdly, the Appellants contend that the Commissioner erred in refusing their request to amend the Order of Justice. Fourthly, the Appellants contend that their Order of Justice presented an arguable case and that Mr Le Sueur cannot demonstrate that it was susceptible to striking out. Lastly, the Appellants contend that they have been prevented from arguing a genuine question in dispute, that justice has not been achieved, and that insufficient "latitude" has been afforded to the Appellants as litigants in person. 20. In support of the appeal, the Appellants served an amended Skeleton Argument dated the 19th November 2015 which reduced their case to four arguable points: first, that the Appellants had notified Mr Le Sueur of their view that the Settlement Agreement had been vitiated before issuing proceedings; secondly, that they only commenced proceedings after establishing that there were bona fide issues in dispute; thirdly, that the Settlement Agreement is null and void for want of consent; and fourthly, that the Settlement Agreement only had the effect of releasing existing legal proceedings by Home Farm Developments against Manor Homes. 21. In determining a strike-out application, the Appellants say that the Court should apply the test set out in *Channel Islands and International Law Trust Company Limited v Pike and others*

[1990] JLR 27 . On that basis, they submit that the onus upon a party seeking to strike out a claim is a heavy one. The Court would have to find that it was "plain and obvious" and "clear beyond doubt" that the proceedings were scandalous, frivolous, vexatious or otherwise an abuse of process. Even if the Court so found, it should nevertheless only strike out the proceedings if it were satisfied in the exercise of its discretion that that would be justified in all the circumstances. 22. In reply, Mr Le Sueur contends that, as the only parties to the

Consultancy Agreement were Home Farm Developments and Manor Homes, Mr Holmes has no contractual entitlement to bring any action in his own name or otherwise against Mr Le Sueur. Insofar as the allegations based upon the Consultancy Agreement are concerned, Mr Holmes was well aware of the entitlement to and amounts of the payments which were taken from Home Farm Developments. In any event, the matter was settled by the Settlement Agreement to which all of the Appellants were parties along with Mr Le Sueur, Manor Homes and Tower Capital. In the Settlement Agreement, all of the parties agreed that they would immediately and permanently withdraw all legal proceedings in connection with the Consultancy Agreement. The commencement of proceedings by the Appellants was in breach of that agreement. Mr Le Sueur also argues that Strata was dissolved in October 2013 and that it cannot be a party to legal proceedings because it does not exist. On the substantive issue raised by the Appellants, Mr Le Sueur contends that upon a proper construction of the Settlement Agreement along with primarily email correspondence between Mr Holmes, Mr Le Sueur and Mr Boots of Cashback, there is no doubt that the claim by Mr Holmes that Mr Le Sueur was obliged to agree a settlement with the creditors of Strata as part of what was comprised in the Settlement Agreement can be shown to be unjustified and that that is sufficient now to demonstrate that the Order of Justice should be struck out. THE TEST FOR A STRIKE-OUT 23. We begin by addressing the legal principles which apply to the consideration of an application to strike 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 ("the 2004 Rules"). 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)." 24. Mr Le Sueur's application seeks to strike out the Order of Justice on the grounds specified in paragraphs (1)(b) and (1)(d) of the 2004 Rules, and the Master, the Commissioner and this Court have all been invited to look at evidence in support of the respective positions which are being advanced. Given that the admission of evidence is prohibited only in respect of an application which is advanced on the ground specified in paragraph (1)(a), the result is that the court may legitimately look at evidence for the purpose of determining an application for striking out advanced on the grounds specified in paragraphs (1)(b) and (1)(d): see *Trant v Attorney General* and others

[2007] JLR 231 , at §23. 25. 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, Tames 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 1988 (referred to as "the White Book "). In giving the reasons of the Royal Court, the Deputy Bailiff said (at [1990] JLR, p. 37) by reference to paragraph 18/19/1 of the White Book at p. 312:- "In applying this rule it must be remembered that 'it is not the practice in the civil administration of our Courts to have a preliminary hearing, as it is in crime' (per Sellers LJ in *Wenlock v. Moloney*

[1965] 1WLR 1238 ... 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 when it can be clearly seen that a claim or 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 ...". 26. Mr Holmes contends that this demonstrates that the burden on Mr Le Sueur is a heavy one. To satisfy this Court that it was "plain and obvious" and "clear and beyond doubt" that the Order of Justice was scandalous, frivolous or vexatious, or was otherwise an abuse of process of the court, Mr Holmes argues that Mr Le Sueur must show that the Appellants brought the Order of Justice in the knowledge that it was compromised by the Settlement Agreement and would thereby not constitute a bona fide use of the court's machinery, and that vexation and oppression will be caused as a result. 27. The Deputy Bailiff in *Pike* referred further to the meaning of the expression "scandalous, frivolous or vexations" when he quoted (at p. 38-39) from paragraphs 18/19/14 and 15 of the White Book at pp. 322-323 - being passages which we consider to be relevant to this appeal:- "The Court has a general jurisdiction to expunge scandalous matter in any record or proceeding ... Allegations of dishonesty and outrageous conduct, etc, are not scandalous, if relevant to the issue ... But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous ... By [the words frivolous or vexatious] are meant cases which are obviously frivolous or vexatious, or obviously unsustainable ... For instance, it is vexatious and wrong to make solicitors or others, parties to an action merely in order to obtain from them discovery or costs ...". 28. The test in an application to strike out was considered further by this Court in the case of *Trant* 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 where 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 cause of action or raises some question fit to be decided by a judge, jurats 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 embracing principles deployed by the courts of the United Kingdom, see e.g. *In re Esteem Settlement* ... (2000

JLR at

- 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). On an application to strike out under sub-para. (a) of r.6/13(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 the 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." It may be observed that the decision of the Deputy Bailiff in Pike was not referred to in Trant but for our part we see nothing in it which could be said to demonstrate an approach which is materially different. 29. 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 paragraph (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 (at p. 37), suggest a degree of opprobrium about what has been pled, 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 Trant, 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. MR HOLMES' FIRST AND SECOND ARGUMENTS 30. Having set out the relevant legal test, we can dispose briefly of Mr Holmes's first two arguments (see §20 above). Those arguments appear to have been based on Mr Holmes's belief that the claim was being struck out on the grounds that he knew he did not have a claim, and he did not tell Mr Le Sueur about his claim before issuing proceedings, and that that was why the action was regarded as scandalous, vexatious or an abuse. However, as will be apparent from our summary of the law set out above, the Court does not need to consider in this case whether Mr Holmes did or did not notify his claim to Mr Le Sueur before issuing proceedings, and it forms no part of the judgments below that Mr Holmes knew his claim to be unfounded. The sole question before the Court is whether the Order of Justice raises issues that are fit to go to trial. For these reasons, we would dismiss Mr Holmes's first two arguments. MR HOLMES' FOURTH ARGUMENT 31. It is convenient next to deal with Mr Holmes' fourth argument (see §20 above), which concerns the correct interpretation of the Settlement Agreement, which provided as follows: "Home Farm Developments Limited ("the Company") We refer to the letter sent to you by our lawyers, Sinels, dated 13 March, 2012 and

our subsequent agreement dated 25 April, 2012 and a further agreement dated 17 May, 2012. Agreement has now been reached between the Company, Mr Shane Holmes and Strata Developments Limited on the one part (jointly "HFDL") and Mr Jamie Le Sueur, Manor Homes Limited and Tower Capital Management Limited on second part (jointly "MHL") to replace in whole the agreements referred to above dated 25 April, 2012 and 17 May, 2012 with the following Agreement:-

1. Mr Shane Holmes, Home Farm Development Limited and Strata Developments Limited and their successors and assigns hereby agree that they will, both individually and jointly, immediately, permanently and irrevocably withdraw all legal proceedings of any nature in connection with the consultancy agreement executed between the Company and Manor Homes Limited on or around 8 September 2010 or any other matter relating to the development of Home Farm, Grouville and all matters referred to in the letter from Sinels dated 13 March, 2012 against Mr Jamie Le Sueur, Manor Homes Limited and Tower Capital Management Limited who individually and jointly admit no liability.
2. Mr Jamie Le Sueur will pay £45,000 to creditors of Strata Developments Limited. These payments will be made either directly to Cashback Limited or to the individual creditors of Strata Developments Limited, as directed by Mr Shane Holmes and will be made in 3 equal payments, the first payment being made on or around 31 May, 2012 and the second on or before 29 June, 2012 and the third on or before 27 July, 2012.
3. Mr Jamie Le Sueur has already made three payments totalling £4,997.00 to creditors of Strata Developments Limited as follows:- £897.00 to Hillbury Collection Services in respect of amounts owed to Electrical Supplies and Machinery (Wholesale) Limited, £1,100 to Mr Lee Le Lai and £3,000 to Cashback Limited in respect of amounts owed to Normans Limited. These three payments are hereby acknowledged.
4. £20,000 of the total funds paid by Mr Jamie Le Sueur as referred to in 2 and 3 above are to be considered as a loan to Mr Shane Holmes who has provided Mr Jamie Le Sueur with a promissory note for £20,000 dated 25 April, 2012 as evidence of his debt.
5. In the event that Investec Bank (Channel Islands) Limited demand repayment under the guarantee provided to Investec Bank (Channels Islands) Limited by Mr Jamie Le Sueur for their loan to Home Farm Development Limited as described in their facility letter dated July 14, 2010 no further payments referred to in 2 or 5 above shall be made by or accrue to Mr Jamie le Sueur as from the date of their demand and the value of the promissory note referred to in 4 above will be adduced to equate to the total of all payments made in 2 and 3 above less £30,000. The terms of this Agreement as listed above are hereby accepted and agreed between the parties hereto on 31 May 2012."

32. It is well established that, when interpreting a document (including a contract), the Court must ascertain the meaning of the document from the words used, not by reference to the subjective intention of the parties. Thus, in *Hyams v Russell* [1970- 1971] JJ 1891 , Ereat DB said this at 1910:- "We agree that it is a fundamental principle of the law of contract that where there is a written agreement which has a plain natural meaning it is not permissible to alter its effect according to the intention of one of the two contracting parties, or to adduce evidence in order to show such an intention. The only question is, what have the parties said by their contract?"

33. We are satisfied that both the Master and the Commissioner were correct in their conclusions as to the correct interpretation and effect of

this Agreement. In our judgment, it amounts to a clear and unequivocal commitment on the part of all three Appellants to withdraw, and not to reinstate, any legal proceedings against Mr Le Sueur, Manor Homes or Tower Capital, whether arising out of the Consultancy Agreement or more widely in connection with the development at Home Farm. We cannot see how the provisions contained in the Settlement Agreement could be construed in any other way. The Master noted (at §32 of his judgment) that clause 1 did not use the expression "full and final settlement" but he concluded that where an agreement provides for the immediate and permanent withdrawal of legal proceedings, that means that such proceedings cannot be raised again in the future, which amounts in its effect to a full and final settlement. We agree. Furthermore, the permanent withdrawal referred to in the Settlement Agreement applied to the legal proceedings threatened in the Sinels letter, which letter is referred to in the preamble to the Settlement Agreement. Since the matters alleged in the Order of Justice amount to a re-statement of the allegations contained in the Sinels letter, this means that the Settlement Agreement expressly prohibited the Appellants, and each of them, from initiating precisely these legal proceedings against Mr Le Sueur, Manor Homes and Tower Capital. 34. In the course of argument, Mr Holmes maintained that the effect of clause 1 was limited to the claim set out in the Sinels letter and that this related only to a claim by Home Farm Developments against Manor Homes, and not to a claim which might be made by any of the other Appellants, or to a claim against Mr Le Sueur. He referred to the decision of the House of Lords in *Bank of Credit and Commerce International SA (In compulsory liquidation) v Ali and others*

[2001] 2 WLR 735 as authority for the proposition that, in the absence of clear language, the court will be slow to infer that a party has intended to surrender rights and claims of which he was unaware: see the speech of Lord Bingham of Cornhill at §8-10, 16 and 19. In our judgment, this argument cannot be sustained in light of what is actually provided in clause 1 of the Settlement Agreement. The wording of that clause is clear beyond doubt, in that it specifies an agreement by all of the Appellants not only to withdraw legal proceedings in respect of "all matters referred to in the letter from Sinels dated 13 March, 2012 against Mr Jamie Le Sueur, Manor Homes Limited and Tower Capital Management Limited" but also in respect of "legal proceedings of any nature in connection with the consultancy agreement", and also "any other matter relating to the development of Home Farm". The commitment by the Appellants to withdraw proceedings cannot be read as applying only to the matters raised in the Sinels letter, or only in relation to claims against Manor Homes, because that is simply not what clause 1 says. 35. We therefore reject the argument put forward by Mr Holmes for a narrow reading of the Settlement Agreement. CONSENT, ERREUR AND RECTIFICATION 36. If the case had turned purely on the interpretation of the words appearing in the Settlement Agreement, we would therefore have dismissed the appeal. However, in his detailed affidavit evidence, and also in his written and oral submissions, Mr Holmes has argued (i) that he entered into the Settlement Agreement on the express understanding that Mr Le Sueur would at the same time procure back-to-back agreements with the creditors of Strata that they would accept

the £50,000 he was offering in full and final settlement of their claims, (ii) that that was a condition of his and his companies' release of their claims against Mr Le Sueur and his companies, and finally (iii) that, in the absence of any agreement by the creditors that their claims were fully and finally settled by receiving the £50,000 payment, his and his companies' release of claims against Mr Le Sueur and his companies falls away. In response, Mr Le Sueur denies that he entered into the Settlement Agreement on the basis alleged by Mr Holmes. He says that the terms of the bargain are fully and accurately reflected in the words of the written contract. He also invites the court to reach the conclusion that there is no realistic prospect of Mr Holmes being able to persuade a court at trial to accept his (Mr Holmes's) version of events. 37. The contemporaneous documentary evidence on which Mr Holmes can fairly rely in relation to points (i) and (ii) above may be summarised as follows:- (a) In an email dated the 29th May from Investec to Mr Holmes, copied to Mr Le Sueur, the lenders stated that they understood that Mr Le Sueur "has agreed to put in £50K and an agreement will be made with the creditors to cover them off within this amount ". It does not appear that Mr Le Sueur replied to that email contradicting Investec's understanding. In the circumstances, both the email from Investec and the absence of any contemporaneous contradiction from Mr Le Sueur are capable of supporting Mr Holmes's case. It is equally true that the expression "cover them off" might have been intended to mean only that the creditors would hold their hand pro tem rather than that they would accept the payment in full and final settlement. It is also true that certain other wording in the same email is consistent with an expectation on the part of Strata's creditors that they would (or at least might) receive further payments from the proceeds of sale of the development properties, which would be inconsistent with any full and final settlement of their claims. Nevertheless, we consider that the true meaning and significance of an informal email such as this, together with any possible internal inconsistencies or anomalies within it, can only properly be explored at trial. Furthermore, it is also important to note that the email ends with a reference to a Mr Lingard, who was negotiating a possible purchase of Home Farm Developments, and it says this: "I understand that [Mr Lingard] has had a call from Cashback saying that they had agreed a 40% payment now with the remaining funds coming on sale of the properties. As discussed at the meeting [Mr Lingard] will not agree to this and want [sic] there to be full and final settlement in order for him to gain confidence to enter into the [Share Transfer Agreement]". In the circumstances, it is fair to say that this email not only contains wording which, on at least one plausible reading, provides support for Mr Holmes's case, but that it also provides circumstantial evidence as to the commercial need for the parties to enter into an agreement in the terms he suggests. (b) Later the same day, at 11:04, Mr Holmes sent an email to Mr Le Sueur setting out "a draft from you [i.e. Mr Le Sueur] to Phil [i.e. Cashback] ... as an accurate depiction of your [i.e. Mr Le Sueur's] settlement agreement". At least arguably that was referring to a proposed settlement agreement between Mr Le Sueur and Cashback (i.e . not to a proposed settlement between Mr Le Sueur and Mr Holmes). Clause 3 of the draft provided that 40% of the £50,000 to be paid by Mr Le Sueur was to be paid to Cashback "in full and final settlement",

while clause 4 provided that the other 60% of the £50,000 was to be paid to the other creditors (i.e . those not represented by Cashback) also "in full and final settlement". At least arguably, that meant in full and final settlement of the creditors' claims. Having said that, it is also true that both clauses 3 and 4 ended with the words "subject to clause 5" and that clause 5 provided that: "In the event Strata receives a further balance payments [sic] from [Home Farm Developments], Strata agrees to distribute this payment equally to the creditors". It is said on behalf of Mr Le Sueur that any agreement to make further payments to the creditors from the proceeds of sale is inconsistent with any suggestion that the £50,000 had to be accepted by them in full and final settlement of their claims. But for present purposes it is sufficient to note that the provision made in clause 5 was entirely contingent, and that this email is therefore capable of lending support to Mr Holmes's version of events. (c) Later the same day, at 15:23, Mr Le Sueur sent an email to Mr Holmes containing a revised version of the draft that Mr Holmes had sent to him earlier in the day. The exact nature of the variations does not matter for present purposes. What does matter is that clauses 3 and 4 both still included the reference to creditors being paid "in full and final settlement". The fact that these words continued to appear in the emails sent (or intended to be sent) by Mr Le Sueur to Cashback (rather than in the terms of any draft settlement agreement between Mr Le Sueur and Mr Holmes) may lend weight to the suggestion that this was a reference to full and final settlement of the creditors' claims against Strata, not a reference to the full and final settlement of the claims by Mr Holmes and his companies against Mr Le Sueur and his companies. (d) The next morning, at 10:30 on the 30th May, Mr Le Sueur sent Mr Boots at Cashback an email reflecting his version of the draft from the previous day. It continued to include the two references to "full and final settlement", and it also ended with the words "Please confirm this is acceptable". On behalf of Mr Holmes it can fairly be said that this email is again consistent with his evidence that Mr Le Sueur was having to ensure that the payment he was proposing to make was going to be accepted by the creditors of Strata in full and final settlement of their claims. If not, why was he writing to Mr Boots at all, and why was he having to ask Mr Boots if the proposed terms of the settlement agreement were acceptable? Mr Boots provided an affidavit in support of Mr Sueur's strike-out application, but his evidence does not answer these questions. (e) Later that day, at 14:35, Mr Holmes sent another email to Mr Le Sueur discussing timing, which contained these words: "As the first payment is only due tomorrow and is still subject to Phil's [i.e. Cashback's] confirmation ...". The reference to needing Cashback's confirmation is again consistent with Mr Holmes' version of events on this point. (f) The next day, at 14:30 on the 31st May, Mr Le Sueur emailed Cashback, copied to Mr Holmes, asking Mr Boots "Am I ok to make the first payment transfer to you of £6k?". This again suggests that the payments from Mr Le Sueur were to be made pursuant to an agreement with Cashback, and it can fairly be said by Mr Holmes that the exact terms of that agreement need to be determined at trial. (g) Later in the year the Cashback creditors learned that at least some of the development properties had been sold and as a result they started renewing their pressure for payment. In that context, Mr Holmes emailed Cashback on the 15th November at 12:33 saying "I had understood

settlement terms had been negotiated and agreed with Jamie Le Sueur". Although the meaning of that email is not free from doubt, Mr Holmes is entitled to say at this stage that it is consistent with his evidence, and that any uncertainty over what he meant can only properly be explored at trial. (h) At 12:41 on the same day Mr Holmes also emailed Mr Le Sueur saying "I had understood Phil [i.e. Cashback] had accepted a reduced settlement of the debts which lead to our offer email which structured the terms of the settlement". This is again capable of supporting Mr Holmes's evidence that his deal with Mr Le Sueur was contingent on Mr Le Sueur having reached a settlement with Strata's creditors that they would accept the payment he was offering in full and final settlement of their claims. (i) Similarly at 13:23 on the 22nd November Mr Holmes again emailed Mr Le Sueur saying "I have put the terms of your settlement to Cashback and that the balances would be taken from sales". There was no reference in the Settlement Agreement to the possibility of any further payment being made to creditors from the sale proceeds of the development properties. In the circumstances, this email again lends some weight to the suggestion that Mr Holmes understood that, in addition to the agreement between him and Mr Le Sueur, Mr Holmes understood that Mr Le Sueur had also entered into a separate agreement with Cashback. (j) Later the same night, at 23:32, Mr Holmes again emailed Mr Le Sueur saying "Part of our agreement was for you to put in place a settlement agreement with Cashback Ltd ... Very obviously if you couldn't have agreed this with Cashback then we [i.e. Mr Holmes and Mr Le Sueur] would have had no settlement agreement as the settlement [arguably, the settlement with the creditors] would not have been final". Again, this is capable of lending support to Mr Holmes' version of events. (k) In an email to Cashback at 12:25 on the 6th December Mr Holmes set out in detail his understanding of the arrangements that had been made with the Cashback creditors, based on Mr Le Sueur's email dated the 30th May. Mr Holmes said that he understood that a full and final settlement had been agreed between Mr Le Sueur and the creditors, and that any attempt to bring their claims back to court involved a breach of that agreement. (l) Mr Le Sueur's response at 13:20 the same day refuted much of what Mr Holmes alleged, but for present purposes it is significant that he added this: "the email attachment sent by Shane Holmes is not related to the final agreement reached with Cashback which I attach hereto". The attachment to that email was not Mr Le Sueur's email to Mr Boots dated 30th May, but an earlier offer dated the 16th May. It was common ground in this Court that that earlier offer did not in the event form the basis of any final agreement between any parties, and in the course of oral argument Advocate Taylor accepted that the most likely analysis is that Cashback, by their conduct, accepted the terms of the 30th May email (whatever those terms truly meant). At this stage we are accordingly left in the position of knowing that, on the 6th December, Mr Le Sueur chose to say that he had entered into an agreement with the creditors represented by Cashback on terms which, as of today, no-one is suggesting were actually agreed. One explanation of his conduct is that Mr Le Sueur was confused at the time, but another would be that he was trying to rely on the 16th May offer because it did not contain the inconvenient words which appeared twice in the 30th May email - namely "full and final settlement". 38. In giving this brief summary, we should emphasise

that we have deliberately not referred to the evidence - and there is a considerable amount of it - which may contradict Mr Holmes's version of events on this point. For example, if (as Mr Holmes now contends) it was such a critical element of his deal with Mr Le Sueur that the latter would procure the creditors' consent to accept an aggregate sum of £50,000 in full and final settlement of their claims, it is hard to understand why Mr Holmes signed the Settlement Agreement without any reference to such an obligation. It might also be said that it is inherently improbable that Strata's creditors would accept £50,000 in full and final settlement of debts which appear to have substantially exceeded £100,000, with no legal recourse against Strata or any other person for the balance, in circumstances where the developments were still in progress and they might well yield substantial profits. Equally, it might be thought commercially improbable that Mr Holmes and Mr Le Sueur would agree that any settlement between them would depend on Mr Le Sueur being able to agree full and final settlement terms, not only with the creditors represented by Cashback, but also with all the other creditors of Strata as well. And, if that was indeed the deal, why did Mr Holmes and his companies release their claims against Mr Le Sueur and his companies immediately under clause 1 of the Settlement Agreement, rather than waiting to see whether Mr Le Sueur had indeed been able to reach an agreement with the creditors? 39. We have not explored these issues in any more detail, and we have not referred to the evidence which contradicts Mr Holmes's version of events, because we are not conducting the trial: rather, we are merely examining whether there is a case fit to go to trial. That being our function, we should not attempt to speculate as to the likely outcome of any trial - unless we are able to conclude with a sufficient degree of certainty that any trial would only be likely to produce one answer. 40. For the reasons outlined above, that is not this case. It is apparent that a significant amount of contemporaneous documentary evidence exists which is capable of supporting Mr Holmes' version of events. The relevant documents are dated both before and after the Settlement Agreement, and not all of them originate from Mr Holmes himself. As such, it cannot be suggested either that the case he is now putting before the court is a recent invention, or that the documentary evidence in support of it is purely self-serving. Whether it is accepted at trial is an entirely different matter. 41. This being the evidential position, it then raises two legal issues. First, Mr Holmes says that, if his evidence were to be accepted at trial, there would have been no meeting of minds as between him and Mr Le Sueur in relation to the terms of their bargain, and accordingly the consent required for the formation of a legally binding contract would have been absent. Secondly (although the point was not put in these terms by Mr Holmes), if Mr Holmes' evidence were to be accepted, he could submit that the Settlement Agreement failed properly to reflect the parties' true bargain, and accordingly it should be rectified. Immediately after the short adjournment on the first day of the appeal, we notified Advocate Taylor that we would be assisted by hearing his submissions on rectification the next morning, even though that was not how Mr Holmes had put his case. Advocate Taylor duly did so. 42. Dealing first with Mr Holmes' case on *erreur* and the supposed absence of consent, we would reject his argument. The starting point is that, for the reasons set out above, we consider that there can be no doubt about

the correct interpretation of the Settlement Agreement. Clauses 1 and 2 simply provide for full and final settlement of the claims by Mr Holmes and his companies against Mr Le Sueur and his companies, in exchange for a payment to creditors by Mr Le Sueur of £50,000. The requirement for such payment to achieve full and final settlement of the creditors' claims against Strata cannot be found in the Settlement Agreement by means of interpretation. 43. Advocate Taylor accepted for the purposes of this appeal that, as stated in *Marett v Marett*

[2008] JLR 384 at 407, the Jersey law of contract determines the question of consent (being one of the essential requirements for a valid contract) by applying a subjective test. In other words, the court has regard to the subjective intention of the parties when deciding whether they have in fact reached an agreement. This approach applies irrespective of whether the alleged *erreur* be an *erreur obstacle* (which prevents the meeting of minds necessary to constitute a contract's creation) or an *erreur vice du consentement* (a defect of consent where there is a consent or meeting of minds but consent is impeachable for some other reason). 44. Mr Holmes argues that there was no meeting of minds since he was in *erreur* because of his belief that the Settlement Agreement included a requirement for Mr Le Sueur to procure the Strata creditors to agree to accept part payment in full and final settlement of their claims. 45. We accept for the purposes of this appeal that a unilateral *erreur* by one party to a contract may prevent the required meeting of minds or amount to a defect of consent as described in *Marett*. However, we do not agree that a misunderstanding as to the meaning of a contract can amount to such an *erreur*. The example given in *Pothier Traité des Obligations*, Part 1, Chapter 1, §18, p. 22, of the sale of a pair of candlesticks is of a very different character, because that was not dealing with a question of interpretation. 46. The consequences of holding that the misunderstanding of a contract by one party is sufficient *erreur* to invalidate the contract would be startling. Let us take a simple case where a plaintiff and defendant disagree over the meaning of a contract. The plaintiff argues for interpretation X and the defendant for interpretation Y. Applying the approach set out in §32 above, the court rules that interpretation X is correct. If an *erreur* as to interpretation by the defendant were held to be sufficient to avoid the contract, he would have lost the battle but won the war, because his interpretation of the contract would have been rejected but notwithstanding that defeat he would be entitled to have the contract declared void on the basis of his own misunderstanding of its effect. Conversely, the plaintiff would be in a lose-lose position, despite having correctly understood the contract and being unaware of the defendant's misunderstanding. That cannot be the law. 47. Accordingly we hold that a misunderstanding or mistake by one party to a contract as to its correct interpretation is not an *erreur* which prevents the contract being formed or gives any ground for it being declared void on the grounds of a *vice du consentement*. The *erreur* must be of a different nature. 48. The *erreur* relied upon by Mr Holmes in this case is, in our judgment, a mistake as to the meaning of the Settlement Agreement. He consented to and signed that agreement containing the words in clauses 1 and 2. He thought (wrongly) that those clauses provided that the payment to

the creditors would have to be accepted by them in full and final settlement. That has been his argument in this case. All the judges who have heard this case have held that he is wrong. He has therefore misunderstood the Settlement Agreement - but the mistake upon which he relies cannot in law amount to an *erreur* such as to void the contract. 49. 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 document. 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. 50. We should record that we reach this conclusion with some reluctance, for two reasons. First, although we have set out the evidence that is capable of supporting Mr Holmes' case in this regard, we do not consider that that evidence is particularly powerful, and we can entirely understand why the courts below reached the conclusion they did. We fully recognise that, in allowing the claim to proceed, there is a very real risk that the Court is condemning the parties to a long and expensive process which will ultimately lead to exactly the same result, after a trial on the merits, as the courts have so far delivered on the basis of a summary application. We are acutely aware of that risk, and of the potential injustice to Mr Le Sueur in allowing the case to proceed. 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. 51. The second reason why we are reluctant to reach the conclusion we have is that no claim in rectification has been pleaded. Nevertheless, we do not consider that justice would be done between the parties if Mr Holmes was shut out from arguing at trial a potentially winning point which appears to have some real support in the evidence. The courts below rightly asked themselves not only whether the claim as pleaded should go to trial but also whether, if not, any defects could be cured by amendment. They were right to ask that question, and on the basis of the material we have considered, this Court has reached a different conclusion. In our judgment, the evident defects in Mr Holmes's current pleading could in principle be cured by amendment. 52. Finally, in fairness to the courts below we should also record that neither the evidential material nor the legal arguments that were deployed before us featured, or certainly did not feature in the same way, before the Master or the Royal Court.

MISCELLANEOUS ISSUES 53. One respect in which the strike-out application succeeded was that Strata has been dissolved and accordingly no claim can lawfully be brought in its name. We agree. Nevertheless, the Master indicated in §47 of his judgment that, if he had not struck the claim out, he would have given Mr Holmes time to apply for Strata to be restored to the register. Some 18 months have passed since then, and so far as we are aware Mr Holmes has done nothing to restore Strata. This state of affairs is thoroughly

unsatisfactory, and Mr Holmes must be put on very strict terms if he wishes Strata to pursue its alleged claim. 54. As noted by the Master in §54 of his judgment, Mr Holmes is also aggrieved by the fact that Investec assigned the benefit of its loan to a company apparently owned by a relative of Mr Le Sueur. We do not attach any weight to this factor, as it can have no bearing on the issues under appeal. DISPOSAL 55. The position today is that the Order of Justice has been struck out. For the reasons set out above, we would set aside the orders below, but only to the following limited extent and only on the following strict conditions:- (i) We consider that the proceedings could in principle be salvaged by an amendment seeking an order for rectification of the Settlement Agreement to reflect Mr Holmes' allegation that it was a condition of that agreement that Mr Le Sueur would procure that the creditors of Strata should accept his aggregate payment of £50,000 in full and final settlement of their claims. To that extent we would allow the appeal, but only on condition that within 4 weeks of today's date the Appellants issue and serve a Summons returnable before the Master applying for leave to amend the Order of Justice in terms which the Master considers properly pleads a reasonable cause of action this regard. (ii) If and to the extent that Mr Holmes wishes to procure that the claim be maintained in the name of Strata, he shall within 4 weeks of today's date issue the necessary proceedings to restore that company to the register and shall at the same time serve copies of the relevant application and supporting evidence on Mr Le Sueur's advocates. If he fails to issue proceedings by the stated deadline, the claim ostensibly brought in Strata's name will remain struck out. If Mr Holmes issues the proceedings in time but fails to pursue them at all stages with due expedition, then Mr Le Sueur shall be at liberty to restore the matter to the Master for a direction that the claim brought in the name of Strata be struck out. 56. We have given Mr Holmes very considerable latitude in allowing him to try salvaging the claim by making the amendments outlined above. In the circumstances, we do not consider that any undue indulgence should be shown to him by the Master in assessing what is an acceptable amended pleading. Mr Le Sueur is entitled to know the case he has to answer, and at present it is wholly opaque. Mr Holmes's legal arguments have evolved as the case has proceeded, and hitherto his pleading has not corresponded with his evidence. The court must now demand absolute clarity and finality in his allegations. 57. Having indicated that we will allow the appeal in respect of the strike-out application to the extent set out above, and having decided that the issues which are raised may be determined only after trial, it follows that we should also allow the appeal by Mr Holmes in respect of the associated summary judgment against him. Both Mr Holmes and Advocate Taylor agreed that the two appeals stand or fall together, and we agree. 58. Finally, for the avoidance of doubt we would repeat and emphasise that the Appellants have no arguable case for alleging *erreur* or any lack of consent in relation to the Settlement Agreement, and we would dismiss the appeal in so far as they seek to rely on these matters. It follows that any amended Order of Justice may not seek to rely on *erreur* or any alleged absence of consent. POST SCRIPT 59. We have mentioned in §43 above that Advocate Taylor drew our attention to the decision in *Marett*. Although the point was not argued in this appeal, and we do not need to decide it, we would nevertheless observe that

the question whether an objective or a subjective test should be adopted was not argued in Marett either: it was simply assumed by the court to be correct (see §55), and indeed the court expressly said that "This is not the time for a detailed analysis of the Jersey law of contract". Advocate Taylor drew our attention to earlier case-law such as *Leach v Leach*

[1969] JJ 1107 where an objective approach had been adopted. We would therefore be concerned if a body of opinion were to develop regarding Marett as the last word on this point. We would be concerned because we consider that there are potentially powerful arguments against the adoption of a subjective test. We cannot express a concluded view as to which arguments ought to prevail, but we do express the view that the arguments have yet to be deployed, and as a result the point has not yet been definitively resolved. Authorities *Home Farm Developments Limited and Others-v-Le Sueur*

[2014] JRC 079 . *Home Farm Developments Limited and Others-v-Le Sueur*

[2015] JRC 110 . Court of Appeal (Jersey) Law 1961. *Planning & Environment Committee v Lesquende Ltd*

[2003] JLR 15 . *Planning & Environment Committee v Lesquende Ltd*

[2003] JLR Note 8 . *Home Farm Strata and Holmes-v-Le Sueur*

[2015] JCA 146A . *Home Farm Developments Limited and Ors v Le Sueur* [2014] JRC241. *Home Farm Developments and Others-v-Le Sueur*

[2015] JCA 180 . *Channel Islands and International Law Trust Company Limited v Pike and others*

[1990] JLR 27 . Royal Court Rules 2004. *Trant v Attorney General and others*

[2007] JLR 231 . Royal Court Rules 1982. The Supreme Court Practice 1988 (referred to as "the White Book") *Hyams v Russell* [1970- 1971] JJ 1891 . *Bank of Credit and Commerce International SA (In compulsory liquidation) v Ali and others*

[2001] 2 WLR 735 . *Marett v Marett*

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