JERSEY / JUDGMENT

Home Farm Developments Ltd and Ors -v- Le Sueur [2015] JRC 110 (21 May 2015)

[2015] JRC 110

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judgment

the commissioner: 1. This is an appeal against the decision of the Master on 18 th February, 2014, to strike out the appellants' claim against the respondent on the basis that the claim was both scandalous and vexatious and an abuse of process. The reasons for the decision are set out in the Master's judgment of 26th March 2014 (Home Farm Developments-v-Le Sueur

[2014] JRC 079).

Background

2. The background to the case is set out in some detail in the Master's judgment, which we will not replicate, but in summary, it is concerned with a building project at Home Farm in Grouville undertaken by the third appellant through the first appellant which acquired the property and the second appellant which undertook the development. We will refer to the appellants individually as "Mr Holmes", "Home Farm Developments" and "Strata Developments" and jointly as "the appellants". 3. The respondent ("Mr Le Sueur") is a chartered accountant who operated a property development business through two companies, Manor Homes Limited ("Manor Homes") and Tower Capital Management Limited ("Tower"). 4. On 9 th September, 2010, Home Farm Developments entered into a consultancy agreement with Manor Homes ("the Consultancy Agreement"), by which Manor Homes was to provide bookkeeping and accountancy services and to assist in the procurement of supplies and materials at discount rates. The Consultancy Agreement nominated Mr Le Sueur as "the executive" to act as a primary contact in relation to the services to be provided by Manor Homes. 5. The way the relationship operated was that Home Farm Developments had access to funds borrowed by way of loan facility secured on its property. The funds from that facility would be made available by Home Farm Developments under the direction of Mr Holmes to Strata Developments. Payments were then made out of the bank account of Strata Developments by Tower, who provided signatories for this account. 6. For reasons set out in more detail in the Master's judgment, the relationship between the parties broke down irrevocably in the autumn of 2011 and on 13 th March, 2012, Sinels, acting for the appellants, sent a pre-action letter to Mr Le Sueur at

Manor Homes seeking the repayment of £103,562.70p representing fees paid under the Consultancy Agreement, which it was claimed Manor Homes had no authority to make in its favour and was acting in breach of duty in doing so. 7. In the letter, Sinels said it had been instructed by all three of the appellants, and it referred to the Consultancy Agreement as the document under which the claims of breach of authority and duty arose. Those breaches were expressed in these terms:- "3. Breach of authority and duty 3.1 Despite the clear and unambiguous wording of the [Consultancy Agreement] and the fiduciary position that you occupied in relation to Strata's accounts, you have arranged, quite improperly and without authority, for the sum of £103,562.70 to be paid to you and another company also controlled by Mr Jamie Le Sueur named Tower Capital Management Limited ("Tower"). 3.2 It is difficult to conceive of circumstances where there could be a more obvious breach of duty on your part given that (1) you were looking after Strata's monies, (2) you knew those monies were earmarked for Strata's third party creditors; (3) you knew that the only entitlement that you might have arose from the [Consultancy Agreement]; and (5) the only person from whom you could claim under the [Consultancy Agreement] was [Home Farm Developments]. 3.3 The obvious inference is that you seized the opportunity to abuse your position in breach of authority by paying monies to yourself from an entity that did not and could not owe any money to you." 8. The letter then went on to say this in relation to foreseeable and consequential losses:- "4 Foreseeable and consequential losses 4.1 Given your knowledge of the funding arrangement for the development of the Site and of the other related interests of Strata and Mr Holmes, it is quite clear that your actions would prevent Strata from paying its creditors and lead to them issuing proceedings against the company. In turn, it is similarly foreseeable that these matters could constitute defaults in respect of the various security arrangements that had been entered into by our clients and might result in the bankruptcy of one or more or all of them. Our clients hereby expressly reserve all and any of their rights to claim any such consequential losses from you." 9. Finally, after making an immediate demand for the repayment of the sum of £103,562.70p, Sinels said at 5.3:- "5.3 Our clients reserve all their rights to bring such personal claims against Tower and/or Mr Jamie Le Sueur as and when they deem it necessary and appropriate to do so." 10. This resulted in a series of negotiations and attempts at a compromise agreement, culminating in an agreement dated 31 st May, 2012, signed by Home Farm Developments, Strata Developments, Mr Holmes, Mr Le Sueur, Manor Homes and Tower - in other words, by all of the parties involved in the matter. It cited the letter from Sinels of 13 th March, 2012, and provided as follows:- "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 £4,897.00 to creditors of Strata Developments Limited as follows:- £897.00 to Hilbury Collection Services in respect of amounts owed to Electrical Supplies and Machinery (Wholesale) Limited, £1,000 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 this debt. 5. In the event that Investec Bank (Channel Islands) Limited demand repayment under the guarantee provided to Investec Bank (Channel Islands) Limited by Mr Jamie Le Sueur for their loan to Home Farm Developments 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 adjusted 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 by:" 11. The Master found that the terms of this settlement agreement ("the Settlement Agreement") had been adhered to by Mr Le Sueur. 12. On 4 th February, 2013, the appellants commenced proceedings against Mr Le Sueur by way of Order of Justice seeking, inter alia, consequential damages of £660,000 arising out of the same alleged breaches of duty and authority. It cites the Consultancy Agreement as the document under which the claims arose and it is striking in that it mirrors virtually word for word the letter from Sinels of 13 th March, 2012. It makes no reference whatsoever to the Settlement Agreement. 13. Mr Holmes had argued before the Master that it was an obligation of Mr Le Sueur under the Settlement Agreement, evidenced by earlier exchanges of emails, to agree full and final settlement terms with Cashback (acting for various creditors of Strata Developments whose actions had to be cancelled). Because he had failed to do so, Mr Holmes argued that the terms of the Settlement Agreement of st May, 2012, should be set aside so that the appellants were free to seek recovery from Mr Le Sueur all sums paid pursuant to the Consultancy Agreement and in the Order of Justice. The Master found that the evidence did not support this contention. 14. After a detailed analysis of the evidence before him and the email exchanges leading up to the agreement of 31 st May, 2012, the Master concluded at paragraph 45:- "45 The view I have reached in relation to the st May agreement and the emails of 29 th and 30 th May is sufficient to dispose of the strike out application. The plaintiffs reached a clear agreement with the defendant to settle the claims made by Sinels, which the defendant has adhered to. There is no basis to conclude that the agreement contended for by the plaintiffs was breached by the defendant and it would therefore be both vexatious and an abuse of process to go behind the parties' agreement. Accordingly I strike out the whole of the order of justice." Grounds of appeal 15. In their notice of appeal, the appellants essentially challenge the Master's assessment of the

evidence before him, but in his skeleton argument and in submissions before us, Mr Holmes accepted that the Settlement Agreement had settled all of the claims made by the Sinels letter, but the settlement was, he said, limited to the claims between Home Farm Developments and Manor Farm under the Consultancy Agreement, which he described as a "side agreement". Under the Order of Justice, he said, the appellants were actioning Mr Le Sueur, not his companies, out of obligations he had incurred personally as a consequence of what Mr Holmes described as "the Bargain"; an argument he developed in this way. 16. Mr Holmes says that in August, 2009, he invited Mr Le Sueur to enter into a bargain to develop Home Farm. The bargain required Mr Le Sueur to enter into the following two relationships with him in return for a consideration equal to 7.5% of the final bill costs of the development then projected at £112,000:- (i) Mr Holmes and Mr Le Sueur would jointly guarantee a loan of around £2.2M for the cost of the site and the build costs. Mr Holmes would provide the required balance of £1.3M towards the upfront site purchase. Mr Le Sueur would manage the residual build capital on behalf of the Bargain. This he described as "the Borrowing Relationship". (ii) Mr Le Sueur would manage and supervise the proposed in-house building of the development. This he described as "the Build Relationship". 17. Pursuant to the Bargain, he said that he and Mr Le Sueur incorporated Home Farm Developments, which was beneficially owned by them in equal shares and secured the borrowing initially from Lloyds Bank and then from Investec by guaranteeing the loan and securing their shares in Home Farm Developments. Mr Le Sueur then incorporated Strata Developments as the in-house builder and opened a bank account in the name of Strata Developments with HSBC, obtaining sole business banking authority "to occupy his chosen role to manage all payments from the residual build loan secured under the Borrowing Relationship". 18. Mr Holmes then argued as follows in his skeleton argument:- "It was an implied term of the Bargain under the Borrowing Relationship that [Mr Holmes and Mr Le Sueur] owed a duty to, inter alia: (a) ensure the Bargain was not operated in a manner which undermined their Performance Obligations to their own detriment and that of [Home Farm Developments and Strata Developments]; (b) not do anything in relation to the handling of the loans which favoured itself to the disadvantage of the Bargain and the other parties. The Appellants' present claim pleads that [Mr Le Sueur] has breached the above obligations and duties owed under the Bargain. The crux of the Appellants' complaint against [Mr Le Sueur] is that he put his own financial interests before the interests and success of the Bargain and undermined the Performance Obligations to the detriment of the Bargain and the Appellants as a result. This detriment has resulted in general inequity to the Appellants and significant direct and proximate loss and damage to [Strata Developments] in the sum of ca. £630,000. This £630,000 sum is the unrecoverable balance of the [Strata Development's] shareholders loan provided under the Borrowing Relationship, excluding consequential losses." 19. Mr Holmes went on to argue that he had drafted the Order of Justice without any previous experience whatsoever and sought to make improvements by way of amendment to reflect the above. 20. It is the case that the company records show Mr Le Sueur as owning 50% of Home Farm Developments, which he says were issued to him by way of security for his agreeing to guarantee the banking loan, in consideration of which he received an indemnity

from Mr Holmes and a charge over Mr Holmes' property. Mr Le Sueur also accepts that he was involved in the incorporation of Strata Developments. Furthermore, he did guarantee the banking loan and secured the shares in Home Farm Developments Limited in favour of Investec. The question of his interest in Home Farm Developments was considered by the Master at paragraph 6 of his judgment, in which he concluded that Mr Le Sueur no longer had any interest in it and that any interest he had was only ever by way of security. 21. Mr Le Sueur accepts that there were discussions about turning "heads of terms" (no record of which appears to exist) into a shareholders' agreement, but that never happened and no such agreement has been produced. An email from Bedell Cristin to Mr Holmes of 15 th October, 2009, states that in the time available it would not be possible to draft and engross a shareholders' agreement and confirms, incidentally, that Mr Le Sueur would take 50% of the shares in Home Farm Developments as additional security, in the event that the bank chose to pursue him direct for repayment of the joint and several liability under the guarantee. 22. The issue of a possible shareholders' agreement was raised in argument before the Master and he dealt with it at paragraphs 50 and 51 in this way:- "50 In relation to the plaintiffs' argument that there was a shareholders' agreement between the third plaintiff and the defendant, which the defendant breached, this argument appeared to be raised on the basis that the defendant was a shareholder in the first plaintiff. Assuming in the plaintiffs' favour that this was the position, (notwithstanding the clear statements made by Advocate Taylor which I have referred to at paragraph 6 above) the fact that the defendant, assuming this to be true, was a shareholder in the first plaintiff does not create a shareholders' agreement. No evidence was produced by the third plaintiff as to the basis of any such agreement and what was the bargain between the parties. The allegation was therefore not supported by any evidence, was wholly unparticularized, was not raised in pleadings or correspondence and was only referred to for the first time orally at the hearing. I am not therefore prepared to allow the third plaintiff an opportunity to amend his case to make such an allegation. Even if such an agreement existed and could be pleaded contrary to the view I have reached, it was accepted by the third plaintiff that at all times he was the sole owner and director of the second plaintiff and there was no shareholders' agreement in relation to the second plaintiff. Moreover the essence of the plaintiffs' complaint against the defendant is that he failed to procure a withdrawal of claims by creditors of the second plaintiff. In light of this complaint, there is no basis for concluding that even if there are grounds to argue the existence of a shareholders' agreement in relation to the first plaintiff somehow places the defendant in breach of duty to the first plaintiff because he failed to procure that creditors of the second plaintiff, in which he had no interest, withdrew their claims. I am not therefore satisfied that the possible existence (if I am wrong that such an allegation cannot be made) of a shareholders' agreement in relation to the first plaintiff, is a basis to allow the plaintiffs an opportunity to amend their case to pursue the defendant on the basis of alleged failings in relation to the second plaintiff." 23. Mr Holmes is no longer asserting a shareholders' agreement as such, but what he now describes as the Bargain which was entered into orally. The difficulty for Mr Holmes is that the Settlement Agreement manifestly was not limited to claims by Home Farm Developments against Manor Farm. Sinels' letter of 13 th March, 2012,

makes express reference to the consequential losses and it reserves all rights on behalf of all three appellants to bring claims against Mr Le Sueur and Tower. Such claims would encompass the claims that the appellants are now making against Mr Le Sueur. The Settlement Agreement, which was signed by Mr Holmes and Mr Le Sueur (as well as all of the other parties involved in the development), covers "any other matter relating to the development of Home Farm" and "all matters referred to in the letter from Sinels." (my emphasis). 24. The allegations upon which the claims made then by Sinels and those made now by Order of Justice remain the same, namely the use of the bank mandate to pay fees to Manor Farm and Tower, leading to Strata Developments having difficulties in paying its creditors. The problem for Mr Holmes is that any claims arising out of that allegation have been settled by the Settlement Agreement. 25. The allegations of breach of authority and duty were dealt with by the Master at paragraph 53 of his judgment in this way:- "53 In paragraph 10 of the plaintiffs' skeleton argument, the plaintiffs made wide ranging allegations that the defendant held various positions of trust, authority and duty with the plaintiffs. However, no evidence of any trust was produced to me. The only agreement between the parties produced in evidence was the consultancy agreement between the first plaintiff and Manor Homes to which I have already referred. Any duties owed were therefore owed by Manor Homes to the first plaintiff only. If I am wrong in this view and duties were owed by the defendant to the second and third plaintiffs all such claims were compromised by the 31st May agreement. What the plaintiffs appear now to want to do is to look behind the terms of a consultancy agreement and the 31st May agreement in order to pursue the defendant personally. This is an attempt to pierce the corporate veil of Manor Homes and to set aside the settlement agreement. Nothing has been produced to me by the plaintiffs to justify or show that there is an arguable case to make such an assertion." 26. The Master's conclusion was set out at paragraph 55 as follows:- "55 In summary any claims brought by the plaintiffs were compromised by the agreement dated 31 st May, 2012, and the agreement contained in the email dated 30 th May sent from the defendant to Mr Boots at Cashback. I am satisfied there is no basis for the plaintiffs to assert that the defendant was under an obligation to ensure that payments made by him to creditors represented by Cashback were in full and final settlement or that any proceedings such creditors had commenced were to be withdrawn. I am also satisfied that there is no alternative claim available to the plaintiffs which could be dealt with by allowing an opportunity to amend rather than strike out the order of justice." 27. In our judgment, the conclusions of the Master were, and, taking into account the further evidence filed by the parties in this appeal, remain correct. 28. Mr Holmes raised a number of further points which we take in turn:- (i) He submitted that the appellants had been deprived of an opportunity to submit affidavit evidence before the Master in reply to Mr Le Sueur's voluminous affidavit evidence. The Master said this at paragraph 2 of his judgment:- "The original hearing for the summons was adjourned for a week. This was partly due to Mr Holmes not being well on the date originally fixed and partly to allow him to respond to the affidavits of the defendant and Mr Boots of Cashback filed shortly before the hearing in support of the defendant's application." It is clear from this that the appellants were given time to respond to the affidavit filed on behalf of Mr Le

Sueur. (ii) The Master had been misled by Mr Le Sueur's evidence into believing (a) that Mr Le Sueur was not party to any agreement nor held personal obligations or duties, (b) Mr Le Sueur had no interest in Home Farm Developments and Strata Developments (c) the Bargain was limited to the consultancy agreement between Home Farm Developments and Manor Homes, (d) the relationship commenced in September 2010, (e) Tower operated Strata Developments' bank account and managed the residual loan capital,

(f) the relationship had come to an end at the time of the 31 st May, 2012, settlement and (g) the present claims were compromised by the 31 st May, 2012, settlement. We can see nothing to support the allegation that the Master was misled and agree with the conclusions reached by him, taking into the account the evidence filed in this appeal. (iii) In the Master's judgment of 4 th December, 2014, (Home Farm Dev-v-Le Sueur

[2014] JRC 241), in relation to security for costs, he said this at paragraph 21:- "21 Against that, the plaintiffs' appeal is developing compared with how matters were put to me. Whether the plaintiffs will succeed on an appeal is a matter for the Royal Court and I make no further observations in relation to the plaintiffs' evidence beyond the fact that the nature of the relationship between the third plaintiff and the defendant may be more complicated than was reflected in the material I was asked to consider." By this, Mr Holmes submitted that the Master was signalling that in the light of the further evidence filed, the Royal Court may take a different view to the strike out application. More detailed evidence may have been filed in the appeal in relation to the dealings between Mr Holmes and Mr Le Sueur, but none of it detracts from the central point that any personal claims against Mr Le Sueur arising out of the underlying allegation of the payment of fees to his companies were settled by the Settlement Agreement. (iv) Mr Holmes alleged that Mr Le Sueur colluded with his own advocate to take an assignment of the banking loan of security agreements "causing a breach of the implied and express terms and general inequity to the appellants". This was canvassed before the Master, who dealt with it at paragraph 54:- "54 Finally, during the course of argument it emerged a relative of the defendant had taken an assignment of loans drawn down by the first plaintiff. That relative had then taken steps to recover those loans out of the proceeds of sale of properties of the first plaintiff. There was a benefit to the defendant in relation to this transaction because he was then released from the guarantee he had given personally to repay such loans. I refer to this because it was clear to me that the third plaintiff was aggrieved at what had occurred. It would also have been helpful if I had been provided with this information by the defendant in his evidence. However, the fact that a relative of the defendant chose to assist the defendant by taking over the loans, securing the recovery of those loans and not pursuing the defendant as guarantor ultimately is not relevant to the issue of whether the order of justice should or should not be struck out." We have nothing to add to what the Master said. 29. 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. 30. The appeal is therefore dismissed. Authorities Home Farm Developments-v-Le Sueur

[2014] JRC 079 . Home Farm Dev and Ors-v-Le Sueur

[2014] JRC 241 . Page Last Updated: 27 Sep 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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