

JERSEY / JUDGMENT

Home Farm Developments Ltd and Ors -v- Le Sueur [2016] JCA 203 (08 November 2016)

[2016] JCA 203

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Court of Appeal 8 November 2016 Before : Jonathan Crow, Q. C., President Robert Logan Martin, Q. C., and Sir Michael Birt, Q. C. 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 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 the judgment of the court. It deals with an application by the Appellants in relation to (i) an earlier judgment given by this court on 18 January 2016 ("the 18 January judgment") and (ii) an Act of Court dated 1 June 2016 ("the 1 June Act of Court"), both of which in turn dealt with certain consequential matters arising from the judgment we gave in the substantive appeal on 25 November 2015 ("the 25 November judgment"). 2. The prolonged procedural history of this matter can be briefly stated. In 2013 the Appellants brought proceedings against the Respondent ("Mr Le Sueur") seeking damages and other relief for breach of contract ("the 2013 proceedings"). On 26 March 2014, the Master struck those proceedings out. The Appellants appealed, but on 21 May 2015 the Commissioner sitting with two Jurats dismissed the appeal. Separately, in 2014 Mr Sueur brought proceedings against the Third Appellant ("Mr Holmes") on a promissory note ("the 2014 proceedings"). On 21 May 2015 the Commissioner and two Jurats gave judgment for Mr Le Sueur in those proceedings. The Appellants appealed to this court against the two decisions of 21 May, in relation to the 2013 and the 2014 proceedings (which, it was common ground, stood or fell together). In the 25 November judgment we held that the pleaded claim in the 2013 proceedings had been rightly struck out, but we considered that a different claim based on rectification might have a reasonable prospect of success. On that basis, we gave the

Appellants permission to amend the pleadings in the 2013 proceedings in order to raise rectification, subject to certain strict conditions. Those conditions were not satisfied, and accordingly we ruled in the 18 January judgment that the 2013 proceedings stood struck out. By a later ruling on 1 June 2016, we also confirmed that, since the 2013 and the 2014 proceedings stood or fell together, the combined effect of the 25 November and 18 January judgments was that the Appellants' appeals in relation to both proceedings were dismissed. This is what led to the 1 June Act of Court. 3. Meanwhile, on 17 January 2016 the Appellants had made an application to this court for permission to appeal to the Privy Council against the 25 November judgment in so far as it dealt with the claim based on *erreur*. That application was dismissed on 12 February 2016. It has now been renewed to the Privy Council by an application dated 1 June 2016. 4. By a further application dated 27 July 2016, the Appellants sought permission from this court, contingent on the success of their application to the Privy Council, to amend their claim in the 2013 proceedings so as to plead rectification and *erreur*. Since the proceedings had been struck out, and there was a pending application to the Privy Council for permission to appeal, the Appellants were informed by email dated 31 August 2016 that this court had no jurisdiction to consider that application. 5. By an Application dated 7 October 2016, as explained and expanded in emails dated 17 and 18 October 2016, the Appellants are now, on the face of it, seeking (i) leave to appeal to the Privy Council against the 18 January judgment and the 1 June Act of Court, and (ii) a direction that that application for leave to appeal be stayed pending a proposed application for judicial review against the refusal by the Legal Aid Office to grant Legal Aid to Mr Holmes. 6. The basis of the present Application is that, when the 18 January judgment was issued, this court did not give proper weight to 12 relevant factors (see paragraph 4 of the Application). The Appellants submit (relying on Cobold

v. Greenwich LBC

[1999] EWCA Civ 2074, at paragraph 11, and Maharaj

v. Johnson

[2015] UKPC 28, at paragraph 63 et seq) that an amendment which has some prospect of success should be allowed (see paragraph 5 of the Application). They accordingly submit that this court should have allowed their application for permission to amend the pleadings in the 2013 proceedings so as to add a claim in rectification "with such permission being temporarily stayed" until the disposal of their application for permission to appeal to the Privy Council against the 25 November judgment (see paragraph 6 of the Application). They submit that refusing to do so involves a disproportionate interference with their right of access to the court under Article 6 of the European Convention on Human Rights ("ECHR") (see paragraphs 7 - 8 of the Application). Finally, they submit it would not meet the court's overriding objective (see paragraph 9 of the Application). 7. Although the Application ostensibly seeks permission to appeal against the 18 January judgment and the 1 June Act of Court, it is apparent from the foregoing that it is (at least in substantial part) an attempt to obtain permission to appeal against the notification given to the Appellants

on 31 August 2016 that this court has no jurisdiction to determine their previous application dated 27 July (i.e. the application to amend the pleadings in the 2013 proceedings by adding a claim in rectification, contingent on the success of their application to the Privy Council for permission to appeal against the 25 November judgment). For that reason, we initially informed the parties that this court had no jurisdiction to deal with the matter. Nevertheless, since the present Application is expressed as a request for permission to appeal against the 18 January judgment, as well as the 1 June Act of Court, and since we cannot prevent the Appellants from making an application direct to the Privy Council on that basis, we will now deal with the Application at face value.

Disposal 8. The Application is dismissed for the following five reasons: (i) First, the 18 January judgment was a decision reached by the court in the context of case management. As such, there is no issue of general importance capable of justifying the attention of the Privy Council. (ii) Second, it involved an exercise of this court's discretion, and the Appellants have not even attempted to suggest that that exercise was perverse or that it involved any error of law. As such, the proposed appeal in relation to the 18 January judgment stands no prospect of success. (iii) Third, there is no substance to the Appellants' contention that the 18 January judgment can properly be impugned on the basis that this court "did not give proper weight" to 12 allegedly "relevant factors" (see paragraph 4 of the Application). Each of those factors is summarised and addressed briefly below. (iv) Fourth, the Application is inexcusably late. It was issued nearly 9 months after the judgment it seeks to impugn. (v) Finally, in so far as the Appellants are seeking permission to appeal against the 1 June Act of Court, that application is not only late but also doomed to failure. It has been common ground throughout that the 2013 and 2014 proceedings stand or fall together, and rightly so. The 2013 proceedings having been struck out, there is no arguable basis on which Mr Holmes can resist judgment in the 2014 proceedings.

9. The first of the Appellants 12 "relevant factors" to which (they say) this court failed to give sufficient weight is that the 25 November judgment gave them permission to apply for leave to amend the pleadings in the 2013 proceedings so as to seek rectification. In our judgment it is untenable for the Appellants now to suggest that the court gave this factor insufficient weight in the 18 January judgment: indeed, the whole judgment was predicated on the fact that such permission had been granted, but it was granted subject to conditions to which the Appellants had failed to adhere.

10. Second, the Appellants say that, when it issued the 18 January judgment, this court did not know that (i) Mr Holmes had sought Legal Aid on 1 December 2015 which was (wrongly, he says) only refused on 14 December, (ii) that between 1 and 11 December 2015 the Appellants identified grounds for appealing against the 25 November judgment in relation to *erreur* and (iii) although one of the conditions imposed by the 25 November judgment was that the Appellants should lodge by 23 December their application to amend the pleadings in the 2013 proceedings so as to seek rectification, neither the Master nor the Respondent's Advocate was available to respond to or deal with those submissions until the New Year, and hence the delay caused the Respondent no prejudice. In our judgment, none of these factors makes any difference. (i) As to (i), in an email dated 7 January 2016 the Master gave Mr Holmes until 11 January to

explain why he had not complied with the time limits set out in paragraph 55 of the 25 November judgment, and to make submissions on whether the court should exercise any power it might have to extend time for compliance. In response, the Appellants submitted a Skeleton Argument on 11 January in which they made no mention of any application for Legal Aid. In the circumstances, having had ample opportunity to draw relevant matters to the court's attention before it made any ruling, the Appellants cannot now be permitted to raise for the first time a matter that was wholly within their knowledge and was not mentioned at the time, and then complain that the court failed to give it sufficient weight. (ii) As to (ii), although it is not mentioned in the 18 January judgment, the court had (before that judgment was issued) been provided with a copy of the Appellants' application to the Privy Council dated 17 January 2016. The reason why it was not mentioned in the judgment is that it was entirely irrelevant to the exercise of the court's discretion. The fact that the Appellants are seeking to persuade the Privy Council to allow them to run an argument based on *erreur* has nothing to do with the question whether they should have been given an extension of time in which to make an application for permission to amend their pleadings in order to seek rectification. (iii) As to (iii), it is apparent from the face of the ruling that the 18 January judgment was not predicated on any prejudice having been suffered by Mr Le Sueur as a result of the Appellants' failure to comply with the time limit imposed by paragraph 55 of the 25 November judgment: no such prejudice had been alleged, and none was taken into account. 11. The Appellants' third point is a reiteration of the point identified in paragraph 10(i) above, and there is nothing to add. 12. Fourth, the Appellants submit that their delay in applying for permission to amend the pleadings in the 2013 proceedings was caused by an innocent mistake which caused no prejudice, and they say that "The evidence of this genuine miscalculation was not before the Court when it exercised its discretion". It is true that, at the time the 18 January judgment was issued, there was no evidence before the court (in that there was no witness statement or affidavit) verifying Mr Holmes' assertion that the delay was caused by a genuine miscalculation. However, this does not assist the Appellants because their Skeleton Argument of 11 January 2016 clearly explained the basis of the innocent miscalculation in §12, and that explanation was expressly noted in paragraph 7 and paragraph 14.2 of the 18 January judgment. In the circumstances, it is untenable for the Appellants now to suggest that the court gave insufficient weight to the fact that the Appellants' delay was unintentional. The absence of any prejudice to Mr Le Sueur has already been addressed. 13. The Appellants' fifth point is a recapitulation of their second to fourth arguments and adds nothing. 14. The Appellants' sixth point is a repetition of the point identified in paragraph 10(iii) above and adds nothing. 15. Seventh, the Appellants object that (i) there had been no formal Application before the court when it issued the 18 January judgment and (ii) no 'unless order' was sought by Mr Le Sueur. These arguments do not advance the Appellants' position in the slightest. (i) Following the 25 November judgment, the position was that the 2013 proceedings stood struck out unless the Appellants complied with the conditions laid down in paragraph 55 of that judgment. They did not comply with those conditions. In the circumstances, no application for an 'unless order' was required. (ii)

Furthermore, the Appellants knew by 4 January 2016 at the latest that Mr Le Sueur's position was that they had not complied with the conditions laid down in the 25 November

judgment.

They knew from the Master's email of 7 January 2016 that he agreed, and that he required them (by 11 January) to make their case as to why they had not complied with those conditions. They duly provided a Skeleton Argument on 11 January, as directed. This court considered it, and made a

ruling.

The fact that the court was prepared to do so without putting the Appellants to the added expense of having to issue a formal Application for an extension of time is not a matter about which they can make any complaint. 16. The Appellants' eighth submission is expressed as follows in the original version of the Application dated 7 October 2016: "in view of the foregoing issues (that were not before the Court), the Punitive Measures are shown to fall on the Appellants [sic] efforts to secure legal aid (for practical and effective access to the court) and exercise their right of appeal from para 55, as apposed [sic] to fall on an unexplainable breach of the 28 day time limit imposed under para 55 for filing the summonses 1 day late. This cannot be what the Court intended." In a revised version of the Application (also dated 7 October 2016) it was expressed as follows: "in view of the foregoing issues (that were not before the Court), the Punitive Measures are shown to fall on the Appellants [sic] exercise of their right to apply for legal aid (for practical and effective access to the court) and for leave to appeal from para 55, as apposed [sic] to fall on an unexplainable breach of the 28 day time limit imposed under para 55 for filing the summonses 1 day late. This cannot be what the Court intended." This submission is unintelligible in either form. 17. Ninth, the Appellants submit that the 2013 proceedings are at an early stage, and that an amendment should therefore be more readily allowed. In our judgment this submission misses the point. The court had already given permission to appeal in its judgment in November 2015. That was no longer an issue. The question in January 2016 was not whether to grant permission to appeal, but whether to extend time for compliance with the conditions on which that permission had already been granted. 18. Tenth, the Appellants submit that they had intended to attach the draft amended pleading to their summons at a later date. In our judgment, this point adds nothing to the matters discussed in paragraph 12 above. 19. Eleventh, the Appellants submit that any error with regard to the form of the application to restore the Second Appellant to the register was excusable. In our judgment, this point again adds nothing to the argument. 20. Twelfth, the Appellants submit that they are bringing judicial review proceedings against the Legal Aid Office. In our judgment, this adds nothing to the matters discussed in paragraph 10(i) above. 21. For this accumulation of reasons, the Application for permission to appeal to the Privy Council against the 18 January judgment and the 1 June Act of Court is refused. Authorities Home Farm Developments Limited and Ors -v-Le Sueur

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