

JERSEY / JUDGMENT

Home Farm Developments Ltd, Strata Developments Ltd and Holmes -v- Le Sueur [2014] JRC 079 (26 March 2014)

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judgment

the master:

Introduction

1. This judgment represents my reasons for striking out the plaintiffs' claim against the defendant on the basis that the claims are both scandalous and vexatious and an abuse of process. I gave my decision orally at the conclusion of the hearing on 18 th February, 2014. The plaintiffs, subsequent to my decision, asked for detailed reasons in writing, which are therefore contained in this judgment.

Procedural History

2. The action was commenced by issue of an order of justice dated 4 th February, 2013. When the matter first came before the Royal Court on 15 th February, 2013, it was adjourned sine die with undertakings to reappear. The matter was brought back to court by the plaintiffs on 20 th December, 2013 and the matter placed on the pending list. On 7 th January, 2014 the defendant's advocate issued a summons to strike out the entirety of the plaintiffs' claim. 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. 3. On 16 th January, 2014 an answer was filed. The relief in paragraph 1 of the prayer to the answer sought dismissal of the action, if it was not struck out by prior order. 4. I asked Advocate Taylor to clarify why the defendant's application to strike out had not been brought earlier. Advocate Taylor explained that so long as the matter was adjourned his client took the view that he was willing to let sleeping dogs lie. However, as soon as it became clear that the plaintiffs intended to pursue their claim, the defendant responded by issuing his strike out application. I accepted this explanation and am therefore satisfied that the defendant has not delayed in bringing this application, which would otherwise be relevant to any exercise of discretion to strike out.

Background

5. The relationship described in this decision arises out of Mr Holmes (the "third plaintiff") undertaking a building project at Home Farm in Grouville. He did so by establishing Home Farm Developments Limited (the "first plaintiff") and Strata Development Limited (the "second plaintiff"). For the purposes of this decision, the first plaintiff owned the site at Home Farm and the second plaintiff was responsible for carrying out development of the site. 6. During the course of argument it emerged that, at some point in time, the defendant had held an interest in the first plaintiff. Advocate Taylor stated expressly during the hearing on behalf of the defendant that his client had held 50 per cent of Home Farm but by way of security only. I was informed that the defendant was given possession of share certificates, which had now been returned. The defendant was provided with such share certificates because he had given a personal guarantee initially to Lloyds Bank and later to Investec Bank (Channel Islands) Limited in respect of borrowings by the first plaintiff. The defendant's position, as put by Advocate Taylor, was that he no longer had any interest in the first plaintiff and that such interest he had was only ever by way of security. The first plaintiff therefore belongs to Mr Holmes. Mr Holmes argued that the share register still showed the defendant having a 50% interest in the first plaintiff. In light of Advocate Taylor's clear statements, I see no reason why the share register cannot be altered so that the 50% interest in the name of the defendant is cancelled or transferred to the third plaintiff. 7. In relation to the second plaintiff, it was agreed that, at all times, the second plaintiff had been owned by the third plaintiff, and the defendant had never had any interest in the second plaintiff. It was also accepted that on 1 st October, 2013 the second plaintiff had been dissolved for non-payment of fees. While the third plaintiff stated in argument that the second plaintiff had assigned its rights of action to him, no evidence of any such assignment was produced to me. However, I accept that the third plaintiff has sufficient interest in the second plaintiff to make an application to declare the dissolution of the second plaintiff void pursuant to the Companies (Jersey) Law 1991, as amended, and therefore has sufficient interest to resist the present application brought by the defendant on the basis that the second plaintiff could be reinstated if the action was not struck out. 8. In relation to the defendant, he is a chartered accountant. In his affidavit, filed in support of his application, he explained that since 2001 he had almost exclusively been involved in property development and that he operated his property development business through two companies Manor Homes Limited ("Manor Homes") and Tower Capital Management Limited ("Tower"). Generally Manor Homes organised construction work and Tower provided book keeping, accountancy and administrative assistance on development projects. 9. On 9 th September, 2010, the first plaintiff and Manor Homes entered into a consultancy agreement. In relation to the first plaintiff, the obligations of Manor Homes under the consultancy agreement were to be fulfilled by the "executive". The identity of the executive was defined in schedule 3 as the defendant. However, the consultancy agreement did not create any direct contractual arrangement between the first plaintiff and the defendant. The agreement was only between the first plaintiff and Manor Homes. The defendant was only the individual through whom

Manor Homes would discharge its obligations. 10. The services to be provided by Manor Homes were set out in schedule 2 to the agreement. In essence, these were (a) the provision of book keeping and accounting services and (b) assisting with the procurement of supplies and materials at discounted rates. In fact the book keeping services were provided by Tower. 11. The fees payable to Manor Homes were set out in schedule 1. For bookkeeping and accounting services, Manor Homes was to receive a consultancy fee of £2,500 per month commencing on 1 st June, 2010. For the remaining services, Manor Homes was to be paid 7.5 per cent of the actual costs incurred on a monthly basis. There were other provisions relating to fees paid only if properties were sold, which provisions are not material given the later breakdown in the relationship between the first plaintiff and Manor Homes. 12. The consultancy agreement commenced on 1 st June, 2010 and lasted until the autumn of 2011. The way the relationship operated was that the first plaintiff had access to funds borrowed by way of a loan facility. Funds from that facility would be made available by the first plaintiff under the direction of the third plaintiff to the second plaintiff. This followed discussion as to what was needed between the third plaintiff and the defendant or one of the defendant's companies. Payment of what the third plaintiff had agreed could be paid was then made out of the second plaintiff's bank account by Tower, who provided signatories for this account. 13. What led to the breakdown in the relationship was non-payment of fees due under the consultancy agreement. According to an email sent from the defendant dated 14 th September, 2011, fees were due to Manor Homes in excess of £22,000. Tower/Manor Homes appear to have taken a part payment of £10,000 on account of this sum out of the second plaintiff's bank account. However, by an email exchange on 16 th September, 2011 the defendant agreed to return this sum on the basis that the third plaintiff agreed to pay all outstanding fees as soon as the project was complete; the monthly administration fees of £2500 would continue to accrue until all administration was finished on the project. The third plaintiff confirmed his agreement in an email sent the same day at 13:38. However matters did not improve and by 1 st November, 2011 relations had broken down irrevocably so that all services from Manor Homes and Tower under the consultancy agreement came to an end. 14. On 13 th March, 2012 Sinels, acting for all of the plaintiffs, sent a pre-action letter to the defendant at Manor Homes. The letter sought repayment of £103,562.70 representing fees paid under the consultancy agreement. This was on the basis that Manor Homes had no authority to make such payments and was acting in breach of duty in doing so. The letter also alleged that the actions of Manor Homes prevented the second plaintiff from paying its creditors and reserved the right to claim consequential losses. 15. It was not clear to the defendant how the figure of £103,562.70 was arrived at. In the course of argument before me it was also not clear to me how this figure had been calculated. What was exhibited to the affidavit of the defendant at pages 19 and 20 were schedules which showed that by the time of the letter from Sinels, Manor Homes had received the sum of £51,116.03 pursuant to the 7.5% management fee under the consultancy agreement. However the total amount invoiced was £98,311.71, leaving an unpaid balance of £47,195.68. These figures were exclusive of the monthly administration fee of £2,500 per month where £45,000 had been invoiced and paid to Tower. 16. The letter from Sinels resulted in a serious of negotiations

and attempts at a compromise agreement. There were two earlier versions dated 25 th April, 2012 and 17 th May, 2012. As these were superseded by the agreement dated 31 st May, 2012 I do not refer further to them but note their existence. 17. In relation to the agreement dated 31 st May, 2012 this was a short document signed by all the plaintiffs and the defendant as well as Manor Homes and Tower. It provided as follows:- "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." 18. The 31 st May agreement is not referred to in the order of justice. Yet the agreement is a significant document. Instead the order of justice simply repeated almost word for word the allegations contained in Sinel's letter of 13 th March, 2012. 19. Prior to the 31 st May agreement being signed, there were

exchanges of emails between the third plaintiff and the defendant on 29 th May, 2012 which led to an email to Mr Phil Boots of Cashback dated 30 th May, 2012. 20. At 11:05 on 29 th May, 2012, the third plaintiff wrote to the defendant as follows:- "The following is a draft from you to Phil, for me to countersign, as an accurate depiction of your settlement agreement. 1. In regard to Strata's claim of £103k I received by way of Sinel's letter of 13 th March, 2012, I can confirm I have offered and agreed with Strata settlement in the sum of £50k. 2. The payment of the £50k will be divided into three equal monthly payments of £16,666.66, the first payment being payable on the 31 st May, 2012. 3. 40% of my £50k settlement will be payable to Cashback for equal distribution to the Strata creditors currently managed by Cashback in full and final settlement, subject to clause 5. The balances of the creditors accounts with Strata to be agreed between Strata and Cashback before any payments are made. 4. The remaining 60% of my £50k settlement will be distributed equally to remaining Strata creditors in full and final settlement, subject to clause 5. 5. In the event Strata receives a further balance payments from Home Farm Developments Ltd, Strata agrees to distribute this payment equally to the creditors." 21. On 29 th May, 2012 at 15:23 the defendant wrote to the third plaintiff as follows:- "Here is draft:- 1. In regard to Strata's claim of £103k I received by way of Sinels letter of 13 th March, 2012, I can confirm I have offered and agreed with Strata settlement (without accepting any liability) in the sum of £50k of which £5k has already been paid. 2. The payment of the balance of £45k will be divided into three equal monthly payments of £15,000 the first payment being payable on the 31 st May 2012. 3. 40% of the £45k settlement will be paid to Cashback from the 3 payments for equal distribution to the Strata creditors currently managed by Cashback in full and final settlement, subject to clause 5. The balances of the creditors accounts with Strata to be agreed between Strata and Cashback before any payments are made . The balances to Gordon Electrics and CT Tiles are both disputed and payments should only be made to these suppliers once they have been agreed. (my emphasis) 4. The remaining 60% of the £45k settlement will be distributed equally to remaining Strata creditors in full and final settlement, subject to clause 5. 5. In the event Strata receives a further balance payment from Home Farm Developments Ltd after repayment of the first charge bond to Investec Bank and the second charge bond to Mr Harry Lingard, Strata agrees to distribute this payment equally to the creditors. 6. This will be confirmed independently by Shane who (as the 100% owner and sole director of Strata) has ultimate control over the agreement of balances in points 3 and 4 and distribution of final sales proceeds in point 5." 22. It was not disputed that the third plaintiff agreed the draft email prepared by the defendant on 29 th May. On 30 th May at 10:30 the defendant sent as an email the text of the draft he had prepared on 29 th May to Mr Boots at Cashback. The only difference from the draft was that the email commenced with the words:- "Shane and I have now reached agreement as follows." 23. The email was in error sent to a third party also called Shane but it was forwarded by Mr Boots to Advocate Richard Wakeham of Sinels, legal adviser to the plaintiffs. The third plaintiff in argument accepted that he saw a copy of the email of 30 th May, 2012 around the time it was sent. 24. Payments were subsequently made by the defendant pursuant to the settlement of 31 st May, 2012 and the email of 30 th May, 2012 sent to Mr Boots. This is clear from an email exchange between the third plaintiff and

the defendant on 13 th August, 2012. At 07:57 that day the third plaintiff sent calculations, by way of a schedule, to the defendant stating that a settlement balance of £6,157 was now due. The defendant responded at 10:24 querying the sent figures and saying that £5,757 was due. The third plaintiff responded at 10:52 agreeing this figure and payment was made by the defendant that day. 25. On 21 st November, 2012 the third plaintiff wrote to Margaret at Cashback. The relevant part of his email stated as follows:- "You will note that the balance payments would come from the sales of the houses at Home Farm and that these terms were agreed by Cashback by exchange of emails on 25 th May 2012 (please see attached email history). Since then the payments have been made by Jamie as agreed and we are progressing with the sales accordingly. As mentioned, I fought with Jamie to get as much funds to the creditors as quickly as possible, together with a payment plan with the balances being agreed from sales so we could keep the matters out of the Court and keep my bankers at bay. It is on the basis of this agreement that I have asked you to withdraw from putting the actions back on the Court list, as you will agree this is not what was agreed between Cashback and Jamie on 25 th May 2012." (my emphasis) 26. However, on 6 th December, 2012 at 12:25 the third plaintiff wrote a further letter to Margaret at Cashback. Paragraphs 4 and 5 of the emails stated as follows:- 4. You will note agreement item 5 confirms that any further payments from Strata to the creditors will only happen in the event Strata receives more funds from Home Farm Developments Ltd (HFDL). You will note there is no condition that HFDL replaces Strata's position, and provides any guarantee or irrevocable undertakings or similar. Similarly, you will note there is clearly no obligation on Strata to provide any documentation over and above the attached agreement and undertakings that Cashback has already agreed with JLS. 5. The above structure and terms are what Strata & SH agreed as settlement with JLS, and as part of this settlement it was for JLS to then agree the same final settlement terms with Cashback so back-to back settlement could be crystallised between all the parties and the Actions cancelled. You will understand that preventing court judgments by obtaining full and final settlement was central to Strata's and SH's agreement with JLS to settle with Cashback; as without this full and final settlement both Strata and SH would clearly remain exposed to judgment being taken against them and reputations and business's being further damaged." 27. This was the first occasion upon which the third plaintiff raised the argument that it was for the defendant to agree full and final settlement in terms with Cashback and that actions had to be cancelled. In argument before me he contended that because the defendant failed to do so, the terms of the 31 st May, 2012 agreement should be set aside so that the plaintiffs were free to seek recovery from the defendant all sums paid pursuant to the consultancy agreement as set out in Sinel's letter of 13 th May and in the order of justice. The defendant's grounds 28. The grounds raised by the defendant to strike out the order of justice are as follows:- (i) The second plaintiff does not exist. (ii) Mr Holmes has no contractual relationship with the defendant and so has no right to pursue any remedy or seek any relief in a contractual claim, which is how the matter is pleaded. As part of his argument the defendant also states that the third plaintiff has no contractual relationship with Manor Homes or Tower and has no legal basis to bring a claim against these companies. (iii) The defendant is not party to any contract with the first

plaintiff in respect of the development properties apart from being named as executive in the consultancy agreement. (iv) The only agreement to which the plaintiffs and the defendant are parties is the 31 st May agreement, which prevents any litigation by any of the plaintiffs in respect of the development project. In relation to this argument the defendant noted that the 31 st May agreement did not prevent him pursuing the balance outstanding under a promissory note given by the third plaintiff to the defendant. 29. In response the third plaintiff in summary contended as follows:- (i) He reminded me of the relevant tests applicable on strike out application and in particular that high hurdle that has to be overcome before the court will strike out a case. I was referred to *Stephens v Stephens*

[1989] JLR 284 , *Minories Finance v Arya Holdings*

[1994] JLR 149 and *Channel Islands and International law Trust v Pike*

[1990] LJR 27). I am familiar with all the principles referred to in these cases. (ii) He indicated in principle that Strata could be reinstated. Both the Jersey Financial Services Commission and the Comptroller of Income Tax had no objection to such a step as long as outstanding fees and tax were paid, which the third defendant was willing to do. (iii) The settlement agreement dated 31 st May, 2012 was a tripartite agreement, which was conditional upon the defendant procuring a settlement with Cashback's creditors. As the defendant failed to do so, then no agreement between all the parties to the agreement, including between the plaintiffs and the defendant, was concluded, and accordingly the plaintiffs are entitled to pursue the matters contained in the order of justice. (iv) There was a shareholders agreement between the defendant and the third plaintiff which the defendant breached by not settling matters with creditors pursuant to the 31 st May agreement. In relation to this argument I was told that the agreement was an oral agreement. No evidence of such an agreement was produced to me. (v) In paragraph 10 of the third plaintiff's skeleton argument filed in advance of the hearing, the third plaintiff also alleged that the defendant "held various positions of trust authority and duty with the plaintiffs" and asserted breaches of fiduciary duty, breach of trust and breach of authority in contract and tort. Decision 30. What is at the heart of whether or not the case should be struck out depends on what the parties agreed by the agreement of 31st May, 2012 and the exchange of emails on 29 th and 30 th May, 2012. 31. I am satisfied that, if a binding settlement was reached between the plaintiffs and the defendant, then to allow proceedings to continue would be both vexatious and an abuse of process because the court would be being asked to adjudicate on a matter that had been resolved by agreement. While a settlement agreement can be set aside on certain grounds, no such argument was advanced by the plaintiffs in this case. Rather the plaintiffs' argument was that the defendant had failed to fulfil the terms of a tri-partite agreement by not settling with creditors represented by Cashback and, in particular, by not procuring that claims were withdrawn. 32. In relation to the agreement of 31 st May, 2012, I consider that the terms of paragraph 1 of the agreement, which I have cited above, are clear. Each of the plaintiffs agreed to "permanently and irrevocably withdraw all legal proceedings of any kind and to withdraw

also irrevocably all matters referred to in the letter from Sinels dated 13 th March, 2012 against the defendant and Manor Homes and Tower". Although the words " full and final settlement " are not used, I regard an agreement to permanently and irrevocably withdraw all proceedings and all allegations in return for a payment of £45,000 as creating a binding settlement agreement including preventing further proceedings in relation to the development of Home Farm. An allegation can only be permanently and irrevocably withdrawn if it cannot be raised again or pursued in any later litigation, which is the effect of a full and final settlement agreement. I further consider this is the only meaning that can be applied to the clear and unambiguous language of clause 1. 33. The plaintiffs are also not making new allegations or allegations that the settlement was procured on grounds entitling the plaintiff to set it aside. Rather they are repeating allegations made by Sinels' letter of 13 th March, as I have noted at paragraph 17 above. 34. As to the remainder of the agreement of 31 st May, I also consider its meaning is clear. All that the defendant agreed was to pay £45,000 to the third plaintiff over three equal instalments, £20,000 of which was funded by way of a loan. There is nothing in the 31 st May agreement which obliges the defendant to have reached a settlement with the creditors represented by Cashback or to have compelled those creditors to have withdrawn their claims. 35. The email exchanges on 29 th and 30 th May to which I have referred however go further. They do contain a reference to 40% of the sum payable by the defendant being paid to creditors of Strata represented by Cashback. They also refer to future payments to Cashback out of the proceeds of sale of properties at Home Farm. In relation to these emails, firstly, the sums to be paid by the defendant were paid, as can be seen from the exchange of emails on 13 th August between the third plaintiff and the defendant. The third plaintiff did not produce any evidence to argue otherwise. Secondly, the terms of the emails of 29 th and 30 th May were adhered to and accepted by Mr Boots. In his affidavit filed in support of the defendant's application at paragraph 5, Mr Boots deposed " I understood his offer was limited to 40% of the claims and the remaining balance would be paid by Shane Holmes and/or Strata as and when they had sufficient funds from the proceeds of sale of the Home Farm Properties." This statement is also consistent with the exchange of emails dated 25 th May between Mr Boots and the defendant referred to in the third plaintiff's email of 21 st November, 2012 set out above. Thirdly Mr Boot's evidence, which was not challenged, is also consistent with the references to " subject to clause 5 " in the emails of 29 th and 30 th May I have also set out above. Clause 5 of both drafts and the final version all made it clear that if the second plaintiff (Strata) received any money, after repayment of secured creditors of the first plaintiff (Home Farm), this would be paid equally to creditors. As clause 6 of the email of 30 th May from the defendant to Mr Boots noted (and sent to the third plaintiff at the time), the third plaintiff controlled the second plaintiff. Finally, the final balance of what was due to creditors of the second plaintiff represented by Cashback was to be agreed between the second plaintiff (controlled by the third plaintiff) and Cashback. This language is entirely contrary to the argument that it was for the defendant to procure a full and final settlement. 36. None of the emails of 29th and 30th May required creditors to withdraw their proceedings. Rather what was agreed was that a

partial payment was to be made with the balance being paid from funds received from the sale of properties. None of the plaintiffs, in May 2012, suggested that a withdrawal of proceedings was required. 37. The draft e-mail from the third plaintiff to the defendant sent at 11:05 on 29 th May in particular states that "in the event Strata receives a further balance of payments the first plaintiff, Strata agreed to distribute this payment equally to the creditors" . This is the third plaintiff's own language, written just prior to the version of the email of 30 th May sent to Mr Boots, which the third plaintiff appeared to have agreed. It is clear to me therefore that the payments to be made by the defendant to Cashback were never intended to be a final settlement of all claims that creditors of the second plaintiff who were represented by Cashback had against the second plaintiff. No withdrawal of proceedings was required by any of the plaintiffs. What those creditors did agree to, as Mr Boots accepted in his affidavit, was that the balance was only payable out of any sale proceeds received by the second plaintiff. 38. The language of the emails of 29 th and 30 th May also does not contain anything inconsistent with the terms of 31 st May agreement. The defendant's only obligation under the 31 st May agreement was to pay over £45,000 to a combination of Cashback or the plaintiffs, as the third plaintiff was to direct. In my judgment, by 31 st May, 2012, it was quite plain to the third plaintiff that the creditors were entitled to receive more monies once the properties were sold. The fact that the defendant's email of 30 th May, which the third plaintiff accepted he saw at the time, commences with the words "Shane and I have now reached agreement as follows" is significant. The 31 st May agreement was not a tripartite agreement. It was an agreement between the plaintiffs and the defendant. The defendant was agreeing to pay £45,000 to the plaintiffs in return for not being pursued further. The agreement did not place any obligation on him to compel the creditors of the second plaintiff to accept sums paid in full and final settlement or to withdraw proceedings. Those creditors still had a right to a share in any proceeds of sale of the properties received by the second plaintiff once all secured creditors were paid. The best the plaintiffs can say is that the 29 th and 30 th May emails go further than the st May agreement. However the evidence before me is that the creditors represented by Cashback in May 2012 accepted that they would only recover a proportion of their claims, with any balance depending on the profitability of the development and to be agreed between the second plaintiff and Cashback. By that time neither the defendant nor any of his companies were providing services in respect of the development at Home Farm under the consultancy agreement. Mr Boots in emails he sent to the third plaintiff subsequent to May 2012 and in his affidavit did not seek to argue otherwise. 39. The view I have reached is also consistent with the exchange of emails on 13 th August between the third plaintiff and the defendant. On 13 th August the third plaintiff accepted that the final balance due from the defendant was £5,757, having provided a schedule showing 3 instalments paid to Cashback. No evidence was adduced from the third plaintiff or any of the other plaintiffs to show that the exchange of emails on 13th August was not how the agreement of 31 st May was intended to operate. The third plaintiff did not say that proceedings had to be withdrawn or that there had been a failure by the defendant to procure that Cashback would do so. 40. My conclusion is also

consistent with the third plaintiff's email of 21 st November, 2012 to Cashback. In the email of 21 st November the third plaintiff stated "as mentioned, I fought with Jamie to get as much funds to the creditors as quickly as possible, together with a payment plan with the balances being agreed from sales so we could keep the matters out of court and keep my bankers at bay." The passages I have underlined in particular support the view I have reached and again no evidence was adduced to show that there was a different interpretation, which justifies a trial or why a trial would not be an abuse of process in light of the clear terms of the 31 st May agreement. 41. What the third plaintiff did request of Cashback on 21 st November was that matters should not go back on the Court list. This followed Cashback giving notification that they were going to take steps to pursue matters as they had heard nothing since May about when properties were going to be sold. Even then, Cashback were sympathetic to adjourning matters if they received firm details in writing about sales of properties at Home Farm. As with his email to the defendant in August, nothing at all was said by the third plaintiff about actions having to be withdrawn based on the email of th May I have referred to or based on a failure by the defendant to procure that Cashback would procure such a withdrawal. 42. The third plaintiff did appear to change his position between his email of 21 st November, 2012 and his email of 6 th December, 2012. This is where he appeared to raise that the defendant was required to agree the same settlement terms with Cashback and have the actions cancelled. This allegation is why it is said that the defendant breached what was agreed in the emails of 29 th and 30 th May and the 31 st May agreement. 43. I do not consider that this argument gives rise to a defence. Firstly, there is nothing in any of the documents to support the plaintiffs' interpretation that a withdrawal of proceedings formed part of what was agreed on 30 th and 31 st May, 2012. I regard the language as clear and only capable of the interpretation contended for by the defendant. Secondly, the e-mails of 29 th and 30 th May are wholly inconsistent with the interpretation contended for by the plaintiffs, as is the affidavit of Mr Boots. The plaintiffs between May and November 2012 did not argue otherwise. Thirdly the third plaintiff does not explain his email exchange of 13 th August with the defendant where he agreed the final settlement balance and did not say that anything else was required. Fourthly, the third plaintiff has not produced any evidence to support his email of 6 th December, 2012. Other than to dispute Mr Boot's affidavit in his skeleton argument, which he verified by an affidavit simply confirming the contents of the skeleton, Mr Holmes has not adduced any evidence to explain why I should construe what was agreed on 30 th and 31 st May, 2012 as including an obligation on the defendant to agree a final settlement with Cashback, so a back-to-back settlement could be crystallised. 44. I also find paragraph 4 of this email surprising to the extent it appears to stress that the first plaintiff, as the legal owner of the property and the recipient of any proceeds of sale, would not pay the second plaintiff as developer any funds from those proceeds to pay the latter's creditors. I accept that the emails of 29 th and 30 th May are consistent with this approach but it was only in December 2012 that the third plaintiff indicated that the first plaintiff might not pay the second plaintiff when he controlled both companies at that time. The response from Cashback that those creditors, who already had not received any

information from the plaintiffs since May, were contemplating taking further steps in response is therefore entirely understandable. Any further threat of proceedings after this email was as a result of the third plaintiff's decision to make it clear that the second plaintiff would only pay its creditors if it received money from the first plaintiff. That decision had nothing to do with the defendant and does not therefore give rise to a claim against the defendant. The defendant's obligations under the settlement reached at the end of May had been met by August 2012. 45. The view I have reached in relation to the 31 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. Other arguments 46. Although I do not need to do so I will also deal with other arguments raised by Mr Holmes and Advocate Taylor. 47. In relation to the point that the second plaintiff does not exist, if I had been minded not to strike out the plaintiffs' claim, I would have allowed the third plaintiff time to take steps to reinstate the second plaintiff in view of the information provided to me at the hearing. The fact that the second plaintiff had been dissolved subsequent to the commencement of proceedings is not a matter that, of itself, would have justified a strike out of the action because the position could have been addressed by an order for reinstatement. The decision I have reached therefore is, on the assumption in the plaintiffs' favour that the dissolution of the second plaintiff would have been declared void on the basis of the information provided to me during submissions, I would still have struck out the claim against the second plaintiff. 48. I also agree with Advocate Taylor that there is no contract between the third plaintiff and the defendant or his companies Manor Homes and Tower. In addition therefore to the fact that all claims between the plaintiffs and the defendant and the defendant's companies have been settled, there is also no basis to allow a claim for breach of a contract by the third plaintiff against the defendant or any of his companies. Such a contract if it had existed might have been a starting point for the third plaintiff being allowed to amend its claim rather than the matter being struck out but there is no evidence of such a contract. 49. Likewise none of the plaintiffs have any agreement with the defendant. The only contract is the consultancy agreement between the first plaintiff and Manor Homes. The fact that the defendant was named as executive in the consultancy agreement does not create a contract between the defendant and any of the plaintiffs. No claim for breach of a contract that never existed can therefore be brought. In any event any claims between the plaintiffs and the defendant based on the matters complained of in the order of justice or in submission were also compromised by the 31 st May agreement. 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. 51. 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 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. 52. In addition on this argument, the plaintiffs have in any event already withdrawn irrevocably all allegations arising out of Sinels' letter of 13 th March, 2012. Within that letter the plaintiffs reserved their right to bring such personal claims against the defendant as and when it was deemed it necessary and appropriate to do so. The 31 st May, 2012 agreement clearly compromises such claims, which includes any claims for breach of a shareholders agreement. 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 31 st May agreement. What the plaintiffs appear now to want to do is to look behind the terms of a consultancy agreement and the 31 st 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. 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.

Conclusion

55. For the reasons set out in this judgment I struck out the order of justice. 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 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 Authorities Channel Island and International Law Trust Company (in its capacity as Trustee of The Halifax Trust), Gilbrun Investments Ltd and West v Pike and Five Oaks

[1990] JLR 27 . Stephens v Stephens

[1989] JLR 284 . Minorities Finance Ltd v Arya Holdings Ltd

[1994] JLR 149 . Mauger (née Kenny)

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