

JERSEY / JUDGMENT

Incat v Luba [2010] JRC 083A (30 April 2010)

[2010] JRC 083A

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judgment

the deputy bailiff:

Introduction

1. This matter came before the Royal Court on a summons issued by the Defendant for an order that the proceedings be discontinued. The grounds for the application were that the parties to the proceedings had reached agreement to that effect. 2. The proceedings were commenced by Order of Justice on 3rd July 2009. In the Order of Justice, the Plaintiffs claim that at meetings held in or about March 2003 and July 2003, representatives of the Plaintiffs and the Defendant respectively agreed a schedule of sums due by the Defendant to each of the Plaintiffs and to another company called Integrated Petroleum Services Gabon Ltd (hereinafter called "IPSG"). In addition the first Plaintiff claims from the Defendant under a debt swap agreement dated 30th November 2002, and the various Plaintiffs claim to have provided a number of different services and other facilities to the Defendant giving rise to a claim for monies due pursuant to the provision of those services and/or facilities. Pursuant to the detailed claims set out in the Order of Justice:- (i) The first plaintiff claims USD3,798,322 (ii) The second plaintiff claims USD95,528 (iii) The third plaintiff claims USD457,098 (iv) The fourth plaintiff claims USD2,452,141 (v) The fifth plaintiff claims USD1,228,201 In each case against the Defendant, and in each case claiming in addition interest and costs. 3. The action was placed on the pending list and on 28th August 2009 an answer and counterclaim was filed by the Defendant. In that pleading, the Defendant denied being indebted to the Plaintiffs as alleged and generally put the Plaintiffs to proof in relation to when and where the services were provided, what their value was, and what the contractual terms that applied in relation to the same might be. The Defendant contends that until 11th May 2006 it was a member of a group of companies including the various Plaintiffs and accordingly that there had been a relationship by which the Plaintiffs and IPSG provided respectively plant and services to the Defendant at the deepwater port of Luba on the island of Bioko, Equatorial Guinea, West Africa, in relation to the development of the deepwater port which was to be known as Luba Freeport. Furthermore, the Defendant counterclaimed for monies due to it by the first Plaintiff pursuant to a loan agreement dated

22nd May 2002, and generally for an account against all Plaintiffs in respect of profits or benefits received by those Plaintiffs at the expense of the Defendant, details of which might be particularised following discovery. The Court's attention has not been drawn to any reply or defence to counterclaim filed by any of the Plaintiffs. 4. Following the exchange of pleadings to which reference has been made above, without prejudice negotiations between the parties commenced in September 2009. Subsequently there was an exchange of emails in October 2009, which we set out in full, because it was contended on behalf of the Defendant that these indicated a completed contract which amounts to an agreement to discontinue, on the terms of that contract. 5. The email of 2nd October 2009 was sent by Mr Geoffrey White, the Chief Executive Officer and Director of Lonrho Plc, which we understand to be the ultimate parent company of the Defendant, to a Mr Steven Baird, representing the Plaintiffs. It is in these terms:- "Steve Thank you for your email dated 1st October 2009 received at 14:08. Firstly I will clarify that our lawyers, DLA, are very confident that any prospects of the joinder of Hayden to our counterclaim being overturned on appeal are very slim indeed. However, in an effort to bring this matter to a close and waste no further time for either party or the courts, your proposal to settle all matters for US\$ 1 million payable by instalments over twelve months and dropping the claim for costs would in principle be acceptable to Luba Freeport Limited subject to the following being complied with in the discretion of and the satisfaction of Luba Freeport Limited: The Board of Luba Freeport Limited approving the settlement terms; The settlement terms being in full and final settlement of all claims which the Incat Group of Companies, John Haden and African Edge and their nominees and assigns may have against Luba Freeport Limited; Satisfactory confirmation of any and all the legal entities that have good and valid title to the debt that is being settled and delivery of the necessary authority to settle the debt; The immediate withdrawal of all court proceedings and an appropriate undertaking and indemnity that no fresh proceedings will be instituted as the matter has been settled on a full and final basis. BRGDS Geoffrey" 6. I add that the Court was advised that the email of 1st October 2009, to which this was a response, was marked "without prejudice". It followed a preliminary discussion between Mr White and Mr Baird in September 2009 and a without prejudice email sent by Mr White to Mr Baird on 25th September 2009. The Defendant contended that as final agreement had been reached, no without prejudice label was attached to the emails on which reliance was placed. 7. By email dated 6th October, Mr Baird responded as follows:- "Dear Geoffrey Apologies for the slight delay in responding. We would like to proceed towards a resolution of this matter on the terms you propose. To this end I have asked Michael Gouldborn [sic] at Bois Bois to draft a compromise agreement for your perusal. Regards Steph en Baird" 8. On 14th October 2009, Advocate Goulborn sent to the Defendant's lawyers a draft settlement agreement. The email was marked "without prejudice and subject to contract" as was the draft agreement. The draft agreement did not include the sum payable and it was contended by the Plaintiffs that this was left blank as the final figure had yet to be agreed. 9. The draft settlement agreement contained a confidentiality provision in these terms:- "This Agreement (including its contents) is and shall remain confidential and the subject matter and contents of this agreement shall not be divulged by

any party to any third party without the prior written consent of the other parties hereto, save as required by law, to the parties' respective legal advisers, auditors, insurers and professional consultants, or for the purpose of preserving or protecting rights under, or enforcing any of, the terms of this Agreement. 4.2 The parties hereto shall to the extent necessary make their servants and agents aware of the provisions of this clause 4 and shall instruct them to observe the same". 10. Over the next three weeks there were some desultory exchanges of emails between the lawyers. 11. On 9th November 2009, Lonrho issued its results for the quarter ended 30th September 2009. In the course of issuing those results, there was included the following passage:- "Agreement in principle has been reached to settle the outstanding dispute with Incat, the previous owners of Luba Freeport, where Incat was claiming US\$8.5M (£5.3M) in disputed outstanding invoices, by an agreed full and final payment of US\$1M (£0.6M) to be paid in monthly instalments over a twelve month period subject to Luba Board approval. Lonrho had made provision for liabilities arising from this claim and as such is expecting to record an exceptional gain of US\$5.5M (£3.5M) before legal costs in the first quarter of the current financial year." 12. The following day Advocate Goulborn sent an email to the Defendant's lawyers referring to the trading update published by Lonrho and indicating that while that publication made a nonsense of the confidentiality provisions and, it was said, put the Defendant's good faith in question in respect to the negotiations generally, he invited comments without further delay on the draft settlement agreement. 13. There was also communication between the clients. Mr Baird emailed Mr White on 10th November 2009 to express disappointment at the lack of progress on the discussions, but also as to the public announcements regarding a potential settlement. He went on "I don't know what you are trying to achieve but it is massively counter-productive and frankly we could only assume you had no intention to pursue the arrangement as it was supposed to be a very quick deal and yet you failed to instruct your lawyers and we have heard nothing. I will take further instructions and revert". 14. Mr White responded by email the same day expressing his surprise at the email and giving a reassurance of the intention to complete as soon as possible. He said there had been progress made and legal documents had been worked on for some time. He went on to say that his lawyers had sent comments through to the Plaintiffs' lawyers and a final version was in the course of being agreed and, Mr White said, he hoped that completion might take place shortly. 15. The following day, the Defendant's lawyers returned the draft settlement agreement to Advocate Goulborn with a number of changes. The revised draft, still marked "Without Prejudice and Subject to Contract" was returned subject to the Defendant's approval. These were considered by the Plaintiffs, on whose behalf Advocate Goulborn responded by email on 16th November in these terms:- "I refer to the Trading Update published by the Lonrho Plc on 9 November 2009. The fact that your clients purported to waive privilege, unilaterally, in the terms of the extant settlement negotiations in such a public forum has caused our client near insurmountable difficulties with stakeholders, particularly when coupled with the glacial pace of the negotiations: almost four weeks delay between submission of a first draft agreement to you and receiving any response. In the circumstances, the terms of the present deal are completely untenable. Incat would prefer to resolve this without the need for

further public statements but this silence cannot be maintained for any length of time. If this situation is to be resolved without further damage to both parties, speedy and candid negotiations must take place without further delay...." 16. Although some efforts appear to have been made between the parties' representatives over the next ten days, the Plaintiffs took the view by 27th November that the efforts at settlement had proved unsuccessful, and that, using Mr Baird's expression "long term battle has been resumed" . 17. On 28th November 2009, a representative of the Defendant arrived at the offices of Integrated Petroleum Services Limited with a letter dated 27th November 2009, addressed to the first plaintiff, and enclosing a cheque in the sum of CFA36,795,603, which was said to be a conversion into CFA Francs from US dollars at the rate of 441.549 francs to the dollar. This sum ostensibly represented US\$83,333, or one month's instalment under the alleged settlement agreement. The cheque was returned immediately uncashed. 18. We should make it plain that this summary above is a distillation of the affidavit and documentary evidence which was put before the Court on the application for discontinuance. No oral evidence has been received, and the statements made on affidavit have not been the subject of any cross examination. In essence, the Court was asked to make a determination of the issue of discontinuance on the basis of the documentary evidence which was produced, and we feel able to do so because the affidavit evidence really provides background rather than anything directly relevant to the issue we have to decide. 19. Those being the facts, we turn next to the issue before the Court, namely whether, in all the circumstances, there was a binding agreement or contract concluded by the parties for the settlement of the litigation. The Defendant contends that a binding contract was made. The Plaintiffs contend that there had been no meeting of minds between the negotiators, namely Mr White on behalf the Defendant and Mr Baird on behalf of the Plaintiffs, and accordingly no agreement was concluded. The Law 20. Both parties agreed that the Court should approach the issue by examining whether or not a valid contract had been formed, and both parties drew our attention to the case of *Selby v Romeril*

[1996] JLR 210 . Adopting Article 1108 of the French Code Civil , which was based upon the writings of Pothier, an author whose commentaries on the law of contract have been held in the highest regard in this jurisdiction, the Royal Court held that there were four requirements for the creation of a valid contract in Jersey: (i) the consent of the party undertaking an obligation; (ii) his legal capacity to enter into a contract; (iii) " objet " or subject matter of the contract; and (iv) a legitimate " cause " or reason for the obligation to be performed. 21. Pausing there, it is noteworthy that it is these requirements for the creation of a valid contract go some way to explaining the ancient maxim *la convention fait la loi des parties* , which reflects Article 1134 of the French Code Civil which is in these terms: " Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. " 22. At the heart of this provision in the French Code Civil, and behind the maxim to which we are so accustomed in Jersey, is the concept that the basis of the Law of Contract is that each of the contracting parties has a *volonté* , or will, which binds them together and requires that the mutual obligations which they have agreed be given effect by the courts.

The notion of *volonté* as the foundation of the contract is sometimes thought to result from the political liberalism of the age of reason and of the economic liberalism of the 19th century where obligations imposed from outside should be as few as possible. A man is bound only by his will, and because he is the best judge of his own interests, the best rules are those freely agreed by free men. However it is to be noted that rather earlier the same rationale appears in the commentaries of Berault, Godefroy and d'Aviron on the *Coutume Reformée du Pais Duché de Normandie Tome 1* p74, this edition being published in 1684, where the authors say this:- "Car la *volonté* est le principal fondement de tous contracts, laquelle doit avoir deux conditions, la puissance et la liberté..." Before going on to consider the restrictions which the law imposes on the making of contracts which are contrary to good morals or otherwise unlawful, notwithstanding the *volonté* which existed in the contracting parties. 23. It is because the concept of *volonté* is so important to the making of contractual arrangements that the grounds of nullity which exist for *erreur*, *dol*, *déception d'outre moitié* and *lésion* become so comprehensible. The principles which are encapsulated in these objections to the formation of a valid contract go to whether or not it can be truly be said that there was a common will of the contracting parties to make the contract which comes under consideration. These grounds of nullity go directly to the reality of the consent of the parties to make the contract - see also *Marett v Marett*

[2008] JLR 384 at paragraphs 58-60. 24. The Defendant submitted that it was useful to look at *Chitty on Contracts*, a textbook on English Contract Law and the authorities referred to therein. There seems little doubt that if one were seeking to ascertain the English Law of Contract, *Chitty* would be a good place to start. It may indeed be a helpful textbook in assisting the Royal Court in construction cases, where the language of a particular contract which is under consideration in the Royal Court is similar to the language which has been under consideration in the English courts. Nonetheless, it is clearly a textbook which is to be approached with some caution insofar as the law of Jersey is concerned, as the basic principles of our law do not have the same provenance. 25. Insofar as the instant application is concerned, both parties have placed an amount of emphasis on the doctrine of *erreur*. Relying on *Marett*, which distinguished *erreurs* obstacle as being of these kinds - *erreur sur la nature du contrat* (a mistake as to the nature of the agreement), *erreur sur l'objet* (a mistake as to the subject of the agreement) and *erreur sur l'existence de la cause* (mistake as to the basis or purpose of the agreement) - the Defendant conceded that each of these *erreurs* would prevent the subjective meeting of minds that is fundamental and necessary to the existence of a proper consent and the creation of a contract under Jersey law. However, having made that concession, and noted that the Plaintiffs did not assert which type of *erreur* existed in this case, the Defendant then went on to rely - inappropriately - upon *Chitty*. 26. By contrast the Plaintiffs' arguments did not clearly identify either what *erreur* was being relied upon. In essence, the Plaintiffs' case was that the email correspondence to which I have referred remained without prejudice correspondence because although it did not in terms exhibit that label, it was a continuation of earlier email exchanges which were clearly without prejudice and the

later ones could not be properly construed without reference to the earlier ones.

Furthermore the Plaintiffs' case was that on their proper construction, the various emails showed that no final contract had in fact been made. 27. The Court invited submissions as to what the governing law of the alleged contract might be. This was alleged to be a contract to settle litigation before the Royal Court of Jersey, made between persons unfamiliar with our law. However, both parties agreed that the proper law of the alleged contract was Jersey law, and it is therefore Jersey law which we have applied. It follows that expressions such "offer and acceptance" or "invitation to treat" are not particularly helpful in considering the issue before us. 28. There has not been a plethora of cases in the Royal Court where *erreur* has been advanced as a ground for annulment of an agreement, and in those cases where the doctrine has been advanced, the authorities are not entirely clear about the theoretical basis upon which the principles are being applied. It is worth recalling that Pothier in his *Traité des Obligations* (B.29 nos 17-19, Edn. of 1827) says this:- "17. L'erreur est le plus grand vice des conventions; car les conventions sont formées par le consentement des parties et il ne peut pas y avoir de consentement, lorsque les parties ont erré sur l'objet de leur convention, non videntur qui errant consentire.... 18. L'erreur annule la convention, non seulement lorsqu'elle tombe sur la chose même, mais lorsqu'elle tombe sur la qualité de la chose que les contractants ont eu principalement en vue, et qui fait la substance de cette chose.... 19. L'erreur sur la personne annule la convention, toutes les fois que la considération de la personne entre dans la convention...." The doctrine of *erreur* is thus generally applied to vitiate a contract which has been made where the *erreur* goes to the heart of the *volonté* to make the contract; where one can genuinely say that there was a lack of true consent to make it. That is not the same objection as one which amounts to saying there never was any meeting of minds in the first place. It is the difference between saying that the contracting minds never met and saying that they did meet but there was an *erreur* which vitiated their consent to contract. 29. For our part, we think it is preferable in this case to examine the language of the exchange of emails in order to identify whether a concluded deal was done. If it was, then questions of *erreur* do not seem to arise, at least on the material which has been raised with us so far. If by contrast, no deal had been done, then there would be no convention, against which the doctrine of *erreur* would need to be considered, and thus no basis for the Court to order discontinuance. 30. Having reviewed the email exchanges which we have set out in detail above, the Court is of the view that there was no sufficient meeting of minds so as to be able to conclude there was a contractual agreement. Our reasons are these:- (i) An examination of the email exchanges of 2nd and 6th October 2009 in our view shows that there was no complete deal. The email of 2nd October was itself subject to a condition that settlement terms were in full and final settlement of any claims which third parties - i.e. John Haden and African Edge

- might have against the Defendant. It is evident that the Plaintiffs could not be understood to have agreed terms of settlement which involved obligations on the part of the third parties. Indeed, in the light of that fact alone, it is unsurprising that the email response of 6th

October, sent on behalf of the Plaintiffs, includes the language that the Plaintiffs "would like to proceed towards a resolution of this matter" which it seems to us is clearly conditional, and, supporting that view of the language, contains the assurance that the Plaintiffs' lawyers had been asked to draft a compromise agreement for perusal, and one assumes agreement, by the Defendant. In the course of argument the Court asked Advocate Le Maistre whether the Defendant accepted that if the email of 6th October had been marked "Subject to Contract" the deal would not be regarded as a concluded agreement. Advocate Le Maistre rightly accepted that, as a proposition of law that was so. In our view, the language of wanting to proceed towards a resolution and the preparation of a draft compromise agreement point to what amounts to a "Subject to Contract" condition on the response which Mr Baird made on 6th October. It was also submitted by Advocate Goulborn on behalf of the Plaintiffs that it was inconceivable in the light of the history of the matter in dispute between the parties that the Plaintiffs would enter a concluded deal on the briefest of these email exchanges. The Court accepts that that is so, and indeed the language used supports that conclusion. (ii) That this is the proper construction of the email exchanges is also evidenced by what transpired subsequently. Eight days after Mr Baird's email of 6th October, Advocate Goulborn sent to the Defendant's lawyers a draft compromise agreement with the sum payable left in blank, and with a number of further terms. In doing so, the email and the draft agreement were marked "Without Prejudice and Subject to Contract". In other words it was the clear understanding of the Plaintiffs, at a time when it would seem they were anxious to proceed towards an agreement, that the email exchange was subject to contract. Although the Defendant did not respond until after the publication of the Trading Update by Lonrho Plc on 9th November, which evidently caused the Plaintiff so much difficulty, the basis upon which the Defendant responded was also "Without Prejudice and Subject to Contract". Had it been thought that a concluded agreement had been reached in October, there would arguably have been no need for further agreement, and secondly there would certainly not have been a response from the Defendant's lawyers that attached a revised draft agreement still marked "Without Prejudice and Subject to Contract". That the draft agreement itself remained a perambulating draft is illustrated by the fact that it was returned "Subject to our client's approval". All these features seem to us to demonstrate that the Defendant itself did not consider, as at 11th November 2009, that a final agreement had been reached. (iii) In our view the proper construction of the three emails of 1st, 2nd and 6th October is this. A without prejudice offer of 1st October, naming a settlement figure of US\$1M, was proposed, subject to two conditions namely the dropping of a costs claim and a payment by monthly instalments. By the email reply of 2nd October, the Defendant conditionally accepted the proposal to settle matters for the figure set out, payable over twelve months, and dropping the claim for costs, but added four further conditions. By email of 6th October, the Plaintiffs indicated that they would like to proceed, but, in effect, their desire to do so was subject to contract. In the event, the contract negotiations never reached fruition. 31. It should not be thought that we have overlooked the tendering of one month's instalment, being a conversion of US\$83,333 to CFA Francs. In our view, the Defendant cannot rely upon tendering that instalment. First of all, if an agreement had been

reached in October 2009, one would have expected the instalment to have been paid by 6th November 2009. Secondly, the instalment was tendered only after the Defendant was aware that the settlement discussions had broken down. Thirdly, the tendering of the instalment was not accepted. In any event, it is unclear why this Defendant considered it was appropriate to tender this payment in CFA francs which was not, ever on its case, the currency of the alleged deal. 32. In the circumstances, the Defendant's application for an Order of Discontinuance fails. Authorities *Selby v Romeril*

[1996] JLR 210 . French Code Civil. Berault, Godefroy and d'Aviron on the Coutume Reformée du Pais Duché de Normandie Tome 1. *Marett v Marett*

[2008] JLR 384 . Chitty on Contracts. Pothier, Traité des Obligations . Page Last Updated: 02 Aug 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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