

JERSEY / JUDGMENT

Morison v Eichner and Conway

[2002] JRC 194D (14 October 2002)

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judgment

the COMMISSIONER: 1. This application is made by Advocate Sinel on behalf of the first defendant to re-amend his answer and counterclaim in three respects. Firstly to delete certain heads of damage; secondly, to introduce in new paragraphs 11(10) and 18(4) allegations that the defendant was unable to work full time and make an equal contribution to the partnership by virtue of Chronic Fatigue Syndrome, alcoholism and, as it is put "general disability". Thirdly, to plead dol or reticence dolosive as an additional or alternative basis in law for rescission or avoidance of the partnership agreement. There is no issue about the first head and leave is granted to make those amendments. 2. As regards the second head, this is opposed by Advocate Chapman on behalf of the plaintiff, principally on the ground that to allow the amendment would introduce a requirement for expert evidence and possibly also lead to particulars, which would be likely, almost inevitably, to result in an adjournment, in order to enable the plaintiff a proper opportunity to deal with these matters. 3. As to the allegation of Chronic Fatigue Syndrome, this is an allegation of a specific medical condition. Absent any admission on the part of the plaintiff that he was suffering from this at the material time, it would be quite wrong for the Court to attempt to reach any conclusion without the benefit of independent expert evidence. Mr Sinel suggests that the Court would be able to do so on the basis of, or at least with the assistance of, the three doctors who will in any event be giving evidence in this case. That, in my view, could not possibly be a proper approach to so serious a matter. 4. The basis of the application appears to be a passage in an affidavit by the plaintiff, sworn in connection with an application for security for costs in these proceedings in September, 1999 in which he made reference to having being diagnosed as suffering from Chronic Fatigue Syndrome at one stage, but having been successfully treated for it, albeit that there was subsequently a lapse in his condition at a later point in time. 5. It may be that it would be legitimate for the defendants to explore this matter with the plaintiff, to some extent, in cross-examination. But any contentious issue as to whether, and to what extent, the plaintiff was suffering from this condition as a matter of fact at the material time, would not be likely to be one that could be resolved in the defendant's favour, given the absence of any independent medical evidence. 6. So far as the allegation of alcoholism goes, the same applies. As far as the allegation of general disability goes, I regard this as a wholly unspecific allegation, which on any view could not stand in its present form. In any event the

pleading that is formulated in paragraph 11(10) is, as a matter of drafting, to some extent duplicative of matters which are pleaded earlier in paragraphs 8(a) and 10(d), though it does not cover the ground in the earlier pleadings in exactly the same way or to the same extent that this proposed amendment does. 7. Mr Benest supports, but not with any "vigour", Mr Sinel's application. He suggests that it is not necessary, as it is already open to explore these matters in evidence. As I have already indicated, that may be, to some extent, right. 8. It is of the first importance that any allegation of fraudulent misrepresentation is specifically pleaded and properly particularised. I do not regard it as a matter of justice between parties to allow this particular allegation of Chronic Fatigue Syndrome, or alcoholism or general disability, in the way in which it is pleaded in this paragraph, to be raised at this late stage in this form. The pleading will accordingly be disallowed. 9. As for Mr Sinel's application to plead *dol* or *réticence dolosive* the first point to be made is that, on the material I have seen and the representations made so far, it is clear that the question whether and the extent to which these concepts or principles are, or ought to be, relevant to the substantive law of Jersey, as regards the rescission of a contract, is currently both uncertain, on any view, and potentially controversial. 10. Mr Sinel candidly acknowledged that he was unable to cite any Jersey case in which these concepts had been applied in such a context. Secondly, if Mr Sinel is right, pleading these concepts as an alternative basis of relief will not materially affect the outcome of the case. They are, he says, very similar to the principles of misrepresentation as developed in English law - they are merely a different label. 11. Mr Benest, for his part, thought that there might be some difference, as regards the effect of delay on the exercise of the Court's discretion, whether to grant rescission, but this was not taken up and pursued by Advocate Sinel. 12. Mr Chapman, for the plaintiff, submitted that, as far as he could see on the authorities, there were, or might well be, very substantial differences between the two bodies of jurisprudence. 13. Accordingly, if Mr Sinel is right there seems very little to be gained by allowing such amendments at this stage or introducing these alternative principles. This action was started some years ago in 1998. It is a case in which Advocates for both the first and second defendants have pleaded their cases in terms of fraudulent misrepresentation repeatedly. They have not sought, up until now, and indeed up until a few days before the start of the trial to introduce any reference to the concepts of *dol* or *réticence dolosive*. I emphasise that this is the case both as regards their pleadings and, of greater importance still, as regards their skeleton arguments, which were served as recently as Tuesday last week. 14. I accept that it is not, in general, necessary for parties to plead matters of law, but skeleton arguments are a different matter and it has become customary for parties to lay out their case fairly, if summarily, in terms of both law as well as the facts, as indeed both parties have done in the present case. 15. The nub of the matter appears to me to be this. Either, as Mr Sinel suggests, the plea adds nothing of substance, in which case it is unnecessary to raise it specifically on the pleadings and his concern about excessive influence of English law on Jersey jurisprudence in contract matters can be met by an appropriate acknowledgment by the Court that it may be that the case could have been argued by reference to *dol* or *réticence dolosive*, but the parties chose not to do it that way. 16. Or, the alternative is, as Mr Chapman submits, that the plea might indeed have a significant effect on the outcome of the proceedings; in which case it would, in my view, be quite wrong to allow the matter to be raised at this very late stage, as this

would almost certainly result in an adjournment, further investigation and research and exposition of the parties' respective cases. And I note, at the moment, that there has been no written submission by either defendant in relation to these matters beyond the proposed amendment to the pleading and the production of a small bundle of authorities. 17. In those circumstances, again, I propose to disallow the amendment. It will be open to Mr Sinel, at the conclusion of the case, if he wishes to do so, to add as a footnote to his submissions that the matter might have been expressed in terms of dol or r  ticence dolosive equally had the parties chosen to argue the matter in that way, with no different outcome to the case. If that is right, it may be that that would be a submission which would find a proper place in the judgment of this Court. 18. The principles that I have applied in considering all these amendments are those which the Court set out in the case of Brown -v- Barclays Bank (4 th December 2001) Jersey Unreported CofA; [2001/241]. That is the Court's decision. Authorities Brown -v- Barclays Bank (4 th December 2001) Jersey Unreported CofA; [2001/241]. Page Last Updated: 22 Sep 2015 BAILII: [Copyright Policy](#) | [Disclaimers](#) | [Privacy Policy](#) | [Feedback](#) | [Donate to BAILII](#)

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