Court of Appeal - Companies - reasons for allowing the appeal against the decision of the Royal Court on 1st February 2018.

[2019]JCA123

COURT OF APPEAL

2 July 2019

Before : Sir William Bailhache, President
John Vandeleur Martin Q.C.
Robert Logan Martin Q.C.

Between	**HRCKY Limited (a company incorporated in the British Virgin Islands)**	**Appellant**
And	**Hard Rock Limited and Hard Rock Café International (STP Inc)**	**Respondents**

Advocate T. V. R. Hanson for the Appellant.

Advocate J. D. Garrood for the Respondents.

JUDGMENT

THE PRESIDENT:

1. This is the judgment of the Court.

Introduction

2. This is an appeal against a judgment of the Royal Court dated 1st February, 2018 (Hard Rock Limited v HRCKY Limited [2018] JRC 026) when the Royal Court (Le Cocq, Deputy Bailiff with Jurats Nicolle and Ronge), for the reasons given in the judgment, granted an application by the Respondents for summary dismissal of the counter-claim of the Appellant, that counter-claim being the only part of the proceedings at that time remaining as a live issue between the parties. Leave to appeal was refused by the Deputy Bailiff on 12th July, 2018 (Hard Rock Limited and Hard Rock Café International (STP) v HRCKY Limited [2018] JRC 125) but was given by McNeill JA as a single judge of this Court in his judgment dated 30th August 2018 (Hard Rock Limited and Hard Rock Café International (STP) v HRCKY Limited [2018] JCA 152).

3. We start by saying that we do not think it was necessary for the learned Deputy Bailiff to sit with Jurats. The Jurats have a responsibility under Article 15(2) of the Royal Court (Jersey) Law 1948 to decide the facts in civil cases while the Bailiff, Deputy Bailiff or Commissioner decides questions of law and procedure, and has a responsibility to decide facts only if the Jurats cannot agree. This was a summary judgment application which engaged issues of law and procedure only. No facts were or could be decided, and while a court exercising the summary jurisdiction will have regard to the affidavit evidence before it, it must always be careful to recognise that this evidence forms the factual framework for the decision which is to be taken but does not exclude any other evidence which at trial might also fall within that envelope. There is a risk, if the Royal Court sits with Jurats, that it may be tempted to make findings of fact, which is not its function on a summary judgment application.

4. Before the learned Deputy Bailiff and McNeill JA, the Appellant was represented by Mr Kevin Doyle, a director of the company, in person. He had filed the application before this Court on 20th August, 2018; but no point on delay was taken by the Respondent before McNeill JA. Subsequent to leave having been given, the Appellant has instructed Advocate Hanson and on behalf of the Appellant, Advocate Hanson has applied for an extension of time under Rule 16 of the Court of Appeal (Civil) Rules 1964 for the Appellant to serve the notice of appeal through the Viscount setting out its grounds of appeal against the order of the Royal Court of 1st February, 2018, summarily dismissing its counter-claim in so far as it relates to allegations of *dol*. Advocate Hanson has also lodged an application to ask the Court of Appeal to admit the expert evidence of an addendum report of Mr Cosimo Borelli dated 22nd November, 2018, and the report and declaration of Mr Craig Tregillus of the United States Federal Trade Commission dated 21st November 2018. These applications (for extension of time and for the admission of the expert evidence) were reserved to the full Court for hearing on 21st January, 2019.

5. Advocate Garrood did not object to the filing of an Amended Notice of Appeal and in the circumstances we did not have to consider that application further and accordingly gave leave to the Appellant to do so.

6. The application to admit expert evidence is dealt with later in this judgment and we turn next to the principal appeal.

7. The test for the Royal Court in adjudicating an application for summary judgment pursuant to Rule 7/7(1) of the Royal Court Rules 2004 (as amended) is set out in the judgment of McNeilll JA at paragraphs 17 – 18. The decision of the Royal Court was an interlocutory decision, albeit that the consequence of it was a final adjudication of the claim brought by the Appellant, and the next question for us is the nature of the test which is to be applied to appeals of that description.

Nonetheless, although the decision appealed against involved a degree of judicial discretion having regard to the particular facts of the case, it would be wrong not to recognise that in effect the Appellant has, in the language of some of the older cases, been driven from the judgment seat without all the evidence having been produced to the Court of trial. In Abdul Rahman v Chase Bank (CI) Trust Company Limited [1984] JJ 127, this Court adopted the approach that it would interfere in the decision below in such cases if:-

(i) The Royal Court misdirected itself with regard to the principles in accordance with which the discretion has been exercised; or

(ii) The Royal Court, in exercising its discretion, has taken into account matters which ought not to have been taken into account or has failed to take into account matters which ought to have been taken into account; or

(iii) Where the decision is plainly wrong; or

(iv) There has been a change of circumstances after the Royal Court made its order that would justify acceding to an application to vary it.

8. The latter ground for interfering would naturally apply only if the case continues, and therefore is relevant where, for example, interim injunctions have been imposed pending trial. Where, as here, summary judgment has been given the scope for an appeal on the basis of a change of circumstances may be rather more limited.

9. This approach to the grounds upon which this Court will intervene in cases involving interim injunctions has been endorsed several times in this Court – see for example United Capital Corporation Limited v Bender and others [2006] JLR 269 – and applies equally to cases such as the present where a discretion has been exercised in giving summary judgment.

10. We apply the established test to the present appeal.

The pleadings

11. The pleadings are not as clear as one would wish. Given our decision on this appeal, there is an urgent need that they be clarified.

12. It is common ground between the parties that the Respondents are affiliates of Hard Rock Café International (USA) Inc, the world-wide controller and promoter of the Hard Rock Café brand by way of franchising and that the First Respondent is incorporated under the laws of Jersey. The Appellant (then called Anakin Holdings Limited) is a company incorporated in the British Virgin Islands and by an agreement dated 11th June 1999, governed by Jersey law ("the Franchise agreement"), the First Respondent granted the Appellant a franchise to operate a "*Hard Rock Café*" branded restaurant in the Cayman Islands. It is also common ground that at a later date, namely 14th April, 2000, the Second Respondent agreed to hire to the Appellant an inventory of personal property by what has been called a "*memorabilia lease*". The order of justice asserted that the Appellant failed to make payments due to the First Respondent under the Franchise agreement as a result of which the sum of US$96,065.61 was outstanding, and that the Appellant had failed to make payment to the Second Respondent under the memorabilia lease in the sum of US$8,517.20. The Respondents claimed in the prayer to the order of justice a declaration that the Franchise agreement had been terminated by reason of the Defendant's conduct and the First Respondent was entitled to treat itself as discharged from any further obligations thereunder; an injunction prohibiting the Appellant from operating the Hard Rock Café restaurant in the Cayman Islands or otherwise using the First Respondent's licensed rights in any form for any purpose; and an order that the Appellant deliver up the Second Respondent's property, and for damages, interest and costs. In its original answer and counter-claim filed on 4th October, 2013, the Appellant pleaded that the Plaintiffs had wrongly and invalidly terminated both the Franchise agreement and the memorabilia lease on various grounds and accordingly claimed that the Appellant was not liable. It was also asserted that the Appellant was entitled to set off against any liability there was sums due to it by way of counter-claim.

13. The counter-claim was based upon a breach of an implied duty of good faith and cooperation in the Franchise agreement on a number of grounds, and a claim that there had been an over-payment to the Second Respondent under the memorabilia lease as a result of which monies were due to the Appellant.

14. In their reply filed on 29th October, 2013, the Respondents denied that there had been any proper defence filed, denied that any terms should be implied into the Franchise agreement but to the extent that there had been such an implied term, breach of it was denied. That reply having been filed, the Respondents issued a summons before the Master for summary judgment and to strike out parts of the answer and counter-claim, which led to a decision of the Master on 19th December, 2013, substantially in favour of the Respondents, in that he declared that the Franchise agreement had been lawfully terminated by the First Respondent and that the memorabilia lease as a consequence was also lawfully terminated. Judgment in the sum of US$90,000 was given in favour of the Respondents against the Appellant but the balance claimed

by the Respondents was a matter sent for trial. Part of the answer and counter-claim was struck out. There was no appeal against that decision of the Master.

15. In amended answer and counter-claim filed on 19th May, 2015, the Appellant no longer claimed that the First Respondent's purported termination of the Franchise agreement by the invalid notice of termination was wrongful and in breach of section 3(A) of the Franchise agreement. It did claim that there was a breach of the implied duty of good faith and cooperation owed by the First Respondent to the Appellant under the Franchise agreement on a number of grounds, as a result of which the Appellant had been prevented from taking steps to reduce or prevent very large losses suffered on the restaurant side of its business and repay and / or recoup its investment in the Grand Cayman franchise. It asserts that full particulars of loss would be provided in a Schedule. The exact status of the next version of the pleading is unclear, but there appears to have been a Re-amended Answer and Counterclaim filed in 2017, to which a Re-amended Reply and Answer to Counterclaim has been filed. Perhaps surprisingly given the Master's judgment of 19th December, 2013, the re-amended Answer contains an averral that the Termination Notice served by the First Respondent on 17th June, 2013, was invalid and that the Franchise agreement and the memorabilia lease continued in force. There are more detailed claims in misrepresentation as set out below, some of which are clearly asserted to be fraudulent, and there are claims for breach by the Respondents of an implied duty of good faith in the performance of the contract.

16. There is a further counter-claim for misrepresentation, the Appellant alleging that prior to entering into the Franchise agreement, representatives of the First Respondent made a number of fundamental misrepresentations to Mr Doyle on behalf of the Appellant. The key alleged misrepresentation was that although the Respondents had had experience for many years in running the Hard Rock Café business directly and through franchisees, and although they knew that there would be considerable investment by the Appellant in that business, the Respondents falsely represented that the Appellant could expect to make returns of 15 – 30% per annum and that its outlay could be paid back within three years, but at the latest five years. It is alleged that the Respondents were well aware that the restaurant business was only profitable in a very few locations where franchises had been granted and in the majority of locations it was unprofitable and loss making – accordingly they must have known the representation was false. The Appellant asserts that in the Cayman Islands, as the Respondents were well aware, it would be unprofitable to run the business in accordance with the Respondents' business model, which had to be followed as a term of the Franchise agreement. It is said that as a result the Appellant has suffered serious loss and damage being the value of its investment and the constant year by year losses, and that particulars of such losses would be served. In the alternative it is claimed that the Respondents induced the Appellant to enter into the Franchise agreement by their express or implied representations as to the potential profits of the business and by their failure to provide full

and accurate information concerning the financial success or lack thereof, and without that inducement, the Appellant would have refused to enter into the Franchise agreement.

17. The Appellants also contend that, to the knowledge of the Respondents, the business under the Franchise agreement was in fact maintained by a company called Island Taste Limited, incorporated in the Cayman Islands and controlled by Mr Doyle. As a result of the losses suffered in the business, Island Taste Limited went into liquidation and was ultimately dissolved by order of the Grand Court of the Cayman Islands on 28th February, 2015, but its rights against the Respondents had first been assigned to the Appellant.

18. Finally, the Appellant claims that there was an overpayment to the Second Respondent under the memorabilia lease, and although the exact amount of that overpayment was unknown at the time of the filing of the re-amended answer and counter-claim in 2017, the sum was believed to be approximately US$ 21,500 and damages were claimed.

The judgment appealed against

19. It was against these claims in the pleadings that the Respondents applied to the Royal Court for summary dismissal of the Appellant's counter claims pursuant to Rule 7/7(1) of the Royal Court Rule 2004 (as amended) which in in these terms:-

> ***"Grounds for summary judgment***
>
> ***(1) The Court may in any proceedings give summary judgment against a plaintiff or defendant on the whole of a claim or on a particular issue in any pleading if –***
>
> ***(a) it considers that –***
>
> ***(i) the plaintiff has no real prospect of succeeding on the claim or issue, or***
>
> ***(ii) the defendant has no real prospect of successfully defending the claim or issue; and***
>
> ***(b) there is no other compelling reason why the case or issue should be disposed of at a trial.***

(2) A summary judgment hearing may be ordered by the Court of its own motion or on application made by either party in accordance with this Part."

20. In relation to the various claims that were made for summary judgment, the Royal Court reached the following conclusions:

(i) The Respondents had argued that there was no implied term of good faith, but the Royal Court concluded that, for the purpose of summary judgment, it could not say that the Appellant could have no real argument to make in that respect as far as the law was concerned (see paragraphs 24 and 25 of its judgment).

(ii) Having reviewed the evidence, the Court concluded that there was insufficient evidence to establish that there was any breach by the Respondents of the implied term of good faith, if one existed (see paragraph 28).

(iii) There was no causal link established on the pleadings between the losses incurred by the Appellant and the lack of good faith alleged on the part of the Respondents (see paragraphs 31 – 33).

(iv) There was a disconnect, whether in *dol* or as a misrepresentation, in asserting a claim that the Respondents made a representation that there would be returns to the Appellant of 15 – 30% per annum, which persuaded the Appellant to enter the Franchise agreement, and a claim that the restaurant business would have high outgoings in the Cayman Islands and would be unprofitable to run in accordance with the Respondent's business model as required under the Franchise agreement because the Franchise agreement included both the restaurant business and the merchandise business (see paragraphs 36 / 37).

(v) The evidence of the joint experts produced by order of the Master in January 2017 did not support the factual allegation (see paragraphs 38 / 39). Accordingly results achieved by comparable cafes during the years 1999 – 2003 were not out of the way with the actual financial results of the Appellant for the period 2001 – 2005.

(vi) There was an entire agreement provision in the Franchise agreement which excluded the effect of any misrepresentation, even if made.

(vii) There was no *dol par réticence* because the Franchise agreement related to two different businesses, was not unprofitable until external factors caused material difficulty in 2004 and it contained no warranties or guarantees as to profit.

(viii) The Respondents' submissions on prescription were considered to have some merit but did not form the basis of the application for summary dismissal.

Analysis

21. Stripped of the inessentials, the Appellant's case now really amounts to this:

(i) The Respondents fraudulently misrepresented the anticipated profits of the restaurant business. Had the Appellant been aware of the true likely position, or indeed even of the risks having regard to the worldwide experience of Hard Rock Café franchises, it would never have entered the Franchise agreement in the first place. As a result, the loss which it has sustained extends to the investment made in a business it would never have entered.

(ii) The unreasonable way in which the First Respondent responded to the requests made by the Appellant for changes in the standard operating business model which the First Respondent insisted upon was a breach of the implied duty of good faith under the contract itself. This caused or contributed to the losses sustained by the Appellant in the operation of its business.

(iii) The termination of the business agreements by the Respondents was unlawful.

(iv) There were various overpayments in any event made by the Appellant to the Second Respondent in respect of which damages are due.

22. The Respondents deny these claims. The misrepresentations are denied in fact, and it is also asserted that the Appellant cannot rely upon them, even if they were made, because one of the terms of the contract contains a '*whole contract'* provision which excludes any liability for representations made before contract. Similarly there was an express exclusion of liability in relation to any representations which had been made that a specific level of profit would be achieved. The Respondents rely upon the maxim that *la convention fait la loi des parties* and assert that these provisions in the Franchise agreement should be given full effect.

23. In granting leave to appeal, McNeill J A noted that the experts were in agreement that the Appellant's actual results were broadly consistent with some of the projections prepared in March 1999 on behalf of the First Respondent. However, that report was based upon the documents available to the experts and, as the learned Deputy Bailiff noted at the summary judgment hearing, there had not yet been full compliance with the disclosure orders. We agree with McNeill J A that, without the entirety of that disclosure evidence, which should reasonably be expected to be available at trial, it is difficult to place much weight on the current joint expert report on the matter. Furthermore, is unclear how the conclusion of the Royal Court summarised at paragraph 19(v) above could justify summary judgment. The complaint of the Appellant was that he was told there would be 15 – 30% profits. Those were not achieved, and the fact that he achieved the same profits in Cayman as occurred in many other of the franchises does not address the complaint that he did not achieve the level of profit which he says he was promised. We consider the Royal Court erred in relying upon the joint experts' report as not supporting the Appellant's complaint, thereby taking into account a matter it should not have taken into account.

The law

24. We now address the two contractual arguments of the Appellant as a matter of theory. The first relates to representations made before contract, and the second to the conduct of the contracting parties during the contract.

25. In referring to the language of '*representation'*, we should be clear that we use that word with its ordinary non-technical meaning – the description or portrayal of someone or something in a particular way, usually by an oral or written statement, but possibly by conduct. We say this because it may be important to distinguish a representation which may be incorrect from the word 'misrepresentation' which carries technical connotations under English Law. It is relevant to recognise that the Misrepresentation Act 1967 which applies in England and Wales does not apply in Jersey any more than do the common law contractual rules of that jurisdiction. In our judgment, it follows that although a similar result might have been obtained on a different rationale, cases in the Royal Court which have been argued and decided in contract upon the basis of the English law of misrepresentation are of doubtful authority.

26. The four elements necessary to constitute a contract under Jersey Law are described by this Court in O'Brien v Marrett [2008] JCA 178, paragraph 55, as capacity, consent, cause and objet. Capacity is not at issue in these proceedings.

27. Objet is a party's obligation of performance under a contract: "***What a party promises to do under the contract by way of performance / discharge of his or her obligations***". In a

bilateral contract, each party's obligation (for example (a) to deliver goods and (b) to make payment for them) is a distinct objet. As this Court stated in O'Brien at paragraph 59, there can only be an objet if the proposed performance is certain, possible and lawful.

28. The concept of *cause*, said to be unique to the French family of legal systems, is used in France (and in Jersey) in order to impose a minimum reciprocity in contractual terms, and so is analogous in some respects (though as the Jersey courts have emphasised, not in all) to the common law concept of consideration. The Institute of Law Study Guide 2013 on the law of contract describes cause as "***the reason or motivation for which the parties enter into a contract***" or, quoting Professor Nicholas, the French Law of Contract (Second Edition at page 118) as "***the end pursued***".

29. Just as each party to a bilateral contract undertakes a distinct objet, so to each objet may attach a distinct cause – thus in bilateral contracts there is a fundamental interdependence between objet and cause. If one party's obligation lacks an *objet*, then it is likely that the other party's obligation will lack a cause. There is, for example, no reciprocity in paying for goods which have not been delivered. At this point one can see immediate similarities between the Jersey and English law of contract, even if the language is different. In Jersey, the contract fails for lack of *cause*. In England, there has been no consideration moving from the promisor to the promisee. Such similarities will not always exist. Accordingly, there will be contracts which are valid in Jersey but not in England because we do not adopt the concept of consideration – one can in Jersey as a result have a contract of gift.

30. The assessment of what is or is not a valid *cause* may well involve identifying the reasoning of both parties by which their consent or *volonté* to make the contract can be ascertained. Whether that is to be identified using the objective or subjective test is a matter of controversy and does not arise in this case. Consent remains a building block for a valid contract - assuming all the building blocks are then in place, the contract is inviolate and it is for that reason that *la convention fait la loi des parties*.

31. Where then do innocent and fraudulent representations made by a party prior to contract fit into the scheme of the law?

32. We do not doubt that in theory such representations can amount to a collateral contract as a result of which the representation becomes a part of the terms agreed between the parties. It is of interest to note that this was the approach taken by this Court in Kwanza Hotels Limited v Sogeo Company Limited (1983) JJ 105 where, having construed an advertisement pre-contract, Le Quesne JA said at page 113:

"It follows from our view of the meaning of the advertisement and the particulars not only that there was no misrepresentation, but also that there was no express warranty, either included in the contract of sale or collateral, to the same effect as the misrepresentation for which the appellants contended."

33. But collateral contracts are a different animal. In this context, the collateral contract achieves the same outcome as an implied term. We are considering here, however, the extent to which it can be said that a misrepresentation prior to contract does not become part of the contract but affects the validity of that contract. In our judgment the answer to that question, where there has been an innocent misrepresentation, depends on whether the outcome of it is adjudged to lead to *erreur* on the part of one of the contracting parties. In order to assess whether *erreur* has been established, the Court will need to analyse the contract itself, as well as the parties' intentions because *erreur* is a *vice du consentement* which goes to the heart of whether there is a valid contract.

34. In Steelux Holdings Limited v Edmondston [2005] JLR 152, the Royal Court was considering a dispute effectively between a man and his step-daughter over a bond which she had executed in favour of the plaintiff. The step-daughter asserted that she had not been fully informed of the implications and details of what she was signing and that her step-father, the owner of the plaintiff, had told her that the bond was not a real debt and she would benefit fiscally from executing it. In connection with innocent misrepresentation, the Court said this at paragraph10:-

"…

It may not be necessary that the statement is, at the time it is made, knowingly false; if the statement is in fact false, and the other party acts upon it, there is nonetheless a defect of consent (vice du consentement) because the other party enters the contract under the mistaken impression that the statement or representation is true. It may be seen, therefore, that the distinction between mistake (erreur) and fraud (dol) as defects of consent may sometimes be blurred. There is, in either event, a defect of consent which allows the injured party to treat the contract as void. The burden of proof lies upon the party who asserts that there is, in law, a defect of consent."

35. This statement has been criticised for eliding the concepts of *erreur* and *dol* and we appreciate the force of that criticism. In our judgment, there is a considerable difference between a misrepresentation which is innocent or negligent and one which is fraudulent. In the former case, the claim in nullity has to be justified under the law of *erreur*; in the latter case, where *dol* is

established, one will almost certainly have the same *vice du consentement*, but the consequences, including the nature of the remedy, may be approached differently.

36. In theory therefore we are of the view that a claim by the Appellant that it had been induced to make the Franchise agreement by assurances given by the Respondents or one of them is, subject to the contract, in theory capable of sustaining a cause of action.

37. That however takes us to the "*entire contract*" provision in the Franchise agreement to which learned Deputy Bailiff referred in his judgment. The Franchise agreement provides at Section 18 that:-

> ***"No other representations have induced Franchisee to execute this agreement. No representations, inducements, promises or agreements, oral or otherwise, not embodied in this agreement….were made by either party, and none shall be of any force or effect with reference to the agreement or otherwise."***

38. A further provision at Section 18(G) was as follows:-

> ***"…***
>
> ***In executing this agreement, [Franchisee] has not relied upon any representation or warranty of Franchisor that the business operations to be conducted at the Restaurant will be successful, or that any specific level of profit will be achieved."***

39. At Section 18(K) there appears this paragraph:-

> ***"Entire Agreement. This agreement, the documents referred to herein, and the attachments hereto, if any, constitute the entire, full and complete Agreement between Franchisor and Franchisee concerning the subject matter hereof, and supersede all prior Agreement, no other representations having induced Franchisee to execute this Agreement. No representations, inducements, promises, or agreements, oral or otherwise, not embodied in this Agreement (as defined in the preceding sentence) or attached hereto (unless of subsequent date) were made by either party, and none shall be of any force or effect with reference to this Agreement or otherwise. Except as otherwise***

provided in this Agreement, no amendment, change, or variance from this Agreement shall be binding on either party unless mutually agreed to by the parties and executed by their authorised officers or agents in writing."

40. The material parts of the "entire contract" clauses which were contained in the Franchise agreement in this case have been described at paragraph 38 above. The essence of them may be identified by noting the passages where it is stated that "No other representations have induced" the Appellant to enter into the contract, that the Appellant "has not relied upon any representation or warranty", and that the written agreement and documents "constitute the entire, full and complete Agreement between [the parties]". The argument for the Respondents is that these provisions prevent the Appellant from relying upon any misrepresentation and that the existence of these clauses would keep the Franchise agreement alive and enforceable even if the Appellant established *dol*.

41. Provisions of this kind raise a question as to whether the principle that *la convention fait la loi des parties* requires that there are no circumstances in which one can go behind such an express term so as to nullify its effect. In our judgment, the answer to this question depends upon the application of all the contractual rules which go to the essential nature of the contracting parties' consent to make the contract. The strength of the maxim that *la convention fait la loi des parties* arises from the solidity of the consent of each party to make the contract. Jersey Law, like French Law, acknowledges that that solidity can be affected by *erreur, violence and dol*. It would be wrong to hold that in no circumstances can the effect of such clauses be undone, although it may be the case that, depending upon the circumstances, a party will find it hard to escape contractual obligations induced by innocent misrepresentations on the grounds of *erreur* where there is an *"entire contract*" provision. That, however, is outside the scope of this judgment.

42. Different considerations arise where there is fraudulent misrepresentation or *dol*.

43. In Steelux [supra] the Royal Court said this:-

"Fraudulent conduct, including the making of a fraudulent representation, can be a moyen de nullité, or a cause of the nullity of an agreement. The underlying principle of fraud, which we may say embraces both dol and fraude, is bad faith. Fraud is a vice du consentement, that is to say, a defect which nullifies the apparent consent between the parties and allows the defrauded party to treat the contract as void. If, therefore, a party knowingly makes a false statement which induces the other party to sign a

document and thereby to enter into a contract, there is a defect of consent which allows the other party to treat the contract as void."

44. In many of the cases where fraud or *dol* appears in the Jersey Judgments, reference is made to Pothier. In his Traité des Obligations, Part 1 Chapter 1 paragraph 28 Pothier defines fraud in this way:-

"En appel dol, toute espèce d'artifice dont quelqu'un se sert pour en trompé un autre."

"One calls dol any kind of artifice made use of by one person for the purpose of deceiving another."

45. At paragraph 30, Pothier tackles the consequences of fraud:-

"Dans le for extérieur, une partie ne seroit pas écoutée à se plaindre de ces légères atteintes que celui avec qu'il a contracté auroit données à la bonne foi ; autrement il y auroit un trop grand nombre de conventions qui seroient dans le cas de la rescision, ce que donnerait lieu à trop de procès et causeroit un dérangement dans le commerce. Il n'y a que ce que blesse ouvertement la bonne foi qui soit, dans ce for, regardé comme un vrai dol, suffisant pour donner lieu à la rescision du contrat, tel que toutes les mauvais manœuvres et tous les mauvais artifices qu'une partie auroit employés pour engager l'autre à contracter ; et ces mauvaises manœuvres doivent être pleinement justifiées. Dolum nisi perspicuis indiciis probari convenit."

"A person cannot be allowed to complain of trifling deviations from good faith in the party with whom he had contracted; otherwise there would be too many contracts that would be liable to rescission which would give rise to too many lawsuits and cause damage to business. There is only what overtly offends good faith, which in this forum is to be considered as a dol, sufficient to give place to the rescission of the contract, such as all tricks and devices which one party might have employed to engage the other to contract; and his questionable dealings must be fully justified. [No] fraud is proved unless by clear evidence."

46. In the quotations above, Pothier has been dealing with fraud which induces a contract. However he goes on to describe *dol* as having a continuing effect during the contract:-

"31. Il n'y a que le dol qui a donné lieu au contrat qui puisse donner lieu à la rescision; c'est-à-dire, le dol par lequel l'une des parties a engagé l'autre à contracter, qui n'auroit pas contracté sans cela: tout d'autre dol qui interviens dans les contrats donnent seulement lieu à des dommages et d'intérêts pour la réparation du tort qu'il a causé à la partie qui a était trompée.

32. Il faut aussi, pour que je puisse faire rescinder mon engagement, que le dol qu'on a employé pour me porter à contracter était commis par la personne avec qui j'ai contracté, ou du mois qu'elle on est était participant : s'il a été commis sans sa participation, et que je n'ai pas d'ailleurs souffert une lésion énorme, mon engagement est relable, et n'est pas sujet à rescision que l'on j'ai seulement action contre le tiers qui m'a trompé, pour mes dommages et intérêts."

"31 It is only dol that gives rise to the contract that can lead to rescission; that is to say, the dol by which one of the parties has engaged the other to contract, who would not have contracted without it: any other dol which arises during the contracts gives rise only to damages and interest for the repair of the wrong which has been caused to the party who has been deceived.

32. It is also necessary, in order that I should be able to rescind my contact, that the dol which operated to persuade me to contract has been committed by the person with whom I have contracted or at least was a participant in it: if the dol was committed without that participation, even if I have nonetheless suffered enormous damage, my contract is valid and is not subject to rescission: I have only an action against the third party who has deceived me, for my damages and interest."

47. Domat in his Les Lois Civilies dans le Ordre Naturel, le Droit Public (1735) Vol. 1 SIII paragraph 1, characterises dol as "***all surprise, fraud, sharpness, manoeuvre and all other bad techniques used to deceive another person***."

48. In his Dictionnaire de la Coutume de Normandie, Maitre Houard, writing in 1780, said this at Volume 1 page 549:-

"Le dol est l'acte par lequel on paroit faire une chose, tandis quand on fait réellement une toute contraire.

On distingue en droit le dol en réel ou personnel, & cette distinction n'est point aussi déplacée que M. Darceau … l'a pensé.

En effet, le dol personnel ou le réel, il est vrai, ont ordinairement pour principe la mauvaise fois; mais la mauvaise foi, lorsqu'elle a consisté à déguiser la valeur de l'objet vendu ou de l'obligation contractée, a des effets très différents de ceux qu'elle produit, quand des voies de fait ont produit son triomphe. Il y a plus : le dol réel quelquefois est exempt des ruse et de supercherie ; tous les jours un acquéreur croit se procurer à bon marché un héritage, mais ni son importance ni sa valeur ne lui sont parfaitement connus et la vilité du prix par lequel il le paie ne part point en ce cas du desir faire préjudice au vendeur ; cependant comme il résulte de l'ignorance qui justifie l'acheteur, que ni lui ni le vendeur n'ont eu en contractant ensemble une connaissance de l'objet du contrat, telle que la loi exigeroit qu'ils l'eussent pour le rendre irrévocable ; la bonne foi exige qu'il soit resolu. "

"Dol is an act by which a person appears to do one thing when in reality is doing something altogether different.

One distinguishes in law real or personal fraud and this distinction is not as out of place as M. Darceau thought it was.

Indeed it is true that the principle underlying both dol personnel et réel is bad faith; but bad faith, when it takes the form of concealing the value of the object sold or of the obligation undertaken has very different effects from those it produces when threatening behaviour has been used to bring about the desired result. Moreover: the dol réel is sometimes free of cunning and deceit; every day a purchaser believes he has obtained a property at a good price, but neither its significance nor its value are fully known to him and the inadequacy of the price which he pays for it does not in this case arise from the desire of doing some harm to the seller: rather it results from the ignorance which justifies the purchaser, in that neither he nor the vendor had knowledge when contracting together of the object of the contract, sufficient law to render it irrevocable: good faith requires that it be set aside."

49. Houard goes on to define the differences between *dol réel* and *dol personnel*.

"Ainsi,

1. Dans tous les contrats ou il y a déception d'outre moitié du juste prix, il y a un dol suffisant pour en anéantir les faits; ce dol s'appelle réel, parce qu'il peut ne pas procédé de la volonté de celui auquel en l'oppose et qu'il est toujours certain qu'il a son principe dans la valeur de la chose vendue.

2. Dans les contrats il peut y avoir un dol d'un autre genre, ce celui auquel en donne la dénomination de personnel; il a lieu, indépendamment de la valeur du fonds aliénés, quand l'aliénation non a était fait par contrant, sans liberté ou au méprises des lois."

"Thus:

1. In all contracts where there is deception d'outre moitié de juste prix, there is a dol sufficient to destroy its effect; the dol is called réel, because of the inability to proceed on the basis of the free will of the party against whom the contract is to be enforced; and it is always clear that it has its principle in the value of the property sold.

2. In contracts there can be a dol of another kind, which one may term as dol personnel; this happens, independently of the value of the property sold, when the sale has only been brought about by coercion, other than by free will or by acting unlawfully."

50. In his *Traité du Droit Coutumier de l'Ile de Jersey* (1943), Le Gros says this at page 350 under the Chapter heading of '*De la Clameur révocatoire ou déception d'outre moitié de juste prix'* :-

"C'est une principe en quelque sort sacré que la convention fait la loi des parties, mais la bonne foi est une condition essentielle et ce n'est pas quoi non de la convention.

La raison en est évidente : c'est un principe, à tous les contrats que les contractants se doivent franchises, sincérités sans voile. Toutes espèces d'artifices que l'une des parties se serrent pour trompé l'autre peur être de nature à rendre le contrat annulable. Ce n'est pas à dire que le préjudice qu'éprouve le vendeur par suite de la suffisance du prix suffit pour rescinder le contrat. D'autre circonstances doivent concourir à l'annulation du contrat, tel que le dol."

"It is a sacred principle that la convention fait la loi des parties, but good faith is an essential condition and a sine qua non of the contract.

The reason for this is obvious: it is a principle common to all contracts that the contracting parties must be candid, with unveiled genuineness. Any kind of artifice which one of the parties uses to deceive another is of a nature to render the contract voidable. This is not to say that the prejudice which the vendor may suffer as a consequence of the insufficiency of the price [always] is sufficient to rescind the contract. Other circumstances must run alongside for the annulment of the contract, such as dol."

51. Although Le Gros is writing about the doctrine of *déception d'outre moitié*, in our judgment his comments state a broader principle. Poingdestre in his *Les Lois et Coutumes de l'Ile de Jersey* at page 206 paragraph 4 says this:-

"Tout contrat ou transaction extorqué par menaces, fausses suggestions, subornement d'un tiers & persuasions indirectes est présumé fraudeux principalement quand la personne induite est faible de jugement ou d'âge, comme un jeune homme, une femme, un décrépit &c."

"Any contract or transaction extorted by threats, false suggestions, bribery of a third person and indirect persuasions is presumed fraudulent, principally when the person so induced is vulnerable in judgment through age, like a young man, or a woman or a decrepit."

We do not share the views expressed as a statement of the modern categories of vulnerable people but we do accept the general principle that there is a presumption of *dol* – which is rebuttable – where the contact is entered into by a person whom the law would class as vulnerable.

52. The present case prompts the question as to what extra protection over and above the remedies in *erreur* is available to a contracting party who is able to establish that he has been deceived by the *dol* of the party with whom he had contracted. It seems to us that in order to address this question in a contemporary way, it is necessary to identify the limits of the doctrine of *erreur*. One such limit is that no remedy is available where the parties recognise as part of their contractual bargain that a particular risk exists. Suppose a farmer has two farms on the Island, one in an area where there has unfortunately been an outbreak of foot and mouth disease, and the other some miles away where the farm is free of that disease. The farmer sells a cow to another farmer in the Island and represents that the cow is from his herd on the uninfected farm. That

representation is one that he knows to be untrue. There will be little doubt that the parties have recognised that there is a risk of foot and mouth spreading in the Island if only because of its geographical size. The vendor farmer may have no knowledge that his cow is carrying foot and mouth, but he has deceived the purchaser as to the farm from which it is sold. It would seem unlikely that the sale could be set aside on the grounds of *erreur*. The *objet* of the contract was the sale of the cow and the payment of the price. The essential elements of the contract were not the subject of a mistake – but the *dol* or fraud would, it seems to us, enable the purchaser to escape the contract where, had the representation been wrong but innocent, it might then have been said that the parties accepted that risk.

53. Secondly, the doctrine of *erreur* does not excuse a contracting party who should have known better - see for example Article 1132 of the current French Civil Code in force from 1st October 2016:-

> ***"L'erreur de droit ou de fait, à moins qu'elle ne soit inexcusable, est une cause de nullité du contrat lorsqu'elle porte sur les qualités essentielles de la prestation due ou sur celles du cocontractant."***

This reflects the comments of Pothier cited at paragraph 43 above.

54. So in practice there is every reason for distinguishing between fraudulent and innocent representations because the consequences will be different in the application of the rules around *dol* and *erreur*. It is of course also relevant to keep in mind the wider definition of *dol* than might be expected if one were looking to establish whether the representations were fraudulent under English law.

55. We turn next to whether there is a continuing obligation of good faith in the performance of the contract, as a term to be implied into all contracts whether or not expressly stated.

56. The extracts from Pothier at paragraphs 44 to 46 above show that there is in every contract a continuing obligation of good faith, which may be part of the law of Jersey as Le Gros suggests. Assuming it exists, it may be that not every breach of the obligation will necessarily amount to *dol*. According to Pothier, a breach of the obligation that does amount to *dol* will not allow a contract to be avoided, but it will enable the innocent contracting party to claim damages for any loss which flows from the fraud. It appears to us that in the 21st century where the variety of contracts is rather more extensive than was the case when Pothier was writing, that is too broad a statement of principle to stand without qualification and we can envisage at least in theory that there would

be circumstances when it would be wrong to hold a contracting party to a contract with a party who was acting fraudulently towards him. According to the proven facts in any particular case, that may depend on the extent to which a breach of the obligation of good faith would fall within the category of *dol* as described in the authorities. We think that any conclusion on this issue is likely to be fact specific and therefore it is inappropriate to close down the argument at this stage of the proceedings.

57. Be that as it may, here we have a case where the agreement contains express provision for termination. The Master has found in his decision on 19th December, 2013, that the Respondents were entitled to terminate the contract, both the Franchise Agreement and the memorabilia lease to the extent that they were separate contracts, and there has been no appeal against that decision. That does not mean that the Appellants might not have succeeded in a similar claim that they were entitled to terminate the contract on the grounds of the Respondents' fraud, if that be established. However, the contract has been terminated and thus the only question which is left over for the courts in the present proceedings is as to the extent of damages, if any, for breach of the obligation which has now been asserted.

58. Against that background of law, we now turn to the matters raised on this appeal.

59. At paragraph 18 of his judgment giving the Appellant leave to appeal the judgment of the Royal Court of 1st February, 2018, McNeill JA helpfully set out the test which is to be adopted by the Court on an application for summary dismissal. In essence the principles are those set out by Lewison J in Easyair Limited v Opal Telecom Limited [2009] EWHC 339 (Ch) at paragraph 15:-

> ***"'(i) The court must consider whether the claimant has a "realistic" as opposed to a "fanciful" prospect of success: Swain v Hillman [2001] 2 All ER 91;***
>
> ***(ii) A "realistic" claim is one that carries some degree of conviction. This means a claim that is more than merely arguable: ED & F Man Liquid Products v Patel [2003] EWCA Civ 472 at [8];***
>
> ***(iii) In reaching its conclusion the court must not conduct a "mini-trial": Swain v Hillman;***
>
> ***(iv) This does not mean that the court must take at face value and without analysis everything that a claimant says in his statements before the court. In some cases it may be clear that there is no real substance in factual***

assertions made, particularly if contradicted by contemporaneous documents: ED& F Man Liquid Products v Patel at [10];

(v) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application of a summary judgment, but also the evidence that can reasonably be expected to be available at trial: Royal Brompton Hospital NHS Trust v Hammond (No 5) [2001] EWCA Civ 550;

(vi) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter the evidence available to a trial judge and so affect the outcome of the case: Doncaster Pharmaceuticals Group Limited v Bolton Pharmaceutical Co 100 Limited [2007] FSR 63;

(vii) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form or documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ICI Chemicals& Polymers Limited v TTE Training Limited [2007] EWCA Civ 725."

60. On a procedural application of this kind it is important to note, as we set out at paragraph 2 above that the Court will not make findings of fact. However, the Court will look at the affidavit evidence,

both in support and in defence of an application for summary dismissal, to identify the extent to which facts are materially in dispute and whether the facts upon which a party relies in this procedural application are consistent with what may be described as the hard facts revealed by agreed documents. The analysis which flows from that review will indicate the extent to which it is safe for a court to exercise its jurisdiction to order a summary dismissal and by contrast will enable the Court to identify those cases which ought to go to trial so that evidence as to the material facts can be adduced and challenged in the usual way.

61. In our judgment, the Royal Court erred in exercising its discretion to grant the application for summary dismissal of the counter-claim. The factual matrix which was essential to enable that counter-claim to be weighed had not been established. It can reasonably be foreseen that Mr Doyle would want to call as a witness in the proceedings his partner who might give material evidence. There is clearly an arguable point as to whether the Franchise agreement and the memorabilia lease are to be taken, for the purposes of any allegation of *dol*, as forming one agreement or two. Furthermore, disclosure which the Royal Court has ordered has still not been completely provided by the Respondents, and that makes it difficult to say at this stage that there are no other factual areas to be investigated. This would take place at trial.

62. Until the facts have been properly established, it seems to us that the expert opinion is not as persuasive as the Respondents would contend. As McNeill JA set out at paragraph 43 of his judgment, the contention of the Appellant that a distinction should be drawn between the different elements of the business might well be supported if, for their own business purposes, the Respondents kept a separate record of the financial results of the two parts of the franchise; and discovery in that respect is not yet complete.

63. As we indicated at the outset, the pleadings leave something to be desired. Nonetheless, the fundamental questions raised by the Appellant's amended counter-claim are not in our judgment such as to lead to a conclusion that, on the paperwork alone, the counter-claim ought to be dismissed. For the reasons which we have given, a claim in *dol* does introduce different considerations for the trial court – without deciding the matter, it does on the face of it mean that the 'entire contract' provisions in the Franchise agreement may not be as reliable for the Respondents as they would wish to contend, for it is hard to see how a party who has by deception encouraged another party to enter into a contract can thereafter rely on any part of a contract which has only been entered into as a result of that deception.

64. The fact that fraud, falsehood or deception may in a particular case have been constituted by a representation does not matter because the essence of *dol* is fraudulent or false conduct. When a contract is induced by such fraudulent or false conduct then it will be void and the contract will

fall. That will mean that each and every one of the clauses, terms and conditions of the contract will be regarded as being void and not enforceable by either party. This will apply as much to an "entire contract" clause as it will to any other clause in the void contract, and it seems to us to mean that the existence of such a clause is no answer to a claim that the contract has been induced by dol. If the contract has been induced by *dol*, that is by fraud or falsehood, then the contract falls as a whole and cannot be kept alive by a condition which was as much induced by the fraud of falsehood as any other. The fact that the *dol* may have been committed in the form of a misrepresentation in a particular case does not matter because it will be the fraud or falsehood which vitiates the contract, not the misrepresentation. In that sense, we cannot see how the "entire contract" clauses quoted above can save it.

65. Furthermore, the allegations of *dol* during the course of the performance of the contract are in our judgment also such as to require evidence to be adduced so that they can be properly appraised.

66. Having reached a firm view that this was a matter which ought to proceed to trial, we have concluded that the decision of the court below was not one which can be supported, having regard to the authorities. In the circumstances, given out conclusions set out above, the Royal Court erred because it misdirected itself as to the principles to be applied,

67. We have been very much assisted by Advocate Hanson's representation of the Appellant in this appeal and we note that the Royal Court was addressed not by a professional advocate but by Mr Doyle as litigant in person. We intend no disrespect to Mr Doyle in saying that that must have caused additional difficulties for the Royal Court and these are exemplified in our judgment by an analysis from the transcripts of the way in which the Royal Court dealt with some of the submissions which Mr Doyle was making. Essentially, what was or ought to have been a submission on the evidence before the Court in the form of the affidavits and documents merged into an enquiry on the facts, by examination of Mr Doyle by the Court. This carried a risk that the Royal Court might then make an assessment of Mr Doyle as a witness, which was not its function on this application.

68. Finally it will be apparent that we have felt able to determine this appeal without adjudicating upon the application of Advocate Hanson for permission to admit the expert evidence of an addendum report of Mr Borelli and the report and declaration of Mr Tregillus. The issue of what expert reports should be adduced for trial is left to the Master and/or the Royal Court as the case may be.

69. For these reasons, the appeal is allowed and the decision of the Royal Court on 1st February 2018 is set aside as is the order for costs of that application. The consequence of our decision is

that, unless otherwise dealt with, this matter will proceed to trial. It is clear that there is discovery yet to be performed, and it seems to us that some amendment of the pleadings may also be necessary. It would be desirable if such amendments as might be allowed take place after discovery.

70. The Appellant and the Respondents are invited to put into writing any applications for the costs of and incidental to the hearing in the court below and in this court. Such representations should be made within the course of the next 21 days and will be determined on the papers.

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