Neutral Citation Number: [2015] EWCA Civ 631

Case No: A3/2014/2325

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MR JUSTICE SMITH
HC12C00507

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: Thursday 25th June 2015

Before:

LORD JUSTICE TOMLINSON
LORD JUSTICE KITCHIN
and
LORD JUSTICE VOS

- -

Between:

(1) GROUP SEVEN LIMITED (a company incorporated under the laws of Malta)	**Claimants/ Respondents**
(2) RHEINGOLD MANAGEMENT INCORPORATED (a company incorporated under the laws of Panama)	
- and -	
(1) ALLIED INVESTMENT CORPORATION LIMITED (a company incorporated under the laws of Malta)	**Defendants**
(2) MAREK REJNIAK	
(3) PAUL SULTANA	**Part 20 Claimant/ Appellant**
- and -	
(1) EDWARD HEEREMA	**Third Parties/ Respondents**
(2) CORNELIS KOOGER	
(3) JOHAN VISSER	

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

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Mr Romie Tager QC and Ms Isabel Petrie (instructed by **Hughmans Solicitors**) for the **Appellant**
Mr Jeffrey Chapman QC and Mr Simon Atrill (instructed by **Mishcon de Reya**) for the **Respondents**

Hearing dates: 17th and 18th June 2015

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Judgment

Lord Justice Vos:

1. This appeal arises out of a fraud perpetrated by persons including the third defendant appellant, Mr Paul Sultana, a British citizen and resident ("Mr Sultana"). The victim of the fraud was the first claimant, Group Seven Limited, a Maltese company formerly called Allseas Group Limited, which I shall call "Allseas". Allseas has assigned its causes of action to the second claimant, Rheingold Management Incorporated (a Panamanian company) ("Rheingold"). The judge dealt in great detail with the nature and extent of the fraud and I do not intend to repeat much of that detail here. He gave judgment in favour of Rheingold against Mr Sultana and the first and third defendants for €9,179,850.48 plus interest.

2. In a nutshell, the appeal concerns whether the judge was right to reject three propositions advanced by Mr Sultana. The first was that no damages should have been awarded against Mr Sultana in favour of Allseas as a matter of Maltese law, because Allseas had not employed the due diligence of a reasonable man. The second was that any damages awarded against Mr Sultana in respect of the fraud should be reduced under Maltese law by reason of the contributory negligence of Allseas and its ultimate beneficial owner and director, Mr Edward Heerema, the first Part 20 defendant ("Mr Heerema"), and Messrs Cornelis Kooger and Johan Visser, the second and third Part 20 defendants ("Mr Kooger" and "Mr Visser"), a director and Treasurer of Allseas respectively. The third was that Mr Sultana should be entitled to recover a contribution towards the damages he was obliged to pay in respect of the fraud from Messrs Heerema, Kooger and Visser (together the "third parties") as a result of their negligence.

3. Mr Sultana was not the only participant in the fraud, but he was the only defendant who defended the case at trial. The other defendants included Allied Investment Corporation ("AIC"), a Maltese company, which received the €100 million loan in issue in the case pursuant to a loan agreement with Allseas dated 15th October 2011 (the "loan agreement"). The judge made the unchallenged findings that the loan was induced by fraudulent misrepresentations made by Mr Sultana and the second defendant, Mr Marek Rejniak ("Mr Rejniak"), a Polish national and a director and shareholder in AIC. The fourth defendant was an English company Larn Limited ("Larn") to which the loan was intended to be directed before it was intercepted, and the fifth defendant was Mr Luis Nobre ("Mr Nobre"), a Portuguese national who was a director and shareholder in Larn. The claims against Larn and Mr Nobre were settled before the trial.

4. Mr Justice Smith described the nature of the fraud at paragraphs 27-28 of his judgment as follows:-

> "Basically a person is targeted because they have a large amount of [money] to invest … It is suggested to that person that they have the honour of being invited to invest in a secret scheme which is operated in secret and produces fabulous returns … Secrecy is essential and any attempt to challenge the scheme or raise questions invokes instant rejection. The victim is usually courted over a period of time and offered these large returns. It is initially offered on the basis that the victim's money can remain in his or her own account often designated a "*blocked fund*" … The Scheme then develops along the way by suggesting that the monies can be

> moved to another account which is similarly blocked or which the victim has apparently a measure of control.
>
> … The returns are quite extraordinary. In the present case it was suggested that the monies would double in value in a month and could over a period of 13 months with an initial investment of €100m produce as much as *€1.3bn* for the investor … The procedure … involves various convoluted proposals over a period of time which the victim just fails to participate in … Then at the last minute when the victim is well and truly ensnared and thinking he keeps missing these wonderful opportunities he is presented with the big final proposal which due to technical reasons requires the victim to release the control of his monies for a short time. Once that is done the money disappears".

5. The judge held in colourful terms that each of the third parties had not behaved appropriately, without making an express finding of negligence against them. Mr Sultana relied specifically on a number of these descriptions of the third parties' conduct such as:-

   i) Paragraph 138: "[Ms Birgit Mohr's evidence] shows the unbelievably low level of competence of Messrs Kooger and Visser and indeed Mr Heerema acting on their advice".

   ii) Paragraph 178: "I do not think any person with a modicum of intelligence would believe that it were possible to make these vast amounts of money on such a short turn in the manner suggested. I do not believe that anybody when told that the Fed [the US Federal Reserve Board] was going to issue its own bills at a 20% discount to enable "favoured" people to do a turn on it would think that that would be possible. Nevertheless that is the deal which Mr Kooger and Visser accepted".

   iii) Paragraph 186: "Allseas received information … which plainly showed that Mr Rejniak was attempting to defraud them. However Mr Kooger, Visser and even [Mr] Heerema, were so connected in with the proposal that they simply ignored it despite its obvious implications for them in their dealings with the Team".

   iv) Paragraph 195: "Messrs Kooger, Visser and Heerema (and in particular Kooger and Visser) were completely dazzled [by this time] and did not exercise the slightest amount of intelligent critical analysis".

   v) Paragraph 221: "The signing away of the control marked the abject failure of Messrs Kooger and Visser properly to investigate what they are actually being sold and to protect Allseas in any way".

   vi) Paragraph 317: "I remained unconvinced about [Mr Heerema's] performance throughout … it would not, in my opinion, have required much inquisitiveness to have exploded the whole balloon completely … I was not persuaded by his evidence that he was actually convinced the proposition was credible … He clearly was sceptical, but if Mr Kooger and Mr Visser could bring it off, he was not going to look a gift horse in the mouth".

vii) Paragraph 326: "It is impossible to overstate the level of incompetence demonstrated by Mr Kooger's evidence at this trial … He fell under the spell of Rejniak, Nasir (and Mr Sultana) to such an extent that he became subject to autosuggestion, in effect".

viii) Paragraph 328: The same comments apply equally to Mr Visser … One would have expected … that this Mr Visser would fall about laughing at the suggestion that €100m could be doubled in a matter of weeks.

ix) Paragraph 329: "It is more difficult to understand how Messrs Visser and Kooger failed to spot the obvious".

x) Paragraph 331: "One cannot avoid the fact that they *were* misled because they released the €100m in the ridiculous and reckless manner set out above. I am afraid they were simply not as clever as they thought they were and they were taken in".

xi) Paragraphs 332-3: "In my view Messrs Kooger and Visser were fools not knaves. They may have exaggerated their stupidity because it suited them … Mr Sultana is the opposite. He is not a fool despite his attempts to put forward that appearance. He is a knave".

6. Mr Sultana then founds his appeal on a finding made by the judge at paragraph 370 of his judgment, which was where he held that the loan agreement should be rescinded. In order to put the finding (which I have emphasised in bold) in context, it is important to recite more than the comment itself:-

> "In this judgment I have been critical of the conduct of Messrs Kooger and Visser and their failings as regards investigation and verification of the proposed investment. It is clear that but for the conduct of the fraudsters summarised above, Allseas would not have entered into the arrangements. **It seems to me** that whilst Messrs Kooger and Visser passed away any notions of common sense in the long drawn out negotiations **that the performance of the fraudsters was so impressive and persuasive that a reasonable man would have been overborne by such activities**. There is no other logical explanation for the conduct of Messrs Kooger and Visser. I therefore conclude that all of the requirements agreed by the Experts for a claim for rescission as against AIC are made out and I declare that the contract between Allseas and AIC is void and that it should be rescinded. AIC should consequentially repay all monies that it received under the Loan Agreement".

7. It became apparent, when Mr Romie Tager QC, leading counsel for Mr Sultana, opened his appeal, that he had not properly identified the first argument he wished to advance in his grounds of appeal. Moreover, his skeleton argument denied that he was challenging any of the judge's findings as to Maltese law, when his first argument was indeed a direct challenge to the judge's finding of Maltese law in paragraph 378 of his judgment. In the event, we gave Mr Sultana permission to amend his grounds of appeal to raise the point, and allowed Mr Jeffrey Chapman QC, leading counsel for the respondents, to file a supplemental respondents' notice to deal with the point.

8. Against this background, Mr Sultana's three primary grounds of appeal were as follows:-

   i) The judge was wrong to find that a claim for damages under article 1031 of the Maltese Civil Code ("article 1031") was not subject to the same defence as applied to a claim for rescission on the grounds of "dolus" under article 981 of the Maltese Civil Code ("article 981"), namely that the claimant had failed to employ the due diligence of a reasonable man. The judge was also wrong to conclude, in the light of his numerous findings as to the incompetence and stupidity of the third parties, that a reasonable man would have been overborne by the fraud. Since the third parties had not objectively employed the due diligence of a reasonable man, their conduct should have been imputed to Allseas, so as to deprive it of any claim under article 1031.

   ii) The judge ought also to have held that the third parties' conduct represented an example of the grossest and most extreme possible negligence, which ought to have led him to reduce Allseas' damages under article 1051 of the Maltese Civil Code ("article 1051"), and to do so by more than a minimal amount.

   iii) In relation to the CPR Part 20 claims against the third parties personally, the judge ought to have applied section 2(1) ("section 2(1)") of the Civil Liability (Contribution) Act 1978 (the "1978 Act") rather than Maltese law, and evaluated the amount which was "just and equitable" for each of the third parties (including Mr Heerema whom he wrongly ignored) to pay "having regard to the extent of that person's responsibility for the damage in question". The judge confused his discretion under section 2(1) with the discretion allowed under article 1051.

The judge's judgment

9. The judge held on the basis of the expert evidence that there were three issues as to the question under Maltese law of whether the loan agreement should be rescinded, namely: (i) was there a fraud by AIC; (ii) was the fraud achieved by the use of significantly serious artifices to induce Allseas to adopt a mistaken perception of the contract; and (iii) was Allseas guilty of a failure to employ diligence where a reasonable man would have done so? He answered the first two issues positively as a result of the findings he had made about the conduct of Mr Rejniak, and held that it was not necessary in those circumstances to ask whether Mr Sultana was guilty of sufficiently serious conduct to lead to rescission. In relation to the third issue, the judge's answer was contained in paragraph 370 of his judgment which I have already set out. He therefore concluded that Allseas was not guilty of a failure to employ diligence where a reasonable man would have done so.

10. The judge started his treatment of the question of Mr Sultana's liability for damages by reciting articles 1031 and 1032 as follows:

   i) Article 1031: "Every person, however, shall be liable for the damage which occurs through his fault"; and

   ii) Article 1032(1): "A person shall be deemed to be in fault if, in his own acts, he does not use the prudence, diligence, and attention of a bonus paterfamilias".

11. The judge then dealt with the need for "dolus" in relation to the claim for damages against Mr Sultana at paragraphs 378-381 as follows:-

> "There was a debate as to the interrelation between Dolus under art 981 (Rescission) and Dolus under art 1031 (liability for fault). In his report Professor [Refalo] stated that Dolus was completely irrelevant for the purpose of art 1031 … Both Experts agreed that in the Joint Report (para 34). However, when giving evidence Professor [Refalo] purported to resile from that and was prepared to argue that the possibility for fraudulent artifices being unnecessary in art [1031] should be reconsidered. I reject that analysis. … This on the facts however, is irrelevant … There is no question of there being anything other than fraudulent intent on his part i.e. Dolus. It follows therefore that whether or not Dolus is necessary under 1031, is irrelevant because if it is he has demonstrated such conduct …[i]f the matter were pressed to argument in my view I would reject the opinion of Professor [Refalo]. Merely because Allseas failed to establish Dolus in the claim for rescission does not in my view mean that a claim under art 1031-1033 necessarily fails".

12. The judge then held that all four of the requirements under article 1031 were established against Mr Sultana including "Dolus or culpa". Before moving to discuss "contributory negligence", he said in paragraphs 385-386 that "[a]rticle 1051(1) provides for the court to have the power to assess the contribution caused by persons in each case" and that he had "not heard any submissions on that at the moment and will consider that when I hand the judgment down".

13. Notwithstanding what I have just quoted the judge as having said, the judge's treatment of contributory negligence in paragraphs 391-404 actually dealt with the contribution claims against the third parties as well as the claim by Mr Sultana that Allseas' damages should be reduced as a result of, at least, Mr Kooger's and Mr Visser's conduct.

14. The judge began at paragraph 391 by setting out the provisions of article 1051 as follows:-

> "[I]f the party injured has by his imprudence, negligence for want of attention, contributed or given an occasion to the damage, the court, in assessing the amount of damages payable to him, shall determine, in its discretion, the proportion in which he has so contributed or given occasion to the damage which he has suffered, and the amount of damages payable to him by such other persons as may have maliciously or involuntary contributed to such damages shall be reduced accordingly".

15. The judge recited in paragraph 399 that Allseas' expert, Dr Zammit, had said that "any amount of reduction in the case of fraud was in practice unlikely or likely to be small". Such a plea was not available to a deceitful defendant in English law (see *Standard Chartered Bank v. Pakistan National Shipping Corp.* [2003] 1 AC 959).

16. The judge concluded as follows in paragraphs 394-404:-

i) Article 1051 did apply to cases where the defendant was guilty of fraud or dolus.

ii) Messrs Kooger's and Visser's conduct potentially fell within the type of conduct that would attract a contribution under article 1051, in that they failed to perform their duties as directors of Allseas with reasonable skill and care, even though they were not in breach of their fiduciary duties.

iii) "The Maltese courts would accept that there [was] a possibility of reducing damages by contribution at the behest of a person guilty of Dolus but would be extremely unlikely ever to do that and if it did would reduce the damages minimally"; it would be a question of fact and discretion, but there would have to be something extreme on the facts to justify such a reduction in the case of Dolus.

iv) He could see no reason to exercise discretion in favour of Mr Sultana on the facts of this case. He concluded that it was, as a matter of discretion, inappropriate to reduce the damages payable by Mr Sultana to Allseas by reason of the clearly established incompetence of Messrs Kooger and Visser.

v) It was inappropriate, in his discretion, to require Messrs Kooger and Visser to make any payment towards Mr Sultana's liability.

17. In paragraph 452, the judge concluded that there was no basis for any "plea of contributory negligence on the facts of the case as against Messrs Kooger and Visser and Allseas".

18. It is to be noted that the judge's order actually dismissed the Part 20 claims, not only against Messrs Kooger and Visser, but also against Mr Heerema, despite the fact that he had not mentioned that specific claim in the decision.

Mr Sultana's arguments

19. On the first issue, Mr Sultana argued that the judge had been unfair to Professor Ian Refalo, Mr Sultana's expert, in saying at paragraph 378 of his judgment that he had resiled from his evidence that dolus was completely irrelevant for the purposes of the liability for damages under article 1031. In fact, the position was more nuanced and entirely justifiable. The brief history was as follows:

i) Professor Refalo had not dealt in his first report with the question of rescission, since that claim did not affect Mr Sultana, but only AIC and Allseas. He had, however expressed the view at page 48 of his report that "[d]olus is only relevant in the context of Article 1031 insofar as a claim in tort may be founded on dolus … Dolus under article 981 is completely irrelevant for the purposes of Article 1031". Moreover, in dealing with dolus generally at pages 22-3 of his report, Professor Refalo had explained that, where article 1031 speaks of fault, that fault is characterised as "dolus" if it is wilful or as "culpa" if it is unintended, and pointed out that for a contract to be "null" under article 981, the fraud must have consisted of artifices practised by one party without which the other party would not have contracted.

ii) Dr David Zammit, the respondents' expert, dealt with rescission, dolus, and the claim for damages under article 1031, in detail in his lengthy first report. He explained in paragraph 69 of his report (in the section on rescission) that in order to prove that the fraudulent artifices were grave or serious under article 981: "it would be necessary to prove that the fraudulent artifices were such that they could have deceived a reasonable man because the artifices used went beyond the customary tricks and exaggerations ordinarily resorted to in business transactions of this kind". He referred to the case of *Anthony Piscopo v. Charles Filletti* of 16th June 2003, where a claimant failed to obtain rescission under article 981 after he had bought a car on the faith of a fraudulent misrepresentation that the car was two years old, because he had failed to take the obvious precautions of checking the log book and examining the car, which would have shown that it was in fact 4 years old.

iii) In the experts' joint report, it was indeed recorded at paragraph 34 that the experts agreed that dolus for the purposes of the law of tort is separate and distinct from dolus as understood under article 981 requiring proof of fraudulent artifices. But paragraphs 27 and 28 of the joint report expressly recorded Professor Refalo's view that, on the strength of *Piscopo v. Filletti* he maintained that "if a claimant who alleges to have fallen victim to a fraud was put on notice of the risk that he was going to be defrauded, but he nonetheless carried on with the transaction and imprudently failed to take any precaution against the fraud of which he had been advised, this would provide ground for a defence to the action". He referred to the case of *Valle del Miele Limited v. Raphael Aloiso* which he said supported his position. Paragraph 28 recorded in detail Dr Zammit's reasons for disagreeing.

iv) When it came to cross-examination of Dr Zammit, Mr Tager had spent a considerable time putting Professor Refalo's view to him. Dr Zammit stuck to his guns, and explained in detail why a failure to prove that the claimant had exercised due diligence was a defence to rescission but not to a claim for damages under article 1031. Mr Tager cross-examined Dr Zammit on the case of *Bugeja v. Muscat* 26th March 2010, which he claimed supported Professor Refalo's view. Dr Zammit disagreed.

v) The point was raised again by Mr Chapman in Professor Refalo's cross-examination. Under questioning from the judge, Professor Refalo accepted that he had originally said that dolus was completely irrelevant for the purposes of article 1031, but had changed his view. He did not, however, refer to paragraphs 27-28 of the joint report recording his change of view and he was not re-examined by Mr Tager so as to bring out that he had not suddenly changed his view. Indeed, Professor Refalo himself added to the confusion by saying to the judge at one point that he had qualified his opinion, "having heard all the discussion which went on in the courtroom".

vi) Having seen paragraph 378 of the judge's judgment in draft, Mr Tager specifically raised the issue with the judge by email saying that Mr Sultana had "relied specifically on the contention that Allseas was guilty of a failure to employ the diligence of a reasonable man", but the judge had not responded to that point, nor had he amended his draft judgment.

20. Mr Tager submitted that this history demonstrated that the judge was wrong simply to rely on the agreement of the experts and to blame Professor Refalo for resiling from that agreement. Had the judge addressed the substantive arguments, he should have preferred Professor Refalo's view. He submitted that the Court of Appeal should send this point back to another judge to be retried.

21. On the second issue, Mr Tager accepted that it had been open to the judge to accept Dr Zammit's evidence that, for article 1051 to apply, there had to be something extreme in the facts to justify a reduction in the damages otherwise payable by a defendant found liable for dolus, but that he had been wrong to conclude that a Maltese court would only reduce the damages minimally since that conclusion was inconsistent with article 1051 itself. He relied upon the facts highlighted above to show that this had been the grossest imaginable negligence by Allseas and the third parties, so that this was a case where there ought to have been a 50% reduction in Allseas' damages.

22. Mr Tager acknowledged that Dr Zammit had relied in his evidence on over 100 recent cases, where the courts had neither reduced nor considered reducing damages for fraud as a result of contributory negligence, with the exception of *Falzon v. Felice* 27th November 1934, where the reduction was by 1/30th, because the victim of a deliberate assault had provoked the assailant. But Mr Tager submitted that the judge ought nonetheless to have realised that this was a wholly exceptional case where the Maltese courts would have allowed a large reduction in damages. Instead, the judge muddled up the Part 20 claims with the claim for contributory negligence and reached an unsafe conclusion.

23. On the Part 20 appeal, Mr Tager accepted that he had not expressly submitted to the judge that he should apply section 2(1) as opposed to Maltese law, but said that, since Maltese law had not been pleaded by the third parties as being applicable to the contribution claim, it had not been open to the judge to apply it and the court should presume the provisions of Maltese law to be the same as those under English law. In applying section 2(1), the judge ought to have undertaken the evaluative exercise explained by Hobhouse LJ in *Downs v. Chappell* [1997] 1 WLR 426 at page 445F-H, where a negligent party's 50% contribution to the damages payable by a fraudulent party was upheld.

24. Mr Tager submitted that the exercise was the same under Maltese law as under section 2(1), and the result ought to have been the same. For the same reasons as in relation to the contributory negligence claim, liability should have been apportioned equally amongst Mr Sultana and the third parties at 25% each (that is 25% of the 50% that should have been awarded to Allseas).

The respondents' submissions

25. Mr Chapman represented both the claimants and the third parties. He did not make any distinction between them in his submissions. In opening his oral submissions he pointed to 10 specific findings of the judge as to the dishonesty and manipulation in which Mr Sultana engaged. He emphasised the judge's finding that the fraud practised by Mr Sultana depended on establishing that the victims were adequately gullible before proceeding. Thus the very fact upon which Mr Tager sought to rely

was the one upon which the fraud itself depended. That in itself would make it surprising if the fraudster could, on that ground, avoid or reduce his liability.

26. On the first main issue, Mr Chapman submitted that the judge had been fully entitled to prefer the evidence of Dr Zammit as to the need for artifices and the establishment of the diligence of a reasonable man under article 1031. The experts had specifically agreed the requirements of article 1031 in their joint report at paragraph 33 and that dolus for article 1031 was different from dolus for article 981. Dr Zammit had provided a compelling explanation for the distinction in his cross-examination, which was broadly that there was a higher standard to establish annulment than for damages as supported by the French academic text by *Mazeaud* on the *French Law of Obligations*. In any event, even if the judge ought to have found that it was necessary to show the same dolus under article 1031 as under article 981, the claimants had done so. The judge was right to say in paragraph 370 that the performance of the fraudsters was so persuasive that a reasonable man would have been overborne. It is anyway to be observed that Dr Zammit had said at paragraph 76 of his main report that the reasonable person in question under article 981 was one in the position of the claimant, not one whose trust has not been gained by the fraudster in a long-running fraud of this kind.

27. On the issue of contributory negligence, Mr Chapman submitted that the judge was entitled to rely on Dr Zammit's evidence about the absence of reductions for contributory negligence in practice in Maltese cases, and to find that, even if they did, that reduction would only be minimal. He submitted that there should be no discount here for the success of the fraudsters in carrying out their fraud so successfully.

28. On the question of contribution, Mr Chapman argued that the judge had been right to apply Maltese law, because that had been the agreed basis upon which the case had proceeded throughout. In these circumstances, Mr Chapman's primary submission was that the judge should not now consider an argument that English law and section 2(1) ought to have been applied instead. In any event, under Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations ("Rome II"), article 15 mandated the application of Maltese law to the contribution claim. Even if section 2(1) were applied, the same outcome would have been reached.

29. In reply, Mr Tager argued that Rome II did not apply Maltese law to the Part 20 claim because article 15(b) provided only that Maltese law should apply to "any division of liability" between defendants, and not amongst third parties.

Was the judge wrong to award damages against Mr Sultana under article 1031 because Allseas had not behaved reasonably?

30. The claim against Mr Sultana was under article 1031, which, as I have said, provides that "[e]very person, however, shall be liable for the damage which occurs through his fault". Article 981 provides as follows in relation to rescission for "dolus": "Fraud shall be a cause of nullity of the agreement when the artifices practised by one of the parties were such that without them the other party would not have contracted".

31. Mr Tager's main complaints are (i) that the judge should not have said that Professor Refalo had resiled from his evidence, and (ii) that he did not give any adequate

reasons for rejecting the argument that, as a matter of Maltese law, it was a defence to a claim for damages under article 1031 to show that the claimant had not behaved with the diligence of a reasonable man.

32. It is true that the judge was a little unfair to Professor Refalo. The professor had, in the joint report, already resiled from the bald statement in his first report. That said, for some reason, neither Professor Refalo nor Mr Tager drew that to the attention of the court in the course of the evidence or in closing submissions. It is not clear, however, that the judge's comment about the professor having resiled from his statement that dolus was completely irrelevant for the purposes of article 1031 had any effect on his decision-making. Indeed, the judge had heard significant argument about the point in the course of the evidence of both Dr Zammit and Pofessor Refalo, so he cannot have been under any illusion that it was something he had to determine. In my judgment, the judge was entitled to prefer the evidence of Dr Zammit to the effect that dolus was irrelevant to a claim under article 1031, and that it was no defence to claim under that article to show that the claimant had failed to exercise the diligence of a reasonable man.

33. Mr Tager then submitted that it was not open to this court to decide the point of Maltese law, since we had not seen the experts give their evidence, and much turned on their demeanour. In my judgment, this is an entirely mistaken contention. If the judge failed to give adequate reasons, it is indeed open to us to consider whether his decision was anyway correct on the evidence that was led before him. We have had the opportunity to see a total of 5 experts' reports from Dr Zammit and Professor Refalo and to read the transcripts of their oral evidence. There was no suggestion by either party that both the experts had not been attempting to assist the court to the best of their ability. In those circumstances, we are in as good a position as the judge to evaluate the difference between their opinions.

34. In my view, the judge was right to prefer the evidence of Dr Zammit on this point. First, article 1031 itself refers to a person's liability "for the damage which occurs through his fault". It was acknowledged by both experts that "fault" included both dolus and culpa, but article 981 is dealing with a quite different situation, namely where the contract can be made a "nullity". Thus there is no obvious reason why the necessary features of a claim for rescission under article 981 should automatically be imported into a claim for damages under article 1031.

35. Moreover, there are sound reasons advanced by Dr Zammit for thinking that it ought to be more difficult to obtain rescission than damages for fraud. It is necessary to guard against the risk that transactions will be inappropriately impugned; this is what is referred to as the need for "security of transactions". Moreover, one can well understand how the requirements of dolus might be regarded differently when considering a claim for rescission as opposed to a claim for damages. Mr Tager complained about Dr Zammit producing the French academic text by *Mazeaud* on the *French Law of Obligations* when he was cross-examined without providing an opportunity for the work to be properly considered. But Dr Zammit did so when his previously expressed point of view (in paragraph 28 of the joint report) was challenged in cross-examination. He cannot be criticised for that. Moreover, the judge was entitled to place weight on the fact that experts had originally agreed that the elements of dolus under article 981 were irrelevant to the claim under article 1031.

The fact that Professor Refalo had not changed his mind on the day of his evidence does not mean that it was irrelevant that he had originally agreed with Dr Zammit.

36. As regards the cases that each side sought to rely upon, it is first worth noting that civil systems do not regard case law as being of the same significance as we do in a common law system. Secondly, even *Bugeja v. Muscat supra* on which Mr Tager placed most reliance, was not referred to by Professor Refalo and did not make any express findings on the point at issue.

37. It seems to me that Dr Zammit's point of view was much to be preferred as the judge found. It would, therefore, be pointless to send the matter back for a costly retrial, because the judge's reasons were exiguous.

38. It is, therefore not strictly necessary for me to consider whether the judge was right to conclude, in all the circumstances, that a reasonable man would have been overborne by the fraud. The finding is only challenged, of course, because if the judge was right on the point, then even if Professor Refalo was right about the need to exercise the due diligence of a reasonable man being a defence to a damages claim under Maltese law, Mr Sultana's defence would still fail.

39. It seems to me that it can at least be said that the judge had reasonable grounds for saying that a reasonable person in the position of Allseas would have been overborne by the persuasive conduct of the fraudsters. As Dr Zammit explained at paragraph 76 of his report, the Maltese courts would have been likely to accept the argument that, given the relationship that had developed between the claimant and the fraudsters, it was reasonable to assume that Mr Rejniak's representations were true, and that a *bonus paterfamilias* in Allseas' position would have relied on Mr Sultana's endorsement of Mr Rejniak. I accept, however, that at first sight there is an inconsistency between the findings that I have listed at paragraph 5 above and the finding in paragraph 370 to the effect that a reasonable person would have been overborne by the fraudsters. Mr Tager made a series of forceful forensic points based on the colourful language employed by the judge to describe the failure of Allseas and the third parties to protect Allseas' interests.

40. In my view, however, these points need to be seen in the context of a long-running play by the fraudsters to ensnare Allseas and the third parties, capitalising on Mr Heerema's greed. The whole process was designed to acquire the trust of the third parties and to persuade them to suspend their disbelief. This fraudulent *modus operandi*, as the judge pointed out, is not uncommon. Whilst I think the judge could have explained his finding in paragraph 370 in more detail, I cannot conclude that it was unsustainable. In any event, as I have said, it is academic because the judge was right in his finding of Maltese law.

41. For these reasons, I would dismiss this ground of appeal.

<u>Ought the judge to have held that the damages payable by Mr Sultana to Allseas should be reduced substantially under article 1051?</u>

42. This ground of appeal raises two separate issues: first whether the judge was right to find that a Maltese court would only reduce the damages minimally, and secondly whether he was right to find that there was nothing so extreme in the facts of this case

as justified reducing, under article 1051, the damages that Mr Sultana had to pay under article 1031.

43. It is true and unfortunate that the judge appears not clearly to have distinguished between the claim for contributory negligence against Allseas, and the claim for contribution against the third parties. The two are obviously quite distinct, but the judge seems to have inappropriately vacillated between the two. That said, the judge seems to have had a firm foundation for accepting Dr Zammit's view that a Maltese court would be extremely unlikely ever to reduce damages by contribution at the behest of a person guilty of dolus and that, if it did, it would reduce the damages only minimally. Dr Zammit supported this view by reference to his trawl through more than 100 cases where the courts had not reduced the damages for fraud as a result of contributory negligence. The only exception was *Falzon v. Felice* 27th November 1934, which was really quite a different case and that reduction was, even then, only by 1/30th.

44. The attempt to re-open the judges' exercise of discretion under article 1051 seems to me to be quite hopeless. As I have said, the judge used colourful language to describe the third parties' want of care in protecting Allseas' interests. But that was not really the point here. The question was whether, under article 1051, the Maltese court would have been likely to reduce the dolus damages payable by Mr Sultana on account of the negligence, but not the fraud, of the third parties, imputed to Allseas. On the evidence that he heard, the judge was fully entitled to reach the conclusion that no such reduction would have been made by a Maltese court. The fraudsters went to great lengths to ascertain the gullibility of the third parties and to acquire their trust. Of course, if they had exercised more scepticism and caution, they would not have fallen for the blandishments of the fraudsters, but, as the judge said, it is really quite unattractive for the fraudster, having planned to play on the greed and gullibility of the third parties, to seek to reduce the damages payable to Allseas on that ground alone.

45. In my judgment, no amount of hyperbole in Mr Tager's submissions can impugn the judge's quite appropriate judgment that Mr Sultana's damages would not have been reduced in Malta, and should not therefore be reduced for contributory negligence in these proceedings. I would dismiss this ground of appeal.

Ought the judge to have required each of the third parties (including Mr Heerema) to contribute under either Maltese law or under section 2(1) to the damages payable by Mr Sultana?

46. Having explained why Mr Sultana's second ground of appeal fails, I can deal quite shortly with this ground.

47. In my judgment, the argument that the judge ought to have applied section 2(1) is just not open to Mr Sultana. We were taken through the pleadings and the submissions that were before the judge in meticulous detail. It is quite clear that the case proceeded throughout the month-long trial on the basis that Maltese law applied as much to the Part 20 claims for contribution as to other aspects of the matter. Even if that were mistaken, it is now too late for Mr Sultana to change horses, once he has seen that the one that he was riding has lost the race.

48. Mr Tager attempted to suggest that he had left the matter open in submissions to the judge. He had not. He submitted in his oral opening that a fraudster (Mr Sultana) could bring the claims against the directors as third parties under Part 20 even if the company did not. The judge interjected to say that he thought there was authority to say that you could not get contribution for fraud in England. He was, of course, referring to the case of *Standard Chartered Bank v. Pakistan National Shipping supra* where it had been held that damages for fraudulent representation could not be reduced for the contributory negligence of the claimant. That was not the situation to which Mr Tager was referring. But it was Mr Tager's response that is important. He said "Anyway … the claims [i.e. the contribution claims against the third parties] are brought under Maltese law. And … there is no suggestion, from either expert, that these claims aren't good claims under Maltese law". That submission was unequivocal. I would reject Mr Tager's submission to us that there was an ambiguity about whether he was referring to the contribution claim or the claim by Allseas against the third parties. He was trying to shift the judge's (wrong) suggestion that in English law a contribution claim could not lie at the behest of a fraudster by arguing that here the contribution claim was governed by Maltese law. The judge later repeated during the evidence of Professor Refalo that he would be deciding the contribution question under Maltese law. Nothing was said by Mr Tager in closing about English rather than Maltese law being appropriate for the determination of the issue of contribution.

49. It is true that Mr Sultana appealed on this point and that the third parties submissions under *Jolly v. Jay* [2002] EWCA Civ 277 complained that the point had not been raised before the judge. Notwithstanding the point having surfaced, Lewison LJ granted permission to appeal. In my judgment, however, that grant of permission cannot bind us to find that it was open to Mr Sultana to raise the point having accepted before the judge that Maltese law applied. Moreover, this point is also not affected by the fact that Maltese law was not pleaded by the third parties. It is open to the parties to agree at trial that a case will be conducted on a particular basis even if the pleadings do not reflect that basis.

50. In these circumstances, it is not necessary for me to address the arguments under Rome II as to whether English or Maltese law was properly applicable. But even if English law and section 2(1) were applicable, I have no doubt that the evaluative exercise described by Hobhouse LJ in *Chappell v. Downs supra* would not have led to any different result. Under section 2(1): "the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person's responsibility for the damage in question". In some cases, a negligent party may be required to contribute to damages payable by a fraudulent party. But in this case, for the reasons I have given above, the judge would have been perfectly entitled to conclude as he did under Maltese law that no contribution was appropriate for the same reasons as I have enunciated when dealing with contributory negligence above. Indeed that is the conclusion that I would have reached. The fraudsters sought out gullible victims for their scam. They cannot use that gullibility to claim contribution from those they identified specifically for that reason.

Disposal

51. For the reasons I have given, I would dismiss this appeal on all grounds.

Lord Justice Kitchin:

52. I agree.

Lord Justice Tomlinson:

53. I also agree.