IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM SALFORD COUNTY COURT
(HIS HONOUR JUDGE HARDY)

CCRTI 1998/1420/2

Royal Courts of Justice
Strand
London WC2

Monday 15th March 1999

B e f o r e:

LORD JUSTICE PETER GIBSON
MRS JUSTICE HALE

- - - - - -

NICOLA RIGBY

Plaintiff/Respondent

- v -

DECORATING DEN SYSTEMS LIMITED

Defendant/Appellant

- - - - - -

(Computer Aided Transcript of the Stenograph Notes of
Smith Bernal Reporting Limited, 180 Fleet Street,
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MR S DAVIES (Instructed by Anstey Sargent & Probert, 4-6 Barnfield Crescent, Exeter, Devon) appeared on behalf of the Appellant

MR S COGLEY (Instructed by Messrs Colemans, Elisabeth House, 16 St Peter's Square, Manchester) appeared on behalf of the Respondent

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J U D G M E N T
(As approved by the Court)

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Monday 15th March 999

JUDGMENT

LORD JUSTICE PETER GIBSON: The primary issue raised by this appeal is a short pleading point: is an allegation of fraud demurrable only by reason of the fact that the actual knowledge which is pleaded is not particularised by averments as to how that knowledge was acquired? His Honour Robert Hardy, sitting as a deputy circuit judge in the Salford County Court on 5th November 1998, answered that question in the negative when dismissing the application of the defendants, Decorating Den Systems Ltd ("the company") and its managing director, Sarah Bell ("Mrs Bell") to strike out the amended particulars of claim of the plaintiff, Nicola Rigby ("Mrs Rigby"). The appeal is brought by the defendants with the leave of the judge.

The background to this case can be summarised thus. On 1st July 1994 the company granted Mrs Rigby a ten-year franchise to operate the "Decorating Den" system of home furnishing. Mrs Rigby complains that she was induced to enter into the agreement by fraudulent misrepresentations made to her by Mrs Bell for the company. A similar complaint was made by other franchisees, Mr and Mrs Miles, who were sued by the company and raised a similar complaint by way of counterclaim. The solicitors acting for Mrs Rigby and for Mr and Mrs Miles are Colemans.

Mrs Rigby, after signing the agreement, attended a training course in America, organised by the company's parent company. On 13th January 1995 Mrs Rigby wrote to the company saying that she no longer wished to be part of Decorating Den. Mrs Rigby commenced proceedings on 3rd June 1996, originally only against the company, claiming rescission of the agreement and damages for negligent misrepresentation and/or breach of contract. But on 17th March 1998 leave was given to join Mrs Bell and a claim of fraud was raised against her. The amendments then allowed included a collateral warranty claim, as well as a claim for negligence against Mrs Bell personally.

The relevant amendments took this form. Originally pleaded were, in paragraph 2 of the particulars of claim, certain oral representations made by the company by its servant or agent Mrs Bell to induce Mrs Rigby to enter the agreement, in paragraph 3 reliance by Mrs Rigby on the representations, and in paragraph 4 the falsity of the representations, that falsity being particularised. To these were added, in paragraph 4A, an allegation that the misrepresentations amounted to collateral warranties, and in paragraph 4B the following:

> "The said representations and collateral warranties were made/given fraudulently alternatively negligently.
>
> PARTICULARS OF FRAUD
>
> Each of the matters pleaded under the Particulars at paragraph 4 were known to the First Defendant and Sarah Bell personally at the time she made the representations and gave the said warranties pleaded under paragraph 2. Such matters were within the said Sarah Bell's direct knowledge and yet she nevertheless made the said representations and gave the said warranties to induce the Plaintiff to enter into the franchise Agreement. The said Sarah Bell thereby lied. Further, in the alternative, the said Sarah Bell was reckless as to the whether the said representations and warranties were true or not."

Thus it can be seen that the pleader pleaded (1) the particular representations made by Mrs Bell, (2) that the representations were false, (3) that they were relied on and (4) that they were false to the knowledge of Mrs Bell, and for good measure it was averred that her knowledge was direct and that she lied in making the representations. Further particulars were given of the alternative claim in negligence, which I need not read.

There was no appeal by the defendants from the order allowing the joinder of Mrs Bell and those amendments. The defendants had solicitors acting for them until 12th March 1998, but then dispensed with their services, instructing other solicitors on 8th April 1998. They served an amended defence and counterclaim, in which they denied paragraph 4B of the amended particulars of claim and denied that any of the matters pleaded in paragraph 4 were known personally to or were within the direct knowledge of the company or Mrs Bell.

On 19th May 1998, two letters were written to Colemans, one as solicitors for Mrs Rigby and the other as solicitors for Mr and Mrs Miles. In the letter relating to Mrs Rigby's action, the defendant's solicitors said that they had been advised by counsel to apply to strike out the proceedings. In relation to the claim against Mrs Bell, this was said:

> "In so far as it based on allegations of fraud, the claim against Mrs Bell is a disgrace (Counsel's words not ours):-
>
> (a) There are no particulars pleaded at all - only assertions of fraud. All the authorities stipulate that an allegation of fraud requires the utmost particularity. We do not believe that your client can give particulars and so we shall apply to strike out.
>
> (b) Please inform us by return of the 'reasonably credible material' which was before your Counsel to enable him to plead fraud within the mandatory provisions of paragraph 606(c) of the Code of Conduct of the Bar of England and Wales".

I make two comments. The first is that no application for further and better particulars was made before this letter or at all: the intention to strike out was asserted as being based on a subjective belief that no such particulars could be given. The second is that whilst the Bar's Code of Conduct undoubtedly requires counsel to have reasonably credible material to enable fraud properly to be pleaded, that Code does not require the disclosure of that material, nor have I ever heard of a demand for such disclosure. The peremptory tone of that demand is remarkable.

The letter went on to say that if the district judge refused to strike out, it was likely that there would be an appeal. There was then an open offer, limited in terms, to settle on the basis that Mrs Rigby should pay the defendants £7,500 or else face an application to strike out.

The letter to Colemans as solicitors for Mr and Mrs Miles also contained the two paragraphs I have quoted, but it further invited them to provide voluntary particulars of the allegations of fraud. The

defendants' solicitors said they were not presently instructed to apply to strike out or to make a settlement offer, because the defendants perceived that Mr and Mrs Miles, unlike Mrs Rigby, were good for their costs. But they asked for confirmation that the pleadings would be put in order, as they considered that that was Colemans' duty. Letters more calculated to get the backs up of any self-respecting legal advisers it is hard to imagine and, not surprisingly, Colemans refused the defendants' demands and suggestions relating to Mrs Rigby's pleading. I should add that the company's own claim against Mr and Mrs Miles has now been struck out, we are told, pursuant to Order 17 rule 11 of the County Court Rules.

The application by the defendants to strike out Mrs Rigby's amended particulars of claim was made on 3rd July 1998. The judge in his judgment relied on Order 18 rule 12(1) as justifying the pleader in not pleading particulars of how knowledge, pleaded as part of an allegation of fraud, has been acquired, and said that the pleading that Mrs Bell made certain statements which were untrue to her knowledge and that she was lying was a perfectly valid plea of fraud. He pointed out that one must look at the circumstances of each particular case to conclude whether the pleading was sufficient, and that in this particular case the statements alleged to have been made by Mrs Bell could only have been to induce Mrs Rigby's entry into the agreement, and that Mrs Bell as managing director of the company might be expected to know the matters alleged.

The defendants had also argued that, among other things, Mrs Rigby's own words after the meeting on 22nd April 1994, when she alleged the representations were made and before she entered into the agreement on 1st July 1994, contradicted one of the allegedly false representations said to have been made by Mrs Bell. That representation was that Mrs Rigby could expect to make £20,000 profit on gross sales of £100,500 in her first year. The defendants pointed out that Mrs Rigby had on 15th May 1994 completed and sent to the company a "Franchise Candidate Qualifying Review Form", in which in answer to the question: "During your qualifying process, has anybody told you how much money

you should expect to make as a Decorating Den Franchise Owner?" she had said "Yes"; and in answer to the further question: "If Yes, how much?" she had answered: "Nothing in first 2 yrs, 3rd yr £20K+", and she had indicated the source of the information as being the franchise development director, Mrs Bell. She had also stated in writing on 6th June to the company that she expected to sell £60,000 of goods in her first year in business, and had added that she expected to earn £0 after costs and expenses.

The explanation of these remarks given by Mrs Rigby's solicitor, Miss Woodward, in her affidavit put before the judge, was this:

> ". . . she used the Franchise Budget for Year One which she had filled in from information provided by Mrs Sarah Bell as the basis of her cashflow projections. The information provided by Mrs Sarah Bell was that Miss Rigby could expect to achieve approximately £20,000 profit on £100,500 turnover in her first year of trading. The Plaintiff's cashflow. . . for 1st July 1994-30th June 1995 showed sales of £60,000. This figure was arrived at using the £100,000 per year stated by Sarah Bell, pro rated. The Plaintiff took into account that there would be no sales in July and August whilst she was still working for her former employer. The Plaintiff would then be in the USA for training during August. The Plaintiff based the projection on a gradual build up of sales for September to December to reflect a realistic learning curve. The costs given to the Plaintiff from the figures provided by Sarah Bell were applied to the cashflow. Taking out the franchise fee and training costs in the USA, the trading profit was £8,551. On the basis of these figures the Plaintiff, although she would show a trading profit would in fact not make a profit as it would take two years to recoup the franchise fee and the USA training costs paid. All figures the Plaintiff used were provided by Sarah Bell. Based on those figures the Plaintiff expected to achieve the profits represented, but in responding to the questions took into account the monies she had expended purchasing the franchise. Hence any profit attributable to her business in reality would in the first two years merely be repayment of the investment she had made. The figures contained in the cashflow therefore reflect those provided by Sarah Bell indicating that a profit was achievable on the figures provided."

The judge did not refer specifically to this evidence, merely saying that the documents which had been produced were very powerful for the purposes of cross-examination and might be sufficient, but that the facts were not indisputable, as was made clear in the affidavit which opposed the application (that

is to say, Miss Woodward's affidavit). The judge refused to strike out that or any other allegation.

On 10th February 1999 Colemans provided the defendants' solicitors with extensive voluntarily particulars of the knowledge pleaded. For my part that is a fact to be noted, but is otherwise not of direct relevance. The explanations given to us for that provision of the particulars are the imminency of the Woolf procedural reforms coming into effect, the fact that witness statements will be exchanged shortly, and because the appeal had been used by the defendants to delay the hearing of Mrs Rigby's application for specific discovery.

Colemans indicated to the defendants that they would not be pursuing at trial claims by Mrs Rigby against Mrs Bell relating to the allegations of collateral warranty and negligence, which were the subject of two grounds of the defendant's notice of appeal. Colemans invited the defendants to withdraw the appeal. But this was refused by the defendants, who made an open offer that the proceedings against Mrs Bell should be struck out, that the defendants' appeal against the representation of profits and turnover be withdrawn, and that Mrs Rigby pay the defendants' costs before the judge and half the costs of this appeal. That offer was not accepted by Mrs Rigby.

There are therefore the two issues on the appeal: (1) fraud, (2) representation of profits and turnover.

(1) Pleading of fraud

Mr Davies for the defendants points out that on a striking out application the court is required to assume as true what is averred. He submits that if the primary facts are not pleaded to justify an allegation, in particular one of personal dishonesty, the allegation should be struck out. So far there can be no possible quarrel with that. But his criticism of the pleading of fraud is limited to the fact that Mrs Rigby does not indicate why she alleges that she knew that the representations were false.

Mr Davies referred us to three authorities on this point. The first was Re Continental Assurance Company of London plc (No 2) [1998] 1 BCLC 583 at page 588. This was an application before Evans-Lombe J in a company winding-up. The directors of the company applied to strike out points of claim, in particular an allegation which was said to be embarrassing because of a failure to supply particulars of knowledge. At page 588A, Evans-Lombe J said this:

> "The substantial reason given to justify the suggestion that the points of claim are embarrassing, in the sense that they are difficult or impossible to plead to, is based on various allegations throughout the pleading that the respondents knew certain facts. Particulars of how that knowledge is placed with the respondents have not been given."

He then refers to various paragraphs in the points of claim and continues:

> "In each of those paragraphs appear the pleading that 'The Respondents knew or ought to have known of the matters thereafter set out. . .'.
>
> It seems to me that the absence of these particulars is not a reason for striking out the pleading as being embarrassing. RSC Ord 18, r 12 provides:
>
>> 'Subject to paragraph (2), every pleading must contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing. . . (b) where a party pleading alleges any condition of the mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.'"

Evans-Lombe J then commented on that paragraph in this way, saying:

> "So, the requirement of the rule is that the party pleading must provide particulars from which the condition of mind is sought to be proved where what is alleged is some disorder or disability of mind or, materially to this case, 'any malice, fraudulent intention or other condition of mind', not excepting mere knowledge of particular facts. That is to be contrasted with Ord 18, r 12(4) which provides:
>
>> 'Where a party alleges as a fact that a person had knowledge or notice of some fact, matter or thing, then, without prejudice to the generality of paragraph (3), the Court may, on such terms as it thinks just, order that party to serve on any other party - (a) where he alleges knowledge, particulars of the facts on which he relies,

> and (b) where he alleges notice, particulars of the notice.'"

Evans-Lombe J then continued:

> "It seems to me to follow from this that in a pleading where fraud is not alleged but where it is pleaded that a respondent had knowledge of particular facts, the pleading is not to be struck out immediately because no particulars of the knowledge are given; rather, if particulars are required by the respondent of how it is alleged that he knew the particular facts, those particulars are to be ordered by the court and are to be given. Failure to give them, of course, may in the end result in striking out. But it does not seem to me that the absence of particulars of knowledge in the circumstance where no allegation of fraud in the sense of dishonesty is being made would justify my striking out these points of claim as being embarrassing."

And so Evans-Lombe J refused to strike out.

Mr Davies focuses on Evans-Lombe J's emphasis that the case before him was a case where fraud was not alleged. Evans-Lombe J's view that in such a case pleadings of knowledge cannot be struck out for want of particulars of knowledge is contrasted with his comment on Order 18 rule 12(1)(b), where he appears to be saying that particulars of knowledge must be provided when a fraudulent intention is alleged. Those remarks are plainly obiter, and I have to say that they seem to me to be wrong and inconsistent with the language of the rule. Indeed, I cannot help but wonder whether something may have gone wrong with the last seven words of the sentence beginning with the word "So", as the rule so clearly excepts from the requirement to give particulars an allegation of knowledge.

When I asked Mr Davies if he could explain how Evans-Lombe J could in commenting on rule 12(1)(b) have relied on the rule to reach the conclusion that in a pleading of fraud where knowledge is pleaded particulars of knowledge were to be provided, he accepted that the rule did not expressly so require. Rule 12(1) undoubtedly refers in paragraph (a) to the necessity to provide particulars of any fraud on which the party pleading relies. But if that requirement to plead particulars of fraud includes a requirement to plead of knowledge as in my judgment it does, then it seems to me that one goes to

paragraph (b) to see whether that plea of knowledge must be particularised at the outset. The answer is that it does not, but one must bear in mind that by sub-rule (4) it is always possible for the court to require particulars of knowledge to be given on an application for further and better particulars. I do not see that the obiter comments in the Continental Assurance case are of assistance.

Mr Davies then referred to Brown v Bennett [1999] BCC 91. At page 99, Rattee J was considering whether to allow an amended statement of claim in a case where it is alleged that a defendant, Mr Sarson, knowingly assisted in a breach of fiduciary duty by former directors, the Bennetts. The allegation pleaded was that Mr Sarson participated in and/or assisted the Bennetts to commit breaches of fiduciary duty, and did so knowing that the conduct of the Bennetts was dishonest. Rattee J referred to counsel's argument that there was no adequate pleading of how Mr Sarson knew that the Bennetts' plan was dishonest and Rattee J said that the complaint was well-founded. He said:

> "This head of claim against Mr Sarson depends on the plaintiffs' pleading and proving dishonesty on his part within the second limb of Barnes v Addy. . . It does not seem to me that the proposed amended statement of claim contains any sufficient particulars of such dishonesty to comply with RSC O 18, r 12, and, to judge by the voluntary particulars, no sufficient such particulars would be forthcoming if sought."

In relation to a pleading of accessory liability, as the second limb of Barnes v Addy (1874) LR 9 Ch App 244 is now called - see Royal Brunei Airlines Sdn Bhd v Tan Kok Ming [1995] 2 AC 378, where dishonesty is established as a necessary allegation for knowing participation in a breach of fiduciary duty - I can well understand that it may not be enough to plead knowledge that a plan was dishonest without more, if the pleaded facts are not sufficient to establish that the plan was dishonest. If, which I think unlikely, Rattee J intended some more general statement, again I would respectfully disagree.

The third case relied on by Mr Davies was Kok v Peachey, a decision of this court on 12th March 1993 (unreported), in which Leggatt LJ said:

> "It is not sufficient, as it is important to bear in mind in this context, to assert a conspiracy or knowledge of facts to show that the relevant defendant was fraudulent. The pleading must give particulars of overt acts, and of facts and documents, relied on for proof of knowledge."

That is all that is said by Leggatt LJ, and it is not clear that he had the particular provisions of Order 18 rule 12(1)(b) in mind.

Further, there is authority that for a pleading of fraud it is sufficient simply to plead knowledge. No judicial statement is cited more often on the principles governing the requirements for pleading fraud than that of Thesiger LJ in Davy v Garrett [1878] 7 Ch D 473 at page 489, where the Lord Justice said this:

> "The Plaintiffs say that fraud is intended to be alleged, yet it contains no charge of fraud. In the Common Law Courts no rule was more clearly settled than that fraud must be distinctly alleged and as distinctly proved, and that it was not allowable to leave fraud to be inferred from the facts. It is said that a different rule prevailed in the Court of Chancery. I think that this cannot be correct. It may be not be necessary in all cases to use the word 'fraud' - indeed in one of the most ordinary cases it is not necessary. An allegation that the Defendant made to the Plaintiff representations on which he intended the Plaintiff to act, which representations were untrue, and known to the Defendant to be untrue, is sufficient. The word 'fraud' is not used, but two expressions are used pointing at the state of mind of the Defendant - that he intended the representations to be acted upon, and that he knew them to be untrue."

It is also to my mind clear from the precedent books to which Mr Cogley, appearing for Mrs Rigby, drew attention, that a pleading of knowledge in a fraud plea is one which can stand even though no particulars are given - see for example "Bullen and Leake and Jacobs Precedents of Pleadings" 13th edition, page 430. In Atkins Court Forms volume 27, it is noted at page 226 that:

> "Particulars of . . . knowledge may be ordered if they are not provided in the statement of claim . . . It is stronger, as well as being better practice, to plead them in the statement of claim."

But that is not to say that it is a requirement of the rules that they must be pleaded, provided that actual

knowledge is unequivocally pleaded, nor is it suggested that the pleading can be struck out if it does not contain such particulars of knowledge. Of course, if there is a pleading that a person "knew or ought to have known" particular matters, then that rolled-up plea should be particularised even though Evans-Lombe J in the Continental Assurance case did not think that it did require particulars to be given. There is clear authority, at any rate in relation to a case where dishonesty is alleged, that particulars of that rolled-up plea must be given - see Belmont Finance Corporation Limited v Williams Furniture Limited [1979] Ch 250 at 268.

For my part I have no hesitation in upholding the judge's conclusion on the first point. It does not seem to me a necessary requirement for a pleading of this nature, where it is quite clear that fraud is being alleged and where the pleading expressly states that the defendants had the relevant knowledge, that particulars of knowledge must be given. That to my mind is sufficient to enable the plea to withstand an application to strike out. It was, of course, open to the defendants to seek further particulars of that pleading of knowledge, and if they had not been provided it may be that the defendants could have proceeded to seek some sanction. But in the present case, it has not been asserted that the defendants were unaware of the plaintiffs' case against them and, as I have said, they have at no time sought to have that knowledge particularised in a way which could lead to the striking out of the action. Accordingly, for my part, I would dismiss the defendant's appeal on the first point.

(2) Representation of profit and turnover

Mr Davies has trenchantly criticised the attempted explanation by Miss Woodward of the reason for the averment in the pleading that the representation was made by Mrs Bell in the terms which are pleaded about profit and turnover in the first year. I own to having some difficulty in understanding Miss Woodward's explanation, and I agree with the judge that the documentary material to which Mr Davies has drawn our attention does provide excellent material for cross-examination when the case comes to trial. However, I am not prepared to say that the judge erred in the exercise of his discretion

in refusing to strike out this allegation. It seems to me that he could properly take the view that it should go to trial when so much else was going to trial. Accordingly, for my part I would dismiss the appeal on this point too. That means, if my Lady agrees with me, that this appeal will be dismissed.

MRS JUSTICE HALE: I do agree.

ORDER: Appeal dismissed. No order as to costs in the court below or of the appeal up till 11th February 1999. After that point, costs should be paid by the defendants to the plaintiff, on the standard basis but the costs to be taxed and paid forthwith.

(Order not part of approved judgment)