

BETWEEN: THOMAS BLAIR **DRUMMIE**, APPELLANT - and - THE **SOCIETY OF LLOYD'S**,
RESPONDENT; AND BETWEEN: BARRY ROBERT MORRISON, APPELLANT - and - THE SOCIETY
OF LLOYD'S, RESPONDENT
Morrison v. Society of Lloyd's
New Brunswick Court of Appeal
2000 A.C.W.S.J. LEXIS 47256; 2000 A.C.W.S.J. 505676; **94 A.C.W.S. (3d) 472**

January 24, 2000, Decided

PRIOR-HISTORY: [*1] Appeal from 208 N.B.R. (2d) 337 dismissed

KEYWORDS:

CONFLICT OF LAWS -- Jurisdiction -- General --Forum non conveniens -- Stay of action -- Appeal from decision to stay two plaintiffs' actions commenced in New Brunswick on basis that England was proper forum

SUMMARY: Appeal from decision at 85 A.C.W.S. (3d) 43 which stayed two plaintiffs' actions on grounds that England was proper forum -- Plaintiffs were underwriting members of defendant and claimed fraudulent misrepresentation against defendant -- They argued that provision in agreement in question calling for England as law of contract was ineffective as entire agreement was void --

HELD: Appeal was dismissed -- Exclusive jurisdiction clause remained effective despite plaintiffs' allegations -- Agreement induced by fraud was voidable only rendering terms operative until final judgment of court -- Motions judge did not err in concluding that plaintiffs failed to discharge heavy burden upon them to show that New Brunswick was in fact more convenient forum -- Fact that one plaintiff brought claim in tort could not alter outcome -- Claims arose out of similar factual circumstances dealing with contract and plaintiff [*2] could not avoid effect of agreement simply by framing action in tort.

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JUDGES: Smith C.J.Q.B. (ad hoc), Savoie and Graser JJ. (ad hoc)

[**1] THE COURT

[**2] The two Appellants in this matter were both underwriting members of Lloyd's. They both reside in New Brunswick and each one brought an action against Lloyd's in New Brunswick.

[**3] Creaghan, J., sitting as motions judge, granted Lloyd's motions and stayed both actions on the ground that England is the proper forum pursuant to the agreements between the parties that the courts of England would have exclusive jurisdiction.

[**4] Although he agreed to hear the motions separately, the motions judge came to the conclusion that there was no distinction between the two actions even though the statement of claims were drafted differently. He stated that conclusion as follows: "They both arose out of similar, if not the [*3] same, circumstances and the real issue before me will not turn on how the statements of claims are presently drafted. Accordingly, I feel I can dispose of the motions, requesting the same relief in both cases, in the same decision."

[**5] For the same reasons, this Court will also dispose of the two appeals in one decision.

[**6] The Appellant, Mr. Morrison, alleges that he was caught in a fraudulent scheme by Lloyd's which induced him to enter contractual relationships with Lloyd's and that therefore those contracts are void

including any agreement to have the disputes between the parties resolved by courts in England according to English law.

[**7] The Appellant, Mr. Drummie, makes the same allegations as Mr. Morrison but further alleges that he is entitled to damages as a matter in tort.

[**8] The motions judge considered the submissions and evidence before him and in his discretion decided that the Appellants did not have the right to bring their actions against Lloyd in New Brunswick, as opposed to England, and consequently, granted the two stays of action. In his decision, he relied upon the exclusive jurisdiction clause which he found still applied despite any [*4] allegation of fraud.

[**9] The exclusive jurisdiction clause is found in a document which both Appellants had been required to sign as a condition of membership. It provides as follows:

"2.2 - Each party hereto irrevocably agrees that the courts of England shall have exclusive jurisdiction to settle any dispute and/or controversy of whatsoever nature arising out of or relating to the Member's membership of, and/or underwriting of insurance business at Lloyd's and that accordingly any suit, action or proceeding (together in this Clause 2 referred to as "Proceedings") arises out of or relating to such matters shall be brought in such courts and, to this end, each party hereto irrevocably agrees to submit to the jurisdiction of the courts of England..."

[**10] The issue before this court is whether the motions Judge committed an error in law when he granted the two stays of action. This court will not interfere with the motions Judge's exercise of discretion unless there is a clear error and a serious injustice will result. This standard of review was best stated over a century ago in *Golding v. Wharton Saltworks Co.* (1876), 1 Q.B.D. 374 (C.A.), at [*5] p. 375:

"... on a question which depends on the discretion of the judge, the Court of Appeal does not in general interfere with that discretion. Not that the Court of Appeal has not complete jurisdiction over such cases, or that the decision of the court below would not be overruled where serious injustice would result from that decision, but, as a general rule, the court of Appeal declines to interfere..."

[**11] With this standard of review in mind, we now turn to the Appellants' grounds of appeal. Essentially, the Appellants argue that the agreements containing the jurisdiction clause are void " ab initio " having been induced by fraud.

[**12] In our view, the law is clear that allegations of fraud do not render a contract void " ab initio ".

[**13] The rationale for the view was summarized as follows by Carthy J.A., at page 758, in *Ash et al v. Corp. of Lloyd's et al* (1991) 6 O.R. (3d) 235, a case similar to this one which was upheld by the Court of Appeal of Ontario, and leave to appeal to the S.C.C. was refused:

"If the plaintiffs can commence an action with an allegation of fraud which would void the contract and thus vitiate a choice [*6] of jurisdiction clause from the outset, then they may succeed on the merits while enjoying their own jurisdiction or fail on the merits while depriving the defendant of the contracted choice. These clauses are too important in international commerce to permit that anomalous result to flow."

[**14] An agreement induced by fraud is only voidable, thus the terms of the contract remain operative until a final judgment of a court. If this were not the law a plaintiff could easily remove the burden of a clause of this nature by alleging fraud in his action.

[**15] The question that now arises is what effect is to be given to the jurisdiction selection clause. Courts have encouraged the use of these clauses since they represent the reasonable expectations of the parties to a contract and generally aid in eliminating disputes of this nature. The courts have placed a heavy burden on the party seeking to override the effect of these types of clauses. In the " *Eleftheria* ", [1969] 2 All E.R. 641, Brandon J. stated that the court has the discretion whether to give effect to these clauses, however, the clauses should be enforced "unless strong cause for not doing [*7] so is shown". In *Volkswagen Canada Inc. v. Auto Haus Frolich Ltd.* (1986), 41 Alta L.R. (2d) 5 (C.A.) the court felt that jurisdiction selection clauses should be given effect "unless the balance of convenience massively favours an opposite conclusion." Courts in New Brunswick have followed course and in *National Bank of Canada v. Halifax Insurance Co.* [1996] N.B.J. No. 72 (Q.B.), the burden was similarly characterized in these words: unless the balance of convenience heavily favours disregarding it".

[**16] In exercising his discretion, Creaghan J. also relied on *Ash* (*supra*). In *Ash* the motions Judge concluded that he should exercise his discretion based on the factors set out in " *Eleftheria* ". While acknowledging the heavy burden placed on the party attempting to override the effect of the jurisdiction selection clause, the court, in exercising its discretion, should take into account all the relevant circumstances of a particular case. In the present case, the motions Judge heard argument from all three parties pertaining to the circumstances of the case and in determining whether the Appellants met the required burden, he applied the correct test when he stated: [*8]

" In the face of their agreement to take disputes of any nature relating to the Plaintiffs' membership at Lloyd's to English courts, the law is that the onus rests with the Plaintiffs to demonstrate strong cause why New Brunswick is a more appropriate forum than England. This I am not satisfied they have done weighing the appropriate factors set out in Ash to the circumstances of this case."

[**17] There is an allegation that the forum non conveniens test is the proper test to follow in these circumstances. The test would have this court determine what is the more appropriate forum to hear the Appellant's action against Lloyd's. This argument was also made in Ash, and the Court of Appeal for Ontario found that even without the exclusive jurisdiction clause, England was still the more appropriate forum. Based on the facts of this case, Creaghan J. also found England to be the more "convenient forum", a finding which this Court should not overrule unless it is a clear error. As stated earlier, the jurisdiction selection clause places a heavy burden on the Appellants to show why the clause should not be enforced. Since this burden has not been satisfied and the test was already [*9] given reasonable consideration by the motions judge, the matter is resolved and this Court should not interfere.

[**18] The Appellants also allege that Lloyd's violated the Securities Frauds Prevention Act (R.S.N.B.) 1973 c. S-6. They contend that since English courts have refused to see Canadian securities law as a defense to enforcing the Lloyd's agreements, they would be denied a juridical advantage if their actions in New Brunswick are stayed. But, as pointed out by Creaghan, J. the English courts did consider judiciously the question of Canadian securities law and determined that under English law it was not applicable.

[**19] The Appellants are entitled to have their securities law defense considered but they are not entitled to a guarantee that the courts will decide the issue in their favour. In our view, there is no error in the decision of the motions judge on that issue.

[**20] The Appellant Thomas Drummie has brought his action in tort law and bases his claim on precontractual misrepresentation. He asserts that by framing his action in tort he can avoid the burden of the jurisdiction selection clause since the fraudulent misrepresentation allegedly occurred [*10] before the parties entered into an agreement. The motions Judge considered this argument and determined that the nature of the pleadings should not have an impact on the outcome of Lloyd's motion since both Appellants' claims arise out of similar factual circumstances and that the agreements are integral to the cause of action. We agree that the Appellant cannot avoid the agreements by simply bringing his action in tort.

[**21] It is therefore our conclusion that the motions judge properly exercised his discretion when he stayed the Appellants' actions against Lloyd's. The appeals are dismissed. The Respondent is entitled to costs against each Appellant as per the tariff on appeal.

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