

‘Exception de fond’ raised by Defendant, alleging that the Plaintiff’s claim is time barred by operation of the limitation of liability clause contained in the Defendant’s Terms of Business.

[2020]GRC062

IN THE ROYAL COURT OF GUERNSEY

ORDINARY DIVISION

Between:

ROY SMITH

Plaintiff

-v-

CAREY OLSEN (GUERNSEY) LLP

Defendant

Hearing date: 15 October 2019

Judgment handed down: 22 October 2020

Before: Richard James McMahon, Esq., Bailiff

Advocate for the Defendant: Advocate A M Davidson

The Plaintiff represented himself assisted by Mr Howard Young (acting as his *McKenzie* friend)

Cases, Texts and Materials referred to in Judgment:

Chitty on Contracts (33rd ed.)
Unfair Contract Terms Act 1977
Morton v Paint (1996) 21.GLJ.61
Booth v Viscount of the Royal Court [2019] JCA 122
C & G Developments Limited v Duquemin (unreported, 16 October 1965)
Carey, Essai sur les Institutions, Lois et Coutumes de l’île de Guernesey
Watson & Watson v Trouteaud (1987) 5.GLJ.16
Priaulx v Le Ray (unreported, 1930)
Marett v Marett and O’Brien 2008 JLR 384
Parker v South Eastern Railway (1877) 2 CPD 416
Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd [1989] QB 433
Du-Buy 925 Limited v National Westminster Bank plc [2010] EWHC 2862 (QB)
Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] I Lloyds Rep 466
Crocker v Sundance Northwest Resorts Ltd [1988] 1 SCR 1186
Dyck v Manitoba Snowmobile Association Inc. [1985] 1 SCR
Steelux Holdings Ltd v Edmondstone 2005 JLR 152
Toothill v HSBC Bank plc 2008 JLR 77
Sutton v Insurance Corporation of the Channel Islands [2011] JRC 027
Trading Standards (Enabling Provisions) (Guernsey) Law, 2009
Billet d’État No. III of 2016
Yaddehighe v Credit Suisse Trust Limited [2007-08] GLR 282
Public Services Committee v Maynard 1996 JLR 343
Boyd v Pickerskill & Le Cornu 1999 JLR 284

Introduction

1. This judgment results from the hearing of a preliminary issue, pleaded by the Defendant as an *exception de fond*, that took place in October 2019. This action has been described by the Plaintiff, Roy Smith, as “*his sole remaining cause of action to recoup what he has lost from the events leading up to and including the fire at the L’Atlantique in 2012*” (para. 2 of his Skeleton Argument).
2. I can adopt the summary of the present proceedings set out by the former Bailiff in an earlier judgment in this action (see [2019] GRC 004, at para. 2), to which I will refer when dealing with a further application that arose at the start of the hearing before me last year:

“The Plaintiff was the tenant of L’Atlantique Hotel until he was evicted from the premises following a fire in 2012. Since that time he has been involved in extensive litigation resulting from the fire, the eviction and subsequent events. For the purposes of the present judgment, it is sufficient to say that in the substantive proceedings to which the Representation Application relates, the Plaintiff claims damages which he has quantified as a sum in the range £1,982,328.20 to £5,067,888.20 from Carey Olsen (“the Defendant”) who were acting for him in proceedings involving the hotel premises at the time of the fire. The claim alleges that the Defendant negligently and/or in breach of contract failed to advise the Plaintiff on the options available to him at the time to avoid being evicted from the premises.”

3. As I will explain, the submissions made by both parties at the hearing ranged over areas that do not frequently come before the Court in respect of contractual matters. Accordingly, at the conclusion on the second day of the hearing, I reserved judgment. I had not expected that it would take me as long as it has to deliver this judgment, for which I apologise. Events have rather overtaken me since last autumn, including, but not limited to, the consequences of managing Court business through the early months of the pandemic earlier this year, as well as moving between judicial offices and everything that has entailed.

Representation

4. Before turning to the substance of the *exception de fond*, I will briefly outline the additional application made by the Plaintiff at the outset of the hearing. It followed a similar pattern to the issue dealt with by Bailiff Collas in [2019] GRC 004 and relates to representation. By an application dated 11 October 2019, the Plaintiff sought leave for the advocacy to be conducted by his *McKenzie* friend, Howard Young. Two signed witness statements, also dated 11 October 2019, accompanied the application. The first was from the Plaintiff and the second from Mr Young. In addition to hearing from the Plaintiff on this application, I heard evidence from Mr Young and Advocate Davidson, on behalf of the Defendant, had the opportunity to cross-examine him, as well as to make his submissions as to whether the application should be granted.
5. It was as a result of Advocate Davidson’s submissions about the financial arrangement between the Plaintiff and Mr Young’s company, SQN Global Limited, that the oral evidence given principally addressed that point. Mr Young confirmed that the usual business model involved taking an upfront fee plus an agreement for a percentage of the damages eventually awarded to be paid, in respect of which the upfront fee would be rebated. He noted that the Plaintiff had been successful in obtaining an arbitral award of in excess of £5 million, but that it was unenforceable. Because the Plaintiff had run out of money and it was clear that the Plaintiff would face insurmountable difficulties dealing with technical issues of law, Mr Young had agreed effectively to work pro bono, although if the action were permitted to

proceed, the Plaintiff would repay the expenses Mr Young had incurred in assisting in respect of this hearing.

6. In the light of that clarification of the current financial arrangements between the Plaintiff and the company of which Mr Young is a director and the majority shareholder, I was satisfied that the Court was in a similar position to that addressed in greater detail in the judgment [2019] GRC 004, the reasoning of which I adopted and reached the same conclusions as set out first in para. 56:

“Thus, in the present Application, the findings of the Solicitors Disciplinary Tribunal that led to the disqualification of Mr Young are to be considered and weighed in the balance. The manner in which he has conducted himself subsequently, including the way in which he has discharged acting as a McKenzie friend, both for the Plaintiff and others, is also a factor. He has disclosed the fact of his disqualification. I, and my fellow judges, have seen how he has conducted himself when appearing with the Plaintiff in different courts at different times. ... A significant fact is that he has been assisting the Plaintiff for some time so he is familiar with the substantive claim against Carey Olsen and the surrounding circumstances. The Plaintiff has full confidence in him and I have no reason to believe that it would be easy for him, at this stage, to find someone else, failing which the Plaintiff would have to present his own case which he would struggle to do satisfactorily.”

And thereafter in para. 58:

“However I am not persuaded that there are exceptional circumstances that would justify granting Mr Young a right of audience or the right to conduct the present litigation on behalf of the Plaintiff. ... I have directed both parties to produce written submissions in advance of the hearing. I anticipate that the issues will be identified in those submissions and will greatly assist the presentation of the case at the subsequent oral hearing. I do not presently envisage that the Plaintiff would be unable to conduct the hearing with Mr Young alongside him in the more conventional role of a McKenzie friend. If there is a need for him to address me on a point of law where I am of the opinion that he is unable to do so adequately, I reserve the right to grant permission to Mr Young to address me directly on such an issue. If I do, permission will be limited to one or more aspects of the matter and will not amount to a general right of audience. The Plaintiff and Mr Young have had previous experience of instances where the Royal Court has given similar limited permissions, such as at the eviction hearing in the Royal Court before Judge of the Royal Court Finch and three Jurats on 13 August 2012.”

7. In the event, the Plaintiff adopted the content of the Skeleton Arguments that had been prepared with assistance from Mr Young and elaborated on them in his oral submissions. However, when the point came when he needed to respond to what Advocate Davidson had submitted orally, it was apparent that the Plaintiff was struggling and so I permitted Mr Young to address the Court directly on those particular issues of law. Further, overnight, Mr Young conducted some additional research on issues that had arisen and returned the following day with a supplemental Skeleton Argument on behalf of the Plaintiff dealing with the central point being advanced by the Plaintiff about excising a provision from the terms of the retainer contract and I again permitted Mr Young to develop those arguments. Throughout, I sought to ensure that Mr Young did no more than fill the gaps in the Plaintiff's submissions in areas where the Plaintiff himself was struggling to articulate them.

The preliminary issue

8. The *exception de fond* on which the Defendant relies is found in para. 68 of its Amended Les Defences dated 2 April 2019. (The contractual time bar was first raised in para. 2, but then left to the end of the pleading because it referred to terms defined in the niances et prétensions.) Paragraph 68 reads:

“The Plaintiff’s claim is time barred by operation of the limitation of liability provision in Clause 14(c) of the Defendant’s Terms of Business –

- 68.1 *The negligent acts / contractual breaches of duty complained of all occurred in the period between the fire on 11 June 2012 and the Plaintiff’s dis-instruction on 10 July 2012;*
- 68.2 *The relevant cause of action in contract therefore accrued on or before 10 July 2012 at the date of the relevant alleged breach;*
- 68.3 *The relevant cause of action in tort therefore accrued on or before 10 July 2012, the Plaintiff having suffered immediate damage on the Defendant’s failure to undertake the steps it is contended it should have done;*
- 68.4 *In the alternative (which is denied) damage was suffered on (1) 13 July 2012 when the Notice was served forfeiting the Lease (2) 15 August 2012 (the date of eviction from the Hotel) or (3) 23 May 2013 (the date of the Court of Appeal’s judgment);*
- 68.5 *Court proceedings in the claim against the Defendant were not commenced until a date between 24 January 2018 (being the date on which the Plaintiff’s application for leave to serve a Summons on the Defendant was granted by the Royal Court) and 30 January 2018 (being the date on which the Summons was served on the Defendant);*
- 68.6 *That is more than 3 years from the date of the accrual of the alleged cause of action;*
- 68.7 *Accordingly, the Plaintiff is barred from bringing any claim.”*

(Clause 14(c) is quoted in para. 27.6 of the Amended Defences.)

9. In the Plaintiff’s Replique dated 5 December 2018 (which did not require revision because para. 68 remained unchanged from the original Defences), para. 4 highlights that the Defendant’s letter to the Plaintiff dated 14 October 2011 drew attention to clauses 11 and 15 of the Terms of business but not to clause 14. He accepts that he signed the terms of business on 18 November 2011, when he attended a meeting with Advocate Dunster, accompanied by his then manager at L’Atlantique Hotel, Angie Dekker (para. 5). He contends that the Defendant’s retainer was terminated on or around 20 July 2012, noting that Advocate Dunster did not draw his attention to clause 14 at that time when he should have done (para. 7). He refers to his Court action against a sub-tenant, J & G Diner Ltd and the successful arbitration proceedings in January 2016, after which he considered a potential claim against the Defendant (para. 10). He points out that a claim was first intimated to the Defendant by way of a letter dated 31 May 2016. When a response dated 15 July 2016 was received, no reference was made to the action being time barred (para. 11).
10. He then pleads six specific defences to the *exception de fond*. The first relies on the principle of *non est factum*. During the course of the hearing, the Plaintiff confirmed that he no longer relied on this principle and so I make no further mention of it. The second is mistake. Clause 14 halves the statutory period of six years within which to bring a claim and so is an unusual

and onerous clause. The Defendant took an unfair advantage over him as a result (para. 19). The third is misrepresentation, which is stated to be innocent or negligent (para. 24). The Plaintiff complains that he should have been told about the existence of clause 14 and the failure to highlight this led him to believe that the normal rules for limitation of causes of action applied (para. 26). The fourth basis on which the consequences of a time bar is opposed involves the Plaintiff claiming that there was an *empêchement d'agir*. Because he has no recollection of signing the terms of business until a copy was disclosed in the course of these proceedings, the Plaintiff did not have the requisite knowledge of the time bar until September 2017, when a draft defence provided to him by solicitors acting for the Defendant's insurers was received, or earlier in March 2016 when he began the process of preparing the letter before action, both of which fall within the three-year period preceding the commencement of proceedings, such that time should not run until then because the Defendant had failed to notify him of the existence of clause 14 (para. 33). The fifth defence is that there had been a breach of the Defendant's fiduciary duty, which required the Defendant to disclose the existence of clause 14. Finally, the Plaintiff contends that clause 14 amounts to an unfair contractual term and should be declared void on that basis (paragraphs 38 and 39).

11. In its Duplique, also dated 2 April 2019, the Defendant admits that its covering letter did not refer to clause 14, but did refer to clauses 11 and 15, and stated that reliance will be placed on the maxim of "*la convention fait les lois des parties*" (para. 6). It contends that the retainer terminated on 11 July 2012. The Defendant says it had no duty to explain the existence of clause 14 to the Defendant (para. 21) and suggests it is not unusual or onerous (para. 22). It follows that there was no mistake or misrepresentation. In respect of *empêchement d'agir*, the Defendant points out that the principle operates to suspend time running for prescription and has no applicability to a contractual provision reflecting the parties' agreement that a time bar for actions exists (para. 41). However, if it does apply, there was no practical impossibility under which the Plaintiff had been labouring (para. 42). Whilst accepting that fiduciary duties were owed, they did not extend to the negotiation or agreement of the terms on which the Plaintiff retained Advocate Dunster (para. 43). As regards the declaration sought that clause 14 is an unfair contractual term, those principles are not known to Guernsey law (para. 47).

Brief facts

12. It is common ground that the Plaintiff, who describes himself as a businessman and the tenant of L'Atlantique Hotel (para. 1 of Re-re-Amended Cause), instructed the Defendant in or around October 2011 as his Advocates. Initially, the Plaintiff's instructions related to a debt dispute with J & G Diner Ltd but subsequently extended to cover other matters relating to the hotel. The Defendant sent the Plaintiff a letter of engagement in mid-October 2011, in which it referred to its Terms of Business and stated to him that "*your continuing instructions in this matter will amount to acceptance of Carey Olsen's Terms of Business*". On 14 November 2011, the Plaintiff signed the Terms of Business.
13. Included within the Terms of Business was clause 14, headed "LIMITATION OF LIABILITY". (I will continue to refer to clauses in the Terms of Business, because that is the style used by the parties, even though the document itself and the covering letter properly refers to them as paragraphs.) Clause 14(a) referred to capping the Defendant's liability at £3 million, subject to any different amount being set out in the letter of engagement. In the case of the relationship with the Plaintiff, the letter of engagement did not set out a different level. Clause 14(c) provides:

“Any claim made by the Client or any other person in respect of loss, liability or damage arising from or in connection with our legal services, whether in contract or tort (including negligence) or under statute or otherwise, must be made:

- (i) where those legal services have been delivered, within three years of the date on which the work giving rise to the claim was performed; and*
- (ii) if those legal services have been terminated, within three years of the date of termination (subject to (c)(i) above),*

and in either of these cases, that shall be the date when the earliest course of action (in contract or tort (including negligence) or under statute or otherwise) shall be deemed to have accrued in respect of the relevant claim. For the purposes of this sub-paragraph (c) a claim shall be made when court or other dispute resolution proceedings are commenced.”

- 14. It is this provision on which the Defendant relies. It is this provision that the Plaintiff argues, at least in the first instance, is inoperative as against him or (as his secondary position), if it does operate, it has still been complied with by him.
- 15. The precise date of the termination of the Defendant’s retainer is not agreed, save that it occurred in July 2012. Because the date of commencing the proceedings is in 2018, it is unnecessary for the purposes of resolving the Defendant’s *exception de fond* to resolve that difference. Subject to what the Plaintiff contends in respect of *empêchement d’agir*, it is common ground that more than three years passed from the termination of the retainer before the action was commenced. Moreover, because an *exception de fond* is determined on the basis of the facts as pleaded by the Plaintiff, I would, were it necessary to do so, take the later date to which he refers in preference to the earlier date asserted by the Defendant.

The parties’ contentions

- 16. On behalf of the Defendant, Advocate Davidson advanced an elegantly simple case. By virtue of the customary law maxim “*la convention fait les lois des parties*”, the signature of the Plaintiff on the Defendant’s Terms of Business demonstrates that he freely entered into this agreement on the terms contained therein, including clause 14(c), with the effect that he cannot now avoid the consequences of the shortened time in which to commence any proceedings against the Defendant arising out of the legal services provided. The majority of his submissions, therefore, were in reply to the arguments raised by the Plaintiff as to why clause 14(c) of the Defendant’s Terms of Business could be found not to apply, meaning that the action was not time barred.
- 17. The Plaintiff accepted that, in normal circumstances, where a person has signed a document, he will be bound by its terms, even where he has not taken the opportunity to read the content. However, these were exceptional circumstances, so the Court is invited to find that the Plaintiff is not bound by his signature. By reference to *Chitty on Contracts* (33rd ed.), para, 13-015, dealing with onerous or unusual terms:

“Although the party receiving the document knows it contains conditions, if the particular condition relied on is one which is a particularly onerous or unusual term, or is one which involves the abrogation of a right given by statute, the party tendering the document must show that it has been brought fairly and reasonably to the other’s attention.”

- 18. In circumstances where it was accepted by the Defendant that no steps had been taken to highlight the effect of this unusual clause, the proper outcome was for the Court to sever this

provision from the otherwise applicable Terms of Business, in which case the proceedings had been commenced within the usual period of six years. The Plaintiff had believed all along that he had the full six years in which to commence any proceedings against the Defendant and so the Plaintiff was subject to a mistake or *erreur*. That mistake flows from the silence of the Defendant, and in particular Advocate Dunster, to highlight that the statutory period in which actions can be commenced had been reduced by 50%.

19. A provision such as clause 14(c) of the Defendant's Terms of Business was of a type that would be susceptible to being found unfair and unreasonable under principles derived from the Unfair Contract Terms Act 1977. The absence of equivalent legislation in Guernsey's domestic law did not matter because the law of Guernsey can evolve through making use of the principles set out by the Court of Appeal in *Morton v Paint* (1996) 21.GLJ.61.
20. The Plaintiff further relies on the other specific matters he has pleaded, including *empêchement d'agir*, as reasons why the time bar found in clause 14(c), even if not excised from the contractual relationship between the parties, cannot operate in the manner suggested by the Defendant. In summary, the Plaintiff submits that time cannot be found to run against him when he was unaware that there was a deadline by which he had to commence his action that is different from the usual deadline, which had not passed. Accordingly, time could only start running against him once he knew that a shorter period was involved.
21. The Defendant joins issue with each of these points. In particular, it submits that Guernsey law does not recognise the same approach as under English law on unconscionability. Instead, there are settled principles relating to *erreur*, and in particular on *erreur vice de consentement*, on which there is recent commentary in the Jersey Court of Appeal in *Booth v Viscount of the Royal Court* [2019] JCA 122, showing that it does not apply in the circumstances in which these parties found themselves. There was no requirement for the Defendant to draw the Plaintiff's attention to clause 14(c), which means that any silence cannot be found to amount to a misrepresentation. The principles found in the 1977 Act cannot be incorporated into Guernsey because it would involve setting aside the fundamental tenet of Guernsey's customary contract law relating to freedom to contract. In relation to *empêchement d'agir*, the test requires the Plaintiff to provide evidence of a practical impossibility of discovering the facts giving rise to the cause of action, which has not been demonstrated by the Plaintiff, because mere ignorance of the existence of clause 14(c) is insufficient.

Discussion

22. By comparison to Jersey, there are fewer cases in which reasoned decisions have been given in the field of the law of contracts. Whilst there might be a tendency in some minds to think that reference to English law produces all the answers, the common root of Jersey and Guernsey law in Norman customary law lends support to the submission of Advocate Davidson that what has been stated as the law of Jersey may well represent the law of Guernsey. This is particularly relevant in a case such as this where, on the one hand, the Plaintiff is placing reliance on English law principles, but resorting to the customary law principle of *empêchement d'agir* as the need to do so arises and, on the other hand, the Defendant is suggesting that applying *erreur* leads to a different result from blind adherence to English law principles. I take the view that the customary law roots of Guernsey law continue to apply unless and until they are abrogated by primary legislation or they necessarily have to evolve in a different manner. In the absence of good reason to follow any different route, the customary law will be found to remain good law.

23. The maxim “*la convention fait les lois des parties*” forms part of the law of Guernsey. This was touched upon by the Court of Appeal in *C & G Developments Limited v Duquemin* (unreported, 16 October 1965), relating to a sale of land but is, in my view, of general application. (That case also endorsed that, in the absence of any specific Guernsey authority, recourse could properly be had to the works of Pothier to try to identify the solution for Guernsey.) The starting point, therefore, is that the Plaintiff’s agreement to contracting for the Defendant’s legal services was done on the Defendant’s Terms of Business, including clause 14(c). Accordingly, the first issue is whether the Plaintiff is correct to submit that this clause should not operate against him.
24. Of the two lines of argument advanced by the parties, I prefer that of Advocate Davidson on behalf of the Defendant. In a choice between an English law principle of an unconscionable bargain and the application of well-established principles derived from Norman customary law on *erreur*, I am satisfied that those English law principles should not be applied.
25. Historically, it is apparent that commentators such as Laurent Carey, in his *Essai sur les Institutions, Lois et Coutumes de l’île de Guernesey*, concentrated on freedom of contract and particularly consent. In the section headed “*des obligations et contrats*”, he referred to the types of contract he mentioned as being that they “*prennent leur escrue de la volonté des hommes et du consentement qu’ils donnent en une même chose*”. He further continued, with the first part of the next passage being expressly relied on by Advocate Davidson:

“Promesse sans cause, promesse pour cause déshonnête, promesse contre les bonnes moeurs, promesse de sous âge, promesse de ne se marier, sont nulles et amendables.

Promesse est un acte de la raison et submission volontaire, soit que la promesse, soit verbale or par écrit, de faire ce à quoi on s’est astreint et obligé.”

26. The Plaintiff’s pleaded case (and, so far as relevant, the confirmation given in the evidence before the Court) does not raise any of these bases for finding the contract null and void. It was a contract for the provision of legal services by the Defendant to the Plaintiff. The Plaintiff is of full age and has capacity to act. He accepts that he entered this contract with the Defendant voluntarily, but now argues that the effect of clause 14(c) should have been highlighted so that he was fully aware of its effect.
27. It is suggested by Advocate Davidson that this Court has previously indicated that the English law concept of an unconscionable bargain has no place in Guernsey law. He has cited the principles digested from the decision of *Watson & Watson v Trouteau* (1987) 5.GLJ.16, which set out that the doctrine of *lésion ultradimidiaire* “*replaced the offence of unconscionable bargain which has no place in Guernsey law*”. However, a closer analysis of the Bailiff’s full summing-up to the Jurats in that case shows that what was said was:

“The second defence in law was that of unconscionable bargain but I need not trouble you with it any further as no authority was quoted to us to show that this was part of our Law. Indeed, it was suggested that instead of unconscionable bargain in English law, we have here this particular defence of the unjust price.”

As a result of going back to the original text, I am not persuaded that the position is as stark as the digest in the Guernsey Law Journal indicates. I take the view that whether the doctrine of *lésion ultradimidiaire* is to be regarded as a complete substitute for the English law principle of an unconscionable bargain was, at best, left open. The reason why the defence of unconscionable bargain was not pursued in that action was because no authority was advanced to support it as part of domestic law but, in any event, there was a complete overlap because of the application of *lésion ultradimidiaire* to a contract for the sale of land.

Accordingly, I do not think that this is a strong argument on behalf of the Defendant that Guernsey law does not recognise the principle of an unconscionable bargain, but does show that the issue has been addressed in different circumstances previously.

28. Similarly, I do not regard the Defendant's reference to the decisions of the Cour des Jugements et Records in *Priaulx v Le Ray*, which were given in late 1930 on the application of the doctrine of *lésion ultradimidiaire* to assist on the issue I have to resolve. To the extent that this relates to something unjust being capable of being challenged and going to the root of the contract, I do not consider that this means that a party to a contract is unable to challenge just a part of the agreement struck. There are other instances where some aspect of "blue pencilling" in respect of an otherwise valid agreement is permissible and so I accept that the Plaintiff can advance a challenge just to clause 14(c) of the Defendant's Terms of Business. Moreover, the doctrine relates to selling land at an undervalue and so is inapplicable to the present case.
29. What does support my decision, though, is the approach that is taken by the Jersey Court of Appeal in *Booth v Viscount of the Royal Court* [2019] JCA 122. In the context of a *désastre*, an issue arose as to whether a loan from a bank was void for *erreur* because both parties were unaware of the value of the real property over which security was granted and taken. I am satisfied that the approach described by Martin JA in that case to the principle of *erreur* as it operates in Jersey law is of equal application as part of Guernsey law. Further I believe that the very significant overlap of the judiciary who form the two Bailiwick's Courts of Appeal supports my view that this is the correct approach to be taken.
30. The customary law recognises two types of *erreurs*: an *erreur obstacle* and an *erreur vice de consentement*. The former sub-divides into three types (as had been explained at para. 60 in *Marett v Marett and O'Brien* 2008 JLR 384):

“... *erreur sur la nature du contrat* (mistake as to the nature of the agreement, e.g. gift v. for value); *erreur sur l'objet* (mistake as to the subject of the agreement); and *erreur sur l'existence de la cause* (mistake as to the basis or purpose of the agreement). Each of these *erreurs obstacles* will prevent the meeting of minds that is fundamental and necessary to the existence of consent and the creation of a contract under Jersey law.”

It is clear that the Plaintiff accepts that there has been no *erreur obstacle*. He knew he was contracting for the provision by the Defendant, and in particular Advocate Dunster, of legal services and was doing so on the firm's Terms of Business. What he now says is that he was unaware that there was a reduction in the period during which he could commence proceedings if he felt aggrieved at the way those services were provided and has an action in contract or tort. Accordingly, there is no *erreur obstacle*.

31. An *erreur vice de consentement* also sub-divides into two types: an *erreur sur la personne* and an *erreur sur la substance*. The first type was explained in the *Booth* case (at para. 22) as being “only where the identity of a contracting party is the main cause of the contract – for example, a contract for the painting of a portrait, where the identity of the artist will ordinarily be fundamental.” It is, therefore, also clear that this does not apply in the present case, meaning that the Plaintiff would be obliged to rely on an *erreur sur la substance*, about which reference was made to Pothier's *Traité des Obligations*, Partie I, Chapitre I, paragraph 18, which was translated at para. 25 of the *Booth* case (where “*chose*” is referred to as “*thing*” but really means the subject-matter of the contract):

“Mistake nullifies a contract, not only when it affects the thing itself, but also when it affects the quality of the thing which the contracting parties had principally in

prospect, and which formed the substance of the thing. It is for that reason that if, wishing to buy a pair of silver candlesticks, I buy from you a pair of candlesticks which you offer to me for sale, which I take to be silver candlesticks but which are in fact only silver plate; even though you had no intention of deceiving me, being under the same mistake as me, the contract will be void, because the mistake which I was under destroys my consent; for the thing which I wished to buy was a pair of silver candlesticks; but what you offered me for sale being silver plate candlesticks, it cannot be said that they were what I wished to buy ... It is otherwise if the mistake only affects some incidental quality of the thing. For example, I buy from a bookshop a certain book, under the false impression that it is excellent, when in fact it is worse than mediocre: the mistake does not destroy my consent, nor as a result the contract of sale; the thing that I wished to buy, and that I had in prospect, is in fact the book the bookshop sold me, and not something else; the mistake I was under about the quality of the book affects only my reason for buying it, and does not prevent the book from being in fact the one I wished to buy; but, as we shall shortly see, mistake in relation to motive does not destroy the contract; it is enough that the parties were not mistaken about the thing which was the object of the contract, and were in agreement about that.”

32. After reviewing other developments, Martin JA set out a four-stage approach at para. 34:

“First, it is essential to start by identifying the chose to which the contract relates – in other words, the subject matter of the contract. It is only once that has been done that it is possible to consider the second stage, which is to see whether the claimed erreur relates to that subject-matter. Thirdly, if the claimed mistake does relate to the subject matter of the contract, it is necessary to consider whether or not the mistake relates to something which in principle, in Pothier’s words, “affects the quality of the thing which the contracting parties had principally in prospect, and which formed the substance of that thing”. Mistakes as to the material from which an item is made, or its authenticity, origin or use are all in principle capable of amounting to erreurs sur la substance; mistakes as to the merits or desirability of something are not. Finally, the court must determine whether or not a mistake which in principle was capable of amounting to an erreur sur la substance related to something that was essential to the mistaken party, such that he would not have contracted had he known the true position. In relation to this final stage, it is important to note two things: first, it can only arise once the second stage has been determined in the mistaken party’s favour (so that it is immaterial that it was essential to him that he should buy a “good” book, since a mistake as to an incidental quality of that nature is incapable of amounting to an erreur sur la substance); secondly, that the court is not obliged to accept the mistaken party’s statement about the importance to him, but should instead consider the plausibility of that statement in the light of all the circumstances.”

33. Applying that test to the present case, it is clear that the Plaintiff held himself out as a man of business and, as such, wished to contract for legal services with the Defendant. He got what he bargained for and it was only much later that he sought to bring an action against the Defendant for what he considers was negligent advice, and so did not meet the standards expected when he contracted. But the subject-matter of the contract was still the legal services the Plaintiff received and so there is no *erreur vice de consentement* vitiating the Plaintiff’s consent to enter that agreement voluntarily. There was no *erreur* relating to the subject-matter of the contract and so the other stages of the test do not apply. In any event, the claimed mistake does not affect the quality of the subject-matter of the contract but is, at best, incidental to what happens if there is an alleged breach of the contract. I am satisfied

that the principle of *erreur* does not enable the Plaintiff to set aside the contract, but does enable the Defendant to rely upon clause 14(c) unless there is some other reason why it should not be permitted to do so.

34. In reaching that conclusion, I have necessarily rejected the Plaintiff's primary contention relying on the passage in *Chitty on Contracts*, para. 13-015, to sever a particularly onerous or unusual term. Although the basis for the principle on which the Plaintiff relies is rooted in authority of considerable antiquity (eg, *Parker v South Eastern Railway* (1877) 2 CPD 416), as cited in the footnote in *Chitty*, the more recent decision on which reliance is frequently placed is *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* [1989] QB 433; a party is not normally able to rely on a contractual provision which is particularly unusual or onerous unless he has done something sufficiently fairly to bring the clause to the attention of the other party. However, an earlier passage in that chapter of *Chitty* (para. 13-002: "*Where the agreement of the parties has been reduced to writing and the document containing the agreement has been signed by one or both of them, it is well established that the party signing will ordinarily be bound by the terms of the written agreement whether or not he has read them and whether or not he is ignorant of their precise legal effect*") also appeared to have some relevance to the present case because it is common ground that the parties had a signed written agreement. Accordingly, when I sought to explore these issues with the Plaintiff, he requested that Mr Young might be permitted to address them, and this resulted in the provision of a Supplemental Skeleton Argument dated 15 October 2019.
35. The Plaintiff acknowledges that the position has not been resolved as a matter of English law. Through Mr Young's consideration of the cases referred to in the relevant footnotes in *Chitty*, he fairly refers to the decision of Andrew Popplewell QC, sitting as Deputy Judge of the High Court in *Du-Buy 925 Limited v National Westminster Bank plc* [2010] EWHC 2862 (QB), at para. 91 of which it states "*it remains an undecided question whether the Interfoto principle can even apply to a signed contract*". By way of further explanation, the paragraph continues:

"In that case the Defendant was held not to be bound by a term in a printed set of conditions which had been provided to him in the form of a delivery note, but which he had neither signed nor read. In Ocean Chemical Transport v Exnor Crags Ltd [2000] 1 Lloyds 466, Evans LJ, with whom Henry and Waller LLJ agreed, was prepared to assume that the principle might apply to onerous and unusual clauses in a signed contract "in an extreme case where a signature was obtained under pressure of time or other circumstances". In HIH v New Hampshire [2001] 2 Lloyds 161, Rix LJ doubted whether the principle was properly applicable outside the context of incorporation by notice (see paragraph 209). In Amiri Flight Authority v BAE Systems Plc [2004] 1 All ER 385, 392, Mance LJ, with whom Rix and Potter LLJ agreed, noted the doubts of Rix LJ in HIH v New Hampshire and stated that it was unnecessary to decide whether the principle could ever apply to signed contracts. He envisaged that it might do so where for example a car owner was asked to sign a ticket on entering a car park or a holiday maker was asked to sign a long small print document when hiring a car which in either case proved to have a provision of "an extraneous or wholly unusual nature"; but that such cases might be ones where the application of the provision was precluded by an implied representation as to the nature of the document. He reiterated the normal rule that in the absence of any misrepresentation, the signature of a contractual document must operate as an incorporation and acceptance of all its terms. This is a reflection of the well known principle whose existence and importance was recently emphasised by Moore-Bick LJ

in Peekay v Australia and New Zealand Banking Group [2006] 2 Lloyds Reports 511, 520 at paragraph 43:

“It was accepted that a person who signs a document knowing that it is intended to have legal effect is generally bound by its terms, whether he has actually read them or not. The classic example of this is to be found in L’Estrange v Graucob [1934] 2 KB 394. It is an important principle of English law which underpins the whole of commercial life; any erosion of it would have serious repercussions far beyond the business community.”

36. As a result, the Plaintiff seeks to argue that this is a form of extreme case, of the type also referred to in Ocean Chemical Transport Inc v Exnor Craggs Ltd [2000] 1 Lloyds Rep 466, where Evans LJ proceeded to “prefer to put the matter more broadly and to say that the question is whether the defendants have discharged the duty which lies upon them of bringing the existence of the clause upon which they rely (and if Mr Charkham is right, the effect of that particular clause) to the notice of the other party in the circumstances of the particular case”. The Plaintiff also seeks to draw a distinction between the cases in which these doubts have been expressed, which were business to business contractual relationships, with the present case where it is an individual contracting with a business. Finally, he seeks to rely upon the approach of the Supreme Court of Canada in Crocker v Sundance Northwest Resorts Ltd [1988] 1 SCR 1186.
37. That Canadian case involved injury to an obviously intoxicated participant in a dangerous sports competition. One of the issues was whether the defendant could rely on a waiver signed by the plaintiff. The Supreme Court decided that this was a different situation from an earlier decision (Dyck v Manitoba Snowmobile Association Inc. [1985] 1 SCR), because on that occasion it was accepted that the claimant had read the rules that purported to release the Association from liability, whereas in the instant case the trial judge had found that the waiver provision set out in the entry form that the plaintiff had signed was not drawn to the plaintiff’s attention, that he had not read it and, indeed, did not know of its existence, and where he thought he had simply been signing an entry form.
38. Where the position in English law, which the Plaintiff invites this Court to adopt, remains unclear, I do not consider that it is appropriate in any event for a court in Guernsey to be developing the position in English law, assuming for this purpose that following the English law approach were to find favour. There is a difference in a party submitting that the settled position in law in another jurisdiction should be accepted as the position to adopt in Guernsey, because it properly reflects what the law of Guernsey should be, and building on a base that would, if followed, amount to making new law, unless there were very good reason to find that that is the law in Guernsey. In my view, the position in English law remains that a signature on a contract reflects that the parties are bound by the terms of that document. In very rare cases, there may be a justification for departing from that position. In particular, if it is shown that the person who would otherwise be bound by a term should have had it drawn to his attention and it is found that the document was not even read. I cannot find that such an extreme case exists here. The Plaintiff had the opportunity to read the Defendant’s Terms of Business and his signature was not a product of being under any pressure of time. It was his voluntary act and any ignorance of its terms should not mean he is not bound by them.
39. I do not think that the Plaintiff should be treated for these purposes as someone who is lacking in commercial awareness and contracts with a business. It is accepted that he was running a business and so contracting in that capacity and not on the basis of someone in a private, non-commercial capacity. There is, in my view, no justification to take the more liberal stance found in the Crocker case to how the Plaintiff came to sign the document. This was an

arm's length transaction and if the Plaintiff chose not to read what he was signing or, even if he had forgotten the tenor of all the provisions to which he was bound, that does not mean he can escape those terms subsequently applying to him. I am not persuaded that clause 14(c) is even of a type that would be regarded as particularly onerous or unusual. It is not so rare that liability might be capped at a specified amount and action would need to be taken swiftly in such a contract. In effect, the maxim "*la convention fait les lois des parties*" operates to make the full contract in principle effective against the Plaintiff in the same way that I consider English law would find even if I had decided that there was merit in the basic approach advanced by the Plaintiff of looking to those English law principles rather than applying principles of *erreur* derived from the customary law.

40. In reaching the conclusion that I have, I am similarly rejecting any reliance the Plaintiff places on a misrepresentation. This amounts to a complaint that the Defendant, through Advocate Dunster, should have highlighted clause 14 in the Terms of Business. Failing to do so is a form of misrepresentation through silence, whether that was innocent or negligent. In the Plaintiff's Supplemental Skeleton Argument, two Jersey decisions are relied upon in support of when silence can constitute a misrepresentation.

41. The first is *Steelux Holdings Ltd v Edmondstone* 2005 JLR 152. At para. 13 it was stated that:

"As a matter of general principle, under the law of Jersey the parties to a contract are expected to defend their own interests. The maxim is: La convention fait les lois des parties. But fraud is a flexible notion. Silence can, in certain circumstances, amount to fraud. If one party, particularly a party who is more experienced and worldly-wise than the other, is silent as to a material fact which, if it had become known to the other party, would have led to a refusal to enter into the contract, that may well amount to fraud which may lead to a setting aside of the contract. In French law, the concept is known as réticence dolosive. We would characterise it as dishonest or fraudulent silence."

The second is *Toothill v HSBC Bank plc* 2008 JLR 77, where it was suggested that this passage was *obiter* (para. 21) and the extent to which *dol par réticence* should feature in Jersey law should be subject to full argument and consideration before any conclusion is reached (para. 22). The Plaintiff has also referred to a passage at the end of para. 48 in the decision of the Royal Court of Jersey in *Sutton v Insurance Corporation of the Channel Islands* [2011] JRC 027, which comes at the conclusion of consideration of many of the cases to which this Court has also been referred:

"Not all silences will have the effect of providing grounds for a claim in nullity. The party making that claim has to relate the alleged réticence dolosive to a material particular of the contract and its actual impact upon his will or volonté to make the contract in order to discharge the burden of showing that the claimed ground of nullity has been established."

42. Even if I put to one side the fact that these passages refer to something that involves dishonesty, or fraud, which is not being alleged by the Plaintiff in the present case, I do not find that there has been any misrepresentation through silence here. There is, in my view, little distinction between this response to the *exception de fond* and the issues of *erreur* to which I have just referred (as was also noted in the *Sutton* case). There could only be a duty to highlight clause 14, and in particular sub-clause (c) if it was particularly onerous. The Defendant's Terms of Business that were signed by the Plaintiff run to 11 pages. The covering letter dated 14 October 2011 comprises four pages plus a single page listing the hourly rates of those in the firm's litigation department. Whilst that covering letter expressly

refers both to clause 15, in the context of a client being responsible for the costs of work carried out on behalf of the client, whatever recovery there might be of costs awarded to be paid by another party, and to clause 11, in the context of the financial institution holding the firm's client account suffering some form of insolvency, no express reference was made to clause 14. However, the first couple of lines of clause 15 appears on the same page of the document as clause 14, where the heading itself ought to have attracted the Plaintiff's attention if he had chosen to look at clause 15. Accordingly, in the context of the Defendant's Terms of Business being a comparatively short document, I am satisfied that there was no duty placed on the Defendant to highlight clause 14. However, if I am wrong about that, I am also satisfied that taking steps to invite the Plaintiff to consider clause 15 was sufficient also to draw attention to clause 14. It is human nature to consider the context of something that is being highlighted and so the existence of clause 14 on the same page was, I think, sufficiently well signposted by the Defendant when viewed in the light of this being a businessman used to considering the terms of contracts engaging with the Defendant for the provision of legal services.

43. Although it is slightly out of the order in which the Plaintiff responds to the *exception de fond*, it makes sense to consider the other arguments relating to the operation of clause 14(c) before turning finally to *empêchement d'agir*, which is only relevant if the clause is found to be operational against the Plaintiff.
44. The comments I have just made about there being no misrepresentation can apply similarly to the contention that the Defendant was in breach of fiduciary duty. This was not advanced by the Plaintiff any differently. It rests on the notion that there was some duty owing to highlight the effect of clause 14. I am satisfied that there has been no breach of any fiduciary duty for the same reasons that I have already given. This was an arm's length contract and, for whatever reason, the Plaintiff either did not read, did not understand, or forgot the terms on which he had contracted. The Defendant cannot be held accountable for any such failing.
45. Again resorting to English law principles, the Plaintiff submits that clause 14(c) ought to be struck out as being an unfair contract term, adopting the same approach as is found in the Unfair Contract Terms Act 1977. The Plaintiff acknowledges that there is no domestic legislation to that effect, but suggests that the principles found in *Morton v Paint* are applicable. In doing so, he submits that section 2(2) of the 1977 Act provides that it is not permissible to restrict liability for negligence "*except in so far as the term or notice satisfies the requirement of reasonableness*". Section 11(1) provides that "*the requirement of reasonableness ... is that the term shall have been a fair and reasonable one to be included having regard to the circumstances which were, or ought reasonably to have been known to or in the contemplation of the parties when the contract was made*".
46. In the Plaintiff's Supplemental Skeleton Argument, reliance is also placed on the terms of Schedule 2 to the Act, which contains "guidelines" for the application of the reasonableness test, as follows:

"The matters to which regard is to be had in particular for the purposes of section 6(1A), 7(1A) and (4), 20 and 21 are any of the following which appear to be relevant

—

- (a) *the strength of the bargaining positions of the parties relative to each other, taking into account (among other things) alternative means by which the customer's requirements could have been met;*

- (b) *whether the customer received an inducement to agree to the term, or in accepting it had an opportunity of entering into a similar contract with other person, but without having to accept a similar term;*
- (c) *whether the customer knew or ought reasonably to have known of the existence and the extent of the term (having regard, among other things, to any custom of the trade and any previous course of dealing between the parties);*
- (d) *where the term excludes or restricts any relevant liability if some condition was not complied with, whether it was reasonable at the time of the contract to expect that compliance with that condition would be practicable;*
- (e) *whether the goods were manufactured, processed or adapted to the special order of the customer.”*

One of the difficulties with this submission is that it remains unclear whether, even if the contract were to be subjected to an English law type of approach, these guidelines are applicable. For example, the sections referred to in Schedule 2 do not appear to apply and, if so, these guidelines do not assist. Although I have my doubts, because I do not consider that this submission in any form has merit, it is unnecessary for me to determine that issue.

47. In this regard, I think it is important to take a step back and remember what is in issue. The Defendant was offering to provide legal services to clients on its standard Terms of Business. No one was obliged to contract with the Defendant because there were other Advocates to whom potential clients could turn instead. The Plaintiff chose to engage the Defendant, and to seek representation and advice from Advocate Dunster. In doing so, he agreed to abide by those standard Terms of Business. It was only much later, when he had not managed to get satisfaction by other means, that he turned to his former Advocates and considered bringing the action he has. Whether or not a term halving the time within which an action for negligence or breach of contract arising out of the performance of those services is commonplace, it is not, at face value, an unfair term to include. The Plaintiff had the opportunity to review the Terms of Business before agreeing to retain the Defendant, so the circumstances were such where this was something in their contemplation, or ought reasonably to have been where the Plaintiff was a businessman wishing to pursue any other business for compensation. In other words, this was more than a consumer contract and the Defendant can, in my view, properly have relied on the clause as a means of ensuring that any alleged shortcomings in the manner in which it provided its legal services were known and capable of being addressed within a reasonable period of time. Accordingly, I am not persuaded that clause 14(c) is even unfair within the four corners of the principles as found in English law.
48. Even if I were wrong to reach that conclusion, I am also not persuaded that this is an area where the *Morton v Paint* approach could sensibly be followed. It is over a decade since the States of Deliberation approved what became the Trading Standards (Enabling Provisions) (Guernsey) Law, 2009. Section 2 of that Law, when read with the reference in the Schedule to the Law referring to the 1977 Act, shows that there are powers to introduce into domestic legislation, perhaps subject to appropriate exceptions, adaptations and modifications, provisions along the lines of those found in the 1977 Act. The States of Deliberation have resolved to direct the preparation of legislation (see the policy letter of the Commerce and Employment Department in Billet d'État No. III of 2016). That legislation has not been prioritised sufficiently since then to be enacted. In those circumstances, I take the view that

the proper course is to await the enactment of that legislation and that this Court should not, in the meantime, be tempted to fill the gap.

49. For all these reasons, I am satisfied that clause 14(c) of the Defendant's Terms of Business is a valid provision and that it governs the relationship between the two parties. All the bases on which the Plaintiff has sought to have that provision excluded from the contract he voluntarily entered into have failed. That means I now turn to the final argument advanced by the Plaintiff as to whether his action is time-barred or whether there is merit in allowing the claim based on *empêchement d'agir* to be determined on the facts.
50. The Plaintiff relies on the discussion of the principle in *Yaddehighe v Credit Suisse Trust Limited* [2007-08] GLR 282. In its traditional form it is another element of the customary law. The maxim "*à qui est empêché d'agir la prescription ne court point*" operates to stop time running for prescription purposes in respect of those facing a practical impossibility of being able to exercise those rights. In the present case, the Plaintiff asserts that he did not have access to any copy of the Defendant's Terms of Business and so was unaware of the reduction in the time available during which to commence his proceedings. He further submits that it has been recognised that these are acutely fact-sensitive issues and so inappropriate for determination on this preliminary issue. The Plaintiff had proceeded on the basis that he had the usual six years in which to bring his proceedings, and he had, quite properly, taken other steps first to seek to gain satisfaction from others and so mitigate any losses for which he would subsequently hold the Defendant responsible.
51. This is a further example of where I find the submissions of Advocate Davidson more persuasive. The primary contention is that the principle operates as part of the regime relating to when an action is prescribed and so does not assist in relation to a contractual term. I think that is the correct approach to what is in issue and so may be the short and simple answer here. Advocate Davidson points out that there must be an impediment that constitutes a "*practical impossibility*" and that it has been recognised that mere ignorance is insufficient. These aspects are clear from the Court of Appeal's decision in *Yaddehighe*, which in turn adopted what had been said in two cases in the Jersey Court of Appeal.
52. The judgment given by Smith JA explains that "*the essential issue is whether, on the pleaded facts, the plaintiff could succeed on any basis in persuading the court of trial that his claims are not prescribed*" (para. 25). Of course, the primary answer to that test is that the Plaintiff had voluntarily agreed that he only had three years in which to bring any action against the Defendant and that time had long passed. In effect, what the Plaintiff invites the Court to find is that time only began to run against him once he realised that he only had three years in which to institute proceedings and he managed to bring his claim well within that three-year period. This is not quite the same as arguing that there was a practical impossibility in the manner described in the cases up until that time. However, I will continue the analysis as if time could potentially stop running in that manner.
53. In *Public Services Committee v Maynard* 1996 JLR 343, Southwell JA stated (at page 354):
- "Mere ignorance does not bring the maxim into operation ... Where there is an impediment creating such a practical impossibility of which ignorance is a part, then the maxim may come into operation and prevent time running."*

Next in *Boyd v Pickerskill & Le Cornu* 1999 JLR 284 (at page 291), Beloff JA further explained:

"In my view, the epithet 'practical' deployed in Maynard ... softens rather than strengthens the concept of impossibility. It requires a consideration of what is in fact,

not in theory, possible. While ignorance of a cause of action does not per se trigger suspension of the limitation period, it may, in appropriate circumstances, constitute or create a relevant impediment ...

The test, as it seems to me, is whether the ignorance of the cause of action is reasonable in all the circumstances, reasonable, that is, both in respect of the facts giving rise to the cause of action and that a cause of action arises in such circumstances.”

54. That passage is, in my view, significant because the type of practical impossibility to which reference is made relates to knowledge of the existence of a cause of action. I regard what the Plaintiff is saying in the present case as being in a different light. He is not saying that he did not know that he had a cause of action against the Defendant. It seems implicit in what he is advancing that he was aware he could, effectively as a last resort, bring an action against his former Advocates, but he delayed doing so. It is the ignorance of the consequences of him delaying doing what he understood he could do that now means he needs to avoid the operation of clause 14(c). The type of impossibility on which he is relying is not about whether he could commence proceedings but the time by which he was required to do so. In my opinion, that type of ignorance cannot in any event be brought within the established principles on which the doctrine of *empêchement d’agir* operates.
55. Another way of looking at what has happened is to ask oneself why the Plaintiff delayed as he did. On his own case, it appears that he knew he should have been given different advice than he was in order to have tried to avoid being evicted from the hotel premises. Nothing in the letter before action sent on his behalf by Mr Young’s company dated 31 May 2016 suggests that the Plaintiff did not know about the causes of action he wished to pursue against the Defendant. Instead, he chose to argue his case against others first, including obtaining an arbitral award for a large amount, but which turned out to be unenforceable. It seems that he only turned his attention towards the relief he now claims against the Defendant because all else had failed. What he did not do before that, though, was to check the terms on which he had contracted with the Defendant. Instead he (and possibly others) assumed that there was still time to bring these proceedings. In my opinion, the impossibility, if it exists at all, arose because the Plaintiff did not look for the terms on which he had contracted. They were in storage, and so available to him. In other words, checking was not impossible. Further, had he chosen to do so, he could have asked the Defendant to provide him with a copy of the terms on which they had contracted. He did not do so. In those circumstances, I am unable to find that the doctrine of *empêchement d’agir* is available to assist the Plaintiff. It is not even a matter that is capable of changing once the facts are fully aired because, taking those facts at the very highest they can be put by the Plaintiff, they do not help him. There has been no suspension of time running against him and so the effect of clause 14(c) of the Terms of Business means that he commenced his action too late. That conclusion is, in my view, the inevitable consequence of what occurred, assuming for these purposes that everything the Plaintiff claims could be proved.

Conclusion

56. As I noted at the outset, I have been very conscious throughout my consideration of this preliminary issue that the Plaintiff is pursuing “*his sole remaining cause of action to recoup what he has lost from the events leading up to and including the fire at the L’Atlantique in 2012*”. I have a considerable degree of sympathy for the position in which he has found himself. He was in the unfortunate position in 2012 of being evicted from the hotel under the terms of the lease. I accept that hotel represented his livelihood and it was where he lived. He contends that this was an avoidable situation, had he received different legal advice. The

effect of my decision is that he is now unable to pursue those claims. Looked at in the broadest sense, it strikes me that he has perhaps spent too much time and effort fighting battles he would have been better advised to realise were already without realistic prospects. The position in which he now finds himself is, therefore, largely of his own making. If he had commenced this action by mid-2015, the Defendant would have been unable to rely on clause 14(c). However, by the time a letter before action was sent, his claim was already out of time. It does not matter that this was not raised in correspondence at the time. Once it was pleaded as an *exception de fond* it became the central question in this action.

57. However much sympathy I have with the Plaintiff it cannot displace the legal position. On the Plaintiff's case, he accepts that he signed the Terms of Business. He will rue the fact that he did not check the position when he should have done. As someone who has been litigating over the events of the summer of 2012 for years, the decision not to go to the source material available much earlier will inevitably be a difficult one for the Plaintiff to accept, but that really is where the root of his problem lies. With assistance from his *McKenzie* friend, the Plaintiff has mounted a staunch opposition to what I have found is the inevitable consequence of him signing those Terms of Business back in 2011. He cannot avoid the consequences of the customary law maxim "*la convention fait les lois des parties*" on any of the grounds he has attempted to do so. In those circumstances, I decide the preliminary issue in favour of the Defendant. Clause 14(c) of its Terms of Business means that the Plaintiff was out of time when he began this action. Accordingly, the action is now dismissed.
58. As regards the costs consequences, having just dismissed the action because the Defendant's *exception de fond* has been established, it seems to me that the costs of the action, so far as they have not been determined by other awards in respect of other stages of the proceedings, should follow the event. Accordingly, unless either party makes an application within the next 14 days seeking some different order, I would be minded to order that the Plaintiff pay the Defendant's costs of the unsuccessful action.