04/09; [2009] VSC 31

SUPREME COURT OF VICTORIA

PAOLACCI v CAPITAL FINANCE AUSTRALIA LIMITED

J Forrest J

17, 18 September 2008; 13 February 2009

CIVIL PROCEEDINGS – CLAIM UNDER A GUARANTEE – PAYMENTS UNDER THE GUARANTEE IN DEFAULT – PROCEEDINGS SETTLED AND ORDER MADE AGAINST GUARANTOR BY CONSENT – GUARANTOR LATER LEARNED THAT HE HAD NOT SIGNED THE GUARANTEE – GUARANTEE SIGNED IN GUARANTOR'S NAME BY EMPLOYEE OF GUARANTOR – WHETHER GUARANTOR EXERCISED REASONABLE DILIGENCE IN RELATION TO THE DISCOVERY OF THE SIGNING OF THE GUARANTEE – WHETHER CONSENT JUDGMENT OBTAINED UNCONSCIONABLY OR BY FRAUD.

1. At common law, subsequent to a verdict or judgment, a party may be entitled to have that judgment set aside by reason of the discovery of fresh evidence or the existence of fraud. The discovery subsequent to verdict of admissible credible evidence, which could not have been sooner discovered by the exercise of reasonable diligence in the circumstances, and which is of such probative value and significance that, taken with the evidence already given at the trial, it will in all probability be decisive of the issues between the parties in a sense opposite to that of the verdict, is a ground for the granting of a new trial. If the Court is satisfied that the fresh evidence fulfils these requirements, it will generally conclude that, therefore, the interests of justice demand that the issues be tried afresh.

***McDonald v McDonald* [1965] HCA 45; (1965) 113 CLR 529; [1966] ALR 496; 39 ALJR 179, applied.**

2. An analysis of the conduct of the guarantor generally and specifically demonstrated an absence of reasonable diligence. He never asserted that he did not sign the agreement nor question his solicitors' advice as to settlement of the claim. He took no steps to obtain a copy of the agreement to ensure that it was in fact signed by him. If he had doubts as to who had signed the document he should have made enquiries of the employees.

3. A consent judgment may only be set aside on grounds which would justify setting aside the contractual agreement upon which the settlement or compromise was based. In the context of this case, the inquiry must necessarily be as to whether the evidence disclosed a *prima facie* case that the agreement entered into between Capital Finance and Mr Paolacci the guarantor was tainted by fraud, unconscionability or mistake. Because it is the settlement agreement which underpins the consent judgment, the relevant inquiry did not involve consideration of all the circumstances surrounding the claim. Rather, it related to the events relevant to the settlement agreement. There is no evidence whatsoever of any fraud or unconscionability on the part of Capital Finance or Mr Koroneos, its solicitor, which may have induced Mr Paolacci to enter into the agreement or which may have tainted the agreement in some way.

4. A court will in certain circumstances set aside a contract on the basis of unilateral mistake, provided it is fundamental and is attended by sharp practice. Accordingly, active concealment of the true facts or inducement of the mistaken belief will be grounds for setting aside a contract. It is not necessary that a party to the contract be actually aware of the other party's mistake; it is enough that the party must have known or strongly suspected that the other party is labouring under a mistake of a fundamental nature. So silence can, in some circumstances, be enough to have a contract set aside; but only where there is evidence of knowledge or strong suspicion of such a mistake.

5. There is nothing in the material to suggest that Capital Finance or Mr Koroneos knew or suspected that Mr Paolacci (a) had not signed the guarantee; and (b) was acting under the misapprehension that he had signed the guarantee. Nor is there any evidence that there was any act on the part of Capital Finance or Mr Koroneos that induced Mr Paolacci to sign the consent orders or that, in some odd way, it had knowledge of the fact that Mr Paolacci had not signed the agreement and withheld that from him. Accordingly, there was no *prima facie* case that the consent orders entered into by the guarantor should be set aside.

J FORREST J:

Introduction

1. On the face of the document, Mr John Paolacci guaranteed and indemnified the obligations of Oxygen Print & Media Pty Ltd ("OPM") under a rental agreement entered into with Capital Finance Australia Limited ("Capital Finance") for the provision of a photocopier. OPM defaulted upon payments to Capital Finance, resulting in it issuing proceedings in the Magistrates' Court against Mr Paolacci based on the guarantee.

2. Subsequently, those proceedings were settled and a consent judgment entered into in the Magistrates' Court in favour of Capital Finance.

3. The twist in the case and the reason for this application is that the uncontested evidence before this Court is that Mr Paolacci did not sign the guarantee; rather, it was signed by one of his employees, a Mr David Ryan.

4. Mr Paolacci now relies upon two grounds upon which to set aside the judgment:

(a) That fresh evidence has emerged and this Court should set aside the judgment.

(b) That the consent judgment was procured by fraud or unconscionable conduct.

The proceedings in this Court

5. Mr Paolacci issued an originating motion on 8 August 2008 seeking to set aside orders made in the Magistrates' Court and remit the matter to the Magistrates' Court for rehearing.

6. The parties were agreed that neither s109 nor s110 of the *Magistrates' Court Act* applied to the facts in this case. No issue was taken by Capital Finance as to the form of the application made by Mr Paolacci, which sought the quashing of orders made in the Magistrates' Court based upon the grounds I have set out above.

7. It was accepted by the parties that I should determine, as a preliminary issue, whether the material provided on behalf of the plaintiff was sufficient to disclose a case to set aside the consent judgment. It was accepted by Capital Finance that this required me to take the evidence at its highest for Mr Paolacci.

8. The parties were also agreed that in the event of a finding that there was a *prima facie* case upon which the consent judgment could be set aside, then I should adjourn the matter for a further hearing at which the deponents of the affidavits would be cross-examined.

Factual background

9. OPM conducted the business known as "Oxyprint Solutions". Although Mr Paolacci was a director, the running of the business was delegated to Mr Ryan, the office manager.

10. In July 2004, OPM purchased a Canon photocopier from Telekom Pty Ltd. To finance the purchase, OPM, on the face of the document, entered into a rental agreement with Capital Finance. The agreement provided for 48 monthly payments at a rate of $1,189.50, paid in advance.

11. The rental agreement[1] is signed in two places by "Paolacci", including a signature under a provision which reads as follows:

> "By signing this schedule, the guarantor undertakes the guarantee and indemnity obligations set out in clause 24 of the terms of rental attached to this schedule."

12. It is not necessary to repeat the terms of clause 24, save to note that, by its terms, the guarantor irrevocably and unconditionally guaranteed payment of all rental payments by OPM under the agreement.

13. The photocopier was delivered to OPM and payments of rent were made between July 2004 to April 2006. In May 2006, OPM was placed in administration and no further payments were made.

14. A copy of the rental agreement is said by Capital Finance to have been sent to Mr Paolacci, after he had requested provision of the agreement, in late August 2006. He denies receipt of it.

15. Capital Finance issued proceedings in the Magistrates' Court against Mr Paolacci.[2] A defence was delivered prepared by a solicitor on his behalf. It did not contend that Mr Paolacci had not signed the guarantee but did assert "the defendant further states that the plaintiff did not at any time request the defendant to sign a personal guarantee".[3]

16. Although Mr Paolacci had been represented by solicitors, by the time the matter came on in the Magistrates' Court on 14 August, he appeared in person. He sought and obtained an adjournment of the hearing to 18 October 2007. Shortly prior to that hearing, he rang Mr Koroneos, the solicitor for Capital Finance, and told him that he did not wish to incur any further costs and wanted to settle the matter.[4] According to Mr Koroneos, Mr Paolacci was told that the matter could only be resolved by him consenting to judgment for the full amount of the claim, interests and costs, and that that, in return for a stay of 60 days being consented to, in which time a settlement proposal could be put to Capital Finance. He eventually accepted this arrangement. Consent orders were agreed upon in the following terms on 16 October 2007 and were signed by Mr Koroneos on behalf of Capital Finance and by Mr Paolacci[5]:

> "The parties consent to the following orders:
> (1) The defendant pay to the plaintiff the amount of $28,837.42 on the claim, $2,723 in interest and $8,450.80 in costs. Stay of 60 days."

These orders were entered in the register on 18 October 2007.

17. Mr Paolacci made no payments to Capital Finance, and on 4 June 2008 a creditors petition pursuant to the *Bankruptcy Act* (Cth) 1966 was served upon him.

18. In June 2008 and by chance, Mr Paolacci met a Mr David Farrugia, a former employee of OPM. Mr Farrugia has subsequently sworn an affidavit which deposes to the following matters: He, in July 2004, was a senior sales manager with OPM and was present when a representative of Telekom visited OPM's premises to discuss the sale of a photocopier and the provision of finance for it. Mr Paolacci was not present at the time. He asserts that the signatures to the rental agreement are not those of Mr Paolacci, but that the agreement was, in fact, signed by Mr Ryan, who forged Mr Paolacci's signature:

> "Dave and I signed the documents in our boardroom. John had had no involvement in arranging the deal and was not present when the documents were signed. Dave signed John's name and when I queried this Dave said that as a shareholder he had John's consent to sign. I recall us celebrating the deal that afternoon. I also recall Dave telling everyone thereafter that he had 'done that deal'. It was not until the end of June this year, when I was having a general catch-up conversation with John and he informed me of the bankruptcy proceeding and the whole saga that I became aware he had not been aware of the deal or given consent for Dave to sign his name."

19. I infer that Mr Farrugia observed Mr Ryan signing both the rental agreement and the agreement for the sale of the photocopier by Telekom. Both Mr Ryan and Mr Farrugia gave the Telekom representative their cards. The Telekom representative[6] did not query Mr Ryan signing as "John Paolacci".

20. Mr Paolacci, in his affidavit, asserts that he opposed the purchase of the photocopier and goes on to say:

> "At the time Court proceedings commenced in 2007 I believed I had not signed the guarantee and had no recollection of doing so or of receiving any explanation of such a document but I had no means of proving I had not signed any guarantee. I did not at that time hold a copy of the document. On the basis that I could not at that time prove I did not sign the guarantee my previous solicitors initially advised me to defend the matter on the basis of the Defence they filed on my behalf and later to consent to judgment in the Magistrates' Court proceeding. That was also the basis upon which they and later myself sought to negotiate a settlement of the claim but not to oppose it. I did what I was advised. After I ceased to have a solicitor I needed time to consider my options, based on the advice I had received. I did not seek further legal advice prior to consenting to judgment and in part what occurred when the matter was adjourned on 14 August and when consent judgment was

> approved on 18 October 2007 was based on what Mark Koroneos told me was required. Subsequent negotiations in 2008 by myself and by solicitors I instructed earlier this year were conducted on the same premise."

21. The guarantee also contains several factual errors. Mr Paolacci's middle name is incorrectly noted as Mark. The address of 1/53 Barkly Street on the guarantee is not his address, but it is close to where he used to live.

22. Mr Paolacci also asserts that he did not sight the rental agreement at any time prior to the 2007 Court proceeding and goes on to say:

> "My then solicitors advised me that based on their viewing of the copy document they I understood they held by way of discovery it looked like my signature on the document and as I depose in paragraph 12 of this affidavit they subsequently advised me that unless I had proof that it was not my signature I should settle the matter rather than proceed to trial. I accepted their advice and also say:
>
> (a) As far as I am aware they took no steps to determine if it was my signature even though my instructions were that I did not recall signing the document;
>
> (b) At that time and until I caught up with David Farrugia by chance in late June 2008 I had no knowledge of and no means of determining who signed the document and who else was present when it was signed."

23. His contention is now:

> "I have read the affidavit sworn by Mark Koroneos 8 September 2008. My response is that the premise of his entire affidavit is that he does not accept either the new evidence I depose to in this affidavit or how that has changed what had previously occurred, including how and why the proceedings and negotiations had been conducted in that manner. Had I been aware in 2007 of what David Farrugia told me this year and been in a position to act on that information, there would have been no consent judgment or adjournment on 14 August 2007. It is clear from the matters deposed by David Farrugia in his affidavit filed in support of my application in this proceeding that Capital Finance relied on the Telekom representative, who had the Capital Finance Rental Agreement with her to be signed at the meeting, to be their agent. Capital Finance have produced no affidavit that disputes what David Farrugia deposes occurred on 26 July 2004."

24. He does not, however, dispute Mr Koroneos' version of the events surrounding the signing of the consent orders.

25. On 3 July 2008, Mr Paolacci issued an application in the Magistrates' Court proceeding seeking that the consent orders be set aside. That application was withdrawn on 8 August 2008, the day upon which these proceedings were commenced.

Fresh admissible evidence obtained after judgment

26. At common law, subsequent to a verdict or judgment, a party may be entitled to have that judgment set aside by reason of the discovery of fresh evidence or the existence of fraud. In *McDonald v McDonald*,[7] Barwick J said of fresh evidence:

> "The discovery subsequent to verdict of admissible credible evidence, which could not have been sooner discovered by the exercise of reasonable diligence in the circumstances, and which is of such probative value and significance that, taken with the evidence already given at the trial, it will in all probability be decisive of the issues between the parties in a sense opposite to that of the verdict, is a ground for the granting of a new trial. If the Court is satisfied that the fresh evidence fulfils these requirements, it will generally conclude that, therefore, the interests of justice demand that the issues be tried afresh."

27. It can be accepted that the evidence of Mr Farrugia is admissible and, on its face, credible and probative; if accepted, it may well be decisive of the issues between the parties. However, Mr Paolacci must also establish that he exercised reasonable diligence in relation to the discovery of the evidence of Mr Farrugia; the question is whether, by the exercise of reasonable diligence, Mr Farrugia's evidence could have been placed before the Magistrates' Court in August or October 2007.

28. An analysis of the conduct of Mr Paolacci generally and specifically in relation to Mr Farrugia demonstrates an absence of such diligence.

29. Mr Paolacci did not at any time during the course of the Magistrates' Court proceedings assert that he had not signed the agreement. Indeed, to the contrary, his case was (or seemed to have been) that he was not requested to sign a guarantee, nor were the contents of the rental agreement, including particularly the presence of the guarantee, drawn to his attention.

30. He did not question his solicitors' advice as to settlement on the basis that he could not prove that he did not sign it. Despite his asserted doubts as to who signed the document, he took no steps to obtain a copy or sight the original to ensure that it was, in fact, his signature. This when he was the one person who could positively identify his signature. If he had any doubt about whether he had signed the document at that time, one would have thought that he would have made inquiries of employees (such as Mr Ryan or Mr Farrugia) as to the circumstances surrounding the execution of the rental agreement and guarantee, particularly where the document, on his account, had several other anomalies.

31. The above matters provide the background to the principal inquiry, namely, whether Mr Paolacci could have, with reasonable diligence, procured the evidence of Mr Farrugia at the trial. The only explanation for failing to speak to Mr Farrugia is an assertion in his affidavit that he had no knowledge of and no means of determining who signed the document and who else was present when it was signed. The high point of his affidavit is that, after Mr Farrugia ceased to be employed by OPM, Mr Paolacci had no contact with him, (who had not left forwarding details, "as far as he was aware"). There is a deafening silence as to any steps taken by him to locate Mr Farrugia or to contact him prior to the settlement of the claim. There is no suggestion in Mr Farrugia's affidavit that he was uncontactable or reticent to assist. I infer that neither he nor his solicitors did anything to track down Mr Farrugia.

32. In summary, and notwithstanding the turn of events, I am not persuaded that reasonable diligence was displayed by Mr Paolacci to adduce evidence from Mr Farrugia prior to the hearing.

33. I reject this ground of his application.

Consent judgment obtained unconscionably or by fraud

34. In *Siebe Gorman & Co Ltd v Pneupac Ltd*,[8] Lord Denning said as follows:

> "There are two meanings to the words 'by consent …'. One meaning is this: the word 'consent' may evidence a real contract between the parties. *In such a case the court will only interfere with such an order on the same grounds as it would with any other contract.* The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order and that is made by the court without the consent of the parties." (Emphasis added.)

35. A consent judgment may only be set aside on grounds which would justify setting aside the contractual agreement upon which the settlement or compromise was based.[9] In the context of this case, the inquiry must necessarily be as to whether the evidence discloses a prima facie case that the agreement entered into between Capital Finance and Mr Paolacci was tainted by fraud, unconscionability or, as matters emerged in argument, mistake.[10] Because it is the settlement agreement which underpins the consent judgment, the relevant inquiry does not involve consideration of all the circumstances surrounding the claim. Rather, it must relate to the events relevant to the settlement agreement.

36. There is no evidence whatsoever of any fraud or unconscionability on the part of Capital Finance or Mr Koroneos, its solicitor, which may have induced Mr Paolacci to enter into the agreement or which may have tainted the agreement in some way. The affidavit of Mr Paolacci does not suggest any such conduct.

37. Although not mentioned in the summons or the originating motion, in the course of argument a further basis for setting aside the agreement, and therefore the order, emerged: namely, that of unilateral mistake. The identified mistake, one may assume, was that Mr Paolacci believed that he had signed the guarantee when in fact he had not.

38. In Australia, a court will, in certain circumstances, set aside a contract on the basis of unilateral mistake, provided it is fundamental and is attended by sharp practice. In *Taylor v Johnson*[11] the High Court said:

> "The particular proposition of law which we see as appropriate and adequate for disposing of the present appeal may be narrowly stated. It is that a party who has entered into a written contract under a serious mistake about its contents in relation to a fundamental term will be entitled in equity to an order rescinding the contract if the other party is aware that circumstances exist which indicate that the first party is entering the contract under some serious mistake or misapprehension about either the content or subject matter of that term and deliberately sets out to ensure that the first party does not become aware of the existence of his mistake or misapprehension. What we have said is sufficient to demonstrate the broad basis of support which the authorities provide for that proposition. Moreover, and perhaps more importantly, it is a principle which is best calculated to do justice between the parties to a contract in the situation which it contemplates. In such a situation it is unfair that the mistaken party should be held to the written contract by the other party whose lack of precise knowledge of the first party's actual mistake proceeds from wilful ignorance because, knowing or having reason to know that there is some mistake or misapprehension, he engages deliberately in a course of conduct which is designed to inhibit discovery of it. Our comment can, for present purposes, be limited in its application to the case where the second party has not materially altered his position and the rights of strangers have not intervened."

39. In *Easyfind (NSW) Pty Ltd v Patterson*,[12] Young J said:

> "In Australia a contract may be avoided not only where the mistake was induced by the person in the part of the present plaintiff, but also where he has deliberately cloaked the mistake or has otherwise behaved unconscionably."

40. Accordingly, active concealment of the true facts or inducement of the mistaken belief will be grounds for setting aside a contract. It is not necessary that a party to the contract be actually aware of the other party's mistake; it is enough that the party must have known or strongly suspected that the other party is labouring under a mistake of a fundamental nature.[13] So silence can, in some circumstances, be enough to have a contract set aside; but only where there is evidence of knowledge or strong suspicion of such a mistake.

41. There is nothing in the material to suggest that Capital Finance or Mr Koroneos knew or suspected that Mr Paolacci:

(a) had not signed the guarantee; and
(b) was acting under the misapprehension that he had signed the guarantee.

Nor is there any evidence that there was any act on the part of Capital Finance or Mr Koroneos that induced Mr Paolacci to sign the consent orders or that, in some odd way, it had knowledge of the fact that Mr Paolacci had not signed the agreement and withheld that from him.

42. I should add, for the sake of completeness, that whether the conduct of the Telekom representative could be described as culpable or dishonest is not at all clear. It was Mr Ryan, the OPM employee, who signed the document; whether the Telekom representative understood Mr Ryan's true identity and the fact that he was signing the name of another is not apparent. There is no suggestion that the representative actively assisted in the forgery or participated in it. Moreover, there is no evidence that any officer of Capital Finance (at any level) was aware that the signature on the rental agreement was not that of Mr Paolacci. Nor is there any evidence that any such officer was aware that the Telekom representative had been present when Mr Ryan effected Mr Paolacci's signature.

43. There is no *prima facie* case to set aside the agreement and therefore the consent judgment stands.

Summary

44. I am not persuaded that there is a *prima facie* case that the consent orders entered into on 18 October 2007 in the Magistrates' Court should be set aside. Neither ground has been made out and the originating motion and summons should now be dismissed.

45. The parties may, if they wish, make submissions as to costs.

[1] Exhibit MSK2 to the affidavit of Mr Mark Koroneos.
[2] Exhibit MSK 1 to the affidavit of Mr Koroneos.
[3] The defence is consistent with a letter written by the solicitor for Mr Koroneos which, rather than taking up the point that he did not sign the guarantee, asserts that he was not advised that he was signing a guarantee.
[4] Affidavit of Mr Koroneos, [9].
[5] Exhibit MSK 5 to the affidavit of Mr Koroneos.
[6] Sadly, the Telekom representative is now deceased.
[7] [1965] HCA 45; (1965) 113 CLR 529; [1966] ALR 496; 39 ALJR 179, 532. See also Menzies J at 542. See also *Clark v Stingel* [2007] VSCA 292 [25], *Bourke v Beneficial Finance Corp* (1993) 47 FCR 264, 271 – 272; (1994) 124 ALR 716; *Munroe, Schneider Associates (Inc) v No.1 Raberem Pty Ltd (No.2)* [1992] FCA 367; (1992) 37 FCR 234; (1992) 109 ALR 137.
[8] [1982] 1 All ER 377; [1982] 1 WLR 185, 189 – 190.
[9] *Harris v Caladine* [1991] HCA 9; (1991) 172 CLR 84; [1991] FLC 92-217; (1991) 99 ALR 193, 205; (1991) 65 ALJR 280; 14 Fam LR 593; *DCT v Chamberlain* [1990] FCA 71; (1990) 26 FCR 221, 230; (1990) 93 ALR 729; 21 ATR 133; *Huddersfield Banking Co Ltd v Henry Lister & Son Ltd* [1895] 2 Ch 273, 280.
[10] See *Mintel International Group Ltd v Mintel (Australia) Pty Ltd* [2000] FCA 1410; (2000) 181 ALR 78, [35].
[11] [1983] HCA 5; (1983) 151 CLR 422, 432; 45 ALR 265; (1983) 57 ALJR 197.
[12] (1987) 11 NSWLR 98, 107 – 108; 10 IPR 464.
[13] *Misiaris v Saydels Pty Ltd* [1989] NSW Conv R 55-474; [1989] ANZ Conv R 403; *International Advisor Systems Pty Ltd v XYYX Pty Ltd* [2008] NSWSC 2, [22] – [25].

APPEARANCES: For the plaintiff Paolacci: Mr M Harris, counsel. Impex Lawyers and Advisers, solicitors. For the defendant Capital Finance Australia Limited: Mr A Schlicht, counsel. Koroneos Lawyers.
