

CLONE PTY LTD v PLAYERS PTY LTD (IN LIQUIDATION)
(RECEIVERS & MANAGERS APPOINTED) & ORS (A22/2017 & A23/2017)

Court appealed from: Full Court of the Supreme Court of South Australia [2016] SASCFC 134

Date of judgment: 8 December 2016

Date special leave granted: 16 June 2017

The appellant ('Clone') was the owner of premises at Pirie Street, Adelaide which it leased to the 1st respondent ('Players'). Clone and Players entered into an agreement to lease the premises before ultimately executing a memorandum of lease. Clause 11(i) of the agreement to lease provided for transfer, on determination of the lease, by Players to Clone of any liquor and gaming machine licences in respect of the premises. A dispute later arose as to whether the word "NIL" in the phrase "for NIL consideration" in clause 11(i) had been struck through by Players prior to execution of the agreement.

In 2004, Clone instituted an action against Players and its directors seeking inter alia a declaration that they were obliged to deliver up the licences at the expiration of the lease. At trial, the original agreement to lease could not be located, but two photocopies were tendered. During evidence in chief of the 2nd respondent Mr Griffin, Clone's lawyers learnt that there was a photocopy of the agreement to lease (the third copy) in the possession of the 5th respondent, The Liquor and Gambling Commissioner ('the Commissioner'). Clone inspected the Commissioner's file containing that document at his premises, but did not discover or disclose the existence of the third copy. During cross-examination of Mr Griffin, Clone issued a notice to produce to the Commissioner, who delivered several files to the Court. Unbeknown to Clone, one of those files contained a fourth photocopy of the agreement to lease. Mr Griffin was cross-examined concerning plans in those files but the notice to produce was not called on and no explicit disclosure was made by Clone of its issue.

Vanstone J ('the trial Judge'), determined in favour of Clone, finding that the word "NIL" had not been struck through by Players. Players' appeal to the Full Court was dismissed in April 2006. Subsequently, in 2009, Players learnt of the existence of the third and fourth copies of the agreement to lease and applied to set aside the judgment (both by way of an interlocutory application in the original action and by way of a new action).

Hargrave AuxJ held that Clone breached an obligation to discover the third copy because it was in its power; this amounted to serious malpractice; absent the malpractice there was a reasonable possibility that there would have been a different result; and that the discretion should be exercised to set aside the judgment and order a new trial on the relevant issues.

Clone's appeal to the Full Court (Blue and Stanley JJ, Debelle AJ dissenting) was unsuccessful. The Full Court found Clone's conduct at trial had misled the trial Judge to believe that only two photocopies of the agreement to lease were

available, when Clone knew that the third photocopy was available. Hargrave AuxJ did not err in concluding that there was a reasonable possibility that absent the malpractice the result at trial would have been different. The Full Court held that on an application to set aside a perfected judgment, it is not essential for the applicant to demonstrate that it did not fail to exercise reasonable diligence or that the result would probably have been different but for the malpractice. Any failure to exercise reasonable diligence is a factor relevant to the exercise of the discretion. If the result was incapable of being affected by the malpractice, the judgment will not be set aside. In the present case, Hargrave AuxJ did not err in the exercise of his discretion to set aside the judgment.

Debelle AJ (dissenting) found that Clone's conduct was not misleading, and the trial judge erred in concluding that there was a reasonable possibility that absent the malpractice the result at trial would have been different.

The grounds of appeal include:

- The Court erred in that the Supreme Court's power to set aside perfected orders, in its equitable jurisdiction outside a statutory appeal, is limited to fraud and does not extend to forms of malpractice not amounting to fraud.