



HIGH COURT OF AUSTRALIA

21 March 2018

CLONE PTY LTD V PLAYERS PTY LTD (IN LIQUIDATION) (RECEIVERS & MANAGERS
APPOINTED) & ORS
[2018] HCA 12

Today the High Court unanimously allowed two appeals from the Full Court of the Supreme Court of South Australia. The Court held that the equitable power of the Supreme Court to set aside its own perfected judgment required actual fraud by the party who succeeded at trial and did not extend to misconduct not amounting to fraud. The Court also held that it was not a precondition to the exercise of the power that the party seeking to set aside the judgment exercised reasonable diligence to discover the fraud.

In 1994, the first respondent ("Players") negotiated an agreement to lease premises from the appellant ("Clone"). The premises would become the Planet Hotel, a licensed hotel and gaming premises. Clause 11(i) of the agreement to lease provided that "[t]he Lessee will upon expiration or early determination of the Lease transfer to the Lessor any Liquor Licences or gaming machine Licences held in respect of the premises for NIL consideration". In 1995, Players took possession of the premises and the parties executed a memorandum of lease which contained clauses consistent with cl 11(i).

In 2004 Clone commenced a proceeding against Players in the Supreme Court. Players alleged, among other things, that it struck through the word "NIL" when three of its directors executed the agreement to lease, with the result that consideration was payable to it by Clone under the agreement to lease. It sought rectification of the memorandum of lease. The original agreement to lease was not in evidence at the trial but Clone and Players each discovered and tendered a copy. Each copy showed the word "NIL" with a faint line through the letters "NI" and over the top of the word "for". Clone argued that the line had been made accidentally or mechanically. Clone called evidence that it could not locate any other copies and its senior counsel made calls for Players to produce copies of the agreement.

During the trial, Clone's instructing solicitor asked an employee of the Liquor and Gambling Commissioner to search the Commissioner's files for any copies of the agreement to lease. The employee advised that she had located a copy ("the third copy") on a different file to the "Planet Hotel premises file". Upon inspection of that copy, Clone's junior counsel noticed a line through the word "NIL". He did not photocopy it, to avoid it becoming discoverable, and asked the Commissioner's employee to inform him of any inspection by Players' solicitors. The Commissioner's employee complied with that request when Players' solicitors subsequently inspected the Commissioner's files but only requested, and were shown, the Planet Hotel premises file. Clone's principal solicitor then gave a notice to the Commissioner to produce all "Planet files" in the Commissioner's possession, which the solicitor advised required production of the Planet Hotel premises file only. Nonetheless, another file was also produced to the Court, which included a fourth copy of the agreement to lease.

Clone was successful at trial on almost all issues. Relevantly, the trial judge held that Clone was not obliged to pay reasonable consideration for the licences, in part on the basis of her Honour's conclusion that the word "NIL" had not been struck through in the agreement to lease. Players appealed to the Full Court, which upheld this conclusion.

After the proceedings concluded, Players learned that Clone knew about the third copy and that the fourth copy had been contained in a file produced to the Court, but was not called upon by Clone. In 2010, Players brought two applications to set aside the judgment against it and obtain an order for a new trial: one application in the original proceeding, and one fresh application. Players alleged that the judgment could be set aside on the basis of Clone's malpractice, which malpractice it alleged on three grounds. Both the primary judge and a majority of the Full Court held that Clone had engaged in malpractice and that its misconduct was a sufficient basis to enliven the Court's discretionary power to set aside the judgment. A new trial was ordered.

By grant of special leave, Clone appealed to the High Court on two grounds: (i) that the Supreme Court's equitable power to set aside perfected orders is limited to fraud and does not extend to malpractice; and (ii) that the Supreme Court's power to set aside its perfected judgment on the ground of malpractice was conditional upon proof that, absent the malpractice, the judgment would probably have been different, and the party applying to set aside the judgment exercised reasonable diligence.

The Court allowed the appeal on the first ground. The Court held that the equitable power in this case was limited to actual fraud, although there are other discrete grounds to set aside a perfected judgment which were not in issue. Fraud must be clearly pleaded and proved, which had not occurred in these proceedings. The Court also stated that the proper application by Clone was a fresh action to rescind the perfected orders, rather than an application in the original proceeding. In the result, the appeal was allowed with costs.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*