

Clone Pty Ltd v Players Pty Ltd (In Liquidation) (Receivers & Managers Appointed) [2018] HCA 12

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Facts

- Clone Pty Ltd (lessor) entered into a lease agreement with Players Pty Ltd (lessee) for a premises on Pirie Street in Adelaide.
- The proposal was that this premises would become the "*Planet Hotel*" - a licensed hotel with gaming machines.
- Clause 11(i) of the draft lease stated that "*the Lessee will upon expiration or earlier determination of the Lease transfer to the Lessor any Liquor Licences or gaming machine Licences held in respect of the premises for NIL consideration.*"
- Players claimed that "*for NIL*" had been crossed out during the various amendments to the lease.
- The original lease had been lost by the time proceedings were commenced in 2004. On the two photocopies of the lease, there was a faint line crossed through the letters '*for NIL*'. Vanstone J of the South Australia Supreme Court rejected Players' claim for rectification on the basis that the marks over the word '*NIL*' on two photocopies discovered by the parties were artefacts, a ruling which was upheld on appeal.
- However, Clone's solicitor had found a third copy of the lease at the Liquor and Gambling Commissioner.
- Clone's junior barrister inspected that copy, and saw a line through the word '*NIL*'. He did not photocopy it so that it would not be discoverable. He also asked the Commissioner's employee to tell him if Players' solicitors wanted to inspect the document. The employee did this.
- Players' solicitors asked to inspect the Planet Hotel file, and were given that file only. Later, Clone's principal solicitor served the Commissioner with a notice to produce all "*Planet files*". They only originally wanted the Planet Hotel file, but another file was also produced which included a fourth copy of the agreement to lease.
- Players sought to set aside the judgment and institute fresh proceedings on the basis of Clone's malpractice for not discovering the third and fourth copies of the lease. Players was permitted to reopen the proceedings against Clone.
- Clone appealed to the High Court, claiming that the Supreme Court's equitable power to set aside perfected orders is limited to fraud and did not extend to malpractice which was not fraud.
- Clone also claimed that even if the Supreme Court had a power to set aside its perfected judgment on the ground of malpractice short of fraud, this was conditional upon proof that, but for the malpractice, the irregularly obtained judgment would likely have been different, and that the party applying to set aside the judgment had exercised reasonable diligence.

Issues

- Was the Supreme Court's equitable power to set aside perfected orders limited to fraud only?
- If the Supreme Court could set aside judgment for malpractice which was not fraud, was it conditional upon proof that, but for the malpractice, the judgment would have been different and the party needed to have exercised reasonable diligence.

Held

- The High Court unanimously allowed the appeal.
- Appeals could be allowed where there was an error of law or where fresh evidence was discovered. Relevant errors of law included misdirection, "*misreception*" of evidence, and wrongful rejection of evidence, as well as "*surprise, malpractice or fraud*".
- It was necessary to show that the party wishing to reopen the matter had exercised "*reasonable diligence*" to obtain the evidence and that the fresh evidence would have reasonably, clearly changed the result.
- Because Players had applied for the Supreme Court to exercise its equitable power to set aside a decree on the basis of fraud, it was necessary for Players to properly plead fraud, with proof of actual fraud. Players did not do this so the appeal was allowed.

Full Text

The full text is available here:

<http://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/cth/HCA//2018/12.html>

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