SUPREME COURT OF QUEENSLAND

CITATION:	*Anvil Finance P/L v Vantage Capital Ltd (in liq) & Ors* [2003] QCA 300
PARTIES:	**ANVIL FINANCE PTY LIMITED** ACN 069 034 242 (plaintiff/respondent) v **VANTAGE CAPITAL LIMITED (in liquidation)** ACN 085 768 878 (first defendant/first appellant) **KONSTANTINOS SAKKAS** (second defendant/second appellant) **DAVID LESLIE GILLARD** (third defendant) **WARREN BRAIN** (defendant by counter-claim)
FILE NO/S:	Appeal No 11082 of 2002 DC No 1003 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED EX TEMPORE ON:	17 July 2003
DELIVERED AT:	Brisbane
HEARING DATE:	17 July 2003
JUDGES:	Davies and Jerrard JJA and Helman J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Allow appeal by second appellant** **2. Set aside judgment against second appellant** **3. Dismiss application for summary judgment against second appellant** **4. Dismiss appeal by first appellant** **5. Reserve costs of application in the District Court and of appeal**
CATCHWORDS:	APPEAL AND NEW TRIAL - APPEAL - GENERAL PRINCIPLES - ADMISSION OF FRESH EVIDENCE - EVIDENCE NOT AVAILABLE AT THE HEARING - WHEN ADMISSIBLE - where parties entered into written contract for respondent to purchase Put Option - where learned trial judge held that plaintiff/respondent did not have

any real prospects of defending claim against it - where appeal based on submission that fresh evidence show that appellant/respondent did have real prospect of success - where credible explanation for failure to have discovered fresh evidence prior to judgment - whether fresh evidence relevant and probative

COUNSEL:	M D Martin for the appellants J P Murphy for the respondent
SOLICITORS:	McCowans (Southport) for the appellants Porter Davies for the respondent

DAVIES JA: On 7 November 2002, the District Court gave summary judgment for the respondent, Anvil Finance Pty Ltd, in the amount of $197,500, against the appellants, Vantage Capital Limited and Konstantinos Sakkas. The court also struck out the counterclaim by Vantage against Anvil and Warren Brain. Vantage and Sakkas appealed only against the judgment against them. Vantage did not appeal against the dismissal of its claims.

As it turns out, we were informed this morning that Vantage is now in liquidation and the liquidators have indicated that they are not interested in proceeding with this appeal on behalf of Vantage.

Anvil had claimed $197,500 against Vantage, pursuant to a contract and in the alternative, damages under the *Trade Practices Act* 1974. It had claimed the same damages against Sakkas.

The learned primary judge concluded that Vantage did not have any real prospect of successfully defending either claim against it and that Sakkas did not have any real

prospect of defending the claim against him. He concluded that there was no need for a trial of any of those claims and, accordingly, gave judgment as I have indicated.

The appeal to this Court is now an appeal by Sakkas only and it is based on a submission that - primarily - that the appellant should be allowed to adduce fresh evidence in this appeal, namely a Put Option between Anvil and Vantage and that once that Put Option agreement is admitted, this Court should be satisfied that Sakkas had a real prospect of successfully defending the claims against him.

That Put Option agreement is unstamped. Mr Martin, on behalf of Sakkas, has indicated orally that his solicitor undertakes to stamp the document and that a written undertaking to that effect will be filed in this Court.

I should add that the appellant, Sakkas, has also appealed and continues to argue the appeal, based on the original evidence before the learned primary judge, but I do not think it is necessary to consider that basis this morning.

It is necessary, however, before turning to the new evidence basis, to say something about the original transaction. Anvil's claim was pursuant to a written contract dated 2 April 2001. That contract had four essential terms:

(1) that Anvil would pay $197,500 to Vantage, to purchase a put option, in respect of certain property;

(2) that Vantage would provide loan funds to purchase the property;

(3) that pending settlement of the loan Vantage would not use the sum paid by Anvil; and

(4) that 31 days after entering into that put option, if the loan did not proceed, the sum would be refunded.

Vantage admitted a contract in those terms, but alleged it had been varied in two respects. It also conceded that absent such variation, Anvil was entitled to payment for the sum for which judgment was given against it.

The variations alleged by Vantage, as appears to have been ultimately pleaded by it, were to paragraphs 3 and 4 of those which I have just enumerated.

It was alleged that those terms were varied by an oral agreement made between Brain on behalf of Anvil and Gillard on behalf of Vantage, in or about April 2001 and this is the way it was pleaded:

> "to provide for the immediate use by [Vantage] of the sum of $197,500, received from [Anvil] to purchase the Put Option."

It was alleged that this was subsequently recorded in writing in two inter office memos of Vantage, dated 1 June 2001 and

11 July 2001, to which it is unnecessary to turn for present purposes.

With that background then I turn to the basis of this appeal, based on an application to adduce fresh evidence. Sakkas and Sakkas' wife have each sworn to circumstances in which, after the hearing of and judgment in the summary judgment application, the Put Option agreement exhibited to Sakkas' affidavit came into their possession. It is unnecessary to set out those circumstances here. It is sufficient to say that they provide a credible explanation for their failure to have discovered it before then. In order to determine whether the document is both relevant and probative it is necessary to say a little more about it.

The Put Option agreement is dated 12 April 2001 and is executed by Anvil, Mr Brain and Vantage. By it Vantage granted a Put Option to Anvil to sell the property described in the agreement of 2 April to Vantage on terms and conditions set out in the agreement.

The option fee is $197,500 and the commencing valuation is $2,500,000. It is plain that this is the Put Option referred to in the agreement dated 2 April 2001.

The Put Option agreement relevantly provided:

"2.1 Grant

Vantage grants to [Anvil] an option to sell the Property to Vantage on terms and conditions set out in this deed.

2.2 Payment of Option Fee

The Option Fee (together with the amount payable by [Anvil] to Vantage under GST clause 12) must be paid by [Anvil] to Vantage on the Commencement Date."

Importantly, in cl 2.4, it was stated that the option fee was non-refundable, regardless of whether or not the Put Option was exercised.

The "Commencing Date" was defined as the date of the deed. Prima facie then, it operated from 12 April 2001 and as Mr Murphy has pointed out, on or by that date, according to Sakkas, the sum of $197,500 had been paid by Anvil.

The provisions of the agreement of 2 April 1991 envisaged that funds to pay for the Put Option would be deposited in a separate bank account, to be held until settlement, presumably by advancement of the loan, was effected and the agreement also provided that 14 days after lodgment of the Put Option funds Vantage would give 14 days notice of drawdown availability of the loan and notify that the loan funds were held in a nominated bank account.

These provisions of the agreement of 2 April may well cause a court to conclude that the Put Option agreement was subject to settlement of the purchase of the property,

including drawdown of the loan funds. And Anvil may be able to show that, to the extent that the Put Option is at variance with the earlier agreement, there was no consideration. But on its face, the Put Option, which the parties executed after the agreement of 2 April, is unconditional and makes the sum of $197,500 non-refundable.

It follows, it seems to me, that the Put Option agreement is both relevant and probative and that, on the basis of it, the judgment against Sakkas should be set aside.

Accordingly, I would make the following orders:

1. Allow the appeal by Sakkas;

2. Set aside the judgment against him;

3. Dismiss the application for summary judgment against him;

4. Dismiss the appeal by Vantage.

I raised with both counsel the question of costs and in my view, because the judgment against Sakkas is set aside, at least partly and it seems to me substantially on the basis of the Put Option agreement which was raised in this Court for the first time on 1 June, I would reserve the costs of the application in the District Court and of this appeal.

JERRARD JA: I agree. I add only the observation that it may be that upon examination, the Put Option has insufficient signatures to be executed by Vantage, but that remains to be determined.

HELMAN J: I agree with the orders proposed by Mr Justice Davies and with his reasons.

DAVIES JA: The orders are as I have indicated.