IN THE SUPREME COURT OF QUEENSLAND No. 4461 of 1983

FULL COURT

BEFORE:

Mr. Justice Connolly

Mr. Justice Thomas

Mr. Justice de Jersey

BRISBANE, 2 MAY 1986

BETWEEN:

GENERAL CREDITS LIMITED (Plaintiff) Respondent

-and-

SUSAN ELIZABETH EBSWORTH also known as SUSAN ELIZABETH HARRISON (Defendant) Appellant

JUDGMENT

MR. JUSTICE CONNOLLY: In this case, I would dismiss the appeal, with costs. I agree in the reasons of my brother de Jersey, which I publish.

MR. JUSTICE THOMAS: I agree with the reasons of my brother de Jersey which have just been published, and with the order proposed.

MR. JUSTICE CONNOLLY: The order of the Court will be: appeal dismissed, with costs.

It not being opposed, the Court will order that execution of the judgment be stayed for 14 days, and if within that time application be made to the High Court of Australia for leave to appeal against the judgment until the hearing by the High Court of the application for leave, or further earlier order.

IN THE SUPREME COURT OF QUEENSLAND Writ No. 4461 of 1983

FULL COURT

BETWEEN:

GENERAL CREDITS LIMITED (Plaintiff) Respondent

AND:

SUSAN ELIZABETH EBSWORTH also known as SUSAN ELIZABETH HARRISON (Defendant) Appellant

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CONNOLLY J.

THOMAS J.

de JERSEY J.

Reasons for judgment delivered by de Jersey J. on 2nd May, 1986. Connolly J. and Thomas J. concurring with those reasons.

"Appeal dismissed with costs. Order that execution of the judgment be stayed for 14 days, and if within that time application be made to the High Court of Australia for leave to appeal against the judgment, an extension of that

stay until the hearing by the High Court of the application for leave or further earlier order."

IN THE SUPREME COURT OF QUEENSLAND No. 4461 of 1983

Before the Full Court

Mr. Justice Connolly

Mr. Justice Thomas

Mr. Justice de Jersey

BETWEEN:

GENERAL CREDITS LIMITED (Plaintiff) Respondent

AND:

SUSAN ELIZABETH EBSWORTH also known as SUSAN ELIZABETH HARRISON (Defendant) Appellant

JUDGMENT - de JERSEY J.

Delivered the 2nd day of May 1986.

CATCHWORDS:

Appeal against judgment by consent; impeachment of consent order; unilateral mistake; prod of absence of consideration for compromise agreement; whether shown plaintiff had no honest belief in claim, and whether it was vexatious.

Counsel: Mr. Robin Q.C. & Mr. Evans for Appellant
Mr. Dutney for Respondent
Solicitors: MacGillivray & Co. for Respondent
Hearing dales: 23rd April, 1986.

IN THE SUPREME COURT OF QUEENSLAND No. 4461 of 1983

FULL COURT

BETWEEN:

GENERAL CREDITS LIMITED (Plaintiff) Respondent

AND:

SUSAN ELIZABETH EBSWORTH also known as SUSAN ELIZABETH HARRISON (Defendant) Appellant

JUDGMENT - de JERSEY J.

Delivered the day of 1986.

On 12th March, 1985 the appellant consented to the entry of judgment in this action, in the respondent's favour, in the amount of $44,446.80. She now appeals by leave (s. 9 Judicature Act 1876) against that judgment.

The respondent had issued its writ on 11th October, 1983. The writ claimed $45,694.56, together with interest at 19% per annum from the date of the writ to judgment. The claim was based on a guarantee dated 20th January, 1977 allegedly given by the appellant. The guarantee related to the liability of a company, Bruce Williams Pty. Ltd., under a mortgage securing repayment of moneys lent by the respondent. The mortgage provided for interest at 19% per annum on moneys due.

The appellant delivered a defence on 28th October, 1983 denying the alleged guarantee, and contending that the mortgagor owed the respondent a sum considerably less than the $45,694.00 claimed. The respondent delivered a reply on 7th November, 1983, and mutual discovery then took place.

The amount of the judgment which was entered by consent on 12th March, 1983 is $44,446.80. That is substantially less than the amount claimed in the writ. By 12th March, 1985 the amount claimed, including interest, would have exceeded $57,000.00. There is evidence before us that the claim was reduced prior to judgment by the exclusion of an amount of $1,147.76 representing the

alleged costs to the respondent of making certain enquiries. There had been discussions between the solicitors for the appellant and the respondent as to the correct amount due to the respondent: those discussions apparently led to the exclusion of that sum. A letter dated 5th March, 1985 from the appellant's then solicitors to the solicitors for the respondent referred to the discussions, and sought details of a particular component of the claim. The letter confirmed that the appellant had instructed her solicitors to consent to judgment, and requested that the respondent's solicitors "withhold from briefing counsel for the hearing date". 12th March, 1985 was the date which had earlier been appointed for the trial of the action. The letter also made mention of "terms of settlement".

The question arose on the hearing of the appeal whether the appellant's consenting to judgment on 12th March, 1985 should be regarded merely as a conceding of the plaintiff's claim, or whether it should be seen as expressing an agreement between the appellant and the respondent. The evidence to which I have just referred suggests that the consent order should be seen as the expression of an underlying agreement between the parties; for its part, the respondent agreed not to pursue any part of its claim in excess of the amount of the proposed judgment, and the appellant for her part agreed to the entry of judgment to the extent of $44,446.80. I return later to the significance of this conclusion.

I will indicate now the events leading to the appellant's dissatisfaction with the judgment.

The appellant did sign an instrument of guarantee dated 20th January, 1977. The named guarantors did not, however, include her. The named guarantors are Bruce William Ebsworth (the appellant's present husband), and Elma May Ebsworth, his mother. The appellant signed the document in the place apparently intended for the signature of Elma May Ebsworth. The appellant says, in an affidavit which is before us, that she signed on Mrs. Ebsworth's

behalf, and that she made this clear to the respondent's representative at the time she signed it. She says that she made it clear to him that she was not assuming personal liability.

Why, then, did the appellant consent to judgment? There is no issue but that the appellant did consent to the entry of judgment. She instructed her then solicitors in writing dated 4th March, 1985 to do so.

The appellant says that on 4th March, 1985, 8 days before the entry of judgment, she attended at her former solicitors' offices. According to the appellant's affidavit, her solicitor told her that she had no defence to the respondent's claim. The solicitor put the matter to the appellant on the basis that because she had signed the guarantee, she was liable to the respondent. The solicitor urged her to consent to judgment, which he said would amount to no more than a “paper judgment”, because “they do not enforce such judgments against ladies or their property”. The solicitor said that he did not want to go to Court because he would “look a fool ... because it's so clear that your signature is there and that's all there is to it”. He suggested that after judgment was entered, the appellant might appeal, but he said that he would not be prepared to act further for her. Feeling that she had no alternative, but “much against (her) own feelings in the matter”, the appellant signed the written instruction to the solicitor to consent to judgment. He had prepared that written instruction for her signature prior to her arrival at his offices that day.

Now it is clear that that advice, if given by the solicitor, was incorrect. The mere circumstance of the appellant's signature on the guarantee could not be conclusive of her liability upon it. No doubt it is true to say that the signature of the party charged ordinarily imports personal liability: Leadbitter v. Farrow (1816) 5 M. & S. 345, 349; 105 E.R. 1077, 1079. There are, however, strong indications in this instrument of guarantee - which

an ordinarily prudent solicitor would have immediately appreciated - that the appellant was signing only as agent for Mrs. E.M. Ebsworth. In particular, it is Mrs. E.M. Ebsworth, not the appellant, who is named as the surety, and it is her name which appears in typescript opposite the position apparently intended for signature.

The appellant is naturally dissatisfied with the judgment. Since late last year, the respondent has been attempting to execute upon it. There is currently a stay on execution.

I said earlier that the consent order for judgment should be seen as expressing an agreement between the parties. It may be styled a compromise agreement: the respondent agreed not to pursue the excess of its claim over the amount of the proposed judgment, and the appellant agreed to consent to judgment to that extent.

The circumstances in which consent orders expressing such agreements may be set aside by the Court were considered in Harvey v. Phillips (1956) 95 C.L.R. 235, 243-4:

> "The question whether the compromise is to be set aside depends upon the existence of a ground which would suffice to render a simple contract void or voidable or to entitle the party to equitable relief against it, grounds for example such as illegality, misrepresentation, non-disclosure of a material fact where disclosure is required, duress, mistake, undue influence, abuse of confidence or the like. The rule appears rather from positive statements of the grounds that suffice (cf. Halsbury's Laws of England, vol. 26, 2nd ed., pp. 84, 85); but there is a dictum of Lindley L.J. which is distinct enough: '... nor have I the slightest doubt that a consent order can be impeached, not only on the ground of fraud but upon any grounds which invalidate the agreement it expresses in a more formal way than usual .... To my mind the only question is whether the agreement on which the consent order was based can be invalidated or not. Of course if that agreement cannot be invalidated the consent order is

> good': Huddersfield Banking Co. Ltd. v. Henry Lister & Son Ltd. (1895) 2 Ch. 273, 280."

See also Purcell v. F.C. Trigell Ltd. (1971) 1 Q.B. 358, 363-4.

I turn then to the question whether the compromise agreement underlying the consent order made in this case can be invalidated. If it can, the judgment may be set aside.

It was first contended, although rather faintly, that the agreement might, be invalidated for mistake. But clearly the only relevant mistake was that of the appellant, a mistake induced, on her evidence, by her solicitor. Such a unilateral mistake, occurring without knowledge or complicity of the respondent, could not operate to avoid the agreement. See Riverlate Properties Ltd. v. Paul (1975) 1 Ch. 133, 144-5 and Powell v. Smith (1872) L.R. 14 Eq.Cas. 85, 90.

The appellant sought support from the decision in In the matter of the Income Tax Act of 1902 (1905) Q.W.N. 46, where the Full Court set aside a judgment entered by consent of parties who were mistaken as to the method by which the matter might be taken further on appeal. Other matters apart, that decision is of no real assistance in relation to the matters before us, because the order vacating the consent judgment was itself made by consent of the parties.

The appellant's major contention was that the respondent gave no consideration for the appellant's agreement to the entry of judgment against her. I have already pointed out that for its part, the respondent abandoned so much of its claim as exceeded the amount of the judgment - an excess of more than $10,000. The evidence indicates the exclusion of one particular amount - $1,147.76, from the claim. There must have been a substantial abandonment of the respondent's claim for interest. The amount of the judgment to be entered by

consent was apparently arrived at in the course of discussion prior to and following the letter of 5th March, 1985 to which I referred earlier in these reasons.

The appellant submits, however, that such reductions and abandonments could not constitute consideration from the respondent because, as it was put, “the respondent had no rights and the appellant no obligations capable of being traded in a compromise. The document sued upon is simply one incapable of imposing any obligation whatever upon the appellant”.

Amongst the documents in the respondent's file is a letter dated 10th December, 1976 to the respondent from the bank making the advance to Bruce Williams Pty. Ltd. In that letter, the bank manager said, with reference to the proposed guarantee, which had not to that stage been executed:

> “Director Ebsworth points out that co-guarantor's name is spelled ‘Alma’ not ‘Elma’. However, Mr. Ebsworth advises the intention is for his wife (Susan Elizabeth Ebsworth) to execute the documents in place of his mother, Alma May Ebsworth. As a result, I have had S.E. Ebsworth sign and both have initialled where amendments are proposed.”

Initials do appear on the document in the vicinity of the places where the name “Elma May Ebsworth” appears.

It was contended before us that the words “in place of his mother” might fairly be interpreted in that context as indicating that the appellant was to become surety in substitution for her mother-in-law. The letter, it was said, provided the “basis for an honest belief that the document was signed by the appellant intending to bind herself as guarantor and that the name ‘Elma May Ebsworth’ was initialled by the appellant preparatory to its being deleted and replaced by her name”. (Initials do, as I have said, appear on the document in the vicinity of the name Elma May Ebsworth.) I must conclude that that is a possible view to which the respondent could honestly have come.

Further, in such curcumstances, I am not prepared to say that the respondent's claim against the appellant was necessarily frivolous or vexatious, or to describe the claim as “so lacking in foundation as to make its assertion incompatible with both honesty and a reasonable degree of intelligence” (Wigan v. Edwards (1973) 47 A.L.J.R. 586, 595). In light of the matters mentioned in that letter of 10th December, 1976, it may have been possible for the respondent to argue that, by consideration of all aspects of instrument (including the initialling), in the context of the events leading to its execution by the appellant, the appellant's signature on the document does indeed import personal liability in her. That being so, the appellant has not satisfied me that I should characterise the respondent's claim as frivolous or vexatious.

The relevance of such issues to the question whether or not the respondent gave consideration for the appellant's consenting to judgment emerges from the following passage in Wigan, supra, p. 595 per Mason J.:

> “It is no objection to the existence of a bona fide compromise of a dispute that the court considers that the claim made by the promisor that he was not bound under the former contract would not have succeeded had the issue been litigated (Callisher v. Bischoffsheim (1870), L.R. 2 Q.B. 449; Miles v. New Zealand Alford Estate Co. (1885), 32 Ch.D. 266). But it is perhaps open to question whether a bona fide compromise of a dispute is sufficiently established by showing that the promisor honestly believed that his claim was well founded. It has been said that it must also be shown that the claim was not vexatious or frivolous. In Miles v. New Zealand Alford Estate Co. (supra, at pp. 291-292) Bowen L.J. expressed himself in favour of the second formulation, whereas in the same case Cotton L.J. (at pp. 283-284) and Fry L.J. (at pp. 297-298) expressed themselves more obliquely. However, as I understand their observations, they are not inconsistent with what Bowen L.J. had to say. In many courts in the United States a similar test to that adopted by Bowen L.J. has been adopted. Williston on Contracts, 3rd ed., s. 135B, states: ‘In many jurisdictions the tendency is to make the test the honesty of the claimant, provided the invalidity of the

> claim in law or in fact is not entirely obvious.' Even so, according to the author, the forbearance is insufficient consideration 'if the claim forborne is so lacking in any foundation as to make its assertion incompatible with both honesty and a reasonable degree of intelligence'.
>
> The different expressions of the principle do not reflect an important conceptual difference. There will be few cases involving an honest or bona fide belief in a claim which is vexatious or frivolous. In this case it is unnecessary to choose between the competing formulations, for in my view the more stringent test, that favoured by Bowen L.J. in Miles' case (supra), is satisfied.

It fell to the appellant to establish, in these proceedings, a ground for impeaching the consent judgment. With regard to the alleged absence of consideration for the agreement, she needed to establish at least that the respondent could have had no honest belief that its claim was well-founded, perhaps also that the claim was frivolous or vexatious. As I have said, the appellant has not persuaded me of either of those matters. Clearly she bore the relevant onus. In my opinion, she has not discharged it.

In the result, I am not satisfied that a ground has been established for invalidating the compromise agreement underlying the consent judgment, which must therefore stand.

Assuming the accuracy of the appellant's recollection of the circumstances leading to the judgment, the result I propose may be considered a hard one for her, but it may well be that she has a clear avenue for recourse against the solicitor who wrongly advised her to consent to judgment (who, I should point out, is not the solicitor presently representing her).

I would dismiss the appeal with costs.