BERMUDA

SUPREME COURT

RULING in the matter of LYDIA CALETTI (as sole Executrix and Trustee of the Estate of LORENZO CALETTI, deceased) -and- RALPH DESILVA -and- WAKEFIELD QUIN LIMITED

[2017] SC (Bda) 76 Civ (27 September 2017)

APPLICATION TO SET ASIDE CONSENT JUDGMENT – WHETHER COURT HAS JURISDICTION TO SET ASIDE CONSENT JUDGEMENT ON APPLICATION BROUGHT IN THE SAME ACTION – WHETHER PROMISSORY NOTE WAS ILLEGAL – WHETHER SETTING ASIDE JUSTIFIED ON ANY OF THE GROUNDS FOR WHICH A CONTRACT COULD BE SET ASIDE – WHETHER ANY DEFENCES TO PLAINTIFF'S CLAIM

The Defendant, Ralph DeSilva, applied to set aside a Consent Judgment in favour of the late Lorenzo Caletti in the sum of $3,372,396. He claimed that the judgment was based on an illegal contract and that it was obtained through misrepresentation or non-disclosure by Mr Caletti; or alternatively that he entered into it by mistake in that he did not appreciate that it could be enforced against his home.

The Plaintiff, Mrs Caletti, appearing in her capacity as executrix and trustee of the estate of her late husband, resisted the application, but applied to amend the judgment sum.

Background

Ralph DeSilva borrowed $3 million from Lorenzo Caletti, which he used to buy 'Virginia Cottage' as his home. The loan, for five years (with option to renew) at 9% interest payable in monthly installments, was made pursuant to a Promissory Note signed by Mr DeSilva. In the event of default on the principal sum or interest payments, Mr DeSilva undertook to execute in favour of Mr Caletti a mortgage of 'Virginia Cottage' and of a second property known as "Portside", as well as a legal charge over his 50% ownership of Great Things Ltd and his 50% ownership of Broadway Development Ltd.

From 2006 to 2012 Mr DeSilva made regular monthly payments to Mr Caletti, but then fell into financial difficulties and the payments stopped. In October 2012 Mr Caletti executed mortgage deeds on 'Virginia Cottage' and 'Portside' in his own favour. 'Portside' was sold for $1,000,299 and the net proceeds were paid to Mr Caletti in part satisfaction of the loan.

Meanwhile, Mr DeSilva fell out with his business partners at Great Things and engaged Wakefield Quin to assist him with the dispute; Mr Caletti also became involved in the dispute and attending meetings with the lawyers.

In October 2013 Mr Caletti's attorneys issued a writ naming Mr DeSilva as Defendant and claiming the $3 million principal, interest and costs. According to an email from Mr Caletti to Mr DeSilva (the "October email"), the purpose of the writ was to "proceed with forcing sale of Great Things and Bdway and to protect my interests". Advised by Wakefield Quin, Mr DeSilva agreed to a Consent Judgment in the amount of $3,372,396 which became effective on 20 November 2013.

In December 2014 Mr Caletti died. Mrs Caletti, as sole executrix and trustee of his estate, was substituted as the Plaintiff. She issued a notice of intention to proceed, and in August 2016 she issued a writ of *fieri facias*.

When the Bailiff contacted Mr DeSilva in January 2017 about having 'Virginia Cottage' valued for sale, Mr DeSilva said he realized for the first time that he could lose his home and instructed Browne Scott to represent him. They issued applications to set aside the writ of *fieri facias* and the Consent Judgment.

Does the Court have Jurisdiction?

One of the legal points considered in this hearing was whether the application to set aside the Consent Judgment could be brought in the action in which the Consent Judgement was made, or whether it should be brought in a separate action. Counsel for the Plaintiff contended that the Court had no jurisdiction to make the order sought, referring to para 20/11/07 of the 1999 Edition of the White Book.

Hellman J found that: "Where a consent judgment or order is fundamentally defective for reasons which would justify a court setting aside or rectifying a contract, there is in my judgement no reason in principle why the Court should not set it aside on an application brought in the action in which it was made… My conclusion therefore is that if Mr DeSilva can demonstrate that the Consent Judgment suffers from a fundamental defect, then I have the jurisdiction to set it aside notwithstanding that the application is brought in the same action as that in which judgment was given."

However, he said that this decision was tentative as the point was only touched on in oral argument, and his decision on this point should not be regarded as setting a precedent – litigants applying to set aside consent judgements should continue to do so by way of fresh actions.

Was the Promissory Note illegal?

Counsel for the Defendant submitted that that Promissory Note was an illegal contract. This argument centred on the requirement that in the event of default Mr DeSilva would execute a valid legal mortgage over his two properties in favour of Mr Caletti – who did not possess Bermuda status. At the time the Promissory Note was signed, it was legal for persons who did not possess Bermuda status to acquire land by way of mortgage, without a license to do so. However, changes to the Immigration Act which took effect from 22 June 2007 required non-Bermudians to get prior approval from the Minister before acquiring any land in Bermuda, including by way of mortgage. The mortgage deeds with respect to 'Virginia Cottage' and 'Portside' were both executed without approval of the Minister and were therefore in breach of criminal law. According to defence counsel, this was sufficient to render the entire Promissory Note illegal and therefore unenforceable (upon the principle that a court will not enforce an illegal contract: "e*x turpi causa non oritur actio"*).

In the judgment of Hellman J, denial of Mr Caletti's claim would not be a proportionate response to the illegality of the executed mortgages. "The illegality relates not to the terms of the Promissory Note, none of which are illegal on their face, but the manner in which it was sought to enforce them. Even if the term requiring Mr DeSilva to execute a valid legal mortgage over his properties was illegal, which it was not, it was severable from the obligation to repay the loan monies. As Ground CJ stated in *E&C Well Drilling Services Ltd -v- Hayward* [2011] Bda LR 1 a para 17: "*The personal obligation to pay is severable from the security, and survives it*."

Was there misrepresentation or material non-disclosure?

The Defendant's counsel further argued that the Consent Judgement should be set aside because when Mr DeSilva signed the consent he was relying upon a representation in the October email by Mr Caletti that he would only seek to enforce judgment against the share in the companies, not against "Virginia Cottage". The argument was that Mr Caletti had misrepresented his future intentions, because he did in fact intend to keep open the possibility of enforcing the Consent Judgment against "Virginia Cottage".

Further or alternatively, defence counsel submitted that the Consent Judgment should be set aside on the grounds of material non-disclosure, because Mr Caletti did not disclose his intention to enforce judgment on the cottage if he was unable to recover the full amount of the debt from the companies.

The Court rejected both these arguments on the grounds that the language of the October email could not bear Mr DeSilva's interpretation of it – there was no misrepresentation and no non-disclosure. Hellman J concluded that Mr DeSilva's mistaken belief that Mr Caletti would not seek to enforce judgment against "Virginia Cottage" was not reasonable. Accordingly he dismissed the application to set aside the Consent Judgment.

Reduction of the Consent Judgment sum

Counsel for the Plaintiff invited the Court to reduce the amount of the Consent Judgment under the slip rule at Order 20, rule 11 of the Rules of the Supreme Court, to take account of:

1. A $1,002,799 payment from Mr DeSilva, being the net proceeds of the sale of "Portside", which was received by Mr Caletti on the same day as the Consent Judgment was sent to Court for signature. The Court should have been notified promptly of the payment, but was not.

2. A $49,288 payment to Mr Caletti in discharge of principal and interest on a Promissory Note provided by the purchasers of "Portside" because they were short of funds by $47,000.

3. An error in the calculation of interest by Mr Caletti, who had been compounding interest when only simple interest was payable. The overcharged interest amounted to $17,470.

Hellman J agreed to reduce the judgment sum to reflect the proceeds of sale from "Portside" and the overcharged interest, giving a figure of $2,353,127. He determined that the $49,288 received in discharge of the Promissory Note should be treated as a credit towards repayment of the judgment sum.