1994 CarswellOnt 1048
Ontario Court of Justice (General Division)

Candev Financial Services Ltd. v. Klein

1994 CarswellOnt 1048, [1994] O.J. No. 1946, 34 C.P.C. (3d) 122, 50 A.C.W.S. (3d) 42, 5 W.D.C.P. (2d) 533

CANDEV FINANCIAL SERVICES LTD. v. MARK KLEIN and MICHAEL SIMON

E. Macdonald J.

Heard: March 23, 1994
Judgment: September 1, 1994
Docket: Doc. 93-CQ-40960-CM

Counsel: *Merran Christie*, for plaintiff.
Michael A. Turk, for defendants.

Subject: Civil Practice and Procedure; Evidence

Headnote

Evidence --- Parol evidence rule — Nature of rule and exceptions

Evidence — Parol evidence rule — Nature of rule and exceptions — Verbal representations made in course of transaction contradicting contractual documents — Defendants alleging reliance on verbal representations — Contract wholly in writing — Evidence of oral representations not admissible.

The plaintiff entered into loan contracts with a partnership of two numbered companies which were controlled by the defendants. As a condition of the grant of credit, the defendants signed personal guarantees, guaranteeing all past and future indebtedness of the two companies. The plaintiff subsequently sought to rely on the guarantees and brought an action against the guarantors. The defendants argued that they had been induced to sign the guarantees by verbal representations made by the plaintiff to the effect that the guarantees would not be relied on. At the conclusion of the trial, the parties made submissions on the parol evidence rule.

Held:

The plaintiff was granted judgment.

The general rule was that extrinsic evidence was not admissible to add to or vary a contract. The rule applied to written documents as well as oral evidence. This "parol evidence rule" meant that oral statements could not have contractual force when it was understood by both parties that the entire contract was in writing. Here, the written guarantees constituted the complete contract and the oral representations were a contradiction of its terms. None of the exceptions to the parol evidence rule was applicable.

Action to enforce personal guarantees.

***Macdonald J.*:**

1 At the conclusion of trial, I asked counsel for submissions on the parol evidence rule. Neither counsel was prepared to make detailed submissions. I reserved the matter to consider the parol evidence issues raised in this case.

2 The plaintiff's case is that the defendants, Mr. Klein and Mr. Simon, executed personal guarantees on May 24, 1991 of the indebtedness of the partnership of two numbered companies. The partnership entered into contracts with the plaintiff. After entering into two contracts, Mr. Klein and Mr. Simon executed the guarantees for all past and future indebtedness. The plaintiff seeks to rely on these guarantees. No issue is raised as to the validity of the guarantees themselves.

3 In defence, it was asserted that certain oral representations were made to the defendants, when the guarantees were signed, to the effect that the guarantees were merely needed "to paper the file" of the lender and that they would not be relied on. On

the basis of these representations, the defendants say they gave the guarantees. They testified that they would not have done so had they not been so assured by the lender.

4 I heard from Mr. McKenzie who, from 1986 to February 1992, was employed with the plaintiff. He is now employed elsewhere. He met Mr. Klein and Mr. Simon in the spring of 1991. He recollected that they were very specific about not wanting to sign personal guarantees. He was not present when they signed, but the guarantees were a condition of credit as the plaintiff was investing $185,000 in the partnership then operated by the defendants.

5 The person with whom the defendants dealt, Mr. John Bates, did not testify at trial. He, too, has changed employment. The defendants state that he gave them the verbal assurances that the guarantee would not be relied upon. I was not given a satisfactory explanation as to his absence. I was asked by the defendants to draw a negative inference from the fact that, on the key issue in the case, he was not made available. I take note that it was also open to the defendants to call Mr. Bates to corroborate their version of events and they did not. It is not appropriate, therefore, to draw a negative inference against the plaintiffs on this ground.

6 Mr. Bates wrote to the defendant on May 15, 1992 and stated in the third paragraph of his letter:

> However, in light of the significant increase in debt taken on by your partnership for the press and the unavailability of current financial information, we must rely heavily on you, the experienced people within this business. Thus, your personal guarantees will be required at the time of signing.

7 In this letter, Mr. Bates of Montreal Trust, asked the defendants to indicate acceptance of the terms of the agreement by signing the foot of the letter. Mr. Klein and Mr. Simon were not pleased with the letter but it was signed by them on May 17, 1991. Attached to the letter are the guarantees of Mr. Simon and Mr. Klein. Mr. Simon and Mr. Klein considered Mr. Bates to be the head person at Montreal Trust responsible for this matter. Mr. Simon testified that he was told by Mr. Bates that Montreal Trust would not act on the guarantee. They wanted something in writing to this effect and they were assured that a letter would be forthcoming. Ultimately, they received a letter dated November 8, 1991 written by Mr. Wilce of Linotype-Hell Inc. Mr. Wilce had been involved with the financing agreements. It is on this letter that the defendants seek to rely, on the basis of being absolved from their guarantees. The relevant portion of the letter reads as follows:

> Although the results were quite positive we still appreciate your lingering concern that there was not sufficient time to test the system with the new scanner in either a simulated or live production run. Please be assured however that Linotype-Hell fully support and endorse all of their products. Should the system fail to consistently produce quality output, or for whatever reason, fail to be a consistently viable and acceptable solution within your marketplace, Linotype-Hell will remove it. Unfortunately, *should such an unlikely eventuality occur, your one and only liability would be forfeiture of any and all payments made to date. Due to policies within Linotype-Hell and Candev/Montreal Trust such monies would not be refundable*. [Emphasis added]

It is the underlined portion that the defendants see as being a statement which limits their liability to forfeiture of all payments made to date.

8 I cannot construe this letter as evidence of the written assurance of the alleged promise not to enforce the personal guarantees. In addition, it is not clear that Mr. Wilce of Linotype-Hell had the authority to limit the liability of the defendants in a contract entered into with the plaintiffs.

9 As I am about the absence of Mr. Bates, I must address the question of what the legal impact is of his having said that they will not rely on the guarantee.

Legal Issue Raised

10 Does this verbal assurance, which contradicts the documents, offend the parol evidence rule? The general rule is that extrinsic evidence is not admissible to add to or to vary a contract. There are exceptions to the rule. Although the rule is referred to as the parol evidence rule, it relates to written documents as well as oral evidence.

11 In Sopinka and Lederman, *The Law of Evidence in Civil Cases* (Toronto Butterworths, 1974) at pp. 267-269, the authors discuss the parol evidence rule:

> Although some noted writers have denied that the Parol Evidence Rule is an evidential principle at all and insist that it is a rule of substantive law delineating what facts are legally effective when there is a written document, it is inserted in this work because it involves the exclusion of certain facts and thus relates to the admissibility of evidence. The classic statement of the rule was given by Denman C.J. in *Goss v. Nugent*:
>
> > By the general rules of the common law, if there be a contract which has been reduced into writing, verbal evidence is not allowed to be given of what passed between the parties, either before the written instrument was made, or during the time that it was in a state of preparation, so as to add to or subtract from, or in any manner to vary or qualify the written contract ...
>
> *Although the rule is known as the "parol" evidence rule, it encompasses all prior to contemporaneous transactions between the parties whether they are oral or written.* Burton J.A. aptly explained the rationale for the rule in an early Ontario decision:
>
> > ... and it is well to bear in mind the reason of the rule, that when parties have deliberately put their engagements in writing in such language as imports a legal obligation it is only reasonable to presume that they have introduced into it every material term and circumstance; and consequently all parol testimony of conversations or declarations made by either of them, whether before or after or at the time of the completion of the contract, will be rejected, because such evidence, while deserving far less credit than the writing itself, would inevitably tend in many instances to substitute a new and different contract for the one really agreed upon.
>
> The crucial question then becomes: What was the intent with which the written instrument was made? Did the parties intend that the written document supersede the prior declarations that passed between them which now, in some way, compete with the subsequent written document? *The rule is designed to prevent the use of fabricated or unreliable extrinsic negotiations to attack formal written contracts which were intended to be the final embodiment of the transactional terms between the parties.* If the written instrument was not intended to integrate the entire transaction, then no prohibi tion to the adducement of parol evidence exists. Accordingly, writings such as receipts, letters and memoranda are not effected by the Parol Evidence Rule for such documents do not by themselves impose legal obligations. On the other hand, any documents which are of a contractual nature such as deeds, mortgages, leases, bills of sale, and contracts cannot be undermined by evidence of previous negotiations. [emphasis added]

12 I see the exceptions to the parol evidence rule as a response to the harsh results that can sometimes occur if the rule is rigorously applied without regard to the commercial realities that prevail between the parties to contracts.

13 In *Gallen v. Allstate Grain Co.* (1984), 9 D.L.R. (4th) 496 (B.C. C.A.), leave to appeal to S.C.C. refused (1984), *(*sub nom. *Allstate Grain Co. v. Guichon)* 56 N.R. 233 (S.C.C.), Lambert J.A. set out the general rule including some of the exceptions to it at p. 506:

> The rule of evidence may be stated in this way: Subject to certain exceptions, when the parties to an agreement have apparently set down all its terms in a document, extrinsic evidence is not admissible to add to, subtract from, vary or contradict those terms.
>
> So the rule does not extend to cases where the document may not embody all the terms of the agreement. And even in cases where the document seems to embody all the terms of the agreement, there is a myriad of exceptions to the rule. I

> will set out some of them. Evidence of oral statement is relevant and may be admitted, even where its effect may be to add to, subtract from, vary or contradict the document:
>
> > (a) to show that the contract was invalid because of fraud, misrepresentation, mistake, incapacity, lack of consideration, or lack of contracting intention;
> >
> > (b) to dispel ambiguities, to establish a term implied by custom, or to demonstrate the factual matrix of the agreement;
> >
> > (c) in support of a claim for rectification;
> >
> > (d) to establish a condition precedent to the agreement;
> >
> > (e) to establish a collateral agreement;
> >
> > (f) in support of an allegation that the document itself was not intended by the parties to constitute the whole agreement;
> >
> > (g) in support of a claim for an equitable remedy, such as specific performance or rescission, on any ground that supports such a claim in equity, including misrepresentation of any kind, innocent, negligent or fraudulent; and
> >
> > (h) in support of a claim in tort that the oral statement was in breach of a duty of care.

One of the exceptions to the parol evidence rule was discussed in a similar context in a decision of the British Columbia Court of Appeal in *Toronto Dominion Bank v. Griffiths* (1987), [1988] 1 W.W.R. 735 [hereinafter *Griffiths*]. Although similar to the case at hand, the facts in *Griffiths* are significantly different. The guarantors, in that case, were induced into signing unlimited guarantees for a business. The bank provided a letter setting out the terms that they said they would adhere to. It was these terms that convinced the guarantors to sign the guarantee. The effect of the terms was that the bank would monitor the financial situation of the company closely. The terms included requiring periodic reports, requiring that the collectible accounts receivable equal at least 75 per cent of the loans, etc. The company defaulted and, it was evident that the bank had not complied with the large majority of the terms. At pp. 743-744 of the decision, Lambert J.A. said:

> Counsel for the bank referred to the decision of the Supreme Court of Canada in *Hawrish v. Bank of Montreal*, supra. In my opinion that decision on the parol evidence rule has no application on either of the trial judge's alternative approaches. As I have indicated in Pt. VI, the *Hawrish* case itself recognizes that the rule does not affect collateral oral contracts. And, on the single contract approach, the oral representation was later reduced to writing and became a part of the contractual relationship.
>
> In *Bank of Montreal v. Perron*, [1982] 6 W.W.R. 442, 18 Man. R. (2d) 418, Mr. Justice O'Sullivan, for the Manitoba Court of Appeal, said this, at p. 447:
>
> > In my opinion, the submission of counsel for the bank on parol evidence, while correct in law, has no application for the facts of this case. *The parol evidence rule arises only after it is established that the contract sued on was wholly in writing*, and the writing is identified.
>
> [my emphasis]
>
> I adopt that statement of the rule. It focuses on the true nature of the rule, which is not that oral representations cannot have contractual force when part of the contract is in writing, but rather that *oral statements do not have contractual force when the whole contract is understood by both parties to be in writing*. [emphasis added]

The *Griffiths* decision is clearly distinguishable from the case at hand. The letter with the terms did not contradict the written guarantee. It refined it with specific terms. In this case the oral representations contradict the written guarantees and are not corroborated in writing or by other evidence.

14 I was referred to the Supreme Court of Canada's decision in *Hawrish v. Bank of Montreal* (1969), 2 D.L.R. (3d) 600 which was referred to in the above passage and distinguished. The facts in *Hawrish* are similar to the case at hand. The bank brought an action against Mr. Hawrish in order to realize on a guarantee that was signed. In defence, Mr. Hawrish claimed that he was assured that his liability under the guarantee was limited in terms of time and quantum. This was in complete contradiction of the written agreement. At p. 605 Mr. Justice Judson said:

> Bearing in mind these remarks to the effect that there must be a clear intention to create a binding agreement, I am not convinced that the evidence in this case indicates clearly the existence of such intention. Indeed, I am disposed to agree with what the Court of Appeal said on this point. However, this is not in issue in this appeal. My opinion is that the appellant's argument fails on the grounds that the collateral agreement allowing for the discharge of the appellant cannot stand as it clearly contradicts the terms of the guarantee bond which state that it is a continuing guarantee.

15 The guarantees in the action at hand do not specify any limitations of liability or otherwise. The "collateral contract" that the defendants are now purporting to rely on is a complete contradiction of the written contract. To allow the parol evidence in this case would be contrary to the parol evidence rule. A written contract is meant to be a representation of the intentions of the parties. Generally, if all of the terms are in the contract then any extrinsic evidence which contradicts the terms is inadmissible. The guarantees in this case represent the complete contract.

16 None of the exceptions to the parol evidence rule are applicable here. In particular, the oral representations allegedly made to the defendants do not constitute a collateral contract. I am guided by the Supreme Court of Canada's decision in *Hawrish*. Accordingly, this defence fails. The action, therefore, is allowed and the plaintiff can realize on its guarantees.

17 No costs.

Judgment for plaintiff.