Ronald Elwyn Lister Ltd. v. Dunlop Canada Ltd., [1982] 1 S.C.R. 726

Supreme Court Reports

Supreme Court of Canada
Present: Laskin C.J. and Martland, Ritchie, Dickson, Beetz, Estey, McIntyre, Chouinard and Lamer JJ.
1981: November 3, 4 / 1982: May 31.
File No.: 15955.

[1982] 1 S.C.R. 726 | [1982] 1 R.C.S. 726 | [1982] S.C.J. No. 38 | [1982] A.C.S. no 38

Ronald Elwyn Lister Limited, Ronald E. Lister and Joan C. Lister, Appellants; and Dunlop Canada Limited, Respondent.

ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO

Case Summary

Contracts — Franchise agreement — Debenture and personal guarantees securing corporate debt — Seizure of assets, including those held personally, without notice — Subsequent agreement settling financing difficulties — Damages sought for unlawful seizure, improper disposition of company's assets, and negligent misrepresentation prior to granting of personal guaranties.

Appellants claim damages arising out of a franchise agreement between Dunlop and the appellant company, and a subsequent agreement. Moneys had fallen due under the franchise agreement and associated security. Dunlop appointed a receiver under the debenture collaterally securing the company's debt and also demanded payment under the personal guaranty of Lister and of his wife. Among the assets seized were assets personally owned by Lister pursuant to a franchise agreement with Chrysler Canada. All outstanding differences between the Listers and Dunlop, and between Mr. Lister and Chrysler, were purportedly settled by the agreement.

The plaintiff/appellants claimed damages for: (a) the unlawful seizure of assets personally owned by Lister, (b) the wrongful seizure and improper disposition of the company's assets, and (c) Dunlop's negligent representation to the Listers prior to their guaranteeing the company's debt. The trial judge allowed the claims for wrongful seizure, but refused to set aside the Listers' personal guaranties. The Court of Appeal only considered, and reversed the judgment with respect to, those claims flowing from wrongful seizure.

Held : The appeal should be allowed.

Dunlop was entitled to enforce its debenture provided adequate notice on which the debtor could act was given. Dunlop did not give this notice. Statements made by Lister in the course of negotiating for some means to save the undertaking and the Listers' allowing the receiver to take possession of and to liquidate the company's assets did not create any waiver of this right to notice. The appellants are therefore entitled to damages for trespass and conversion on the part of Dunlop, and the facts provide a sufficient basis for the exercise by the trial judge of his discretion to award exemplary damages. The Listers, by their entry into a performance of the settlement agreement, were foreclosed, however, from asserting that the guaranties made

by them were unenforceable at law or unenforceable because of Dunlop's misrepresentations.

Cases Cited

Lloyds Bank Ltd. v. Bundy, [1974] 3 All E.R. 757; Callisher v. Bischoffsheim (1870), L.R. 5 Q.B. 449; Miles v. New Zealand Alford Estate Company (1886), 32 Ch.D. 266; Magee v. Pennine Insurance Co. Ltd., [1969] 2 Q.B. 507; Massey v. Sladden (1868), L.R. 4 Ex. 13; Toms v. Wilson and Another (1863), 4 B. & S. 442, 122 E.R. 524; Moore v. Shelley and Another (1883), 8 A.C. 285; Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal (1979), 25 O.R. (2d) 198; Royal Bank of Canada v. Cal Glass Ltd. and Coopers & Lybrand Limited (1979), 18 B.C.L.R. 55; J. & E. Hall, Ltd. v. Barclay, [1937] 3 All E.R. 620; Kullberg's Furniture Limited v. Flin Flon Hotel Company Limited (1958), 26 W.W.R. 721; Yukon Southern Air Transport Limited et al. v. The King, [1942] Ex. C.R. 181; Brodt v. Wearmouth and Pyle, [1937] 1 W.W.R. 777, referred to.

APPEAL from a judgment of the Ontario Court of Appeal (1979), 105 D.L.R. (3d) 684, 27 D.R. (2d) 168, allowing an appeal and dismissing a cross-appeal from a judgment of Rutherford J. Appeal allowed.

D.K. Laidlaw, Q.C., and P.H. Griffin, for the appellants. R.M. Loudon, Q.C., and H.W. Sterling, for the respondent.

Solicitors for the appellants: McCarthy & McCarthy, Toronto. Solicitors for the respondent: Harries, Houser, Toronto.

The judgment of the Court was delivered by

ESTEY J.

This is a claim by a corporate plaintiff/appellant (hereinafter referred to as the Company) and its two shareholders, the co-appellants (hereinafter referred to as the Listers), for damages arising out of a franchise agreement between the defendant/respondent (hereinafter referred to as Dunlop) and the Company and a settlement agreement between the Listers and Dunlop. The action arises out of three main events:

(a) The franchise agreement whereby Dunlop granted to the Company exclusive rights within a defined area to market the wares of Dunlop;

(b) The demand by Dunlop for moneys due under the franchise agreement and the associated security and the appointment by Dunlop at the same time of a receiver under the debenture issued to collaterally secure the indebtedness of the

Company. At the same time, Dunlop demanded payment from Mr. Lister on his guaranty of the Company's debt. About a month later a similar demand was made upon Mrs. Lister.

(c) All outstanding differences between the Listers and Dunlop and between Mr. Lister and Chrysler Canada Ltd. (hereinafter referred to as Chrysler) concerning a franchise agreement between Chrysler and Mr. Lister, were purportedly settled by a contract dated 31 May 1972 but apparently executed on 6 June 1972. The Company was not a party to this settlement agreement presumably because it was in receivership and nothing remained to be settled with respect to that process as it was covered by the debenture itself.

The plaintiffs appellants claim damages for:

(a) unlawful seizure of the assets of Mr. Lister personally relating to an Autopar parts business carried on by Mr. Lister personally under the franchise agreement with Chrysler (hereinafter referred to as the Chrysler franchise);

(b) wrongful seizure of the Company's assets including the merchandise delivered by Dunlop to the Company under the franchise agreement;

(c) negligent misrepresentation made by Dunlop to the Listers prior to the giving of the guaranties of the Company indebtedness.

Note:

In these reasons "guaranty" (plural, guaranties) is employed as a noun and refers to the agreement guaranteeing something to somebody; guarantee is used both as a verb to give a guaranty and as a noun, the correlative of guarantor.

The trial judge awarded damages with respect to the seizure of both the goods of the Company and the Autopar parts goods which were the property of Mr. Lister, (and which goods are hereinafter referred to for the sake of brevity as the Autopar assets), to be assessed on the basis of:

1. In the case of the Company:

   (a) the difference between the amount realized by the receiver on the assets of the Company and the amount that would have been realized had their disposition been on a proper basis;

   (b) the loss of future income resulting from the destruction of the business of the Company by the wrongful seizure of its assets; and

   (c) exemplary damages by reason of the wilful nature of Dunlop's trespass as manifest in the decision to seize without reasonable time for compliance together with the circumstances of the seizure itself.

2. In the case of Mr. Lister the damages for the wrongful seizure of the Autopar assets were calculated in the same manner as in paragraphs 1(a),(b) and (c) above.

The plaintiffs claimed damages for breach of representation made in the negotiation for the franchise agreement by Dunlop. The trial judge found these claims were barred by paragraph 4(11) of the franchise agreement and dismissed them. This was not appealed to the Court of Appeal. Similarly the trial judge dismissed the claim that the personal guaranties given by the Listers at the time of the franchise agreement be set aside. Neither was this refusal by the trial judge included in the appeal to the Court of Appeal.

I propose to review the facts and the law and ultimately the legal position of the parties in the context of:

1. the seizure of the Company's assets;
2. the Autopar seizure;
3. the settlement contract; and
4. the alleged misrepresentation made with reference to the franchise agreement and the associated personal guaranties of the Listers.

1. The Seizure of the Company's Assets ----------

Negotiations for a dealership agreement (as it is termed in the agreement itself) were undertaken by the Listers and Dunlop and ultimately a franchise agreement was signed by the Company (which was incorporated by the Listers during these negotiation] and Dunlop. The Listers were the sole shareholders of the Company and signed the agreement as its officers in June 1970, Mr. Lister as President and Mrs. Lister as Secretary-Treasurer of the Company. The Listers were not personally parties to the agreement.

Unhappily the succeeding commercial venture did not measure up to the participants' hopes. The debt to Dunlop mounted, sales were below expectations and eventually the parties fell into a correspondence over claims of overdue debts and accusations of inadequate support. Strangely enough, during this period the Company opened a branch store in Orangeville, Ontario.

After an exchange of letters over a period of about four months concerning the moneys owed by the Company to Dunlop, Dunlop appointed a receiver under the debenture, and the receiver, a representative of Dunlop and a security guard arrived on the Guelph premises of the Company on the morning of March 20, 1972. Mr. Lister resisted the claim for possession of the premises by the receiver, but a few hours later, after being assured by an officer of Dunlop that the personal guaranties would not be enforced, Mr. Lister withdrew his opposition and the receiver took possession of the premises at Guelph and Orangeville.

The state of the business of the Company under the franchise agreement was described by the learned trial judge:

> During the latter part of 1971, the evidence indicated increasing concern by Dunlop as to the financial situation of the Lister dealership, especially in respect of its failure to reduce its indebtedness to Dunlop.... It was decided by, at latest, the beginning of March, 1972 that this situation had become intolerable and a decision was taken by the defendant to terminate the Lister franchise and realize on its security.

At the time of the entry into possession by the receiver, $127,160.84 was owing (as of February 29, 1972, made up of $77,117.27 on the trade account and $50,043.57 on the loan account) by the Company to Dunlop. The debenture is silent as to any requirement of notice on default, section 6 providing only:

> SECTION 6. Default and Enforcement ---------
>
> 6.1 Notwithstanding anything to the contrary contained in the Debenture and without prejudice to the right of the holder of this Debenture to demand payment at any time of the principal and interest hereby secured, all unpaid principal and interest owing under this Debenture shall forthwith become due and payable and the security hereby constituted shall become enforceable in each and every of the events following:
>
> (i) if the Company makes default in the payment of the principal of the Debenture when the same becomes payable;
>
> . . .
>
> (xix) if the Company fails to pay to Dunlop any monies due to Dunlop as and when they become due and payable;
>
> 6.2 Whenever the security hereby constituted shall have become enforceable and so long as it shall remain enforceable the holder of this Debenture may proceed to realize the security hereby constituted and to enforce his rights by entry; or by proceedings in any court....
>
> 6.3 Whenever the security hereby constituted shall have become enforceable and so long as it shall remain enforceable the holder of this Debenture may by instrument in writing appoint any person to be a receiver (which term shall include a receiver and manager) of the charged premises including any rents and profits thereof and may remove any receiver and appoint another in this stead, and such receiver so appointed shall have power to take possession of the property and assets charged and to carry on or concur in carrying on the business of the Company and to sell or concur in selling any of all of such property and assets.... The holder of the Debenture in appointing or refraining from appointing such a receiver shall not incur any liability to the receiver, the Company or otherwise.

On the arrival of the aforementioned three persons on the premises on the morning of the 20th the representative of Dunlop presented to the Listers:

(a) a letter dated March 16, 1972 being a demand by Dunlop's solicitors directed to the Company for payment of the aforementioned $127,160.84 subject to any increase necessary to reflect transactions after February 29, 1972 together with interest at the rate of 12 per cent per annum. The demand required payment "to our client forthwith". The letter concluded that in the event of failure to pay "we shall take such action as we deem advisable to protect our client's interest on the debenture".

(b) a letter dated March 16, 1972 from Dunlop's solicitors addressed to Mr. Lister announcing default by the Company and that the total sum of $127,160.84 "is now due and payable by..." the Company. Demand is then made for payment "forthwith" by Mr. Lister and concluded:

> Unless payment is received forthwith, we shall take such action as we deem advisable to protect our client's interest under the said guarantee.
>
> (c) a formal notice by Dunlop to the Company and its directors under section 6 of the debenture as quoted above and further notifying the Company of the appointment of a receiver-manager under the debenture "to enter upon and take possession of the undertaking, property and assets of ..." the Company

whereupon the receiver took possession and remained in possession. The receiver did not attempt at any time to carry on the business but simply proceeded to liquidate the assets of the Company. No accounting had been made by the receiver to the Company or the Listers at the date of trial.

That Dunlop was entitled to enforce its debenture by reason of the default of the Company under the promissory note and demand obligation secured by the debenture there is no doubt and no argument. The issue raised by the appellants in respect to the enforcement of the debenture is that Dunlop adopted a wrongful procedure in these enforcement proceedings in that no reasonable time was afforded the Company to pay up the moneys secured by the debenture. Both courts found that demand obligations of the type with which we are here concerned entitled the obligor to "[be] given a reasonable time to make payment of the amount due" per Weatherston J.A. in the Court of Appeal, and "a demand for payment must be reasonable and a reasonable time given to meet it" per Rutherford J. at trial. The learned trial judge found that "there was no intention of allowing the plaintiffs any reasonable time to make payment" and that "from the evidence before the Court as to the assets at the disposal of the plaintiffs, it is reasonable to presume that such funds could have been obtained in fairly short order". The majority of the Court of Appeal concluded that under the circumstances of the case "Dunlop was not required to give time to the Company to borrow money with which to pay up the indebtedness, unless time had been asked for, and it was not". In reaching this conclusion Weatherston J.A. observed:

> So, by early March the situation facing Dunlop was that the Company was heavily in debt and insolvent; it was faced with future losses; no proposal had been made for reduction of the indebtedness to Dunlop and the principal officer of the Company had already said he would not invest more of his own money in the Company.

and concluded:

> But it was the individual plaintiffs who had assets at their disposal, so it would have been necessary for them to borrow money, and in turn lend it to the Company. The reasonableness of the demand must be judged according to the facts as they appeared at the time of the seizure. Here, Lister had already, in September 1971, told an official of Dunlop that he would not borrow money from the bank, and that if any further investing was to be done it should be done by Dunlop.

2. Seizure of Autopar Assets of Mr. Lister ----------

At the time of seizure there were on the premises at the two locations of the Company, the Autopar assets which were owned by Mr. Lister personally. Furthermore the Autopar parts business was carried on by Mr. Lister independently of the business of the Company, albeit from the same premises, and indeed the accounts were maintained in the same set of books. Nevertheless it is clear that at the time of the seizure Mr. Lister informed Dunlop's representative

that the Autopar assets were the personal property of Lister. The learned trial judge found:

> But even if there were any real doubt on the defendant's part at the time of the seizure as to whether the parts belonged to Mr. Lister (and I find on the evidence that there was no such doubt), Mr. Lister's ownership thereof had to have become apparent to Dunlop and to Mr. Young [Dunlop's representative] at sometime shortly thereafter, and in any case prior to the execution of the agreement of May 31, 1972 [the settlement agreement]. ...

The trial judge in referring to events after the seizure was probably referring to correspondence passing between the solicitors for Dunlop, Chrysler and the Company wherein by letter dated three days after the seizure Chrysler's solicitors stated that the Autopar assets were supplied by Chrysler to Mr. Lister personally. The solicitors for Dunlop in response to this information advised Chrysler's solicitors that no steps would be taken by the receiver in respect of Autopar assets until such time as he received an opinion from the solicitors for Dunlop as to the ownership of those parts. No such opinion was ever received.

Notwithstanding the knowledge of Dunlop that the Autopar assets had been improperly seized under the debenture, which of course was a grant of security only in respect of the assets of the Company, the receiver remained in possession and declined to deliver the goods in question either to Chrysler or to Mr. Lister the owner. Under the Chrysler franchise agreement these parts could be returned by Mr. Lister for a full refund of the price which would have retired the indebtedness of Mr. Lister to Chrysler and would have forestalled the institution of the bankruptcy proceedings later taken by Chrysler.

On about April 12, Chrysler filed a petition in bankruptcy in the Supreme Court of Ontario against Mr. Lister by reason of its claim for indebtedness in the amount of $82,927.36 for automotive parts and equipment sold to Mr. Lister. This petition was adjourned repeatedly from April 26 onwards until its ultimate withdrawal on June 9, 1972 pursuant to the settlement agreement.

In the course of these proceedings Mr. Lister swore an affidavit in paragraph 8 of which it was provided:

> 8. Dunlop Canada Limited has agreed to permit the said inventory to be returned to Chrysler Canada Ltd. provided my wife and I deliver to Dunlop Canada Limited collateral security by way of land mortgages on the three real properties above mentioned. My wife and I have both agreed to meet the demands of Dunlop Canada Limited and the petitioning creditor but my auditor has not been able to verify the amount owing to Dunlop Canada Limited and my wife and I are not therefore able to execute the collateral land mortgages until such verification is available.

It is also important to note that long after Chrysler had demanded the delivery to it of the Autopar assets the solicitors for Dunlop stated in evidence:

> A. I said basically I had considered that our position was weak with retention of the parts at that time, yes.

In response to a further question:

Q. ... why didn't you ask or advise Mr. McAuley they should withdraw their bankruptcy proceeding and the parts could go back to Chrysler?

A. Because we have the right to share in those parts as a creditor of Mr. Lister. We were a personal creditor of his as well.

While Dunlop realized the retention of the Autopar assets was "weak" nevertheless Dunlop insisted on the right to share in Mr. Lister's personal assets with Chrysler, presumably under the guaranty by Mr. Lister of the Company's debt. Of course any such alleged right would require judicial determination in appropriate proceedings against Mr. Lister. Eventually, on the settlement of all the claims between Dunlop and the Listers, the Autopar assets were delivered to Chrysler and Chrysler released all claims against Mr. Lister. It is not at all clear from the record why the Chrysler claims against Mr. Lister were woven into and made dependent upon the settlement of the Dunlop claims against the Company and the Listers.

The appellants asked that two conclusions be drawn from the seizure of these Autopar assets by Dunlop:

(1) that the seizure was a wrongful conversion and trespass against the goods of Mr. Lister and that damages including exemplary damages should flow therefrom as awarded at trial; and

(2) that the wrongful retention after wrongful seizure amounted to duress or coercion of the Listers by Dunlop which resulted in the execution of the settlement agreement of May 31, 1972, which agreement and the securities delivered thereunder should be set aside.

3. The Settlement Contract--May 31, 1972 ----------

When the receiver went into possession and took over all the assets of the Company at the premises in Guelph and Orangeville, and took over the Autopar assets of Mr. Lister as well, there was some discussion about the personal guaranties given to Dunlop by the Listers. The trial judge found that some assurance was given to Mr. Lister that these guaranties would not be enforced at least for the moment. Faced with a complete cessation of the Company's business, the seizure of all its assets by Dunlop, the seizure by Dunlop of the Autopar assets of Mr. Lister, the termination of the lease to the Guelph store by Dunlop the owner, the pending petition by Chrysler under the Bankruptcy Act against Mr. Lister personally, and the notice by Dunlop to Mr. Lister requiring payment by him on his guaranty of the Company debt, and a similar notice to Mrs. Lister on April 14, 1972 calling upon her for the performance of her personal guaranty, the Listers negotiated a settlement of all these matters embracing not only the Dunlop but the Chrysler claims. The agreement was said to have been reached in mid-April but was reduced to writing on May 31, 1972 and executed on June 9, 1972. The Company of course was then without assets and does not appear as a party to the agreement. The parties were Dunlop, Chrysler and the Listers personally. It is this agreement which the Listers must set aside to succeed against Dunlop in respect to the mortgages granted by themselves thereunder. In order to escape the personal guaranties it is also necessary to void the settlement agreement as well as to circumvent the provisions of paragraph 4(11) of the franchise agreement of 1970, if it applies to the Listers personally.

After reciting the history of the indebtedness of the Company to Dunlop and its default on repayment, and the guaranty of the Company's obligations to Dunlop by the Listers, and the demand by Dunlop for the performance of those guaranties by the Listers, the agreement recites that the Listers requested Dunlop and Chrysler to enter into the settlement agreement rather

than pursue their respective rights under the personal guaranties and under the Bankruptcy Act. The agreement then provided for:

(1) an acknowledgement by Mr. and Mrs. Lister of the indebtedness of the Company to Dunlop and by Mr. Lister of his personal indebtedness to Chrysler;

(2) the granting of three mortgages by the Listers on real estate owned by them personally, to Dunlop to secure the personal guaranties of the Listers to pay the net indebtedness of the Company to Dunlop;

(3) Dunlop agreed not to enforce the personal guaranties of the Listers so long as these mortgages were not in default;

(4) Dunlop and Mr. Lister agreed to the immediate delivery of the Autopar assets to Chrysler who agreed to accept them as payment in full of Mr. Lister's debt to Chrysler.

By a further provision Mrs. Lister was required to provide a certificate of independent legal advice with respect to her signature of the mortgages to be given by the Listers to Dunlop under the settlement agreement. This was completed by a solicitor practising in Guelph (not the same solicitor who delivered the certificate with reference to the personal guaranties of the Listers under the franchise agreement in 1970) and was delivered on final execution of the settlement agreement. The most surprising term of the agreement is found in paragraph 5 thereof:

5. Subject to prior compliance by RONALD and JOAN with paragraph three of this agreement, DUNLOP and CHRYSLER agree not to oppose the application for a dismissal of the Petition for a Receiving Order filed by CHRYSLER against RONALD.

On June 9, Chrysler obtained leave of the court to withdraw the petition in bankruptcy against Mr. Lister. Nowhere in the record is there any explanation of the joining together of the Chrysler claims against Mr. Lister with those of Dunlop against the Company. This apparently innocent combination of action is all the more unusual when one considers that Dunlop and Chrysler took diametrically opposed views after the seizure of the contents of the Company's stores as to the ownership of the Autopar assets. While Dunlop did undertake not to dispose of them until its solicitors had come to a decision as to the true ownership of these assets, nevertheless Dunlop never did instruct the receiver to release them to Chrysler so as to pay off the indebtedness which was the subject of the bankruptcy petition. The result of making the Chrysler settlement concerning the Autopar assets of Mr. Lister was, of course, to increase the pressure on Mr. Lister personally to settle the Dunlop claims. There is no finding or even a suggestion that the two creditors had conspired to bring about this result but in fact the Lister family difficulties were considerably increased by this procedure.

The trial judge scrutinized the settlement agreement and the events preliminary thereto and concluded that the Listers entered into the settlement agreement "when their bargaining power was grievously impaired", using the terminology of the judgment in Lloyds Bank Ltd. v. Bundy, [1974] 3 All E.R. 757, on which he relied. However, by reason of the fact that the Listers had independent legal advice throughout the franchise transaction and later during the settlement negotiations, including additional independent legal advice with respect to Mrs. Lister's position at both stages of this entire matter, the trial judge concluded:

> ... with some reluctance, that the presumption that the agreement and mortgages in question were not freely consented to by the Listers has been rebutted...And in the circumstances of this case, I would find that notwithstanding the pressure upon the

> Listers, they were able to make an independent and informed judgment in the light of the advice they received. Indeed, in the case of Mr. Lister, given his experience with commercial matters, such a finding might well have been justified even in the absence of independent advice.

The Court thereupon declined to void the settlement agreement and the mortgages. The majority of the Court of Appeal, speaking through Weatherston J.A., concluded, "There is no reason to interfere with this finding of fact."

4. Alleged Misrepresentation by Dunlop to Listers with reference to 1970 Franchise Agreement and Associated Personal Guaranties of Listers.

The Listers contend that they are entitled to have their personal guaranties set aside because of alleged misrepresentations by Dunlop prior to the 1970 transactions. Rutherford J., without expressly making a finding of misrepresentation, appears to have been prepared to do so but found that Dunlop's liability would be excluded in any case by paragraph 4(11) of the franchise agreement which provides as follows:

> Dunlop and the Dealer agree that, except as herein expressly stated, no representation, statement, understanding or agreement has been made or exists, either oral or in writing, and that in entering into this Agreement the Dealer has not relied upon any presumption of fact or of law which in any way affects this Agreement, or any provision of the consideration for, or the validity of, this Agreement, or which relates to the subject matter hereof or which imposes any liability upon Dunlop in connection with this Agreement.

The trial judge appears to have dealt with all claims springing from the 1970 transactions, including the personal guaranties, on the same basis as the dismissal of the Company's claims under the 1970 agreement, namely that paragraph 4(11) of the agreement forecloses any claim of misrepresentation. The Listers' guaranties are not mentioned in the agreement nor does the guaranty mention the agreement.

There was no direct discussion of any plea to set aside the guaranty of the Listers on the basis that it was obtained by misrepresentation made by Dunlop to the Listers. The contract paragraph 4(11) for example is cited as "being fatal to the plaintiffs' claim for damages for negligent misrepresentation". The conclusion is later stated more broadly when the trial judge, dealing with paragraph 4(11), states that such clause

> ... acts as an effective bar, in the circumstances of this case, to recovery on the basis of any pre-contractual representation other than one made fraudulently.

In the Court of Appeal the distinction between the Listers and the Company was drawn but the majority found that the Listers were bound by the above-quoted paragraph of the 1970 agreement because they were aware of it when they delivered their guaranties. In dissent Madam Justice Wilson concluded otherwise.

Whether the personal guaranties should be set aside is not necessary to be decided if the 1972 settlement agreement can be enforced notwithstanding the alleged invalidity of the guaranties. The settlement agreement recites in part:

> AND WHEREAS RONALD and JOAN have requested DUNLOP to enter into this agreement, rather than pursue its rights under their personal guarantee to DUNLOP of

> the indebtedness of Ronald Elwyn Lister Limited and its rights as an unsecured creditor of RONALD under the provisions of the Bankruptcy Act.

By several provisions in the Agreement the Listers acknowledge and agree that the Company is indebted to Dunlop in the specific amounts therein set forth and that the Listers will grant mortgages to secure the net amount of this indebtedness after the assets of the Company "have been realized". The provisions for the final payments under the mortgage are somewhat confusing but not here in issue. In the result the agreement seems to provide for a discharge of the mortgages when the net debt owing by the Company to Dunlop has been paid in full by the Listers together with interest as stipulated, whatever that may be. The operative sentence appears to be that found at the end of paragraph 4 which states:

> RONALD and JOAN will be entitled to discharges of their mortgages when the lesser of the balance of the principal and interest owing pursuant to the said mortgages or the indebtedness of Ronald Elwyn Lister Limited and RONALD and JOAN to DUNLOP has been paid.
>
> In return, Dunlop agrees elsewhere in the agreement not to take proceedings to enforce the guaranties of the Listers as long as the mortgages are not in default.

The agreement provides, without any explanation, that the Company indebtedness (and again it is noted the Company is not a party to the contract) to Dunlop "will become due and payable" to Dunlop on June 1, 1974. No reservation of any kind is asserted by the Listers in this 1972 agreement from the acknowledgment of responsibility for the Company's debt to Dunlop. I find no reason in fact and none has been advanced in law for any construction of the settlement agreement other than giving it its plain meaning, namely that the Listers undertook on this new basis to pay in 1974 the indebtedness of the Company to Dunlop.

Even if the claims as they arose in the Listers survived paragraph 4(11) of the franchise agreement they were, to the extent the Listers are made liable under the settlement agreement, embraced in the acknowledgment of liability therein as guarantors of the Company's indebtedness. By the strongest possible inference, paragraph 6 of the settlement agreement evidences the understanding by the Listers that at the time of the settlement agreement the personal guaranties remained outstanding. Paragraph 6 provides:

> 6. DUNLOP agrees not to take proceedings to enforce the guarantees of RONALD and JOAN of the indebtedness of Ronald Elwyn Lister Limited to DUNLOP as long as the said mortgages are not in default.

There is no qualification in the settlement agreement of this recognition of liability in the Listers both under the personal guaranties and under the mortgages.

In the result the settlement agreement is the crux and climax of these successive transactions and the relationship which arose between the plaintiffs/appellants and Dunlop. If that agreement can stand independently of the alleged invalidity of the personal guaranties, the setting aside of the guaranties need not be considered.

5. Consideration for the 1972 Settlement Agreement ----------

This agreement in law was produced by the parties jointly for the purpose of composing their recited differences. The consideration moving to the Listers was the response by Dunlop to the request for time to realize on their assets in an orderly fashion so as to reduce the debt to

Dunlop. Dunlop benefitted from the receipt of mortgages to secure the performance of the Listers of their previously unsecured undertaking. The adequacy of consideration supporting a contract has not been the subject of court scrutiny for several centuries: Cheshire and Fifoot's Law of Contract, 10th ed., at p. 70. The comments of the learned authors of Chitty on Contracts, 24th ed., at pp. 82-83 are directly on point:

> But if the validity of the claim is doubtful, forbearance to enforce it can be good consideration. And the same rule applies even if the claim is clearly invalid in law, so long as it was in good faith and reasonably believed to be valid by the party forbearing.

The old authority of Callisher v. Bischoffsheim (1870), L.R. 5 Q.B. 449, is cited in support. Bowen L.J. may be seen to the same effect in Miles v. New Zealand Alford Estate Company (1886), 32 Ch.D. 266, at p. 291:

> It seems to me that if an intending litigant bon+a fide forbears a right to litigate a question of law or fact which is not vexatious or frivolous to litigate, he does give up something of value. It is a mistake to suppose it is not an advantage, which a suitor is capable of appreciating, to be able to litigate his claim, even if he turns out to be wrong.

Even if this principle were not to be found embedded in the basic concepts of the law of contracts, where would the equities lie here? In Magee v. Pennine Insurance Co. Ltd., [1969] 2 Q.B. 507 (C.A.), a case of common mistake in the absence of fraud, the parties entered into a compromise agreement in settlement of an insurance claim which both parties, under common fundamental mistake, believed was enforceable. The majority of that court of appeal found in all the equities that the settlement contract could not stand after the discovery by the parties of the falsity of the application for insurance on which the alleged settlement contract arose. Lord Denning, Master of the Rolls, for the majority concluded at p. 515:

> ... but I cannot shut my eyes to the fact that Mr. Magee had no valid claim on the insurance policy: and, if he had no claim on the policy, it is not equitable that he should have a good claim on the agreement to pay L-385, seeing that it was made under a fundamental mistake. It is not fair to hold the insurance company to an agreement which they would not have dreamt of making if they had not been under a mistake.

Here the equities run in the other direction. The Listers, it will be remembered, negotiated a franchise agreement, incorporated a Company to take the agreement, and then guaranteed that Company's account with Dunlop. The venture foundered. The parties eventually composed their differences in a settlement contract in 1972. At every stage of both agreements in 1970 and 1972 both parties proceeded with the assistance of legal advice, including independent legal advice for Mrs. Lister in connection with the guaranties and the mortgages. The settlement agreement recites the Listers' request that Dunlop join the agreement rather than pursue its remedies against them. Reference is also made of the need to dispose of the proceedings under the Bankruptcy Act concerning Mr. Lister. The agreement was executed and performed by June 9. The bankruptcy proceedings were terminated, and the securities were delivered by the Listers to Dunlop as the agreement required. In short, the agreement was fully executed by the parties. No reservation of right was effected in the agreement by the Listers to allow them to attack on other grounds the validity of the Company note or their personal guaranties of 1970 or their mortgages of 1972. The Listers achieved their obvious goal of gaining time to pay off the Company debt to Dunlop without the necessity of selling the mortgaged assets or other property on a forced sale basis. In all the circumstances it would be inequitable for the law now to allow

them to disown the agreement that they solicited and entered into on full knowledge of all the facts and supported by legal counsel throughout.

It would be contrary to the basic principles of equity to allow the guarantors to request and to obtain from Dunlop a postponement of liability under the guaranty in the form of the 1972 agreement and thereafter to assert, allegedly by reason of circumstances known by the Listers at the time of the 1972 agreement, that the guaranties had never been enforceable at law; or alternatively, if originally enforceable were rendered unenforceable by reason of Dunlop's misrepresentations, a circumstance known to the Listers in their allegations long before the time of the execution of the 1972 agreement.

Where parties experienced in business have entered into a commercial transaction and then set out to crystallize their respective rights and obligations in written contract drawn up by their respective solicitors, it is very difficult to find or to expect to find a legal principle in the law of contract which will vitiate the resultant contracts. Certainly where the parties have capacity in law to enter into the contract, where the terms of the contract are clear and unambiguous, where there is valid consideration passing between the parties, and where there is no evidence of oppression or operative misrepresentation, the law recognizes no principle which fails to enforce the validity of such a contract. No doubt the law of contract in this connection reflects the needs for certainty in commerce. This is particularly true where, as here, the two contracts, at the time of commencement of action, are not executory but have been acted upon and performed by the parties. Where, as here, the persons engaged in the commerce at hand were fully and continuously in contact with their legal advisors, there is neither need not warrant for the intervention of the courts to remake or set aside these contracts.

In the end, therefore, the outcome does not turn on the narrow fact that the Listers, not being parties to the franchise agreement, are not bound by its exclusionary terms relating to representations outside the agreement. Nor does the outcome turn on the collateral issue (in the sense it could not be and was not litigated in these proceeding] of the validity of the 1970 guaranty. Dunlop had its right in law to proceed against the Listers but forbore from doing so. The Listers, by their entry into a performance of the settlement agreement, are foreclosed from the remedies now sought to be enforced by them.

6. Validity of the Seizure ----------

The principal difference between the courts below was on the right of the Company and the Listers to reasonable notice from Dunlop when enforcing its claims under the note, the debenture and the guaranties. Both courts below agreed that the debtor had the right to reasonable notice but, as quoted above, the majority of the Court of Appeal found that the debtor must ask for time to make the payment claimed to be due and none was asked for by the plaintiff-appellants. The facts of the demand have been set out. The debenture and note signed and delivered by the Company provide for payment "on demand". By its terms the debenture further provides that the principal and interest shall "forthwith become due and payable" on the happening of any of nineteen specified events such as a default in payment of interest and principal by the Company. The security thereby constituted by the debenture likewise becomes enforceable at the same time. The guaranty by the Listers is performable upon "notice in writing" delivered personally or by mail.

The rule has long been that enunciated in Massey v. Sladen (1868), L.R. 4 Ex. 13, at p. 19: the debtor must be given "some notice on which he might reasonably expect to be able to act". The application of this simple proposition will depend upon all the facts and circumstances in each case. Failure to give such reasonable notice places the debtor under economic, but

nonetheless real duress, often as real as physical duress to the person, and no doubt explains the eagerness of the courts to construe debt-evidencing or creating documents as including in all cases the requirement of reasonable notice for payment.

This authority (Massey) relates back to the dictum of Cockburn C.J. in Toms v. Wilson and Another (1863), 4 B. & S. 442, 122 E.R. 524, at p. 529. Blackburn J., in concurring, put the matter directly:

> But, when, by the express terms of the instrument creating the debt, payment is to be made "immediately upon demand in writing," it must be construed to mean within a reasonable time.

Baron Pigott, in Massey, supra, stated (at p. 19):

> It is not necessary to define what time ought to elapse between the notice and the seizure. It must be a question of the circumstances and relations of the parties, and it would be difficult, perhaps impossible, to lay down any rule of law on the subject, except that the interval must be a reasonable one. But it is quite clear that the plaintiff did not intend to stipulate for a merely illusory notice, but for some notice on which he might reasonably expect to be able to act.

See also Moore v. Shelley and Another (1883), 8 A.C. 285 (P.C.), and for a modern summation of the rule and its particular application see Mister Broadloom Corporation (1968) Ltd. v. Bank of Montreal (1979), 25 O.R. (2d) 198 (H.Ct.) and Royal Bank of Canada v. Cal Glass Ltd. and Coopers & Lybrand Limited (1979), 18 B.C.L.R. 55 (S.C.)

Mr. Lister said before the seizure that he did not intend to advance further money to the venture and that if any such money were required, Dunlop should provide it. This is something quite different from a waiver of a right to reasonable notice. This was something said by one party to another in a failing venture, incidental to continuing bargaining or negotiating for some means to save the undertaking and their respective investments in it. If Dunlop relied on this statement in seizing the assets without notice, as they did, they were in my view quite wrong. The Listers remained entitled to reasonable notice. The majority of the Court of Appeal concluded that the appellants were required either on these facts or generally to ask for time to pay. No authority was cited for the proposition and none was advanced in this Court. Here the Listers allowed the receiver to enter into possession and to proceed to liquidate Mr. Lister's assets and those of the Company on behalf of Dunlop. This technical or mechanical acquiescence in no way eliminated, by waiver, acquiescence or otherwise, the appellants' entitlement to reasonable notice. In the result therefore, Dunlop and its agents, its employees and the receiver were guilty of trespass and conversion.

7. Damages

The trial judge assessed the damages firstly with reference to the loss arising from the inadequate realization on the assets by the receiver, and secondly, the loss of future profits because of the destruction of these two businesses by the wrongful seizure. Illustrations of similar applications of this principle are to be found in J. & E. Hall, Ltd. v. Barclay, [1937] 3 All E.R. 620 (C.A.); Kullberg's Furniture Limited v. Flin Flon Hotel Company Limited (1958), 26 W.W.R. 721 (Man. C.A.); Yukon Southern Air Transport Limited et al. v. The King, [1942] Ex.

C.R. 181; Brodt v. Wearmouth and Pyle, [1937] 1 W.W.R. 777 (B.C.C.A.)

> The circumstances here arising have been set out above and were reviewed in detail at trial. There appears to be no error of application of law inviting appellate intervention. The Court of Appeal neither awarded nor dealt with the issue of damages for destruction of the two businesses although this claim was raised by all plaintiffs in the statement of claim. The extent of the damages will be assessed on the reference according to the duration of the wrongful retention of assets in the case of the Autopar seizure, the magnitude of the inadequate realization occurring (if any) in the case of the company assets, the prospect of loss of profits in the case of each of the businesses, and the impact of the wrongful conduct on the part of Dunlop on the appellants. Because the computation and assessment of damages will now proceed before the Master, no more need be said about the process.

The Court of Appeal made no mention of the issue of exemplary damages as awarded by the trial judge other than to observe that such an award was "not appropriate" in the case of the Autopar seizure. In its order the Court of Appeal did not include any exemplary damages for either seizure. The facts and circumstances of the receiver's entry into possession with an armed guard and the protracted delay by Dunlop in replying to the demand for the return of the Autopar parts to Chrysler are a sufficient basis in my view for the exercise of the trial judge's discretion to award exemplary damages here. The place in the law of Ontario of exemplary damages for wrongful seizure was not argued here nor does the record reveal any argument being directed below to the right of a trial judge to make such an award in law. Accordingly, the matter is taken no further than to restore that aspect of the trial judgment.

Therefore, for the reasons stated, I would allow the appeal and restore the judgment at trial with costs here and in the courts below to the appellants; costs of the reference to be reserved for disposition when the Master's report is received.

> Appeal allowed with costs.

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