 Original
1983 CarswellOnt 901
Ontario Supreme Court

Travel Machine Ltd. v. Madore

1983 CarswellOnt 901, 143 D.L.R. (3d) 94, 18 A.C.W.S. (2d) 161

In the Matter of an action in the Seventh Small Claims Court of the Judicial District of Ottawa/Carleton, No. 699/82

The Travel Machine Ltd., Plaintiff (Respondent) v. Mrs. Shelley Madore, Defendant (Appellant)

Sutherland J.

Judgment: February 3, 1983

Counsel: *C.B. Sproule, Q.C.*, for the Appellant.
Mr. George Brightman, Vice-President, for the Respondent.

Subject: Civil Practice and Procedure; Contracts

Related Abridgment Classifications

1983 CarswellOnt 901, 143 D.L.R. (3d) 94, 18 A.C.W.S. (2d) 161

For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Headnote

Judges and Courts --- Justices, Magistrates and Provincial Courts — Powers and duties — Provincial Court Judges

Ontario — Small claims court — Judge bound to apply statutes and ordinary rules of law notwithstanding provisions of s. 57 of Act — Small Claims Court Act, R.S.O. 1980, c. 476, s. 57.

The provisions of s. 57 of the Act empowering a Judge to "make such order or judgment as appears to him just and agreeable to equity and good conscience" does not mean that a Judge acting under the Act is not required to apply the rules of law, or that he can decide an issue contrary to law.

Practice --- Practice on appeal — Powers and duties of appellate Court — Amending pleadings

Defendant wishing to raise defence on appeal not pleaded, argued or referred to at trial — Appellate Court permitting defendant to arise Statute of Frauds defence -- Pragmatic test applied — Appellate Court holding that new plea should not prejudice opposite party, in sense that, had party been aware of new plea at trial, different evidence might have been led or different emphasis given on cross-examination -- Statute of Frauds, R.S.O. 1980, c. 481.

Statute of Frauds --- Application of statute — Contracts of guarantee — Distinguished from original promise

Travel agent giving oral guarantee of payment for customer's travel tickets — Employer suing agent on guarantee after customer failing to pay — S. 4 of Statute of Frauds not providing defence where guarantee given as incidental to wider and ongoing economic relationship in which agent had interest -- Statute of Frauds, R.S.O. 1980, c. 481, s. 4 — Small Claims Courts Act, R.S.O. 1980, c. 476, s. 57.

Defendant, a travel consultant employed by plaintiff, violated her employer's policy by issuing travel tickets to a customer on credit and giving an oral personal guarantee of payment. Plaintiff sued defendant on the guarantee when the customer failed to pay. Judgment against defendant was given at trial in Small Claims Court. On appeal, held, the appeal should be dismissed. Despite the provisions of s. 57 of the Small Claims Courts Act, a Small Claims Court Judge was bound to give effect to applicable Acts. Defendant was permitted to raise s. 4 of the Statute of Frauds as a defence, although it had not been referred to at the trial. However, since the guarantee given was part of a wider economic relationship in which defendant's interest was to effect the sale of travel services, it did not come within s. 4, and the Statute of Frauds did not provide a defence.

***Sutherland J*:**

1 This is an appeal by the defendant, Mrs. Shelley Madore, from a decision of His Honour Judge T.C. Tierney in the Seventh Small Claims Court of the Judicial District of Ottawa/Carleton issued on 7 July 1982, in which judgment was given against the defendant in the amount of $726.00 without costs. At the trial Mrs. Madore acted for herself and plaintiff, The Travel Machine Ltd., was represented by Mr. George Brightman, its secretary-treasurer and vice-president of marketing.

2 On the appeal before me there was no material dispute as to the facts, and the argument related principally to three

issues, namely: (i) the extent to which a judge acting under section 59 of *The Small Claims Court Act*, R.S.O. 1980, c. 476 to make such order on judgment "as appears to him just and agreeable to equity and good conscience" is bound to apply the statutes and ordinary rules of law applicable to tribunals not operating under that Act; (ii) whether and in what circumstances a defendant should be allowed to raise on appeal a defence that was not pleaded and was not argued or referred to at trial, and (iii) the effect of section 4 of *The Statute of Frauds*, R.S.O. 1980, c. 481, on actions to enforce oral guarantees. With respect to the issue under *The Statute of Frauds* the plaintiff (respondent) also argues that there is part performance on the part of the plaintiff to take the case out of the prohibition of section 4.

3 The facts are relatively simple. At the material times Mrs. Madore was employed by The Travel Machine Ltd. as a travel consultant. As found by Judge Tierney, the travel agency had a policy of requiring payment by cash, cheque or credit card at the time the travel arrangements and the instructions to order tickets became final, except in the case of commercial accounts, where a limited period of credit was allowed. The Grenada High Commission in Ottawa was one of the customers of the travel agency, and the troubles giving rise to this case arose in respect of sales made on behalf of the agency by Mrs. Madore to a Miss Brenda Butler who was then employed at the Grenada High Commission. Summarising the findings of fact in this regard by Judge Tierney, it may be said that Mrs. Madore, contrary to the policy of the agency, issued some travel tickets to Miss Butler, in her personal capacity, on credit, and subsequently, while the first order had not yet been paid for, issued tickets to the Grenada High Commission on credit, and on terms that deviated from the arrangements usually followed by that Commission with respect to payment, such tickets being for the personal use of Miss Butler.

4 When these matters came to the attention of management Mrs. Madore stated that she knew Miss Butler and was certain that the tickets would be paid for and she told her employer that she guaranteed their payment. There was a subsequent transaction in which further tickets were issued for the account to Miss Butler, again on the strength of statements by Mrs. Madore that she guaranteed payments of the amounts in question. Miss Butler has since left the employ of the Grenada High Commission and has left the country, having made only a part payment on her account with the agency. It appears that no part of the indebtedness was properly indebtedness of the Grenada High Commission. Judge Tierney found that in issuing the first tickets Mrs. Madore had violated her employer's policy, and he further found that Mrs. Madore gave a personal guarantee of payment for the subsequent tickets.

5 I have read the transcript of the evidence at the hearing and it appears clear to me that the oral guarantees given by Mrs. Madore applied not only to the tickets subsequently sold, but also to the first tickets sold to Miss Butler. Finding that Mrs. Madore had breached the company policy, and that she had given guarantees, Judge Tierney gave judgment for the plaintiff.

6 As to all but the first of the purchases here in issue, it is expressly stated by Judge Tierney that the liability of Mrs. Madore is based upon her oral guarantees. It is the reasonable interpretation of Judge Tierney's reasons to say that, although there was reference to breaches by Mrs. Madore of her employer's rules as to credit sales, the liability of Mrs. Madore as to the first of the transactions was mainly based upon her oral guarantees.

7 Mrs. Madore presented her own case at the trial, and the issue of the unenforceability of an oral guarantee was not raised in her simple pleadings, nor argued before Judge Tierney. There is nothing in the record to suggest that the question of section 4 of *The Statute of Frauds* was brought, or came, to the attention of the Court.

8 With respect to the first point of the argument, I accept the contention of the appellant, based on the Court of Appeal decision in *Sereda v. Consolidated Fire and Casualty Insurance Co.*, [1934] O.R. 502, that the provisions of section 59 of *The Small Claims Court Act*, R.S.0. 1980, c. 476, empowering a judge to "make such order or judgment as appears to him

just and agreeable to equity and good conscience" does not mean that a judge acting under that Act is not required to apply the rules of law or that he can decide an issue contrary to law. Accordingly, if on the law section 4 of *The Statute of Frauds Act* is applicable to the oral guarantee here in question, neither trial judge, nor I sitting on appeal, can properly, on the basis of "equity and good conscience" ignore the fact that section 4 of *The Statute of Frauds Act*, generally speaking, has the effect of prohibiting actions based on oral guarantees.

9 The second issue raised on the appeal is whether or not a defence based on the said section 4 can be raised on appeal when it was neither pleaded nor argued at trial, and when there has not previously been any motion to amend the pleadings. While scrupulous care must be taken not to permit a new argument to be made on appeal if to do so would prejudice the position of the opposed party, the test on the authorities is a pragmatic one. The concern is with the question of whether or not the allowing of the new plea would prejudice the opposite party in the sense that, had such party been aware at trial of the new plea, different evidence might have been led or a different emphasis would or might have been sought to be given on cross-examination. In *Shaver Hospital for Chest Diseases v. Slesar et al.* (1979), 27 O.R. (2d) 383, Lacourciere J.A. speaking for the Court of Appeal quoted with approval the following statement of Lord Watson in the Privy Council judgment in *Connecticut Fire Ins. Co. v. Kavanagh*, [1892] A.C. 473, at p. 480:

> When a question of law is raised for the first time in a court of last resort, upon the construction of a document, or upon facts either admitted or proved beyond controversy, it is not only competent but expedient, in the interests of justice, to entertain the plea. The expediency of adopting that course may be doubted, when the plea cannot be disposed of without deciding nice questions of fact, in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below. But their Lordships have no hesitation in holding that the course ought not, in any case, to be followed, unless the Court is satisfied that the evidence upon which they are asked to decide establishes beyond doubt that the facts, if fully investigated, would have supported the new plea.

In the *Shaver Hospital* decision Lacourciere J.A. referred to the earlier Court of Appeal decision in *Canadiana Towers Ltd. v. Fawcett et al.* (1978), 21 O.R. (2d) 545, citing it for the proposition that an appellant could raise on appeal points not pleaded at trial only if the appellate court is satisfied beyond all doubt that it has before it all the facts bearing upon the new contention. Also quoted was the following statement of Lord Herschell in *Owners of the Ship "Tasmania" et al. v. Smith et al.* (1890), 15 App. Cas. 223, at p. 225, as follows:

> My Lords, I think that a point such as this, not taken at the trial, and presented for the first time in the Court of Appeal, ought to be most jealously scrutinised. The conduct of a cause at the trial is governed by, and the questions asked of the witnesses are directed to, the points then suggested. And it is obvious that no care is exercised in the elucidation of facts not material to them.
>
> It appears to me that under these circumstances a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it be satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and next, that no satisfactory explanation could have been offered by those whose conduct is impugned if an opportunity for explanation had been afforded them when in the witness box.

10 Having regard to the nature of the new plea here sought to be introduced, the plea that no action can be brought on an oral guarantee, because of the provisions of section 4 of *The Statute of Frauds*, I am of the opinion that the above mentioned tests have been met and that the new plea should be allowed, and that the pleadings of the appellant should be deemed to be amended accordingly. Any issue as to whether a separate motion to amend should have been brought prior to the hearing of the appeal should be resolved in favour of the appellant, as to do otherwise would be to apply a degree of technical formalism not appropriate to matters arising under *The Small Claims Court Act*.

11 We come now to the third, and main, issue, which is whether section 4 of *The Statute of Frauds* is a defence to the claims founded on the oral guarantees in question. In my opinion, if these were ordinary oral guarantees that had not been given as incident to a wider series of transactions in the course of a relationship of employer and employee, section 4 would have been a complete defence. But in my opinion the guarantees in question are not within section 4, because they were given as incident to a wider, and ongoing relationship. The authorities for this distinction are the cases of *Sutton & Co. v. Grey*, [1894] 1 Q.B. 285, and *Harburg India Rubber Co. v. Martin*, [1902] 1 K.B. 778, 786, which are discussed in para. 4819 on p. 1026 of *Chitty on Contracts*, (25th Ed.) as follows:

> 4819. *Guarantee as incident to wider transaction*. Even where a person clearly does promise to answer for the debt, default or miscarriage of another, the promise will not be within the section where it is merely an incident to a wider transaction. The question is whether the main object of the parties is that one should guarantee the liability of another, or whether it is to enter into a different sort of transaction altogether. Thus where a person contracts to buy goods as agent for a principal on the terms that he is to be liable for the price if the principal fails to pay, this does not fall within the section even though the agent is in a sense promising to answer for the debt of the principal, for the object of the parties is to effect a sale of goods, not to enter into a contract of guarantee. Similarly, where a person promises to pay off an encumbrance on property in which he has an interest in order to secure its release, the mere fact that the encumbrance arose out of another's debt does not bring the case within the section.

12 In my opinion, the oral guarantees given by the respondent were given as part of a wider economic relationship with the appellant, in circumstances similar to those referred to in the immediately preceding quotation, where the person contracted to buy goods as agent for his principal on the terms that he is to be liable if the principal fails to pay, and section 4 was held not to apply because the object of the parties was to effect a sale of goods. Here the object was to effect the sale of travel services and the oral guarantees arose in a pre-existing commercial relationship.

13 In *Sutton & Co. v. Grey*, *supra*, Esher M.R. in stating that a particular guarantee was not one to which section 4 of *The Statute of Frauds* applied, stated: "The contract is not a guarantee with regard to a matter in which the defendant has no interest except by virtue of the guarantee". In the same case Lopes L.J. declared:

> The true test, as derived from the cases, is, as the Master of the Rolls has already said, to see whether a person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction or whether he has an interest in it independently of the promise. In the former case, the agreement is within the statute; in the latter, it is not.

Sutton & Co. v. Grey was considered by the Supreme Court of Canada in *Morin v. Hammond Lumber Company* (1922), S.C.R. 140, where, although the main ground of the decision was that the promise there in question gave rise to a new contract, or to a contract of indemnity and not of guarantee, the decision in *Sutton* and related English decisions were referred to with approval by three of the five judges who gave judgments.

14 The oral guarantees given by Mrs. Madore were related to her regular work and to the regular business of her employer. Mrs. Madore had an interest in having the business in question transacted. It therefore cannot be said that any of her guarantees was "a guarantee with regard to a matter in which [she] had no interest except by virtue of the guarantee". Under the rule in *Sutton & Co. v. Grey, supra*, the employment and commercial nexus is sufficient to take the case out of the statute.

15 Although it is not really necessary to the decision in this case, I should respond briefly to the arguments addressed to

me by the respondent to the effect that if the oral guarantees were found to be within *The Statute of Frauds* the respondent should nonetheless succeed because of the application of the doctrine of part performance. With respect, I cannot agree, for three reasons, the first being that the respondent's acts of part performance (even if the doctrine of part performance were to be found to be applicable to this class of case) while consistent with the existence of the contract of guarantee, do not point to its existence with sufficient clarity. The respondent's conduct does not depart sufficiently from the way it would have been without the guarantees. The second reason is that if the doctrine of part performance were applied to oral contracts of guarantee then anytime the recipient of the guarantee had acted on the guarantee, the case would be taken out of the statute; it would not then be possible to envisage a cause of action where the statute would be a bar to an action on an oral guarantee, and that would constitute, in effect, an improper judicial repeal of the provisions of the statute relating to guarantees. The third reason is that, historically, the doctrine of part performance has been employed to take cases out of the statute only, or, principally, in the case of contracts relating to land, being contracts where the remedy of specific performance is available. It is said that the House of Lords' decision in *Steadman v. Steadman*, [1974] 3 W.W.R. 56, extends the doctrine of part performance beyond land transactions but even in that case there was, as part of an omnibus oral agreement between separating spouses an agreement to convey land. The case decided that part performance of one of the other elements of the omnibus agreement was sufficient to take the case out of the statute although there had been no part performance of the element of the omnibus agreement involving a transfer of land. In my view *Steadman*, *supra*, is not an authority for the proposition that part performance by the beneficiary of an oral guarantee will take such guarantees out of section 4 of *The Statute of Frauds*.

16 The appeal is dismissed. In the circumstances, where the respondent was represented by its vice-president, and where the preliminary issues were carried by the appellant and the crucial issue was not argued by the respondent, and where the respondent's contention as to part performance was rejected, it seems appropriate that there be no order as to costs and so there will be none.

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Citing References (15)

Treatment	Title	Date	Type	Depth
Considered in	1. **Grant v. V & G Realty Ltd.** 2008 NSSC 180 (N.S. S.C.) **Judicially considered 1 time**	June 10, 2008	Cases and Decisions	
Considered in	2. **Brar v. Roy** 2005 ABCA 269 (Alta. C.A.) **Judicially considered 14 times**	Aug. 16, 2005	Cases and Decisions	
Considered in	3. **Ferrell Builders Supply Ltd. v. 1234932 Ontario Ltd.** 2003 CarswellOnt 2279 (Ont. S.C.J.)	June 03, 2003	Cases and Decisions	
Considered in	4. **Conmac Western Industries v. Robinson** 1993 CarswellAlta 341 (Alta. Q.B.) **Judicially considered 13 times**	May 07, 1993	Cases and Decisions	
Considered in	5. **Lindstrom Construction Ltd. v. Capozzi Enterprises Ltd.** 1992 CarswellBC 840 (B.C. S.C.) **Judicially considered 6 times**	Feb. 06, 1992	Cases and Decisions	
Considered in	6. **301364 Ontario Inc. v. Chetti** 1989 CarswellOnt 1475 (Ont. H.C.) **Judicially considered 1 time**	Nov. 16, 1989	Cases and Decisions	
Considered in	7. **Talisman Projects Inc. v. Sunnymede Agrico Ltd.** 1984 CarswellBC 240 (B.C. S.C.) **Judicially considered 5 times**	May 23, 1984	Cases and Decisions	
Referred to in	8. **Settle v. Punnett** 2010 CarswellOnt 11256 (Ont. Small Cl.Ct.) **Judicially considered 1 time**	Aug. 20, 2010	Cases and Decisions	
Referred to in	9. **Collette v. Tarasoff** 2006 ABPC 84 (Alta. Prov. Ct.) **Judicially considered 1 time**	June 29, 2006	Cases and Decisions	
—	10. **Zuker, Ontario Small Claims Court Practice Case Law 25, Case Law**	2005	Secondary Sources	—
—	11. **Zuker, Ontario Small Claims Court Practice Case Law RSmCC 3.02, Case Law**	2005	Secondary Sources	—
—	12. **Zuker, Ontario Small Claims Court Practice Commentary 25, Commentary**	2005	Secondary Sources	—
—	13. **CED Contracts VI.1.(a), §296-§306**	2009	CED	—
—	14. **CED Contracts VI.4.(a), §375-§380**	2009	CED	—
—	15. **CED Guarantee, Indemnity and Letters of Credit VI.2, §113-§120**	2009	CED	—

