Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 251 ALR 322; (2008) 83 ALJR 196

Agricultural and Rural Finance Pty Ltd v Gardiner (2008) 251 ALR 322 is a decision concerning whether a late payment, if accepted, was made 'punctually' within the meaning of an indemnity agreement and, if not, whether the acceptance of payment or representations made in this regard constituted a waiver of this requirement.

The proceedings arose in the context of the collapse of an investment scheme known as the *'Port Macquarie Tea Tree Plantation'*, whereby investors would participate in a commercial tea tree plantation project ([10]). The appellant, Agricultural and Rural Finance Pty Ltd (ARF), lent money to participants such as the first respondent (Gardiner). The second respondent, OAL, managed the project and would indemnify the participants for liability to ARF in or on certain conditions.

ARF made four loans to Gardiner. In each case, the loan agreement required periodic repayments and provided that the whole of the principal outstanding was immediately repayable, at the option of ARF, 'if [Gardiner] defaults in the due and punctual payment of interest … or any repayment instalment' ([1]).

Each loan agreement was made contemporaneously with an indemnity agreement between ARF, Gardiner and OAL which provided that, in consideration of Gardiner paying a flat fee, if Gardiner *punctually* paid amounts due under the related loan agreement, and if, as a result of certain events, Gardiner ceased to carry on the business to which the money lent was to be applied, OAL would indemnify Gardiner against any demand by ARF for repayment under that loan agreement, and ARF would look only to OAL for repayment of the loan ([2]).

...the majority, commenting more generally, stated that the making of a representation, without more (such as election, variation or detrimental reliance) ought not suffice to alter the rights and obligations for which the parties stipulated their contract.

Gardiner did not pay certain sums due under, relevantly, the first and second loan agreements. ARF accepted late payment and did not choose to accelerate repayment of the whole of the outstanding principal ([5]). However, following the collapse of the scheme, ARF sought to recover the money lent to Gardiner ([25]).

It was accepted that Gardiner later ceased to carry on the relevant business as a result of an event of a kind specified in the indemnity agreements ([5]). The issue that arose was whether he could rely upon the indemnity agreements and require ARF to look only to OAL for payment. This in turn depended whether the late payment could be said to be 'punctual' and, if not, whether this condition to the indemnity was waived ([6]).

At first instance, Young CJ in Eq (as he then was) found in favour of ARF in respect of moneys owing under all four loan agreements. The Court of Appeal, however, allowed Gardiner's appeal in part and found that only the monies under the fourth agreement was due and payable ([27]). The decision turned on a letter sent by ARF in respect of an overdue payment that: '... as we failed to send reminder notices we will accept payment as 'on time' up until 30 June 1999.'

Spigelman CJ held that payment was made 'punctually' ([28]-[29]). Basten JA held that payment was not made 'punctually' but the letter constituted an express variation ([30]). Handley AJA dissented ([31]).

Gummow, Hayne and Kiefel JJ delivered a joint judgment that upheld the appeal to it and held Gardiner to be liable in respect of the first and second loan agreements. Heydon J agreed with the joint judgment. Kirby J dissented.

The majority held that the late payments were not made 'punctually', stating that ([32]):

> The word 'punctually' when used in cl 2 of the indemnity agreements, like the word 'punctual' in cl 5 of the loan agreements, should be read in its ordinary sense of '[e]xactly observant of [the] appointed time; up to time, in good time; not late'. Nothing in the text or context of the agreements (whether read separately or together) supports reading the critical words in some other way. [Footnotes omitted].

This meant that payment was to be in accordance with the contractual provisions whether or not ARF was content to accept a later payment. By using the words 'punctually' or 'due and punctual', the relevant clauses of the contract looked to the way in which the obligation to pay had been performed, which required consideration of what the borrower has done, not what the lender has done in response to the fact of payment ([34]).

The majority also rejected the argument that there was 'waiver' of the requirement that payment be made 'punctually' in the three senses in which the concept was argued before it.

First, there was no waiver in the sense of an election between inconsistent rights. ARF's election not to accelerate did not deny the fact of the breach by Gardiner but, to the contrary, the premise for analysis of the events as an election by ARF was that Gardiner had not made due and punctual payment ([63]). There was also no election by OAL because the lateness of payment did not give OAL a choice between competing rights ([66]).

Second, there was no waiver in that there was forbearance ([68]-[87]). A contracting party was not to be held (pending reasonable notice to the contrary) to that party's acceding to the opposite

party's request to forbear from insisting on performance as stipulated ([87]). This was not a case in which principles relating to estoppel, an election between inconsistent rights or variation arose.

Third, there was no waiver in that there was 'abandonment' or 'renunciation' ([88]-[93]). Even if ARF and OAL had said that they would not insist upon compliance with the condition for punctual payment, the time for abandonment or renunciation of the right to insist upon the condition had not arrived when those statements were made and what was said or done at that time constituted, therefore, no abandonment or renunciation ([93]).

Finally, the majority, commenting more generally, stated that the making of a representation, without more (such as election, variation or detrimental reliance) ought not suffice to alter the rights and obligations which the parties stipulated by their contract ([95]-[96]).

Accordingly, Gardiner could not rely upon the indemnity as an answer to ARF's claim for monies owing under the first and second loan agreements.

By Patrick Reynolds

Kennon v Spry (2008) 83 ALJR 145; (2008) 251 ALR 257

The central question in this case was whether the assets of a family trust were included among the property of the parties to the marriage for the purposes of a property settlement under the *Family Law Act 1975* (Cth).

The facts were that the husband had created a discretionary trust some 10 years prior to the marriage. The husband made direct financial contributions to the trust assets; the primary judge found that the wife made indirect financial contributions to the trust assets, by her efforts in the marriage. The husband was at all relevant times the sole trustee. The marriage lasted for 23 years, after which the parties separated in 2001. There were four children of the marriage, each of whom subsequently intervened in the proceedings.

A number of variations to the trust were effected over the years. First, in 1983 the husband caused to be executed a deed pursuant to which the husband: (1) released the trust from any loans advanced to it by him; and (2) released and abandoned any beneficial interest he may have held in the trust, and confirmed that he ceased to be a beneficiary, or a person to whom or for whose benefit any part of the trust fund and income could be applied.

Next, in 1998 the husband caused to be executed a further deed pursuant to which both the husband and the wife were excluded from receiving any part of the capital of the trust. Lastly, in 2002 the husband caused to be established four separate trusts, in the names respectively of each of the children of the marriage. In his capacity as trustee of the trust the husband then applied one quarter of the total income and capital of the trust fund to each of the trustees of the trusts for the four children.

By way of preliminary, the following propositions were affirmed in the various judgments. The term 'discretionary trust' has no fixed meaning and is used to describe particular features of certain express trusts (French CJ at [47]; see *Chief Commissioner of Stamp Duties (NSW) v Buckle* (1998) 192 CLR 226 at [8]). A person falling among the class of objects of the discretionary power conferred upon the trustee of a discretionary trust has no proprietary interest in the assets of a trust, only a mere expectancy or hope that one day the power will be exercised in that object's favour (Heydon J at [160]; and see *Gartside v Inland Revenue Commissioners* [1968] AC 553). However, an object of the trustee's discretionary power has certain rights, including a right in equity to due administration of the trust; moreover the trustee owes a fiduciary duty to the objects to consider whether and in what way he or she should exercise the power (Gummow and Hayne JJ at [125] and see *McPhail v Doulton* [1971] AC 424).

The question then was whether the husband or the wife, or both, had interests in or in relation to the assets of the trust that fell within the description of 'property of the parties to the marriage' in section 79(1) of the Family Law Act.

The effect of the primary judge's orders was that the 'net asset pool' to which regard could be had in assessing the parties' contributions included the assets of the trust (Kiefel J at [191]). A full court of the Family Court by majority dismissed an appeal from the decision of the primary judge. The High Court by majority

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