IN THE COURT OF APPEAL OF NEW ZEALAND CA 249/93

BETWEEN UDC FINANCE (1991) LIMITED formerly known as NATIONAL MUTUAL FINANCE LIMITED

Appellant

AND ANDREW GRAHAM GARLAND

Respondent

Coram: Casey J
McKay J
Ellis J

Hearing: 15 June 1994

Counsel: I W Thorpe and T R T Anderson for Appellant
Tracey J Walker for Respondent

Judgment: 15 June 1994

JUDGMENT OF THE COURT DELIVERED BY McKAY J

The appellant applied for summary judgment against the respondent in respect of his liability under a guarantee. The guarantee was of an advance made to a partnership for the breeding of racehorses. Summary judgment was refused by the Master on the ground that the respondent's liability was subject to an express condition which had not been shown to have been waived or otherwise not applicable. The appeal is from the Master's decision.

The respondent was persuaded by the promoter of the partnership to become a member of the bloodstock syndicate by subscribing for 10 of the 101 partnership shares. He signed a form of application to purchase shares, and a power of attorney in favour of McArdle & O'Rourke Bloodstock Ltd, who were appointed to manage the business. Finance was sought from the appellant, which advanced $550,000 at an interest rate of 21 percent. The loan was to be secured by an instrument by way of security over the horses purchased by the partnership. Each partner was to give a personal guarantee for an amount of up to $55,000 plus one tenth of the interest and costs.

The instrument is dated 28 June 1988, and was signed on behalf of all of the partners by McArdle & O'Rourke Bloodstock Ltd as their attorney. It named all the partners as guarantors, and included a covenant by them to repay the full advance. The Deed of Guarantee is dated 18 July 1988, and was similarly executed by the company as attorney for each partner. It incorporated a clause limiting "the liability of the guarantors" to $55,000 plus one tenth of the total interest and costs. Despite the wording, the limitation is presumably intended to apply not to their total liability, but to the individual liability of each. At about the same time as these documents were signed, the appellant sent to the partners a separate document which it required each of them to sign, confirming the terms of the loan and of their individual liability. One such document was signed by the respondent, and is in the following terms:

> "Wellington Branch Manager
> National Mutual Finance Limited
> PO Box 2695
> WELLINGTON
>
> Dear Sir
>
> RE: INTERNATIONAL STANDARDBRED PARTNERSHIP

I ANDREW GRAHAM GARLAND confirm that I am a partner in the abovementioned partnership holding 10 of the 101 units. I understand that National Mutual Finance will be advancing credit of $550,000.00 to the International Standardbred Partnership on the terms set out in the attached loan offer for a period of five years.

Security for the loan will be a chattel security over the stock outlined in the McArdle & O'Rourke Bloodstock Limited proposal dated 20 April 1988 with stock being fully insured.

I hereby agree and understand that if called upon by National Mutual Finance Limited that I will be personally liable for an amount of up to $55,000.00 together with a one tenth share of interest and costs incurred by your company. I undertake that I would make this payment upon demand to National Mutual Finance Limited provided that demand shall not be made by National Mutual Finance Limited within a period of 60 days from the date of the first default and National Mutual Limited having attempted to realise on its security within that period and I acknowledge that I will make this payment whether or not National Mutual Finance Limited have pursued any other guarantor of the facility.

DATED at WHAKATANE this day of 25TH JULY 1988.

"A. G. GARLAND""

The document originated from the appellant, and is expressed as being signed prior to the advance being made. Mr Thorpe, for the appellant, accepted for the purposes of the summary judgment application that this document, and the limitation contained in its final paragraph, was a term of the arrangement and binding on his client. He reserved the right to argue otherwise if the case proceeds to trial, but accepted that for summary judgment purposes it should be treated as binding.

The condition in the final paragraph is that the respondent was to be liable only if the appellant made demand more than 60 days from the date of first default, and had attempted to realise its security within that period. This condition was of obvious importance to the individual partner as limiting his potential liability. In the ordinary way he would only be called upon for his share of the balance of the

debt, if any, after recourse had been had to the security. A period of 60 days was allowed to enable realisation to be effected.

Defaults were made by the partnership in respect of the loan. In January 1990 the appellant sent to each of the partners a further document. According to Mr Mayes, the appellant's manager, it was recognised by the partnership and by the appellant that because of the depressed state of the bloodstock market at that time it would not be in the best interests of the partnership to have the appellant realise the bloodstock within 60 days of the default. Letters from each of the partners, addressed to the appellant and dated 15 June 1990, were prepared in identical terms releasing this condition, and these were sent to the partners for signature and return.

These letters were signed by each of the parties, with the exception of the respondent. They were each in the following form:

"15 June 1990

TO: NATIONAL MUTUAL FINANCE LIMITED

Dear Sir/Madam

RE: INTERNATIONAL STANDARDBRED PARTNERSHIP

The loan documentation in respect of the advance made by National Mutual Finance Limited to the partners of International Standardbred contains an undertaking by each of the partners in the following terms:

> "... I undertake that I would make this payment upon demand to National Mutual Finance Limited provided that demand shall not be made by National Mutual Finance Limited within a period of sixty days from the date of the first default and National Mutual Finance having attempted to realise on its security within that period ...".

> It is accepted that neither National Mutual Finance Limited nor the partners in International Standardbred wish the stock to which the provision relates to be sold within the sixty day period referred to. I therefore expressly release National Mutual Finance Limited from any obligation to endeavour to sell the stock within the sixty day period referred to before making demand in respect of my personal liability under the loan documentation."

The first part of the document sets out the previously agreed limitation on the right of the appellant to make demand. It then contains an acceptance by the intended signatory that neither the appellant nor the partners wished the stock to be sold within the 60 day period. There is then an express release by the signatory in favour of the appellant from the previously agreed limitation on making demand in respect of his personal liability. If the respondent had signed such a document, then he could no longer rely on that limitation as a defence to the claim.

He did not sign it, but Mr Thorpe for the appellant submitted that he was bound by it nevertheless. He submitted that the sale of stock was part of the usual business of the partnership, and accordingly within the powers of McArdle & O'Rourke Bloodstock Ltd under the wide terms of their power of attorney, and also under their powers as manager under the partnership deed.

There are a number of difficulties in the way of this argument. In the first place, the waiver by the respondent of a condition attaching to his personal liability is not an exercise of a power given to the manager to manage and sell stock on behalf of the partnership. The manager's power to sell stock is not affected by the terms agreed between the respondent and the appellant as to the respondent's personal liability. Nor is there anything in the documents to suggest that the manager was authorised to use its power of attorney to vary the terms so agreed. As Miss Walker put it, the waiver was in respect of the terms agreed with each of them in respect of their personal obligation, not in relation to an element of the partnership business.

For the same reason, Mr Thorpe's second argument that the respondent was bound by the decision of his partners cannot succeed. This was not a matter which could be decided by a majority of the partners in such a way as to bind the minority. The majority had power to bind the minority in respect of matters relating to the business, either under clause 9 of the Deed of Partnership or under section 27(h) of the Partnership Act 1908. Although the borrowing was for the purpose of the business, the conditions of liability of individual partners were limited by individual agreements. These conditions, once fixed, could not be varied in respect of any partner without his personal agreement.

In any event, there was no evidence of any decision by the manager or by the partners purporting to vary the terms of the liability of individual partners. Nine partners individually signed the document of waiver, each on his own behalf. The respondent did not sign. The manager did not purport to sign it on his behalf, whether as attorney or as manager, and no resolution of a majority purported to bind him. He was asked to sign on his own behalf, and did not choose to do so. The fact that all the other partners did so, each for himself, could not bind the respondent even if the matter had been one for decision by the partnership.

The other main submission relied on for the appellant was that by his failure to reply to the document of release or waiver sent to him, the respondent had by silence waived the limitation on the power to make demand. Mr Thorpe recognised that mere silence would not be enough without other circumstances, but he relied on the fact that the respondent was a member of the partnership, his only dealings with the appellant had been as a partner, and the sale of stock was part of the partnership business. He submitted that if silence did not amount to waiver, it could amount to a representation of agreement, and so give rise to an estoppel. He

referred to the principle that an estoppel may arise from silence or inactivity in circumstances where there is a duty to speak or act: 16 Halsbury 4 ed 955.

It may be questioned whether the fact that the sale of stock was a part of the partnership business would cover the total realisation of all stock to wind up the business. Be that as it may, the situation was not one in which mere silence could possibly justify an inference of waiver, or could found an estoppel. The appellant sent to each partner a document which it asked him to sign and return. The document contained an express, individual release of a limitation which applied to that party's liability. A failure to sign and return such a document could not support an inference of agreement, or be regarded as a representation of agreement. By sending out such a document for signature the appellant had signalled the method by which the release was to be communicated to it. In such a situation, mere silence could be construed as a refusal, but not as an acceptance.

For these reasons, the Master's decision to refuse summary judgment was clearly correct, and the appeal is dismissed. The issues in this case turn largely on matters of law, and it is perhaps unfortunate that it should have come to this Court only on an issue as to summary judgment, so that the ultimate decision in the case must be left to trial. On the material put before us, it is difficult to see what additional facts might be brought out in evidence that would overcome the appellant's difficulties. No doubt the appellant's counsel will consider the position in the light of this judgment. We have recorded the concession made for the purposes of the summary judgment application, and the appellant will not be bound by that if the case goes to trial.

The respondent is entitled to costs which we allow in the sum of $2,500, together with the reasonable costs of travel and accommodation of counsel, to be fixed if necessary by the Registrar.

Thomas J.

Solicitors
Bell Gully Buddle Weir, Wellington, for Appellant
Simpson Grierson Butler White, Auckland, for Respondent