



Case note

January 2009

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Agricultural and Rural Finance Pty Ltd v Gardiner [2008] HCA 57

High Court confirms the ordinary and strict interpretation of the requirement in commercial contracts for payments to be made "punctually".

In *Agricultural and Rural Finance Pty Ltd v Gardiner* [2008] HCA 57, five judges of the High Court unanimously concluded that where commercial contracts require payments to be made "punctually" by a due date or time, the concept of punctuality is to be given its ordinary and strict meaning and is not dependent upon the attitude of the payee.

In so deciding, the High Court clarified the rights of parties to commercial contracts where punctual payments are required and where there are consequences for late payments including, in this particular case, whether or not an indemnity granted by Oceania Agriculture Pty Ltd (**OAL**) to borrowers should apply.

The High Court allowed the appeal of Agricultural and Rural Finance Pty Ltd (**ARF**). Colin Biggers & Paisley acted for **OAL**.

As a result of the judgment, borrowers who made late payments are not entitled to the benefit of **OAL**'s indemnity.

Facts

OAL was the manager of a tax-effective prescribed interest investment scheme called the Port Macquarie Tea Tree Plantation, which involved a commercial tea tree plantation for the purposes of producing, harvesting, marketing and selling tea tree oil.

Participants in the scheme each made one or more investments. Each investment entitled the investor to obtain a licence over one or more allotments on the plantation on which to carry on a tea tree oil business, except that **OAL** as manager would effectively run that business on behalf of each investor.

Investors had the option of obtaining finance to fund their investments, with **ARF** acting as the lender. The majority of investors took advantage of a loan from **ARF**. For each investment that was made with the help of finance from **ARF**, **ARF** entered into a pro forma Loan Agreement, which required the investor to make certain pre-payments of interest and repayments of principal at regular intervals.

Pursuant to the Loan Agreement, if the investor/borrower defaulted in the "due and punctual payment" of either principal or interest payments, **ARF** had the option of

calling for the immediate payment of the entire outstanding principal and interest. ARF also had the option of calling up the entire outstanding principal and interest if at any time the investor ceased to carry on business on his or her allotment(s).

However, the investor/borrower could be protected from repaying the entire outstanding principal and interest to ARF if a certain indemnity was "effective and enforceable". That indemnity was one which arose out of an Indemnity Agreement, which each borrowing investor also had the option of entering into, in respect of each of his or her investments, for a \$250 flat fee.

OAL, ARF and the investor/borrower were the parties to the Indemnity Agreement, with OAL as the indemnifier. For the purposes of the High Court hearing, the indemnity would be "effective and enforceable" if the investor had "punctually paid" the interest and principal payments required under the Loan Agreement.

The schemes collapsed and, as of early 2003, each participant in the scheme ceased to carry on business. ARF called up the entire outstanding principal and interest from investors, and commenced proceedings in the Supreme Court of New South Wales in June 2003 against 216 investors to recover that outstanding principal and interest.

One such investor was Mr Bruce Gardiner. Relevantly, Mr Gardiner defended ARF's claim on the basis that the indemnity granted by OAL

was effective and enforceable. The case in relation to Mr Gardiner was run as a test case, the decision in which would bind the majority of the other defendants.

In the lower Courts

Mr Gardiner made four investments. At first instance, Young CJ in Eq decided, leaving aside the question of punctuality, that, prima facie, the indemnity was not effective and enforceable in respect of any of Mr Gardiner's four investments.

Mr Gardiner appealed. The Court of Appeal found that the indemnity was effective and enforceable, subject to the condition that payments had been made punctually. It was found that in respect of Mr Gardiner's third investment he was punctual in all his payments, and that in respect of his fourth investment he was not punctual in his payments, on any definition of punctuality.

However, it was in respect of Mr Gardiner's first and second investments that there was controversy as to the meaning of punctuality. Payments in respect of these two investments had been made after the due date. However, Spigelman CJ found that ARF had accepted those payments without calling up the entire outstanding principal and interest as it was entitled to do, and on that basis the payments had been accepted as punctual.

Basten JA and Handley AJA gave the word "punctually" its strict and ordinary meaning, but Basten JA found that a letter from ARF

allowing Mr Gardiner additional time for payment effectively made Mr Gardiner's payments punctual. The combination of Spigelman CJ and Basten JA's different reasoning resulted in a finding that Mr Gardiner had in fact "punctually paid" in respect of his first and second investments.

In the High Court

ARF appealed against the Court of Appeal's decision in respect of Mr Gardiner's first and second investments. ARF sought clarity as to the definition of "punctually paid", ie whether Spigelman CJ's definition was correct, or whether Basten JA and Handley AJA's strict and ordinary interpretation was to be preferred. Despite English cases on this point, surprisingly there had been no High Court authority on the meaning of a requirement of punctuality.

A second issue before the High Court was the effectiveness of the letter from ARF to Mr Gardiner to bind both ARF and OAL to an extension of time for Mr Gardiner's payments such that ARF and OAL waived their right to deny indemnity on the basis the payments had not been "punctually paid". This in turn caused the Court to consider the principles of the doctrine of waiver.

"Punctual" means punctual

ARF's appeal was heard by Gummow, Kirby, Hayne, Heydon and Kiefel JJ. The joint decision of Gummow, Hayne and Kiefel JJ decided that the words "punctually" or "punctual"

"should be read in its ordinary sense of "[e]xactly observant of [the] appointed time; up to time, in good time; not late"". Their Honours found that the interpretation given by Spigelman CJ in the Court of Appeal, which hinges on the payee's (ie ARF's) attitude, would strip the words "punctually" or "punctual" of meaning.

Their Honours continued:

"By using the words "punctually" or "due and punctual", each clause looks to the way in which the obligation to pay has been performed. That requires consideration of what the Borrower has done, not what the Lender has done in response to the fact of payment."

Heydon J agreed with the joint decision. In his final judgment prior to retirement, Kirby J decided that whilst words such as "punctually" are not always inflexible, in such commercial situations the ordinary and strict interpretation of punctuality is correct, to "facilitate a business-like approach" especially in circumstances where pro forma agreements are in use.

Kirby J continued that any unfairness caused by strictness could be remedied by equitable principles, estoppels, consensual variation or statutory relief, but Courts should not adopt "atextual meanings of words of strictness". His Honour added:

"Adopting atypical meanings of words such as "punctually" tends to defeat the expectation

of [parties to contractual agreements, especially international parties using English]. It diminishes their capacity to agree in advance on their respective legal obligations and entitlements. It erodes confidence in the capacity of the law to uphold the bargains, upon which the parties have agreed, according to their terms."

Mr Gardiner's payments under his first and second investments were, therefore, found to have been unpunctual.

Doctrine of waiver

Their Honours unanimously found that the letter upon which Basten JA had relied in his reasoning did not bind OAL to grant an extension of time for Mr Gardiner's payments because it was written by ARF. As a result, there had been no waiver of OAL's right to deny indemnity on the basis that Mr Gardiner's payments had not been "punctually paid".

The Court also considered whether there was a doctrine of waiver recognised in Australian law, separate from the concepts of estoppels, election and contractual variation, but as a result of the factual findings the Court did not reach at a conclusion on this issue.

Conclusion

Mr Gardiner was found not to have the benefit of OAL's indemnity in respect of his first and second investments. The High Court's decision will now serve to guide the determination of the cases in respect of all the other defendants sued by ARF.

From a broader perspective, the High Court's decision confirms that the requirement of punctual payment in commercial contracts is to be understood in its ordinary and strict sense, and is not to be determined by reference to the attitude of the payee. It also assists in clarifying the rights of parties to commercial contracts, where there is a requirement for payments to be made "punctually", and where there are consequences, rights and entitlements flowing from late payments.

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