



## HIGH COURT OF AUSTRALIA

Public Information Officer

11 December 2008

### AGRICULTURAL AND RURAL FINANCE PTY LIMITED v BRUCE WALTER GARDINER AND OCEANIA AGRICULTURE LIMITED

Indemnity for a loan was unavailable when loan payments were late, even if the lender accepted the payments as “punctual”, the High Court of Australia held today.

In 1997, Oceania Agriculture (OAL) promoted a tea tree plantation investment scheme that was marketed as having tax advantages for investors. Each participant was granted a 17-year licence over an allotment of land on which would be planted at least 18,000 tea trees for the production of tea tree oil. They paid OAL annual licence and management fees. OAL managed the project and established and maintained the trees. Investors could obtain finance under a loan agreement to fund the initial management fees and those who accepted finance from Agricultural and Rural Finance (ARF) had the option of entering into a loan indemnity agreement with OAL and ARF. For a flat fee, if amounts due under the loan agreement were paid punctually, OAL would indemnify obligations under the loan contracts if the business ceased due to certain events.

Between October 1997 and May 1999, ARF made four loans to investor Bruce Gardiner. Each loan agreement required periodic payments and provided that the whole of the principal outstanding was immediately payable, at the option of ARF, if Mr Gardiner defaulted in the punctual payment of interest or any repayment instalment. Mr Gardiner did not pay certain amounts under three of the four loan agreements on the due date. When payments were late, ARF accepted payment and did not choose to accelerate repayment of the outstanding principal. Mr Gardiner ceased to carry on the tea tree business due to an event of a kind specified in the indemnity agreement. When the scheme collapsed, ARF sought to recover its loans and sued Mr Gardiner and 215 other borrowers in the New South Wales Supreme Court. The Chief Judge in Equity, Justice Peter Young, rejected all of Mr Gardiner’s defences to ARF’s claims for payment and dismissed his cross-claims against ARF and OAL. ARF obtained judgment for the whole of the amounts it claimed as principal and most of its claim for interest. In the NSW Court of Appeal, ARF obtained judgment for its claim under Mr Gardiner’s fourth loan agreement, but lost its claims to recover principal or interest in respect of the first three loan agreements. ARF appealed to the High Court in respect of the first two agreements. The third loan agreement was performed punctually and ARF no longer disputed that the indemnity agreement was effective and enforceable and that it could only look to OAL for repayment.

In the High Court, Mr Gardiner sought to rely on the indemnity agreements for both loans, claiming that his overdue payments should be regarded as “punctual” and that ARF, in its statements and actions, had waived compliance with due dates by accepting late payments. Mr Gardiner submitted that the waiver took the form of an election between inconsistent rights, forbearance from exercising a contractual right, or the abandonment or renunciation of a right.

The High Court unanimously allowed the appeal with costs. It held that Mr Gardiner did not pay punctually, indemnities for the first and second loans were therefore not effective and enforceable, and there had been no waiver by ARF or OAL. “Punctual” had its ordinary meaning and did not depend on ARF’s attitude to late payments. The Court held that, in the circumstances of the case, none of the three forms of waiver contended for by Mr Gardiner applied. Even if ARF had waived its rights to punctual payment, that did not bind OAL to indemnify the loans. The obligation for punctual payments was imposed by the loan agreements and was owed to ARF, not to OAL. ARF was entitled to judgment for the amounts owing for the first and second loans as well as for the fourth loan.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court’s reasons.*