COURT OF APPEAL [1996] QCA 099

McPHERSON JA
DAVIES JA
AMBROSE J

Appeal No 176 of 1995

DARLING DOWNS GROUP OPERATOR
PTY LTD (ACN 009 793 140) Appellant

and

MESSRS O'MARA, PATTERSON & PERRIER
(a firm) Respondent

BRISBANE

..DATE 26/03/96

JUDGMENT

McPHERSON JA: On 28 August 1992 the defendant executed an indenture in the form of a deed with the plaintiffs, who are a firm of solicitors. The deed recited that the plaintiff firm had done legal work for the defendant giving rise to an indebtedness of $42,757.96, which is the sum sued for together with interest in this action.

For present purposes it is necessary and sufficient to set out the recitals E to G of the deed, and also clause 1 of it:

> "E. The total outstanding sum (hereinafter referred to as the 'Total Outstanding Sum') due and owing to O'Mara is $42,757.96.
>
> F. Darling Downs does not dispute the quantum of the Total Outstanding Sum.
>
> G. Darling Downs is currently unable to attend to the payment in full of the Total Outstanding Sum."

Clause 1 of the deed is expressed as follows:

> "Darling Downs shall commence to make periodical payments to O'Mara by way of reduction of the Total Outstanding Sum as soon as possible."

It is necessary to add that, in reading those provisions of the deed, the reference to O'Mara is a reference to the plaintiff firm of solicitors, and the reference to Darling Downs is a reference to Darling Downs Group Operator Pty Ltd, which is the defendant.

In the course of the reasons for the judgment, which was given in favour of the plaintiff, the learned trial judge said that clause 1 was uncertain and the deed was consequently void. I

doubt, however, if the expression "as soon as possible" in clause 1 is so uncertain as to render clause 1 meaningless and the whole deed void. In Head v. Kelk [1963] S.R.(NSW) 340 the Full Court of New South Wales held that a promise to pay "when financially able to do so and not before" was not uncertain. I see little, if any, difference between that expression and the verbiage of clause 1 in the present case.

In any event it does not matter much if clause 1 is uncertain and void. It incorporates a promise to pay the amount in question. Eliminating the promise to pay from the deed would not have the consequence that the whole deed was rendered void. To adopt that approach to the matter would be to confuse two distinct functions which the deed was designed to perform, one of which was to acknowledge the existence of the debt and its amount, and the other to provide for its discharge by payment. If the covenant or promise to pay is, as it is contended by the appellant, void, the deed nevertheless remains a valid deed and an effective acknowledgment of the debt in other respects.

This accords with ancient and long-standing law, as well as with common sense. For example, in Spencer v. Hemmerde [1922] 2 A.C. 507, the debtor wrote a letter to the following effect: "It is not that I won't pay you, but that I can't do so..." He never paid any part of the money involved. It was held by the House of Lords that that was a sufficient acknowlegement to take the case out of the Statute of Limitations. The decision has been followed on many occasions, and in particular it was applied by

the High Court in Bucknell v. Commercial Banking Company of Sydney Ltd (1937) 58 CLR 155, 164 to 165. As appears from the passage at 165 of that report, the only question is whether the acknowledgment is an unqualified acknowledgement, which in the recitals in the present case it certainly is.

A debtor, it need hardly be said, cannot get rid of an admitted debt by making a qualified promise to pay it. I do not consider that, if the provisions of clause 1 of the deed are not effective, they can be viewed as in some way indefinitely suspending or postponing the promise to pay the debt. Whether void or valid, the provisions of clause 1 of the deed do not touch the plain and unqualified acknowledgment that appears in the recitals to the deed and which demonstrate that the defendant admitted under seal that it owed the amount of money specified in those recitals.

In these circumstances it is not possible simply to ignore the acknowledgment and pretend that somehow the debt is not owing, and is not to be taken as owing.

Some attempt was made by the appellant to refer us to other letters that preceded the execution of the deed, and to suggest that in some way the provisions in the body of the deed could be qualified or better understood when read in the light of that correspondence.

It is a settled rule of law that one cannot resort to parole

evidence, which in this context includes letters and correspondence between the parties, in order to interpret, qualify, contradict or detract from the terms of a formal document like a deed. Consequently, it is not open to arrive at the result that the appellant wishes by attempting to show that in some way or other there was an understanding or an agreement or condition that altered the effect of the deed as we now see it before us.

In all these circumstances it seems to me that there is no basis on which this appeal can succeed. I would dismiss it with costs.

DAVIES JA: The appellant's grounds of appeal in this appeal which as the learned presiding Judge has said is one against a judgment for $46,695 and costs for professional fees by a firm of solicitors are in summary that -

(1) A letter dated 11 February 1991 from the appellant to the respondent was not a retainer to act in a Planning and Environment Appeal, but for a more limited purpose;

(2) The retainer of the respondent in that appeal was by another company, Agaric Pty Ltd ;

(3) A deed dated 22 August 1992 was not an admission by

the appellant of an existing liability to the respondent;

(4) A letter dated 4 August 1994 from Hemming and Hart Solicitors to the respondent either was not such an admission or was inadmissible.

The learned trial Judge held that the letter dated 11 February 1991 was a retainer by the appellant, on its own behalf and on behalf of Agaric, to the respondent to act in relation to an application to the Rosalie Shire Council, including an appeal to the Planning and Environment Court. If His Honour was correct in that conclusion this appeal must fail because the amount of fees was proved by the respondent and there was no dispute as to that.

As His Honour pointed out in his judgment the letter contemplated that the application then before the council would not be successful and that there would be an appeal to the Planning and Environment Court. It referred to need to make plans for the lodgment of an appeal and "our strategy and tactics from there". It enclosed an amount of $2,000 to pay fees as and when they fell due and asked to be "kept updated" on further costs and fees. It was in that context that the solicitors were asked in the letter to act "with regard to the application recently made to Rosalie Shire Council for town planning consent". Without more I would have been inclined, as

His Honour did, to construe this letter as a retainer from the appellant to the respondent to act in relation to the Planning and Environment appeal, but so strong is the subsequent evidence against the appellant that it is unnecessary to decide this question.

Thereafter accounts were periodically rendered to the appellant and for a time they were paid. The appeal to the Planning and Environment Court proceeded and was successful. After a time, without explanation from the appellant, accounts rendered by the respondent were not paid. On 28 August 1992 the appellant executed a document in the form of a deed. In it the appellant acknowledged that in February 1991 it instructed the respondent to institute an appeal to the Planning and Environment Court consequent upon refusal by the Rosalie Shire Council to allow the application; that the respondent delivered it to it bills of costs under cover of letter dated 1 April 1992; that the outstanding sum due by it to the respondent was $42,757.96 and that it did not dispute the amount of that sum. The appellant then undertook to make periodical payments of that sum "as soon as possible" and during the period that it or any part of it remained outstanding, to pay interest at the rate of 13 percent on monthly rests.

The learned trial Judge held that the deed was void for uncertainty because no certain meaning could be given to the phrase "as soon as possible". The respondent does not seek to

contest that conclusion so far as the deed constitutes a promise to pay but nevertheless relies on the document as an admission signed under seal by the appellant. The trial Judge held it to be such an admission and in that, in my view, he was plainly right.

His Honour also referred to the letter signed by the appellant returning the executed instrument in which did thank the respondent with its patience with regard to the payment of accounts and expressed the hope that payment of the amount referred to could be made in the near future.

The learned trial Judge also relied on a letter from Hemming and Hart written on behalf of the appellant to the respondent on 16 August 1994 but it is unnecessary for the purpose of this appeal to refer to that letter or the appellants objections to it. The evidence shows plainly that the appellant retained the respondent for its Planning and Environment appeal, acknowledged that it had done so and acknowledged its indebtedness to the respondent in the sum of $42,757.96.

No question arises in this appeal or indeed could arise as to the amount of interest which was in fact awarded pursuant to the Common Law Practice Act. Accordingly I agree with the presiding Judge that the appeal must be dismissed with costs.

AMBROSE J: I agree that the appeal must be dismissed with costs

and I adopt without addition the reasons given by the other members of the Court.

McPHERSON JA: The appeal is dismissed with costs.
