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

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)*

dismissed a further appeal.

In the majority, French CJ held:

> Where a property is held under such a trust [*ie, a discretionary trust with an open class of beneficiaries*] by a party to a marriage and the property has been acquired by or through the efforts of that party or his or her spouse, whether before or during a marriage, it does not, in my opinion, necessarily lose its character as 'property of the parties to the marriage' because the party has declared a trust of which he or she is trustee and can, under the terms of that trust, give the property away to other family or extended family members at his or discretion (at [65]).

French CJ further held:

> For so long as [*the husband*] retained the legal title to the Trust fund coupled with the power to appoint the whole of the fund to his wife and her equitable right, it remained, in my opinion, property of the parties to the marriage for the purposes of the power conferred on the Family Court by s 79. The assets would have been unarguably property of the marriage absent subjection to the Trust (at [66]).

Gummow and Hayne JJ (with whom French CJ agreed on this point) held (at [137]):

> And because, during the marriage, the husband could have appointed the whole of the Trust fund to the wife, the potential enjoyment of the *whole* of that fund was 'property of the parties to the marriage or either of them'. Furthermore, because the relevant power permitted appointment of the whole of the Trust fund to the wife absolutely, the value of that property was the value of the assets of the Trust.

Kiefel J was also in the majority in dismissing the appeal. However Kiefel J arrived at this outcome by a different route. Section 85A of the Family Law Act provides that the court may in proceedings under the Act make such order as the court considers just and equitable with respect to the application of the whole or part of property dealt with by 'ante-nuptial or post-nuptial settlements made in relation to the marriage'. Kiefel J held that this provision enabled the primary judge to deal with the trust property as contemplated by his orders.

In dissent, Heydon J would have allowed the appeal. Heydon J expressed the view that giving an extended meaning to the definition of 'property' would lead to a wholly unreasonable result (at [163]). Heydon J continued:

> For it would mean that if a discretionary trust existed under which a wife was among a class of objects of a bare power of appointment having thousand of members who had nothing to do with her family or the husband's family, the Family Court of Australia would have power to make a s 79(1)(a) order altering her 'interests' in the assets of that discretionary trust favourably to her.

Heydon J further held:

> Even if, contrary to the reasoning employed above, the wife's rights are 'property' rights, they are not forms of property to which the proceedings were directed. The proceedings were directed to obtaining orders enabling the wife to gain access, directly or indirectly, to the assets of the Trust. In those assets she had no property (at [164]).

As to section 85A, Heydon J held that the wife could not rely on this provision, since it had not been raised in either court below and, in any event, the settlement in question was not one 'in relation to the marriage' for the purposes of section 85A, since the trust had been established some 10 years prior to the marriage.

By Jeremy Stoljar SC