HIGH COURT OF AUSTRALIA

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Details of Filing

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Important Information

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **Yakun Shao**
Appellant

- and -

Crown Global Capital Pty Ltd (in prov liq) ACN 604 292 140
First Respondent

Crown Group Holdings Pty Ltd (in prov liq)
Second Respondent

APPELLANT'S REPLY

Part I: INTERNET PUBLICATION

1. These submissions are in a form suitable for publication on the internet.

Part II: REPLY

2. **Implied term**: The Respondents' Submissions (**RS**) rest entirely on the premises that:

   (a) *Ardern*[1] and *Catlin*[2] were decided upon the basis of an implied term that the bank's debt to the customer would only be repaid in accordance with the mandate;[3] and

   (b) Shao is seeking to rely upon an implied term to similar effect in this case.[4]

   As set out below, these premises are wrong: the decisions in *Ardern* and *Catlin* relied upon express terms, as does Shao.

[1] *Ardern v Bank of New South Wales* [1956] VLR 569.
[2] *Catlin v Cyprus Finance Corp (London) Limited* [1983] QB 759.
[3] RS, paras. 17-32.
[4] RS, paras. 3, 13 & 33-46.

3. ***Ardern***: The term that was relied upon by Martin J as giving rise to Ardern's right to damages was an express term described by his Honour as follows (emphasis added):

- *"Each of them* [Ardern and Brookes] *stated that* ***all cheques to be drawn on such an account were to be signed by both of them****, and the manager said he was agreeable to that."* [[1956] VLR 569 at 571]

- *"Now the agreement in this case was that the bank would open a joint account in the names of both partners and that* ***no cheque would be honoured unless signed by both of them****."* [[1956] VLR 569 at 573]

4. ***Catlin***: The term that was relied upon by Bingham J as giving rise to Mrs Catlin's right to damages was an express term described by his Honour as follows:

- *"...Mr and Mrs Catlin instructed the defendants in writing that* ***all orders for payment or transfer from the account were to be signed by both of them****."* [[1983] QB 759 at 763G]

- *"The factual position can therefore be put very shortly. The plaintiff and her husband deposited funds in a joint deposit account with the defendants* ***on terms of an express mandate that no payment out of the account should be made save on the joint signatures of both account holders****."* [[1983] QB 759 at 768D]

5. It may be that the Respondents rely upon the following passage in *Catlin* to contend that Bingham J's decision was based upon an implied term:

> *"The defendants agreed to honour instructions signed by both account holders. This no doubt imported a negative duty not to honour instructions not signed by both account holders."* [[1983] QB 759 at 771C]

However, even if the mandate in *Catlin* was in the terms expressed in the first sentence of the above passage, the implication referred to in the second sentence arises as a matter of construction from the express words of the contract: *Brambles Holdings Ltd v Bathurst City Council* (2001) 55 NSWLR 153 at [28]-[31]. As such, the Court is not concerned with the requirements for the implication of a term set out in cases such as *BP Refinery (Westernport)*[5]: *Boreland v Docker* [2007] NSWCA 94 at [110]-[111].

6. **Clause 4**: Clause 4 of the Facility Agreement expressly required Crown to pay the debt owing under the Facility Agreement into a bank account nominated by Shao and Peng:

> *"All money payable by the Borrower to the Lender under the Notes* ***must be*** *...deposited into the Lender's bank account as notified by the Lender to the*

[5] *BP Refinery (Westernport) Pty Limited v President, Councillors and Ratepayers of the Shire of Hastings* (1977) 180 CLR 266 at 283.

Borrower from time to time." [ABFM 12 (emphasis added)]

7. Crown breached this clause when it paid the debt into a bank account nominated by Peng alone. In the circumstances, there is no need to imply a further term which prohibits Crown from paying out the debt other than in accordance with Clause 4:

> *"Where the act complained of is a breach of an express term, there is no need to imply any further term which would have the effect of preventing that act."*[6]

8. The Respondents submit [at RS 41] that, *"The essential problem with the Appellant's argument is that it does not explain why, to give business efficacy to the facility agreement, it is necessary for non-compliance with cl 4 to give rise to a claim for damages for breach of contract."* However, a breach of contract by one party always gives the other party a right to recover damages for the breach.[7]

9. **Goodhart v Williams**: The Respondents submit [at RS 21-22] that the solution proposed by Dr Glanville Williams to the difficulties raised by McNair J's decision in *Brewer v Westminster Bank* [1952] 2 QBD 650 should be preferred to the solution proposed by Sir Arthur Goodhart. However, Dr Williams' solution is premised on McNair J having erroneously found that the fraudulent joint account holder had been paid.[8] In fact, McNair J made no such finding – to the contrary, his Honour recognised that the bank's debt to the joint account holders had not been discharged [at 656G-H]. McNair J held that the innocent account holder was not entitled to a declaration that the bank had wrongfully debited the joint account with the amount of the forged cheques because (i) a joint right could not be enforced unless each joint right holder was in a position to obtain relief and (ii) the fraudulent joint account holder was unable to sue because the claim that the bank had wrongfully debited the account was based upon his own fraud [at 654G-H]. That is to say, the account had only been *wrongfully* debited as a direct result of one account holder having forged the other's signature. As such, it remains necessary to adopt the Goodhart solution for the innocent account holder to be entitled to relief.

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[6] Lewison, *The Interpretation of Contracts*, 8th ed (2024) at 386 [6.87].
[7] *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [58]; *State of New South Wales v Stevens* (2012) 82 NSWLR 106 at [18]; *Motium Pty Ltd v Arrow Electronics Australia Pty Ltd* [2011] WASCA 65 at [7].
[8] Dr Glanville Williams, *Notes of Cases – Joint Bailments and Joint Accounts* (1953) 16 MLR 232 at 234.

10. **Defective performance v non-performance**: Underlying the Respondents' submissions is an assumption that a debtor either repays a debt in conformity with the contract, or the debtor has not performed the contract at all.[9] The Respondents' submissions deny the possibility that a debtor may defectively perform the contract – a possibility expressly contemplated in *Mackenzie v Albany Finance Limited*:[10]

> *"… Repayment of any or all of the deposit by the respondent, without demand being made or without interest being paid,* ***would not be a payment made in conformity with the terms of the deposit****. … **Such a premature or part payment of principal could be made and accepted, but would still entitle the appellant to bring a claim for damages for loss of interest if reinvestment on comparable terms was not possible.** …"*

11. A similar argument to the Respondents' was made in *Albright & Wilson UK Limited v Biachem Limited*[11] – a case involving the delivery of a chemical to the wrong location, leading to an explosion at a factory. It was argued that the contract required the chemical to be delivered to another location, and because no delivery had been made to that other location, the only damages that could be claimed were for failure to deliver the chemical at all – not damages for the loss of the factory arising from the delivery to the wrong location [at [36]]. This argument was rejected by the Court of Appeal:

> *"…**It assumes, as other arguments in this case have assumed, that breaches of terms can only arise when there is actual and total performance of the contract. That is not so:** I revert again to Denning LJ in* Wilson v Rickett. *Here, performance was tendered at the wrong place, but it was purported performance nonetheless. Mr Bartlett also pointed out that there had been delivery and that delivery had been accepted in the way that I have already set out earlier in this judgment; the breach, therefore, was one of misdelivery, but that did not mean that there was no purported performance of the contract. I agree with that analysis."* [at [37] (emphasis added)]

12. The Respondents submit [RS 16] that Shao is not entitled to have *"both repayment of the debt and damages to compensate her for not receiving the moneys comprising repayment of the debt."* Pursuant to the Facility Agreement, however, Shao was entitled to have repayment of the debt into a bank account of her (and Peng's) choosing. If the debt was repaid into a bank account not of her (and Peng's) choosing, and Shao

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[9] *See*, *e.g.*, RS, paras. 31-32.
[10] [2004] WASCA 301 at [106] (emphasis added).
[11] [2001] 2 All ER (Comm) 537 (reversed in part by the House of Lords in *Albright & Wilson UK Limited v Biachem Limited* [2002] 2 All ER (Comm) 753, but not on this point).

suffered loss as a result, then Shao could accept that Crown had discharged the debt defectively and sue Crown for damages.

13. The fact that the damages in this case approximate the quantum of Crown's debt is purely a matter of circumstance. Had Shao recovered $900,000 from Peng's trustee in bankruptcy, then Shao's claim against Crown would be reduced by $900,000.

14. ***DAR***: The Respondents' submissions [at RS 40] misstate the rationale underlying the decision in *DAR International FEF Co v AON Limited* [2004] EWCA Civ 921. At paragraph [35] of the judgment, Mance LJ states that it was a breach of contract for AON to pay FNS the monies which were due under the agreement to both DAR and FNS. Once those monies had been paid to FNS, and DAR elected to claim damages, there was no debt remaining payable under the agreement.

15. **Notice of Contention**: At the core of the decision in *UBS AG v Tyne* (2018) 265 CLR 77 was the vexation caused to UBS of being required to deal again with claims that should have been resolved in the Supreme Court proceedings: *Yammine v Liemant* [2022] FCA 1480 at [66]-[67]. The Respondents in this case were not vexed at all in the 2016 Proceedings, never having been served.

16. Furthermore, in circumstances where Shao had obtained freezing orders against Peng, it does not bring the administration of justice into disrepute for Shao to have immediately discontinued the proceedings against Crown in order to seek expedition of the proceedings against Peng. Expediting those proceedings both reduced the burden of the freezing orders on Peng and reduced Shao's exposure under the usual undertaking as to damages. Had Shao succeeded in recovering the misappropriated funds from Peng, she would not have needed to sue Crown at all. Thus, it was to Crown's advantage that Shao sought recourse from Peng first, without troubling Crown.

Dated: 10 July 2025

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