HIGH COURT OF AUSTRALIA

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Details of Filing

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IN THE HIGH COURT OF AUSTRALIA **S46/2025**

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

RESPONDENTS' SUBMISSIONS

PART I: CERTIFICATION

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

PART II: ISSUES

2. The question for determination in this proceeding is whether the Appellant, having accepted that the Respondents had validly discharged a debt owed to her and her former husband jointly, can now sue the Respondents for the amount of the debt (or a portion of it) by reason of the *manner* in which the debt was repaid. The answer is that she cannot, because there is no term in the note facility agreement that entitles her to do so.

3. The Appellant's conceptualisation of the issue at AS [2] is cast at too high a level of generality. It overlooks the need for the Appellant to demonstrate a basis for implying, in fact or in law, a term into the particular contract that governs the terms of the loan arrangement entered into between the Appellant, the Respondents, and Mr Peng.

PART III: SECTION 78B NOTICE

4. No notice is required under s 78B of the *Judiciary Act 1903* (Cth).

PART IV: MATERIAL FACTS

Note Facility Agreement

5. The note facility agreement included the following provisions in addition to those summarised at AS [6]-[9].

6. The facility agreement was entered into by the Appellant and her then-husband Mr Peng, as "Lender", the First Respondent as "Borrower" (cl 1), and the Second Respondent as "Guarantor" (cl 2): ABFM 4. The facility agreement obliged the Lender to make available drawings under the facility by way of cash advances upon receipt of a "Drawdown Notice" in the form at ABFM 10 (cl 4), and subject to the satisfaction of the conditions precedent in cl 6. Upon the settlement of each cash advance, the Borrower was to issue "Notes" to the Lender accompanied by a note certificate in the form at ABFM 11-12. Drawings were repayable by redemption of Notes at any time in accordance with their terms and otherwise on the expiry date (cl 8).

7. The facility agreement regulated what was to occur in the event of default by the Borrower. In that event, the Lender had the benefit of terms which provided that:

   (a) default interest would be payable (cl 9(c));

   (b) the Guarantor would be required, "immediately on demand from the Lender", to cause the Borrower to perform its obligations or "perform them itself" (cl 11);

   (c) "at the Lender's option" and in "its absolute discretion", the Lender could determine that an "Event of Default" had occurred (cl 13). At any time after an Event of Default occurred, and "despite any omission, neglect, delay, or waiver of the right to exercise the option, and without liability for loss", the Lender was expressly entitled by cl 14 to:

      (i) cancel the Limit (being $1 million: cl 3);

      (ii) "demand and require immediate payment of the Debt and recover the Debt from the Borrower, including by way of redemption of the Notes"; or

      (iii) "exercise any right, power, or privilege conferred by law, equity or this facility".

8. The submission that "Lender" was "defined in the Facility Agreement as Peng and Shao" requires some clarification (AS [8]). The Court of Appeal found, and the Appellant does not challenge, that the meaning of "Lender" takes on a different complexion depending on where in the agreement it appears. In particular, the reference to "Lender" in cl 3 of the note certificate is to either the Appellant or Mr Peng (CA [59], CAB 65), whereas in cl 4 it is to the Appellant and Mr Peng together (CA [60], CAB 65-66).

Previous proceedings against Mr Peng and the Respondents

9. To the summary at AS [14] should be added the fact that the Appellant initially named the Respondents as defendants in the 2016 Proceedings. The proceedings as against the Respondents were discontinued, with leave, on 10 March 2016: CA [24], CAB 55. The Appellant accepts (AS [57]), and the contemporaneous records confirm, that this was a considered decision. The Appellant's counsel and instructing solicitor specifically discussed "strategy against Crown whether to take action now or later".[1] An invoice issued by the Appellant's solicitor refers to advice that "Res Judicata not an issue even if case against Peng is determined as Crown would be spectator".[2]

10. It is not in contest that, by bringing the 2016 Proceedings, the Appellant necessarily accepted that in paying into the account nominated by Mr Peng the amount owing under the facility agreement, the Respondents obtained a good discharge of the debt owed by the First Respondent: AS [19]. The Appellant sued Mr Peng for the moneys paid into his account on the basis that they were identifiable with the moneys she had advanced under the facility agreement: CA [25]-[26], [29], CAB 55-56.

11. The Appellant sought judgment for a money sum after having obtained a declaration that the $1 million paid by the First Respondent to Mr Peng was received and held on her behalf: CA [30]-[31], CAB 56-57. She then proceeded to bankrupt Mr Peng on the basis of that judgment, and was paid dividends from his bankruptcy: CA [30]-[31], CAB 56-57.

12. The 2016 Proceedings were not the first in which the Appellant had sued her husband alleging that he had misappropriated her money. On 7 August 2016, the Appellant obtained freezing orders against Mr Peng on the basis that Mr Peng had, without her

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1 RBFM, p. 6, entry dated 8 June 2016. See also RBFM, p. 7, recording a telephone attendance regarding a "claim against Crown" (entry dated 6 June 2016).

2 RBFM, p. 6, entry dated 8 June 2016.

permission, withdrawn moneys from their joint account (in a transaction unrelated to the facility agreement): CA [17], CAB 53.

PART V: ARGUMENT

13. The predicate of the Appellant's case is that, as a matter of necessary implication, the facility agreement contains a negative covenant to the effect that the Respondents promised not to pay moneys into an account unless the account had been jointly nominated by both the Appellant and Mr Peng. Such a term is neither an incident of the debtor-creditor relationship nor a term that must be implied into the contract in order to give it business efficacy. Even if such a term were implied into the facility agreement, any breach of the term does not sound in a loss for which the Appellant is entitled to sue.

I. The debt has been repaid

14. The starting point is that it is uncontroversial that the Respondents have discharged their debt under the facility agreement. The Appellant accepts that, through the 2016 Proceedings, she ratified Mr Peng's acceptance of the moneys as repayment of the debt: AS [42], [53]. The Appellant does not take issue with the line of authority that holds that a plaintiff cannot approbate and reprobate by taking a position in proceedings that is "inconsistent with its prior conduct in endorsing the validity of a transaction or taking the benefit of conduct which it subsequently seeks to disavow": CA [50]; CAB 62. That a litigant cannot approbate and reprobate, or "blow hot and cold",[3] has been applied in a long-standing line of cases, the correctness of which the Appellant does not challenge. The logic of the principle is that "a person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage".[4] It has been treated as synonymous with the equitable doctrine of election.[5]

15. The principle has been applied in many cases. It operates, for example: to prevent a plaintiff who has sued the recipients of goods sold and delivered from subsequently

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3 *Smith v Hodson* (1791) 4 TR 211 at 217 (Lord Kenyon).

4 ***Verschures Creameries*** *Limited v Hull and Netherlands Steamship Company Limited* [1921] 2 KB 608 at 612 (Scrutton LJ).

5 *Lissenden v CAV Bosch Ltd* [1940] AC 412 at 417 (Viscount Maugham).

bringing action against the carriers for mis-delivery;[6] to prevent a plaintiff who has sued a firm for the price of goods delivered to the firm from subsequently suing the partner of that firm in his personal capacity for the same debt;[7] and to prevent an entity from accepting a payment from a defendant on terms that would reserve the entity's right to later contest that the payment was in satisfaction of a debt owed to it.[8]

16. The Appellant does not challenge the correctness of those principles. Rather, her argument on this appeal is that there is no inconsistency between her bringing the present proceedings and accepting that the debt has been repaid. The Appellant contends that, under the note facility agreement, she is entitled to have both repayment of the debt and damages to compensate her for not receiving the moneys comprising repayment of the debt. That unlikely result is neither supported by the terms of the facility agreement nor by the cases upon which the Appellant relies.

II. No basis for an implied term in *Ardern*

17. The Appellant has not identified any authority of this Court, or of any intermediate appellate court in Australia, which recognises an implied term of the kind for which she advocates.

18. The central pillar of the Appellant's case is the decision of Martin J of the Supreme Court of Victoria in ***Ardern*** *v Bank of New South Wales* [1956] VLR 569. *Ardern* concerned the terms of a mandate pursuant to which a bank was permitted to pay funds to third parties from a joint account. Martin J cited a two-page note by Sir Arthur Goodhart in the *Law Quarterly Review*, which expressed the view that when a bank entered into an agreement with account holders to honour cheques signed by them jointly, it also made a separate agreement with each of them severally that it would not honour any drawings unless the cheques were signed by both of them.[9] Sir Arthur considered this necessary to give "business efficacy" to the agreement and to avoid rendering "meaningless" the clause requiring the signature of both executors to any drawings.[10]

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6 *Verschures Creameries* [1921] 2 KB 608 at 612 (Atkins LJ).

7 *Scarf v Jardine* (1882) 7 AC 345 at 351 at 354 (Lord Selborne LC).

8 *Republic of Peru v Peruvian Guano Company* (1887) 36 Ch 489 at 499 (Chitty J).

9 ***Ardern*** *v Bank of New South Wales* [1956] VLR 569 at 573 (Martin J); and see the extract of the note at AS [23].

10 Sir Arthur Goodhart, *Notes* (1952) 68 *Law Quarterly Review* 446 at 447.

19. Martin J, apparently endorsing that reasoning, observed that "the undertaking of the bank not to honour cheques unless they were signed by both partners was a condition which inured for the benefit of each partner".[11] It followed, in his Honour's view, that the plaintiff who was a joint holder of the account that had been wrongly drawn upon could elect between: (i) a declaration that the defendant had wrongfully debited the joint account; or (ii) damages reflecting his half-share of the funds paid out without authority. It is by reasoning inferentially, from the availability of that second remedy, that the Appellant discerns the existence of the term that the Appellant contends was a necessary premise of *Ardern* (AS [25]-[28]).

20. One of the animating concerns of Martin J's reasoning appears to have been to avoid the harshness of the result in ***Brewer*** *v Westminster Bank Ltd* [1952] 2 All ER 650 (referred to at AS [23]). In *Brewer*, McNair J had held that the customer of a bank whose signature had been forged by a joint account holder was not entitled to seek a declaration that the bank had wrongfully debited the joint account. His Honour reasoned that: (i) "a right to have drawings honoured by the bank if signed by them both" was a right held jointly; (ii) by reason of the joint nature of that right, both account holders needed to be named in the proceedings; and (iii) to permit the account holders to sue jointly upon that right would be to permit a party to benefit from his own fraud,[12] with the result that neither the plaintiff nor the rogue account holder was permitted to sue (pp. 654-655).

21. What the analysis in *Brewer* overlooked, however, was that the right being sued upon was not a right that was relevantly affected by the forgery. McNair J found, correctly, that the bank's payment did <u>not</u> give it a good discharge against both executors (p. 656). The corollary of that finding should have been that neither of the account holders was disabled from suing upon that right, though the bank would no doubt have had a cross-claim to raise against the rogue.

22. This was the solution to the *Brewer* "problem" posited by Dr Glanville Williams, writing in the *Modern Law Review* in an article which Martin J appears to have referred to in

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11 *Ardern* [1956] VLR 569 at 574.

12 Applying the principle in *Brandon v Scott* (1857) 7 E & B 234 that where the right sued upon is a joint right, none of the rights holders can sue unless each is entitled to sue.

passing.[13] The answer was to recognise "the error in asserting that [the fraudulent joint account holder] had been paid".[14] Where a payment was made to a joint party individually contrary to the terms of a mandate, the payment was not a performance of the bank's obligation to pay. The payment was not effective to discharge the debt: it was "something quite outside of and irrelevant to the contractual obligation". The appropriate course for enforcement of the bank's promise to pay was for the account holders to join in an action against the bank for the unpaid debt (in which case the bank could counterclaim against the enriched party for repayment of the sum erroneously advanced).[15] It would be sufficient, in that regard, for the second joint account holder to be named as a co-defendant if he or she did not consent to being named as a plaintiff.[16]

23. There was no need to imply into the contract in *Ardern* a promise to each account holder that, in discharging its debt, the bank would "follow the contractually prescribed payment method": cf AS [30]. If the funds were released contrary to the terms of the mandate, the bank's debt to the joint account holders was not discharged.

24. Consistently with the approach advocated by Dr Williams, Lord Chorley writing in the *Modern Law Review* explained that the decisions in ***Welch*** *v Bank of England* [1955] Ch 508 (referred to in *Ardern* at 572) and ***Baker*** *v Barclays Bank* [1955] 2 All ER 571 (referred to in *Ardern* at 574) should be understood simply as establishing that, in the circumstances of each case, "property [was] not divested from the original owners".[17] In *Welch*, Harman J referred to authorities supporting the proposition that "property in the stocks [affected by the forgery] was never transferred from the true owner",[18] and on that basis ordered the bank to correct the register in respect of the transfers that had not otherwise been ratified by the plaintiff.[19] Similarly, in *Baker*, Devlin J considered that

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13 Dr Glanville Williams, *Notes of Cases – Joint Bailments and Joint Accounts* (1953) 16 MLR 232. Martin J may have been referring to the note in passing when he observed that the decision in *Brewer* had been "the subject of criticism by Dr Glanville Williams" at 572.

14 Dr Glanville Williams, *Notes of Cases – Joint Bailments and Joint Accounts* (1953) 16 MLR 232 at 234.

15 Dr Glanville Williams, *Notes of Cases – Joint Bailments and Joint Accounts* (1953) 16 MLR 232 at 234.

16 See *Cullen v Knowles* [1898] 2 QB 380 at 382 (Bigham J), cited by the defendant bank in *Brewer* [1952] 2 All ER 650 at 653.

17 Lord Chorley, *Notes of Cases – Recent Decisions in Banking Law* (1956) 19 MLR 76 at 78.

18 *Welch v Bank of England* [1955] Ch 508 at 528, citing Best CJ in *Davis v Bank of England* (1824) 2 Bing 393.

19 *Welch v Bank of England* [1955] Ch 508 at 539-540 (Baker J).

property did not pass in cheques endorsed by one member of a partnership in circumstances where he did not purport to act as agent of the company.[20] Neither case was determined on the basis of an implied obligation owed severally to the affected party.

25. The reasoning in *Ardern* did not engage in any detail with the principles governing when a term not expressed in the contract is to be read in as a matter of necessary implication. The plaintiff in *Ardern* submitted that such a term was to be implied in fact.[21] The conditions necessary for the implication of such a term are settled. A term is implied in fact in order to give effect to "the presumed intention of the parties to the contract in respect of a matter that they have not mentioned but on which presumably they would have agreed should be part of the contract".[22] The principles were recently summarised in *Realestate.com.au Pty Ltd v Hardingham*:[23]

> Apart from being reasonable and equitable, capable of clear expression and non-contradictory of the express terms of the contract, to be implied a term must be necessary to give business efficacy to the contract (which will not be satisfied if the contract is effective without it), and it must be so obvious that "it goes without saying".

26. In order for a term to be implied in fact, it is not enough that it is reasonable to imply it: the term must be necessary to make the contract work.[24] A term will not be implied merely to improve the position of a party or provide a better commercial outcome.[25]

27. The Appellant has not identified any intermediate appellate authority in Australia which holds that there is to be implied into the debtor-creditor relationship a term entitling the creditor to sue for the quantum of the debt in damages while accepting that the debt has been repaid. The authorities point the other way. In *National Australia Bank Ltd v Hokit Pty Ltd* (1996) 39 NSWLR 377, Mahoney P observed, in the context of the relationship between banker and customer, that "prima facie, unless the customer has authorised the bank to make payments in reduction of its indebtedness — or is estopped from denying

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20 *Baker v Barclays Bank Ltd* [1955] 2 All ER 571 at 577 (Devlin J).

21 See the three factors alleged in paragraph 3 of the statement of claim, extracted in the headnote at *Ardern* [1956] VR 569 at 569.

22 *Breen v Williams* (1996) 186 CLR 71 at 102 (Gaudron and McHugh JJ).

23 *Realestate.com.au Pty Ltd v Hardingham* (2002) 227 CLR 115 at [18] (Kiefel CJ and Gageler J). See also Gordon J at [44] and Edelman and Steward at [113]-[115].

24 *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 65-66 (Gibbs CJ).

25 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 423 (Brennan CJ, Dawson and Toohey JJ).

that it has — the debt remains".[26] His Honour considered that to be a legal incident of the debtor-creditor relationship, of which the banker-customer relationship is a particular species.[27]

28. Consistently with that, Macfarlan J observed in *Varker v Commercial Banking Co. of Sydney Limited* [1972] 2 NSWLR 967 that a bank that pays out funds in breach of its mandate "pays at its peril".[28] Since "the bank's only authority to pay is in accordance with the customer's mandate, if the bank makes a payment that is not in accordance with a mandate, it does not by that payment discharge its debt to the customer, and is not entitled to debit its customer's account with the amount of the payment".[29]

29. That line of reasoning recognises that there is no need to imply into the agreement between a customer and their bank a term that the bank's debt to the customer will only be repaid in accordance with the mandate. A debt that is purportedly paid other than in accordance with the mandate is not repaid at all. The decision of Bingham J in *Catlin v Cyprus Finance Corporation (London) Ltd* [1983] 1 QB 759, which cited *Ardern* and is relied on at AS [37]-[38], replicated the error of endorsing "the Goodhart solution" as the only way not to "deprive the innocent party of any remedy".[30] That reasoning was inconsistent with Bingham J's express recognition that "payment to one joint contractor in breach of mandate does not give the debtor a good discharge, so that his obligation remains".[31] Describing it as "anomalous" that such an obligation would not be enforceable, his Honour appears to have endorsed the incorrect premise of *Brewer*, namely, that the right to repayment of the debt was not a right that a joint creditor could sue upon if a co-creditor had fraudulently sought to access the joint funds.

30. The Appellant's reliance on *Ardern* is inconsistent with authority of this Court concerning the particular incidents of the banker-customer relationship. In *Commonwealth Trading Bank of Australia v* ***Sydney Wide Stores*** *Pty Ltd* (1981) 148 CLR 304, it was recognised that "there is a duty upon the customer [of a bank] to take

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26 *National Australia Bank Ltd v* ***Hokit*** *Pty Ltd* (1996) 39 NSWLR 377 at 384 (Mahoney P).

27 See, further, ***Varker*** *v Commercial Banking Co. of Sydney Limited* [1972] 2 NSWLR 967 at 972-973 (Macfarlan J).

28 *Varker* [1972] 2 NSWLR 967 at 973 (Macfarlan J).

29 *Varker* [1972] 2 NSWLR 967 at 973 (Macfarlan J).

30 ***Catlin*** *v Cyprus Finance Corporation (London) Ltd* [1983] 1 QB 759 at 771 (Bingham J).

31 *Catlin* [1983] 1 QB 759 at 770 (Bingham J).

usual and reasonable precautions in drawing a cheque to prevent a fraudulent alteration which might occasion loss to the banker".[32] So expressed, the duty underscores why the logic of *Ardern* was incorrect: a fraudulently drawn cheque occasions loss to the bank, because a bank that pays out on that cheque will remain liable for the debt. To similar effect, the Privy Council has observed that if banks pay out on cheques that are not their customers', "they are acting outside their mandate and cannot plead [the customers'] authority in justification of their debit to [their] account".[33] That is a "risk of the service which it is their business to offer".[34]

31. This was precisely the risk identified by the primary judge at PJ [40], CAB 19:

> It was not a breach by Crown of the Facility Agreement for it to pay away its own money in any way it considered appropriate. However, the risk it ran in making a payment that was not in accordance with the Facility Agreement was that it would not receive a good discharge for the debt it owed by Mr Peng and Ms Shao.

32. Similarly, the Court of Appeal was correct to observe at CA [65], CAB 67 that because "Crown did not abide by the method prescribed in the Facility Agreement when it paid the money to Mr Peng alone, it did not thereby obtain good discharge of the debt". The payment to Mr Peng did not, of itself, discharge the loan: it was only the Appellant's subsequent ratification that had that effect. It was not a breach of any term of the facility agreement for Crown to pay money to Mr Peng. It was not a case where Crown had promised to deal with an identified fund in a particular manner.

III. No basis for implying the proposed term into the facility agreement

33. Even if *Ardern* was correctly decided, there is no basis for implying into the note facility agreement a term of the kind the Appellant seeks to derive from *Ardern*. The term posited by the Appellant is a promise by Crown "not to repay the debt other than into a bank account nominated by both Shao and Peng": AS [24(b)].

34. Insofar as the Appellant contends that such a term should be implied into the note facility agreement as a matter of law, the Appellant has not demonstrated that the term is an

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32 *Commonwealth Trading Bank of Australia v* ***Sydney Wide Stores*** *Pty Ltd* (1981) 148 CLR 304 at 317 (Gibbs CJ, Stephen, Mason, Aickin, Wilson and Brennan JJ).

33 *Tai Hing Ltd v Liu Chong Hing Bank* [1986] 1 AC 80 at 106 (Lord Scarman for the Privy Council).

34 *Tai Hing Ltd v Liu Chong Hing Bank* [1986] 1 AC 80 at 106 (Lord Scarman for the Privy Council).

inherent feature of the debtor-creditor relationship. A term implied under the common law is implied as a legal incident of the particular "nature, type or class of contract in question".[35] It arises not from the parties' intention, but rather because the term has become "so much a part of the common understanding as to be imported into all transactions of the particular description" as a default rule.[36] Implication is justified on the basis of the term's necessity.

35. To support an implication in law, it is not sufficient for the Appellant to identify cases in which "a joint creditor [has been] entitled to claim damages from a debtor in circumstances where a debtor has been repaid in breach of contract": cf AS [34]. It is necessary for the Appellant to show, *first*, that such a term is an incident of the identified class (presumably, contracts between debtors and joint creditors) and, *secondly*, that the implied term supports a claim for damages commensurate to the debt itself. The Appellant has established neither of those propositions.

36. Almost every one of the cases cited at AS [34] concerns the relationship between a bank and its customer. While it is true that "[t]he relationship between banker and customer is one of debtor and creditor" (AS [40.1]), it has also been recognised that it is a "more complicated form of [that] relationship".[37] The incidents of the relationship between a bank and its customer were described as follows by Atkin LJ in *Joachimson v Swiss Bank Corporation* [1921] 3 KB 110 at 127:[38]

> The terms of that contract involve obligations on both sides and require careful statement. … The bank undertakes to receive money and to collect bills for its customer's account. The proceeds so received are not to be held in trust for the customer, but the bank borrows the proceeds and undertakes to repay them. The promise to repay is to repay at the branch of the bank where the account is kept, and during banking hours. It includes a promise to repay any part of the amount due against the written order of the customer addressed to the bank at the branch. … The customer on his part undertakes to exercise reasonable care in executing his written orders so as not to mislead the bank or to facilitate forgery.

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35 *Breen v Williams* (1996) 186 CLR 71 at 103 (Gaudron and McHugh JJ).

36 *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 449 (McHugh and Gummow JJ).

37 *Hokit* (1996) 39 NSWLR 377 at 384 (Mahoney P).

38 Cited with approval in *Tai Hing Ltd v Liu Chong Hing Bank* [1986] 1 AC 80 at 105 (Lord Scarman for the Privy Council).

37. Reflecting the bespoke nature of this relationship, courts have recognised that there are incidents of the banker-customer relationship that are particular to that class. The law imposes on customers specific responsibilities which are "plainly necessary incidents of the relationship", in accordance with which the service offered by the bank "is to honour their customer's cheques when drawn upon an account in credit or within an agreed overdraft limit".[39] Those responsibilities are "to take usual and reasonable precaution in drawing a cheque to prevent an alteration of it"[40] and "to inform the bank of any forgery of a cheque as soon as he becomes aware of it".[41] Both reflect the distinctive arrangement between a bank and customer, by which the bank holds the customer's funds on the condition that release of those funds – including to third parties – will be in repayment of the bank's debt provided that it occurs in accordance with the customer's mandate.

38. In those circumstances, the Court of Appeal was correct to observe that "[t]he bank's obligation to honour a cheque only when the conditions of the mandate have been fulfilled is conceptually different from the debtor/credit relationship which otherwise exists between banker and customer": CA [69], CAB 69. The Appellant's suggestion that the law imposes the incidents of that relationship on debtor-creditor relations generally is unsupported by authority, and should be rejected: cf AS [40].

39. The only case relied upon by the Appellant that did not concern a conventional banker-customer relationship was ***DAR*** *International FEF Co v AON Limited* [2004] EWCA Civ 921. Insofar as *DAR* purported to apply "parallel reasoning" to that of Bingham J in *Catlin* (see *DAR* at [31]-[32]), it was wrong for the reasons outlined in [29] above.

40. However, on proper analysis, there is no inconsistency between *DAR* and the reasoning of the Court of Appeal in the present case. Lord Justice Mance identified a claim for damages on the express assumption that moneys "were due" under the agreement: *DAR* at [35]. His Honour recognised that, if no bank account had been agreed and notified as the agreement required, the debtor "was in those circumstances relieved of… any duty to pay at all": *DAR* at [33]. Accordingly, it was only on the assumption that the debt had <u>not</u> been discharged that a claim for damages was available: cf AS [39]. That is, of course, the opposite to the situation that prevailed in the present case once the Appellant

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39 *Tai Hing Ltd v Liu Chong Hing Bank* [1986] 1 AC 80 at 106 (Lord Scarman for the Privy Council).

40 *Sydney Wide Stores* at 317.

41 *Greenwood v Martins Bank Ltd* [1933] AC 51 at 58-59.

had ratified acceptance of the payment. Lord Justice Mance's observation that "[i]t was a breach in such circumstances to pay" ([35]) must be read in that context. The erroneous payment cannot, of itself, have constituted the breach: it was simply ineffective to discharge the debt.

41. Nor has the Appellant established a basis for concluding that the term for which she contends is to be implied into the facility agreement as a matter of fact. The Appellant's argument appears to rest solely on cl 4 of note certificate: AS [24(b)], [40.2].[42] 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. If money was not paid as cl 4 prescribed, then the First Respondent's obligation had not been discharged and the moneys remained "payable" within the meaning of that clause.

42. The submission that the Court of Appeal's decision will have "serious implications for the recovery of stolen monies" (AS [48]) overstates the frequency with which the present situation is likely to arise, involving as it does the unusual combination of staged court proceedings and the acceptance by a creditor that a joint debt was repaid. In any event, the hypothetical at AS [48] serves only to underscore that the term advocated for by the Appellant is unnecessary. The hypothetical transaction posited by the Appellant was without authority. The bank was not in that scenario entitled to debit the employer's account and the bank's debt to the employer was still owing. The employer, on identifying the unauthorised transaction, would contact its bank as soon as practicable. This would not require any investigation by the employer as to the fault of the bank. It is not contrary to public policy to expect this step to be taken, particularly before seeking to invoke the coercive powers of the court. Notification by the employer would enable the bank to correct the balance of the account and itself take action against the employee. The bank may well have a basis for a *Mareva* order against the employee.

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42 Contrast *DAR*, where Mance LJ attached importance to a clause of the agreement which provided that any changes could only be made with the express agreement of all: *DAR* at [29].

43. The Appellant is not assisted by the authorities cited at AS [43]. In none of those cases was a plaintiff awarded damages reflecting the quantum of a debt that had been repaid, as distinct from a loss occasioned by a failure to repay the principal on time.

(a) If a debt is repaid early, the loss to be compensated is the loss caused by the early repayment. That is distinct from the quantum of the debt itself, in respect of which, if the debt has been discharged, no loss has been incurred: cf AS [43(a)], [44]-[46].[43]

(b) Similarly, if a debt is repaid late, the loss to be compensated for is not the failure to receive the loan moneys at all, but rather, the loss that is attributable to the delay. In *Hardie v Shadbolt* [2004] WASCA 175 (cited at AS [43(b)]), the award of damages was for interest calculated up to when the loan was in fact repaid: [65].

(c) If a debt is repaid only in part, the creditor is entitled to accept the part payment while suing for the balance, because the debt has been discharged only to the extent of the repayment. There is no inconsistency between suing for the unpaid portion in debt and suing in damages for losses arising from the late repayment: cf AS [43(c)]. An inconsistency would only arise if, as here, a plaintiff claimed both repayment of the debt *and* damages reflecting the quantum of the whole of the principal.

44. The example given at AS [47] of misdelivered goods is a counterpoint, rather than analogous, to the Appellant's case. If the purchaser of goods accepts goods that were delivered to the wrong address, there is no inconsistency in suing for the costs of shipping them to the right address. What a purchaser could *not* do would be to accept the misdelivered goods, but nonetheless seek to sue the seller for their (undiminished) value. The Court of Appeal was correct to conclude that no analogy could be drawn to the cases concerning mis-delivery: CA [56], CAB 65.

45. For those reasons, the Appellant has not established a basis for implying, in law or in fact, a term that entitles her to damages reflecting the value of the debt in circumstances where the debt has been discharged. The Court of Appeal was correct to find that, by accepting that the debt had been repaid, the Appellant ratified all the acts of Mr Peng that

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[43] The unchallenged finding of the primary judge in the present proceedings is that the early repayment of the debt did not cause the appellant any loss: PJ [82], CAB 34.

were necessary to support the conclusion that the debt had been repaid in accordance with the facility agreement: CA [66]; CAB 67-68. This included Mr Peng's nomination of the account into which the moneys had been paid: cf AS [51]-[53].[44] That is because the debt could only have been discharged if the condition in clause 4 was complied with and, on the unchallenged finding of the Court of Appeal, clause 4 required both Mr Peng and the Appellant to nominate the account for repayment: CA [60]; CAB 65-66. The example at AS [53] proceeds on a wrong premise. If the Respondents had paid moneys into a bank account nominated by Mr Peng on a previous occasion (concerning an unrelated transaction), then by accepting the payment into that account in discharge of the debt, the Appellant would be taken to have treated that prior nomination as a nomination in accordance with clause 4.

46. Whether or not the Appellant intended to ratify all that was necessary to effect a repayment of the debt is beside the point: cf AS [54]. Ratification will be "implied from or involved in acts when you cannot logically analyse the act without imputing such approval to the party, whether his mind in fact approved or disapproved or wholly disregarded the question".[45] A party cannot avoid the doctrine of ratification by expressly attempting to reserve their rights, where the preservation of those rights would be inconsistent with the conduct that constitutes the ratification.[46]

IV. Abuse of process

47. A further obstacle to the Appellant's success on appeal is that the proceedings should have been stayed as an abuse of process. This is the subject of the notice of contention.

48. The courts below did not consider it necessary to address that argument, having regard to their conclusions on ratification and approbation/reprobation: PJ [80], CAB 33-34; CA [76], CAB 70-71. If – contrary to the Respondents' primary submissions – there was a separate term of the agreement entitling the Appellant to sue the Respondents in damages for the value of the debt, such a term should have been sued upon in the 2016 Proceedings. It was an abuse of process for the Appellant to bring that claim almost six years later in subsequent proceedings.

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44 The email by which Mr Peng nominated that account is extracted at CA [19]; CAB 54 and reproduced at RBFM, p. 4.

45 *Harrisons & Crossfield v London and North-Western Railway* [1917] 2 KB 755 at 758 (Rowlatt J).

46 *Verschures Creameries* at 612 (Atkin LJ).

49. Proceedings will be an abuse of process if a plaintiff seeks to make a use of the court's procedures that is unjustifiably oppressive to a defendant or that brings the administration of justice into disrepute.[47] The categories of an abuse of process are not closed. One such category arises where a plaintiff seeks to bring a claim or raise an issue which "ought reasonably to have been made or raised for determination in [an] earlier proceeding".[48] This may be the case even though "the factual merits of the underlying claim have not been determined and any delay in prosecuting the claim has not made its fair trial impossible".[49] In assessing whether a claim ought to have been brought, it is appropriate to have regard to the overriding purpose reflected in s 56(1) of the *Civil Procedure Act 2005* (NSW), being to "facilitate the just, quick and cheap resolution of the real issues in the proceedings".[50]

50. The present case is analogous to the circumstances in which this Court held that the proceedings in *UBS AG v Tyne* (2018) 265 CLR 77 should have been stayed. As explained above, the Respondents were initially named as defendants to the summons in the 2016 Proceedings. The Appellant's only justification for having discontinued against the Respondents is an asserted expectation that the proceedings would progress more expeditiously if brought only against Mr Peng: AS [58]. That expectation appears to have been realised: Mr Peng entered a submitting appearance and the hearing against him proceeded *ex parte*.[51] However, the fact that the Appellant derived a tactical advantage from discontinuing the earlier proceedings and suing only one (ultimately inactive) defendant, does not prevent this Court from finding an abuse of process. The decision of a litigant to conduct proceedings in a staged fashion may be forensically rational and within the rules of court, but nonetheless "give rise to the perception that the administration of justice is inefficient, careless of costs and profligate in its application of public moneys".[52]

51. The 2016 Proceedings would have been an appropriate forum for advancing the claim now brought against the Respondents, in addition to the claims advanced against Mr

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47 *UBS AG v Tyne* (2018) 265 CLR 77 at [44] (Kiefel CJ, Bell and Keane JJ).

48 *Tomlinson v Ramsay Food Processing Pty Ltd* (2015) 256 CLR 507 at [26] (French CJ, Bell, Gageler and Keane JJ).

49 *UBS AG v Tyne* (2018) 265 CLR 77 at [1] (Kiefel CJ, Bell and Keane JJ).

50 *UBS AG v Tyne* (2018) 265 CLR 77 at [38], [42] (Kiefel CJ, Bell and Keane JJ).

51 *Yakun Shao v Qian Peng and Others* [2016] NSWSC 1444, RBFM p. 8.

52 *UBS AG v Tyne* (2018) 265 CLR 77 at [59] (Kiefel CJ, Bell and Keane JJ).

Peng. Had the Appellant pressed her claim against the Respondents, this would have avoided the duplication and burden on the Court's resources from litigating, twice, issues arising from the same substratum of facts. It is not possible to now predict how the pursuit of the Respondents in 2016 might have changed the course of those proceedings – for example, whether they might have been defended differently, or whether relief by way of counterclaim would have been available to the Respondents against Mr Peng.[53] It is not, in any event, necessary for the Respondents to demonstrate specific prejudice to the defence of their proceedings. It is enough that the Supreme Court will have lent its procedures to "the staged conduct of what is factually the one dispute", which is "apt to occasion an increase in the cost of justice and a decrease in the quality of justice".[54]

PART VI: ORDERS SOUGHT

52. The appeal should be dismissed with costs.

PART VII: ESTIMATE OF TIME

53. The Respondents estimate that approximately 2 hours will be required for their oral argument.

Dated 19 June 2025

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53 By the time the proceedings against the Respondents proceeded to trial in June 2023, their sole witness, Ms Edwards had resigned some six months previously and "was not a willing witness": PJ [7], CAB 9. The primary judge placed little weight on her evidence, finding that she "plainly resented having to appear in court" and was "argumentative and uncooperative when cross-examined": PJ [7], CAB 9.

54 *UBS AG v Tyne* (2018) 265 CLR 77 at [45], [59] (Kiefel CJ, Bell and Keane JJ).

ANNEXURE TO RESPONDENT'S SUBMISSIONS

No	Description	Version	Provision(s)	Reason for providing this version	Applicable date or dates (to what event(s), if any, does this version apply)
			Statutory provisions		
1	*Civil Procedure Act 2005* (NSW)	1 December 2021 to 29 October 2023	Section 56	In force when Appellant commenced these proceedings	All relevant times