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 SUBMISSIONS

Part I: INTERNET PUBLICATION

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

Part II: ISSUES

2. In circumstances where a debtor repays a debt in breach of contract – by, for example, repaying it into the wrong bank account (or otherwise contrary to the contractual instructions of the creditor) – can the creditor accept that the debt has been discharged but sue the debtor for damages arising from the breach of contract?

Part III: SECTION 78B NOTICE

3. No notice is required under s78B of the *Judiciary Act* 1903 (Cth).

Part IV: CITATIONS OF DECISIONS BELOW

4. The decision of the primary judge is *Shao v Crown Global Capital Pty Limited* [2023] NSWSC 820 (**PJ**). The decision of the Court below is *Shao v Crown Global Capital Pty Ltd* [2024] NSWCA 302 (**CA**).

Part V: RELEVANT FACTS

5. On 6 March 2015, the Appellant (**Shao**) and her then husband (**Peng**) made a loan of $1 million to the First Respondent (**Crown**) for a term of 12 months (expiring on 5 March 2016): CA [7] & [10] (Core Appeal Book **(CAB)** 51 & 52). The monies loaned belonged to Shao: CA [7] (CAB 51).

6. The loan monies were advanced to Crown by way of a Note Facility Agreement (**Facility Agreement**), pursuant to which Crown issued one million redeemable notes (**Notes**) to Shao and Peng: CA [4] (CAB 50). The Second Respondent guaranteed the performance by Crown of its obligations under the Facility Agreement: CA [3] (CAB 50).

7. The note certificate issued to Shao and Peng under the Facility Agreement relevantly contained the following terms (Appellant's Book of Further Materials **(ABFM)** 12):

   (a) cl. 3(a) (**Clause 3(a)**): *The Borrower may at any time by issuing a Redemption Notice to the Lender redeem any Notes, and on the Expiry Date must redeem all Notes, which have not previously been redeemed for cash at their Face Value and repay the Face Value and all interest accrued but unpaid on the Note to the date of payment"*; and

   (b) cl. 4 (**Clause 4**): *"All money payable by the Borrower to the Lender under the Notes must be paid by cheque drawn by the Borrower and either delivered personally to the Lender on the due date for payment or deposited into the Lender's bank account as notified by the Lender to the Borrower from time to time."*

8. *"Lender"* was defined in the Facility Agreement as Peng and Shao: CA [8] (CAB 51).

9. The Court of Appeal held that Clause 4 required Crown *"to pay out the debt only when both joint creditors, Ms Shao and Mr Peng, had nominated an account into which the monies could be paid."*: CA [65] (CAB 76). The primary judge held that this clause permitted payment by way of electronic funds transfer: PJ [51] (CAB 23).

10. During the term of the loan, Shao and Peng separated, and Peng misappropriated other monies belonging to Shao: CA [17] & [18] (CAB 53). On 24 August 2015, Shao informed Crown of her separation from Peng, of her intention to divorce him, and of his misappropriation of her monies: CA [18] (CAB 53).

11. Notwithstanding this, on 17 February 2016, Crown emailed Peng **alone** to notify him that the Facility Agreement was due to expire on 26 February 2016 (this was incorrect – it was due to expire on 5 March), and to ask him where the proceeds of the Facility Agreement should be repaid: CA [19] (CAB 54). The Court of Appeal upheld the finding of the primary judge that this email constituted a valid Redemption Notice pursuant to Clause 3(a): CA [34] & [62] (CAB 57 & 66).

12. Peng requested (via email) that the repayment be made into his own bank account (CA [19]-[20]; CAB 54), which Crown did on 25 February 2016: CA [21] (CAB 54). Peng then misappropriated the funds: CA [21] (CAB 54).

13. On 3 March 2016, Shao telephoned Crown to discuss the imminent expiry of the Facility Agreement, only to learn that Crown had already paid the proceeds to Peng: CA [22] (CAB 54).

14. Shao commenced proceedings against Peng that same day (the **2016 Proceedings**), and obtained freezing orders against him (although, as it turned out, the funds had already been dissipated): CA [23] (CAB 55). In the 2016 Proceedings, Shao sought to recover from Peng the monies Crown had paid him on the basis that Peng was not authorised to direct Crown to repay the loan monies into his own bank account, and that he held those monies on a constructive trust for Shao: CA [23], [25] & [29] (CAB 55-56). Shao subsequently obtained judgment against Peng, and ultimately bankrupted him: CA [30]-[31] (CAB 56-57).

15. On 18 February 2022, Shao commenced the proceedings below against the Respondents (CA [32]; CAB 57), seeking damages for Crown's breach of the Facility Agreement by, *inter alia*, repaying the monies owing under the Facility Agreement into an account nominated by Peng alone: PJ [5] & [38]-[39] (CAB 8-9 & 18). The damages sought by Shao comprised the monies she was unable to recover from Peng (being the monies misappropriated by Peng less the dividends received by Shao from Peng's bankruptcy trustee), together with the costs incurred by Shao in prosecuting the 2016 Proceedings

against Peng and bankrupting him (as costs incurred in mitigation): CA [32] (CAB 57). The parties are now in agreement that these damages total $1,133,117.40 (being $1,018,740 + $131,793.95 – $17,416.55): CA [21], [31] & [74] (CAB 54, 56-57 & 70).

16. In dismissing Shao's claims, the primary judge and the Court of Appeal held that while Peng did not have authority to nominate the bank account into which Crown was to repay the loan monies, Shao had ratified Peng's nomination when she sued Peng for those monies: CA [39], [65], [66] & [73] (CAB 59, 67, 68 & 70).

17. In its decision below, the Court of Appeal held that (CA [65]-[66]; CAB 67-68):

(a) a debt is not discharged unless the debtor complies with the payment method prescribed in the contract; and, *consequently*,

(b) once a creditor accepts that the debt has been discharged, the creditor necessarily accepts that the debtor has complied with the payment method prescribed in the contract – and is therefore precluded from claiming damages arising from the debtor's failure to follow that payment method.

18. Accordingly, the Court of Appeal upheld the primary judge's finding that when Shao learned that Peng had applied the proceeds of the Facility Agreement to his own use, she had a choice between the following two (inconsistent) actions (CA [38] & [70]; CAB 59 & 69):

(a) suing Crown for recovery of the proceeds on the ground that its payment to Peng did not validly discharge the debt owed by Crown to her and Peng jointly; or

(b) accepting that the payment to Peng validly discharged the debt owed by Crown to Peng and Shao and suing Peng to recover the proceeds.

19. However, this analysis overlooked a third option available to Shao – namely, accepting that the payment to Peng had discharged Crown's debt to her and Peng, but suing Crown for damages arising out of its breach of the obligation to repay the monies into a bank account nominated by both Shao and Peng. As set out below, the availability of this third option to Shao is supported by extensive authority – in Australia, the United Kingdom and New Zealand – and is entirely consistent with orthodox contractual principles.

Part VI: ARGUMENT

Ground 1: The Court of Appeal erred in holding that Shao was not entitled to claim damages from the Respondents for having repaid loan monies into Peng's bank account in breach of contract, in circumstances where Shao had previously sued Peng to recover those monies (but had not been made whole)

A. A joint creditor is entitled to claim damages from a debtor in circumstances where a debt has been repaid to the other joint creditor in breach of the contractually prescribed payment method

20. In *Ardern v Bank of New South Wales*,[1] two partners, Ardern and Brookes, opened a joint account with a bank. All cheques drawn on the account were required to be signed by both partners. Brookes withdrew a total of £662 from the account by forging Ardern's signature on 13 cheques (which Brookes also signed in his own name). Ardern then sued the bank for breach of contract.

21. The question before the Supreme Court of Victoria was whether Ardern could sue the bank in relation to its wrongful repayment of a debt that was owed jointly to both Ardern and Brookes, in circumstances where Brookes was disentitled from suing the bank by reason of his fraudulent conduct. Martin J held that there were, in fact, two separate obligations owed by the bank in relation the joint account:

(a) an obligation in debt owed to Ardern and Brookes jointly; and

(b) an obligation not to honour cheques unless signed by both Ardern and Brookes – which obligation was owed to each of them severally.[2]

22. Martin J concluded that Ardern was entitled to sue the bank in relation to the obligation owed to him severally.[3]

23. In reaching this conclusion, Martin J cited with approval a note by Sir Arthur Goodhart in *The Law Quarterly Review*[4] criticising the decision in *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650. In *Brewer*, McNair J had held (at 654) that if one joint account

[1] [1956] VLR 569.
[2] Id. at 573.
[3] Id. at 574.
[4] *Notes*, (1952) 68 *Law Quarterly Review* 446.

holder was disentitled from suing the bank by reason of his fraudulent conduct, then the other joint account holder could not sue either – because the bank's obligation to the two account holders was a single obligation owed jointly. Sir Arthur Goodhart argued that the bank, in fact, owed two separate obligations to the joint account holders:

> *"But does it necessarily follow from this that this joint right was the only one created when the bank accepted the account? Did it not also agree severally with each of the depositors that it would not honour any drawings unless signed by him or her? If after the deposit had been made, the bank had made a separate agreement with Miss Brewer not to make a payment on her co-executor's order without duly notifying her, could she not have brought an action in her own name if the bank had failed to perform its agreement and she had thereby suffered damage? This interpretation of the bank's agreement gives it business efficacy, for it is obvious that the purpose of the clause requiring the signature of both executors to any drawings is to protect each of the joint depositors against the possible wrongful acts of the other. If this is not the effect of these words then they are not only meaningless but are also a trap for the unwary.* ***In other words, it is submitted that the bank makes an agreement with the executors jointly that it will honour any drawings signed by them jointly, and it also makes a separate agreement with each of the executors severally that it will not honour any drawings unless he or she has signed them.***"[5]

24. So, too, in the instant case, Crown owed:

(a) an obligation in debt to Shao and Peng jointly (pursuant to Clause 3(a)); and

(b) an obligation not to repay the debt other than into a bank account nominated by both Shao and Peng (pursuant to Clause 4) – which obligation was owed to each of them severally.

25. Returning to *Ardern*, the question arises as to whether the bank's debt to Ardern and Brookes was discharged by the payments made on the forged cheques. The answer to that question may be discerned by considering the alternative remedies that Martin J offered Ardern at the conclusion of the judgment:

(a) a declaration that the bank had wrongfully debited the joint account with the amount of the forged cheques (which would have had the effect of requiring the bank to restore the balance of the joint account); or

[5] Id. at 447 (emphasis added).

(b) an award of damages for half the amount of the forged cheques (representing Ardern's half interest in the funds stolen from the account).[6]

26. The first remedy could only have been available if the bank's debt to Ardern and Brookes **had not been** discharged (as the full balance of the joint account would remain owing). The second remedy could only have been available if the bank's debt to Ardern and Brookes **had been** discharged – thereby giving rise to Ardern's loss (because the joint account, in which he had a half interest, had been emptied). If the debt remained owing, Ardern would have suffered no loss and would not have been entitled to damages.

10 27. Consequently, if Ardern elected to claim damages, that election must have had the effect of discharging the bank's debt to him and Brookes. There are two alternative explanations for how Ardern's election effected such a discharge. Because Brookes had written the forged cheques, Brookes must be taken to have accepted that the payments made by the bank on those cheques discharged the bank's debt to him and Ardern. Thus, Ardern's election to claim damages must constitute either:

(a) an acceptance by Ardern, as the other joint creditor, that the payments made on the cheques discharged the bank's debt; or alternatively

(b) a ratification by Ardern of Brookes' acceptance that the payments made on the cheques discharged the bank's debt.

20 28. Shao submits that the first explanation is the correct one. Regardless of which explanation is correct, however, the end result was that the bank's debt to Ardern and Brookes was discharged upon Ardern electing to claim damages.

29. Crucially, Ardern's acceptance that the bank's debt had been discharged – whether in his own right as a joint creditor, or via his ratification of Brookes' acceptance thereof – did not constitute either:

(a) an acceptance by Ardern that the bank had complied with the payment method prescribed in the contract; or

[6] *Ardern v Bank of New South Wales* [1956] VLR 569, 574.

(b) a ratification by Ardern of Brookes' unauthorised instructions to the bank (via the forged cheques).

If it were otherwise, Ardern would not have been entitled to damages.

30. Thus, *Ardern* stands for the proposition that a creditor may accept that a debt has been discharged, but still claim damages arising from the debtor's failure to follow the contractually prescribed payment method. Indeed, it was the fact that *the debt had been discharged in breach of contract* that gave rise to Ardern's entitlement to damages.

31. Would the result in *Ardern* have been different if Ardern had sued Brookes to recover the stolen funds, and bankrupted him, prior to suing the bank? Such a lawsuit against Brookes would have constituted an acceptance by Ardern that the bank's debt to him and Brookes had been discharged (for, if it had not, the full balance of the joint account would remain owing, and Ardern would have no claim against Brookes). Once again, Ardern's acceptance that the bank's debt had been discharged may have been in his own right as a joint creditor, or via his ratification of Brookes' acceptance thereof. Whichever is the correct explanation, the result in *Ardern* demonstrates that Ardern's acceptance that the bank's debt had been discharged does not constitute either:

(a) an acceptance by Ardern that the bank had complied with the payment method prescribed in the contract (namely, that cheque payments would only be made if the cheques had been signed by both partners); or

(b) a ratification by Ardern of Brookes' unauthorised instructions to the bank.

32. Accordingly, had Ardern sued Brookes first, Ardern would have been precluded from seeking in his suit against the bank a declaration that the bank had wrongfully debited the joint account with the amount of the forged cheques (with the consequence that the bank was required to restore the balance of the joint account and/or that Ardern had a claim against the bank in debt). This is because such a remedy would have been inconsistent with Ardern's lawsuit against Brookes (in which he accepted that the bank's debt had been discharged). However, Ardern would still have been able to claim damages from the bank – because the remedy of damages is premised upon the bank's debt having been discharged in breach of contract, leading to Ardern's loss.

33. So, too, in the instant case:

(a) Shao's suit against Peng constituted an acceptance by Shao that Crown's debt to her and Peng had been discharged (whether such acceptance was in her own right as a joint creditor, or via her ratification of Peng's acceptance thereof);

(b) Shao was therefore unable to sue Crown in debt, as a cause of action in debt would have been inconsistent with her lawsuit against Peng;

(c) Shao's acceptance that Crown's debt had been discharged did not constitute either (i) an acceptance by Shao that Crown had complied with the payment method prescribed in the contract, or (ii) a ratification by Shao of Peng's unauthorised nomination of his personal bank account to Crown; and

(d) accordingly, Shao was still able to claim damages from Crown, because that remedy was premised upon Crown's debt having been discharged in breach of contract. (Shao's damages included the full value of the loan monies repaid by Crown to Peng, because Shao was the beneficial owner of all those funds: CA [7] (CAB 51)).

34. *Ardern* has been followed and/or cited with approval for the proposition that a joint creditor is entitled to claim damages from a debtor in circumstances where a debt has been repaid in breach of contract in, *inter alia*, the following cases and texts:

- *Vella v Permanent Mortgages Pty Limited* (2008) 13 BPR 25,343 at [432] & [442] (***Vella***);
- *Spina v Permanent Custodians Limited* [2009] NSWCA 206 at [118];
- *Masters v Dobson Mitchell & Allport* [2014] TASSC 31 at [36];
- *Catlin v Cyprus Finance Corp (London) Limited* [1983] QB 759 at 770-771 (***Catlin***);
- *Vivar v National Bank of New Zealand Limited* (High Court of New Zealand, Salmon J, 30 November 1998) at 10 & 13 (**Vivar**);

- Anton Didenko, *Banking Law in Australia*, (LexisNexis Australia, 11th ed, 2024) at 134;

- LexisNexis, *Halsbury's Laws of Australia* (online at 21 May 2025) 45 Banking and Finance, 'II Banker and Customer' [45-895]; and

- Thomson Reuters, *The Law Relating to Banker and Customer in Australia*, vol. 2 (Update 185) at [3.9870] and [9.3850], which states as follows regarding *Ardern* (at [3.9870], emphasis added):

> *"The innocent partner sued the bank for breach of the bank-customer contract and it was held that the bank's obligation to honour only those cheques which bore the signatures of both parties enured for the benefit of each partner, that the innocent party, acting alone, could sue for the breach of this obligation* ***and that if the innocent partner elected to ask for damages as an alternative to a declaration that the account had been wrongly debited****, the appropriate measure of damages was one half of the aggregate value of the cheques on which his signature had been forged."*

35. *Vella* involved facts relevantly identical to those in *Ardern*. In his judgment, Young J (as his Honour then was) quoted the following passage from A L Tyree, *Banking Law in Australia* (Butterworths, 4th ed, 2002) at 10.6.3:

> *"The Ardern case also noted that the appropriate measure of damages is half the amount of the forged cheque since the parties in that case were entitled to equal shares in the account. When the account is a trust account or where it can be established that all the funds in the account were the property of the defrauded customer such a reasoning would not apply."*[7]

36. His Honour concluded that:

> *"…it seems to me that the weight of authority is in favour of the proposition that in a case like the present where one joint holder sues the bank for breach of compliance with its mandate, it is only the plaintiff's proportional interest in the property that is to be compensated for in damages."*[8]

37. In *Catlin*, a bank paid out funds held in a joint account on the instructions of one account holder (Mr Catlin), despite being required to act only on instructions signed by both account holders (Mr and Mrs Catlin). Following *Ardern*, the court held that Mrs Catlin was entitled to damages for the bank's breaches of its obligation not to honour

[7] (2008) 13 BPR 25,343 at [432].
[8] Id. at [442].

instructions that had not been signed by both her and Mr Catlin (which obligation was owed to each of them severally).[9] As in *Ardern*, Mrs Catlin could only have been entitled to damages if she accepted that the debt owing by the bank to her and Mr Catlin had been discharged (otherwise she would have suffered no loss).

38. *Catlin* has been followed and/or cited with approval for the proposition that a joint creditor is entitled to claim damages from a debtor in circumstances where a debt has been repaid in breach of contract in, *inter alia*, the following (appellate) cases and texts:

- *DAR International FEF Co v AON Limited* [2004] EWCA Civ 921 at [31]-[32] & [35] (***DAR***);

- *B L McG v Bank of Scotland PLC* [2012] ScotCS CSIH_84 at [15]-[17] (**B L McG**);

- John Odgers KC and Ian Wilson KC (eds), *Paget's Law of Banking* (LexisNexis Butterworths, 16th ed, 2023) at 153-154; and

- LexisNexis, *Halsbury's Laws of England* (online at 21 May 2025) 48 Financial Institutions, '1 Banks' [124], which states as follows (emphasis added):

> *"Unless the contract otherwise provides, a sum standing to the credit of a joint account is a debt owed to the creditors jointly and is not enforceable by either on their own. Where the mandate provides for both account holders to sign, the bank impliedly undertakes to each of them severally not to honour orders for payment without his or her signature.* ***A claim for breach of such an undertaking may be brought without joining the other account holder, and the measure of damages is prima facie equal to the value of the claimant's interest in the money wrongfully paid away.***"

39. In *DAR*, a debtor (Aon) owed monies to two joint creditors (FNS and DAR), which monies were to be paid into a designated bank account agreed by both FNS and DAR[10] (a relevantly identical obligation to that in the instant case: CA [65] (CAB 67)). In breach of that term, Aon paid the monies owing on the instructions of FNS alone[11] (as occurred in the instant case). The Court of Appeal held that DAR was entitled to sue Aon for damages arising out of Aon's breach of the term governing payment.[12] By

[9] [1983] QB 759 at 771.
[10] *DAR International FEF Co v AON Limited* [2004] EWCA Civ 921 at [17].
[11] Id., at [18].
[12] Id., at [35].

claiming damages from Aon, DAR must be taken to have accepted that Aon's debt to FNS and DAR jointly had been discharged by Aon's payment to FNS alone – because, if Aon's debt had not been discharged, but was still owing and payable in full, DAR would have suffered no loss, and could not have claimed damages.

40. In its decision below, the Court of Appeal sought to distinguish *Ardern* on the basis that it involved a bank's breach of a mandate governing the honouring of cheques – thereby involving a putative third party (being the payee or endorsee of the cheque): CA [69] (CAB 69). With respect, however, this is not a relevantly distinguishing feature of *Ardern*:

10 40.1. The relationship between banker and customer is one of debtor and creditor – as was the relationship between Crown (on the one hand) and Shao and Peng (on the other): *Bank of New South Wales v Brown* (1983) 151 CLR 514 at 537 (per Brennan J, as his Honour then was).

40.2. There is no difference in principle between the mandate in *Ardern* – which required the bank to only honour cheques signed by both partners – and Clause 4, which required Crown *"to pay out the debt only when both joint creditors, Ms Shao and Mr Peng, had nominated an account into which the monies could be paid"*: CA [65] (CAB 67).

40.3. In *Banking Law in Australia*, it is stated that although *Ardern* concerned
20 cheques, it is clear that it is *"applicable to any dispute between the bank and one of the parties to a joint account"*.[13]

40.4. *Catlin*, which followed *Ardern*, did not involve cheques – but instructions given to a bank regarding the payment out of monies (similar to the facts of this case).

40.5. *DAR*, which followed *Catlin*, did not involve cheques or banks – but rather the breach of an obligation by a debtor to pay a debt owed to joint creditors into a jointly agreed and designated bank account (a relevantly identical obligation to that contained in Clause 4).[14]

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[13] Anton Didenko, *Banking Law in Australia*, (LexisNexis Australia, 11th ed, 2024) at 135.
[14] [2004] EWCA Civ 921 at [32].

41. In light of the above authorities, it is submitted that the Court of Appeal erred in holding that Shao's acceptance in the 2016 Proceedings that Crown's debt to her and Peng had been discharged precluded her from subsequently claiming damages against Crown. The above authorities demonstrate that, contrary to the Court of Appeal's decision, Shao's suit against Peng was **not** inconsistent with her suit against Crown – namely, because Shao accepted in both suits that Crown's debt to her and Peng had been discharged.

42. It should be noted that the suggestion in CA [66] & [70] (CAB 67-69) that Shao took the position in the first instance proceedings that Crown's debt had **not** been discharged is erroneous. It was common ground at first instance that Crown's debt had been discharged – Shao's claim against Crown was for damages: PJ [5] & [38]-[39] (CAB 8-9 & 18).

B. Orthodox contractual principles allow a creditor to claim damages from a debtor in circumstances where a debt is discharged in breach of contract

43. It is uncontroversial that a creditor may accept repayment of a debt and proceed to sue the debtor for breach of a contractual term governing the time of payment. For example:

(a) when a debt is repaid early, it may be accepted and damages may be claimed for loss of interest: *Mackenzie v Albany Finance Limited*;[15]

(b) when a debt is repaid late, it may be accepted and damages may be claimed for losses caused by the late repayment: *Hardie v Shadbolt*,[16] citing *Hungerfords v Walker*[17] and *Cook v Fowler*;[18] and

(c) where there is a dispute regarding the amount of a debt owing, the creditor may accept a part payment of the debt, sue the debtor for the balance, and claim damages for losses caused by the late repayment of the balance: *International*

[15] [2004] WASCA 301 at [106].
[16] [2004] WASCA 175 at [7]-[11], [46], [58] & [65].
[17] (1989) 171 CLR 125.
[18] (1874) LR 7 HL 27.

Minerals & Chemical Corporation v Karl O Helm AG;[19] *Volk v Hirstlens (NZ) Ltd*.[20]

44. In *Mackenzie v Albany Finance Limited*, E M Heenan J stated:[21]

> *"… 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.*** *…"*

10 45. There is no reason in principle why a contractual term as to the *time* of payment should be treated differently to a contractual term as to the *place* of payment: if it is possible to accept payment of a debt and sue for damages for breach of the former, it should also be possible to accept payment of a debt and sue for damages for breach of the latter – as Shao did in the proceedings below.

46. If, for example, contrary to the instructions of both Shao and Peng to repay the loan into a particular interest-bearing account, Crown had repaid the loan into a non-interest bearing account in their name, Crown would be exposed to a claim for damages on account of lost interest – notwithstanding Shao and Peng's acceptance that Crown's debt to them had been discharged.

20 47. Shao and Peng's ability to sue Crown in the above situation is analogous to the entitlement of a purchaser to accept goods which have been delivered to the wrong address, but then claim damages from the seller for the costs of shipping the goods to the right address: *see Peter Cremer v Brinkers Groudstoffen BV*.[22]

48. If the Court of Appeal's decision is permitted to stand, it will have serious implications for the recovery of stolen monies. Take, for example, the following hypothetical: An employee attempts to transfer money to his own bank account from an employer's bank account without authority. The bank – in breach of its contract with the employer – permits the employee to do so. The employer, upon discovering the unauthorised transaction, immediately obtains a freezing order against the employee on the basis that

[19] [1986] 1 Lloyd's Rep 81 at 104.
[20] [1987] 1 NZLR 385 at 400.
[21] [2004] WASCA 301 at [106] (emphasis added).
[22] [1980] 2 Lloyds Rep 605 at 608.

the employee holds the employer's funds – however, the employee has already dissipated those funds. At this point, upon the reasoning of the Court of Appeal, the employer has made an election to treat the bank's debt to it as having been discharged, and is now precluded from suing the bank for damages for breach of contract. As a matter of public policy, the law ought to encourage employers in the above situation to act as quickly as possible to recover the stolen funds – without having to first investigate whether the bank was at fault in permitting the payment.

Ground 2: The Court of Appeal erred in holding that Shao's suit against Peng necessarily involved a ratification of the notice given by Peng to Crown nominating his bank account to receive the repayment of the loan monies

49. As illustrated by *Ardern*, *Vella*, *Catlin* and *DAR*, Shao's acceptance (in her suit against Peng) that Crown's debt to her and Peng had been discharged, did not constitute either:

(a) an acceptance by Shao that Crown had complied with the payment method prescribed in the Facility Agreement; or

(b) a ratification by Shao of Peng's unauthorised instruction to Crown to repay the loan into his bank account.[23]

50. As a joint creditor, Shao was able to accept (in her own right) that Crown's payment to Peng discharged its debt to both her and Peng without accepting that Crown had complied with the payment method prescribed in the contract.[24]

51. In the alternative, if Shao's acceptance that Crown's debt had been discharged was via her ratification of Peng's acceptance thereof, then such ratification by Shao did not also constitute a ratification of Peng's unauthorised nomination to Crown of his bank account.[25]

52. Peng's nomination of his bank account (via email) was a separate act to Peng's acceptance of Crown's payment to him – which was technically undertaken by Peng's bank, as his agent, when it accepted the instruction from Crown's bank to credit Peng's

[23] *See* paras. 27-29, above.
[24] *See* paras. 27-29, above.
[25] *See* paras. 27-29, above.

account. As these were two separate acts, it was open to Shao to ratify one without ratifying the other.

53. Indeed, where a principal sues an agent, the principal is taken to have ratified the agent's conduct only to the minimum extent necessary to maintain the cause of action.[26] In order to maintain her action against Peng, Shao need only have ratified Peng's acceptance of Crown's payment in discharge of its debt – not Peng's nomination of his bank account. That this is so is demonstrated by the following hypothetical: Let us assume that Crown had repaid the loan monies to Peng (in breach of contract) without Peng having nominated his account to receive those funds (because Crown had Peng's bank account on file from a separate transaction). Let us further assume that Peng had then refused to return those monies Shao. If Shao had sued Peng to recover the monies, her suit could only constitute a ratification of Peng's acceptance of the payment in discharge of Crown's debt. It could not have constituted a ratification of Peng's nomination of his bank account, as he made no such nomination.

54. Furthermore, only unequivocal words or acts will suffice to establish ratification.[27] In the 2016 Proceedings, Shao specifically pleaded that Peng was **not** authorised by her to direct Crown to pay the loan monies into his bank account: CA [25] (CAB 55). As such, it would be absurd to hold that by bringing the 2016 Proceedings, Shao ratified Peng's nomination of his bank account. Ratification is a legal fiction which ought not be extended any further than is necessary: *Keighley, Maxsted & Co v Durant* [1901] AC 240 at 247 and 262-3.

Notice of Contention

55. By their Notice of Contention (CAB 92), the Respondents contend that the Court of Appeal ought to have found that the proceedings below were an abuse of process because Shao should have prosecuted her claims against the Respondents in the 2016 Proceedings.

[26] *Harrisons & Crossfield Limited v London North Western Railway Company* [1917] 2 KB 755 at 759 (referred to at CA [66]; CAB 67-68).
[27] *Petersen v Moloney* (1951) 84 CLR 91, 101 (per Dixon J (as his Honour then was), Fullagar J and Kitto J).

56. However, as set out above, Shao's remedies against Peng, on the one hand, and Crown, on the other, were cumulative – not alternative and inconsistent.[28] As such, Shao was free to sue Peng and Crown successively.[29]

57. Furthermore, to the extent that any explanation is necessary as to why Shao discontinued the 2016 Proceedings against the Respondents within a week of those proceedings having been filed, and without the Respondents having been served,[30] the uncontested evidence below revealed that this was done in order that Shao could obtain expedition of the proceedings against Peng: ABFM 14.

58. Finally, in circumstances where Shao had succeeded relatively quickly in 2015 in obtaining repayment from Peng of monies he had misappropriated from her by suing him,[31] it was reasonable for Shao to proceed expeditiously solely against Peng in 2016 without involving Crown.

Part VII: ORDERS SOUGHT

59. The appeal be allowed.

60. The orders made by the Court of Appeal of the Supreme Court of New South Wales on 19 December 2024 be set aside and, in lieu thereof, order that:

(a) the appeal be allowed;

(b) the orders made by the Supreme Court of New South Wales on 14 July 2023 be set aside and, in lieu thereof, substitute the following orders, with effect from 14 July 2023:

(i) judgment be entered for the Plaintiff against the Defendants in the sum of $1,133,117.40, together with interest pursuant to s100 of the *Civil Procedure Act* 2005 (NSW) in the sum of $431,048.82; and

(ii) the Defendants pay the Plaintiff's costs of the proceedings; and

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[28] *See Baxter v Obacelo Pty Limited* (2001) 205 CLR 635, 653 (per Gleeson CJ and Callinan J, quoting *Tang Man Sit v Capacious Investments Limited* [1996] AC 514 at 522).
[29] Id., at 654.
[30] CA [24] (CAB 55).
[31] CA [17] (CAB 53).

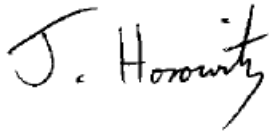
(c) the Respondents pay the Appellant's costs of the appeal.

61. The Respondents pay the Appellant's costs of the application for special leave to appeal and the appeal to this Court.

Part VIII: ESTIMATE OF TIME

62. It is estimated that approximately 2.5 hours will be required for the Appellant's oral argument (including reply).

Dated: 22 May 2025



Jacob Horowitz
11 St James Hall
Telephone: 8226 2382
Email: jacob.horowitz@stjames.net.au

Michael Hazan
11 St James Hall
Telephone: 8226 2345
Email: mhazan@stjames.net.au