HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON AND KIEFEL JJ

AGRICULTURAL AND RURAL FINANCE
PTY LIMITED APPELLANT

AND

BRUCE WALTER GARDINER & ANOR RESPONDENTS

Agricultural and Rural Finance Pty Limited v Gardiner
[2008] HCA 57
11 December 2008
S180/2008

ORDER

1. *Appeal allowed.*

2. *Set aside paragraphs 1-3, 7 and 8 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 6 September 2007, and in place thereof order:*

   (a) *appeal allowed in part;*

   (b) *set aside paragraphs 1, 2, 4, 5 and 6 of the order made by Young CJ in Eq on 11 April 2006;*

   (c) *appellant have judgment in the sum of the amounts owing under the relevant loan agreement for principal and interest on the first, second and fourth loans ("the sum"); and*

   (d) *first respondent to pay the appellant's costs in the Equity Division of the Supreme Court of New South Wales and in the appeal to the Court of Appeal.*

3. *The parties have 21 days from the date of this order to agree upon the sum, and in default of agreement the matter be remitted to the Court of Appeal for determination of the sum.*

4. *First respondent to pay the costs of the appellant and the second respondent in this Court.*

On appeal from the Supreme Court of New South Wales

Representation

B W Walker SC with C J Bevan for the appellant (instructed by Evangelos Patakas & Associates)

R M Smith SC with M A Jones for the first respondent (instructed by Clayton Utz)

G P Ellis SC with F F Salama for the second respondent (instructed by Colin Biggers & Paisley)

CATCHWORDS

Agricultural and Rural Finance Pty Limited v Bruce Walter Gardiner

Contracts – Interpretation – Where indemnity agreement provided that indemnity effective and enforceable if borrower "punctually paid" amounts under related loan agreement – Meaning of "punctually" – Whether context of agreement required departure from dictionary meaning – Whether conduct of lender in accepting late payment could render such payment "punctual".

Contracts – "Waiver" of contractual right – Meaning of "waiver" – Waiver distinguished from contractual variation and promissory estoppel – Whether doctrine referred to as "waiver" exists in form of election between inconsistent rights, common law doctrine of forbearance, or abandonment or renunciation of right – Whether any other residual form of "waiver" exists – Whether acceptance of late payments under loan agreement and other conduct constituted "waiver" by lender and indemnifier of condition for indemnity taking effect, that the borrower have "punctually paid" amounts under loan agreement.

Contracts – Election between inconsistent rights – Point at which choice between inconsistent rights arises – Whether indemnifier faced with choice between inconsistent rights.

Contracts – Forbearance from exercising contractual right – Relationship with estoppel – Influence of *Statute of Frauds*.

Contracts – Abandonment or renunciation of contractual right – Point at which time comes for abandoning or renouncing right – Whether time had come for lender or indemnifier to abandon or renounce right to insist on punctual payment under loan agreement.

Equity – Equitable doctrines – Election – Distinct character and application.

Words and phrases – "abandonment", "approbate and reprobate", "election", "forbearance", "punctually", "renunciation", "waiver".

1 GUMMOW, HAYNE AND KIEFEL JJ. Between October 1997 and May 1999, the appellant ("ARF" or "the Lender") made four loans to the first respondent (Mr Gardiner or "the Borrower"). In each case the loan agreement required periodic repayments and provided that the whole of the principal outstanding was immediately repayable, at the option of the Lender, "if the Borrower defaults in the due and punctual payment of interest ... or any repayment instalment".

2 Each loan agreement was made contemporaneously with an indemnity agreement which, like the loan agreements, took substantially the same form in each case. The Lender, the Borrower, and a company associated with the Lender (the second respondent, "OAL" or "the Indemnifier") agreed, in consideration of the Borrower paying a flat fee, that if the Borrower punctually paid amounts due under the related loan agreement, and if, as a result of certain events, the Borrower ceased to carry on the business to which the money lent was to be applied, the Indemnifier would indemnify the Borrower against any demand by the Lender for repayment under that loan agreement and the Lender would look only to the Indemnifier for repayment of the loan.

3 Mr Gardiner did not pay certain sums due under three of the four loan agreements on the day appointed. ARF accepts that the third loan agreement Mr Gardiner made with ARF, in June 1998, was performed punctually. It is not now disputed that the indemnity agreement made in respect of the third loan is effective and enforceable and that, as a result, ARF may look only to OAL for repayment of the third loan. The third loan may be put aside from further consideration.

4 ARF obtained judgment in the Court of Appeal of the Supreme Court of New South Wales (from whose orders this appeal is brought) for the amount it claimed in respect of the fourth loan agreement. Mr Gardiner has not sought to cross-appeal against that judgment. The fourth loan may also be put aside from further consideration.

5 When payments due under the first and second loan agreements were made otherwise than on the day appointed, ARF accepted late payment and did not choose to accelerate repayment of the whole of the outstanding principal. Mr Gardiner later ceased to carry on the relevant business as a result of an event of a kind specified in the indemnity agreements.

6 There are two issues in this appeal. First, even though the Borrower did not pay on the day fixed by the agreement, did the Borrower nonetheless pay "punctually" the amounts due under the first and second loan agreements? Secondly, if he did not, can the Lender and the Indemnifier rely on the failure to make payment punctually as failure to satisfy a condition for the related indemnity agreements being "effective and enforceable"? Or did the Lender's

acceptance of late payments, or what was said or written to the Borrower about the late payments (or some combination of those matters) "waive" compliance with the condition that the Borrower had punctually paid amounts due?

7 There was a lively controversy about whether the relevant statements and letters were made or written on behalf of the Lender or the Indemnifier, or both. But as these reasons will later show, these and other aspects of the factual controversies between the parties in this Court need not be resolved. There was also an issue as to whether the Indemnifier was released from liability in respect of the first and second loan agreements by reason of acceptance by the Lender of late payments by the Borrower. In its written submissions in chief the Lender contended for such a release but subsequently withdrew the submission.

8 These reasons will show that the Borrower did not pay "punctually". The indemnities relating to the first and second loans were not "effective and enforceable". The Borrower's argument that there was a "waiver" should be rejected.

9 The issues in this appeal arise in litigation stemming from a failed agricultural investment scheme that was marketed as having taxation advantages for investors. It is necessary to say something more about the scheme, the agreements, and the litigation.

The scheme

10 In April 1997 OAL invited participation in a project described as "the Port Macquarie Tea Tree Plantation". The invitation was to subscribe for or buy "prescribed interests" and was therefore regulated by Div 5 of Pt 7.12 of the then Corporations Law. In its prospectus OAL described the objective of the project as "to establish and maintain a commercial tea tree plantation for purposes of producing Australian tea tree oil, and to market and sell that oil". Those who elected to participate in the project were to enter a Licence and Management Agreement with OAL as the manager of the project. Each participant or "farmer" was to be granted a 17 year licence over one or more allotments of land on each of which would be planted no less than 18,000 tea trees. OAL would establish and maintain the trees. Each farmer was obliged to pay OAL for the purchase of seeds and to pay OAL annual licence fees and management fees.

11 The prospectus recorded that a participant could obtain finance "to assist in funding the initial management fees payable" and that those "who take advantage of the finance offered by the Lender [ARF] have the option of entering into an Indemnity Agreement". Most who participated in the scheme took advantage of the offer of finance and entered an indemnity agreement.

12 Mr Gardiner made two investments in this project (referred to in argument and in some of the documents as "Project No 1"). In each case, Mr Gardiner invested with his wife but nothing was said to turn on this and it is convenient to deal with the matter as if he were the sole borrower. He made the first loan agreement in October 1997 and the second loan agreement in March 1998.

13 In the meantime, in February 1998, OAL issued a new prospectus inviting participation in a further project – Project No 2. (Supplementary prospectuses relating to Project No 2 were issued in June 1998, February 1999 and June 1999.)

14 Mr Gardiner made two investments in Project No 2 (one with his wife and the other on his own account). These were the third and fourth loans mentioned earlier. As previously noted, the third loan agreement was performed according to its terms. The fourth loan agreement made by Mr Gardiner, like the first and second loan agreements, was not. As noted at the outset of these reasons, however, ARF now has judgment for the amount owed in respect of that loan and it is not necessary to consider it further.

15 It is not disputed that four payments due under the first loan agreement were made late (in one case more than three months late) or that two payments due under the second loan agreement were made late. Nor is there now any dispute that Mr Gardiner, and the others who participated in Project No 1 and Project No 2, ceased to carry on the business of cultivating, harvesting and processing tea trees to produce tea tree oil as a result of an event identified in the indemnity agreements as a condition for the indemnity becoming "effective and enforceable".

16 Rather, as noted at the outset, there is a dispute about whether the condition for engaging the Indemnifier's obligation under the indemnity agreements, of the Borrower having made punctual payment under the relevant loan agreement, was met, and there is a dispute about whether, in the events that happened, satisfaction of that condition was necessary to hold the Indemnifier liable to Mr Gardiner under the indemnity agreements made in respect of the first and second loans.

The agreements

17 Although reference has already been made to the most important features of the agreements which give rise to the present litigation, it is as well to refer to some other provisions of those agreements and to set out the text of the principal provisions. It was not suggested that there was any relevant difference between the text of the two relevant loan agreements or indemnity agreements.

18 Each loan agreement provided (by cl 1) for the Lender to advance the principal sum in two instalments. Clause 2 of the agreements fixed the term of the loan and provided that:

> "Subject to the specific requirements of this agreement in respect of payments and repayments from time to time, and subject further to clause 7, the Principal Sum outstanding and all interest outstanding must be paid to the Lender on demand on or after the last business day in June 2014 ...".

19 Clause 3 provided for interest and recorded, in cl 3.2, that "[i]n consideration of the Lender discounting the rate of interest" set out in the agreement, the Borrower agreed to pay upon execution of the agreement the first year's interest on the principal sum advanced. Clause 3.3 provided that in further consideration for the Lender reducing the rate of interest payable during the second year of the agreement, the Borrower would pay to the Lender "on the date which is one year from the date of execution of this agreement or if that date is not a business day, the next following business day" interest for that second year in advance. Clause 3.4 provided that interest which became due and payable during the third and subsequent years, but which was not paid by 30 June at the end of that year, was to be capitalised to form part of the principal sum then outstanding. (Clause 3.3 anticipated payment of interest in the third and subsequent years to come out of project income.)

20 Repayment of part of the principal was to be made in accordance with an election to be made by the Borrower in the application for a loan. The repayment of that part of the principal was to be made as a lump sum, or by four equal quarterly instalments, or by 12 equal monthly instalments. Times for the payments were fixed according to which election the Borrower made. The balance of the principal sum was to be paid to the Lender "by direct deduction from the income of the Borrower from the Business".

21 Clause 5 of the loan agreements regulated the subject of default. The critical provision was cl 5.1, which provided that:

> "The parties agree that subject to Clause 7 below the whole of the Principal Sum remaining outstanding shall become immediately repayable at the option of the Lender on the happening of any one or more of the following events without the necessity of any notice of demand:
>
> (a) if the Borrower defaults in the due and punctual payment of interest or the Principal Sum or any repayment instalment or any other monies payable under this agreement;

(b) if the Borrower defaults in the observance or performance in any of his other covenants or obligations contained in this agreement;

(c) if the Borrower ceases to carry on the Business."

22 Clause 7, to which cl 5 was expressly subject, limited the Borrower's liability. It provided that:

> "The Lender acknowledges and agrees that the Borrower shall have no liability to repay any part of the Principal Sum outstanding or any interest thereon if the indemnity granted under the Indemnity Agreement as defined in the Project Deed is effective and enforceable in accordance with Clause 2 of the Indemnity Agreement."

23 As noted earlier, the indemnity agreements were made between OAL, ARF and the Borrower. Clause 1 of those agreements provided that:

> "Subject to the terms of this Agreement and in consideration of the payment on the date hereof of the Indemnity Fee as provided in clause 5 by the Borrower to the Indemnifier, receipt of which payment is acknowledged by the Indemnifier, the Indemnifier agrees to indemnify and save harmless the Borrower against any demand by the Lender for repayment of any Principal Sum outstanding and any interest thereon under the Loan Agreement subject to the terms of this Agreement ('the Indemnity')."

Clause 2 of the indemnity agreements identified what was meant by the indemnity being "effective and enforceable". It provided that:

> "The Indemnity referred to in Clause 1 shall be effective and enforceable if:
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> (a) the Borrower has punctually paid the interest payable pursuant to Clauses 3.2 and 3.3(a) of the Loan Agreement; and
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> (b) the Borrower has punctually paid the reductions of the Principal Sum set forth in Clause 4.1 of the Loan Agreement; and
>
> (c) the Borrower is not otherwise in default of any covenant or obligation contained in the Loan Agreement (save and except for any covenant or obligation to repay principal and interest which is subject to the Indemnity) or the Licence and Management Agreement; and
>
> (d) the Borrower has ceased to carry on the Business as a result of:

(i) any event described in Clause 31(a) of the Licence and Management Agreement ...".

Subject to cl 2 the Indemnifier agreed to pay the Lender, upon demand of either the Lender or the Borrower, any principal sum outstanding under the relevant loan agreement and any interest thereon.

24 Clause 4 provided, in effect, that the Lender could not have recourse to the Borrower if the indemnity was "effective and enforceable", regardless of whether the Indemnifier met its obligations. It provided that:

> "The Lender agrees and acknowledges that the Borrower may rely upon the Indemnity set forth herein and that notwithstanding any failure on the part of the Indemnifier to punctually perform any covenant or obligation contained herein the Lender shall not have recourse to the Borrower if the Indemnity herein contained is effective and enforceable in accordance with the terms of Clause 2."

The litigation

25 After the scheme had collapsed, ARF sought to recover the amounts it had lent in relation to both Project No 1 and Project No 2. ARF sued Mr Gardiner, and 215 other borrowers, in the Supreme Court of New South Wales. The borrowers denied liability.

26 In March 2004, Bergin J, sitting in the Commercial List, ordered that issues raised by ARF's claims against Mr Gardiner, a cross-claim filed by Mr Gardiner in answer to ARF's claim, and a cross-claim filed by OAL should be determined separately from any other question in the proceedings. Of the 216 persons sued, 179 agreed to be bound by the findings made on this separate determination.

27 On the trial of those issues, Young CJ in Eq rejected[1] all of Mr Gardiner's defences to ARF's claim for payment of the sums lent with interest, and dismissed his cross-claims against ARF and OAL. ARF obtained judgment for the whole of the amounts it claimed as principal and substantially all of its claim for interest. On appeal to the Court of Appeal of the Supreme Court of New South Wales, Mr Gardiner's appeal was allowed[2] in part. The judgment entered

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1 *Agricultural and Rural Finance Pty Ltd v Atkinson* [2006] NSWSC 202.

2 *Gardiner v Agricultural and Rural Finance Pty Ltd* (2008) Aust Contract Reports ¶90-274.

at first instance was set aside and judgment entered for ARF for a lesser sum. In effect, ARF obtained judgment for the principal lent under the fourth loan agreement, with interest, but lost its claims to recover principal or interest in respect of any of the first three loan agreements.

28 Several issues were considered in the Court of Appeal that are not pressed in this Court. On the issue of whether payments were made "punctually", the Court of Appeal (Spigelman CJ, Basten JA and Handley AJA) divided in opinion. Spigelman CJ concluded[3] that the requirement for punctuality of payment was satisfied when the person entitled to the benefit of the obligation accepted a payment as constituting punctual payment. The Lender had said, in a letter dated 2 June 1999, that a payment due in respect of Project No 1 was due on 7 April 1999 "however as we failed to send reminder notices we will accept payment as 'on time' up until 30 June 1999". Spigelman CJ found[4] that the letter of 2 June 1999 constituted acceptance as made punctually of payments that were made after the times appointed under the first and second loan agreements.

29 Although expressed in terms that might suggest application of notions of "waiver", the conclusion reached by Spigelman CJ was founded on the construction of the relevant provisions of the loan agreements and the indemnity agreements. Spigelman CJ noted[5] that "punctually" when used in a contract "usually requires a payment to have been made on the day provided in the contract and on no later day". But Spigelman CJ held that these contracts were not to be construed in that way. Particular significance was attached[6] to a conclusion that the Indemnifier did not have "a direct financial interest in the punctuality of the prior payments by the Borrower to the Lender". This "unusual aspect of the context" was said[7] to lead "to the word 'punctually' losing its usual connotation of precision in timing". Instead, the condition of the indemnity agreements requiring punctual payment was described[8] as "a stipulation inserted for the benefit of the Lender, which was not the party undertaking the principal obligation, which the Agreement imposed so as to emphasise the need on the part

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3 (2008) Aust Contract Reports ¶90-274 at 90,356 [126].

4 (2008) Aust Contract Reports ¶90-274 at 90,356 [129].

5 (2008) Aust Contract Reports ¶90-274 at 90,354 [110].

6 (2008) Aust Contract Reports ¶90-274 at 90,355 [118].

7 (2008) Aust Contract Reports ¶90-274 at 90,355 [118].

8 (2008) Aust Contract Reports ¶90-274 at 90,356 [124].

of the Borrower to fulfil its obligations to the Lender in the manner upon which the Lender would insist in accordance with its contractual rights".

30 By contrast, both Basten JA[9] and Handley AJA[10] held that payment of principal or interest after the due date was not payment "punctually". But Basten JA concluded[11] that the letter of 2 June 1999 was "an express variation of the borrowers' obligations under the first and second loan agreements". It followed, in his Honour's view, that the real question was[12] "whether such acceptance of the payments as sufficient satisfaction of the financial obligations between [ARF] and the borrowers also satisfied the requirements for punctual payment under cl 2(d) of the indemnity agreement". On the footing that the loan agreements and the indemnity agreements were[13] "interlocking agreements [which] should, so far as possible, be read together, so that cl 5 of the loan agreement operated consistently with cl 2 of the indemnity agreement", and that the indemnity agreements were tripartite agreements, Basten JA concluded[14] that the payments made under the first two loan agreements had been made punctually for the purposes of cl 2(a) and (b) of the indemnity agreements.

31 The third member of the Court, Handley AJA, reached a different conclusion on whether payments made under the first two loan agreements had been made punctually, holding[15] that acceptance of late payments by ARF, without more, did not make those payments punctual for the purposes of the indemnity agreements. Handley AJA further held[16] that a waiver by ARF of late payment for the purposes of a loan agreement could not, without more, be a waiver by OAL of late payment for the purposes of the related indemnity

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9 (2008) Aust Contract Reports ¶90-274 at 90,380 [243].

10 (2008) Aust Contract Reports ¶90-274 at 90,399 [359].

11 (2008) Aust Contract Reports ¶90-274 at 90,381-90,382 [255].

12 (2008) Aust Contract Reports ¶90-274 at 90,382 [257].

13 (2008) Aust Contract Reports ¶90-274 at 90,382 [259].

14 (2008) Aust Contract Reports ¶90-274 at 90,383 [268].

15 (2008) Aust Contract Reports ¶90-274 at 90,399 [359].

16 (2008) Aust Contract Reports ¶90-274 at 90,401 [373]-[375].

agreement. Handley AJA considered[17] that ARF should have judgment for the amounts due in respect of the first, second and fourth loan agreements.

Construing the agreements

32 Clause 2 of the indemnity agreements provided that the indemnity was "effective and enforceable if ... the Borrower has punctually paid" certain amounts. Clause 5 of the loan agreements provided that the Lender could require immediate repayment of the whole of the principal sum outstanding if the Borrower defaulted "in the due and punctual payment" of any sum payable under the loan agreements. The word "punctually" when used in cl 2 of the indemnity agreements, like the word "punctual" in cl 5 of the loan agreements, should be read in its ordinary sense of "[e]xactly observant of [the] appointed time; up to time, in good time; not late"[18]. Nothing in the text or context of the agreements (whether read separately or together) supports reading the critical words in some other way.

33 The construction urged by the Borrower (and adopted by Spigelman CJ) sought to read "punctually" (or "punctual") as hinging about the Lender's attitude. The words were read as inviting the questions: "How has the Lender treated the payment? Has the Lender treated the payment as 'punctual'?" To read the words in this way would strip "punctually" and "punctual" of much, if not all, of their meaning. The clauses could as well have spoken only of "payment" without the addition of the qualifying words "punctually" or "due and punctual".

34 Each loan agreement fixed times for payments of interest and repayments of principal. Both cl 2 of the indemnity agreements and cl 5 of the loan agreements invite attention to more than whether the obligation to make those payments was performed. By using the words "punctually" or "due and punctual", each clause looks to the *way* in which the obligation to pay has been performed. That requires consideration of what the Borrower has done, not what the Lender has done in response to the fact of payment.

35 Further, the questions earlier identified of how the Lender "treated" the payment, and whether the Lender treated payment as "punctual", raise the further question: "What is meant by treating a payment as punctual?" It is an expression evidently intended to convey more than bare acceptance of a payment of money.

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17 (2008) Aust Contract Reports ¶90-274 at 90,413 [496].

18 *The Oxford English Dictionary*, 2nd ed (1989), vol 12 at 840; *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia* [1977] AC 850 at 871.

On its face it is an expression that seeks to attach legal consequences to the fact of receipt. But those consequences were not further identified. In particular, if more is meant than that the payment was received *without* the Lender exercising the choice it had under the loan agreements of accelerating payment of the balance, the content of that additional element is not explained. In addition, to approach issues of construction in this way would be at odds with the general principle that "it is not legitimate to use as an aid in the construction of [a] contract anything which the parties said or did after it was made"[19].

36 The term of the loan agreements permitting acceleration of payment of the balance is predicated upon there being fixed times for performance which, if not met, do not constitute "due and punctual payment". If acceptance of a payment as "punctual" means no more than that the option to accelerate payment in the event that there is *not* due and punctual payment has not been exercised, *exercise* of that choice says nothing about what is meant by punctual payment. On the contrary, recognition of the *existence* of the choice presupposes that "punctual" has its ordinary meaning. And there is no reason to give "punctually" some different meaning in the indemnity agreements.

37 As noted earlier, Spigelman CJ attached significance to a conclusion that the Indemnifier did not have a direct financial interest in punctuality of performance by the Borrower. The conclusion is not well founded. The Indemnifier always had a direct financial interest in whether it remained liable on its indemnity. If it remained liable, it had a contingent liability which would be reflected in its balance sheet; if it was no longer liable, its balance sheet was to be altered accordingly. Whether the Indemnifier had a contingent liability under the indemnity agreements depended upon whether the conditions of its obligation were capable of being met. If they were not, it was no longer liable. One circumstance where the Indemnifier was not liable was if there had *not* been punctual repayments by the Borrower. It is not right, therefore, to say that the Indemnifier had no financial interest in the punctuality of repayments by the Borrower. The Indemnifier had expressly stipulated for such an interest by providing that it would be liable on the indemnity only if there had been punctual performance.

38 Further, the loan agreements and the indemnity agreements must be construed in their commercial context. Each was an important constituent

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19 *Whitworth Street Estates Ltd v Miller* [1970] AC 583 at 603 per Lord Reid, repeated by Gibbs J in *Administration of Papua and New Guinea v Daera Guba* (1973) 130 CLR 353 at 446; [1973] HCA 59; cf *Gibbons Holdings Ltd v Wholesale Distributors Ltd* [2008] 1 NZLR 277.

document in a publicly marketed investment scheme. It is not readily to be supposed that documents of that kind are to be given meanings other than the meaning ordinarily conveyed by the words used. As Spigelman CJ recorded[20], the availability of the taxation advantages said to attach to investment in the scheme was seen by the promoters of the scheme and the Australian Taxation Office as depending upon such matters as whether those who invested were engaging in a commercial venture attended by risks of the kind ordinarily encountered in business and, in particular, whether the loans could be described as "non-recourse". That being the position, there is even less reason to suppose that the liability of the Borrower to repay money lent should depend upon the unfettered discretion of the Lender. Yet in effect that is the construction urged by the Borrower. It is a construction that should be rejected.

39 It follows that the Borrower did not pay punctually amounts due under the first and second loan agreements. It also follows that, subject to the plea of waiver, the indemnity agreements made in respect of those loans were not "effective and enforceable". It is necessary to deal now with the plea of waiver.

The plea of waiver

40 On the last day of the hearing before Young CJ in Eq, Mr Gardiner was granted leave to file a further amended defence. That pleading added a plea of waiver. It alleged that:

> "ARF and OAL waived any non-compliance with the requirements to pay strictly in accordance with [the relevant provisions of the loan agreements] as a basis for denying the effectiveness or enforceability of the indemnity provided for in clause 1 of each Indemnity Agreement applicable to each of [the investments Mr Gardiner had made in the scheme], and therefore as a basis for denying that [his] obligation to repay the loans was to be performed by OAL and that ARF had no right of recourse against him".

Elaborate particulars were given of the allegation and it is important to set out their text:

> "During the course of his site visit in January 1998, Mr Gardiner in substance requested Mr Lloyd to put in place a procedure whereby Mr Gardiner would receive contact a couple of days in advance of the due date of quarterly payments. Mr Lloyd said in substance that would not be a problem. That procedure was put in place.

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20 (2008) Aust Contract Reports ¶90-274 at 90,349-90,352 [74]-[89].

On or about 16 July 1998 Mr Gardiner had a conversation with Mr Lloyd in which Mr Lloyd informed Mr Gardiner in substance that:

(a) OAL effectively acted as agent for ARF;

(b) 'we are pleased to receive payments from farmers at any time within reason';

(c) there was no need to pay additional interest;

(d) Mr Gardiner need not be concerned about the indemnity;

(e) Mr Gardiner was 'fine'.

On or about 27 October 1998 Mr Gardiner telephoned Ms Edwards and requested that she confirm with Mr Lloyd that there would be no adverse circumstances as a result of delay in payment. If there was a problem he requested that either Mr Lloyd or Mr Henry contact him. Neither Mr Lloyd nor Mr Henry advised Mr Gardiner that there were any adverse consequences arising.

On 2 June 1999 Mr Gardiner received a letter from Ms Edwards which recorded that, as a consequence of ARF's failure to send a reminder notice, the payment due on 7 April 1999 would be accepted as 'on time' up until 30 June 1999."

41 There are three initial observations to make about the particulars. First, the Mr Lloyd mentioned in the particulars was the managing director of OAL. Ms Edwards was described[21] by the trial judge as "financial controller" of ARF. In this Court the appellant described her as ARF's bookkeeper and OAL's compliance officer. The particulars do not identify the party or parties for whom Mr Lloyd or Ms Edwards was allegedly acting when taking the steps described in the particulars. Given the way in which the pleading itself was framed ("ARF *and* OAL waived any non-compliance") it may well be that each was alleged to be acting on behalf of both ARF and OAL (emphasis added).

42 Secondly, the particulars suggested that the waiver of "any non-compliance with the requirements to pay strictly in accordance with [the relevant provisions]" was constituted by the combination of four separate events: Mr Lloyd's response to a request made of him at a site visit in January 1998, a conversation with Mr Lloyd in July 1998, a conversation with Ms Edwards in

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21 [2006] NSWSC 202 at [51].

October 1998 and a letter from Ms Edwards dated 2 June 1999. Yet at trial, it would seem that attention was directed for the most part, perhaps even exclusively, to the alleged conversation between Mr Gardiner and Ms Edwards in October 1998 and what followed.

43 The third observation to make is a temporal observation. The defaults in punctual payment under the first and second loan agreements included defaults that had occurred before the last of the dates mentioned in the particulars (2 June 1999) and one that had occurred before that date (on 7 April 1999) but was remedied by payment on 30 June 1999 (the date mentioned in the letter of 2 June 1999 as the last day on which ARF would "accept payment as 'on time'"). Some of the defaults under the first and second loan agreements occurred before the alleged conversation of October 1998; some occurred after that date.

44 This being the temporal relationship between the failures to make payments punctually and the events said to constitute the waiver of non-compliance with the requirements for punctual payment it is evident that, depending upon what was found to constitute the waiver, the arguments for waiver, if otherwise sound, would likely require separate consideration of what was alleged to be a waiver of past defaults and the alleged waiver of defaults that had not yet occurred. These reasons will demonstrate, however, that these temporal complications need not be resolved.

45 Two other prefatory comments may be made. The plea of waiver added at trial alleged that "ARF *and* OAL waived any non-compliance with the requirements" to pay punctually (emphasis added). It was not alleged, and it was not submitted in argument, that one of ARF or OAL might be bound to treat the indemnity as effective and enforceable even if the other was not. It is not necessary, therefore, to consider any such differential outcome.

46 The plea of waiver was not accompanied by any plea of unilateral release or abandonment of the requirements of punctual payment, based upon some general doctrine of "unfairness" or "approbation and reprobation"[22]. Nor was such a submission made in this Court. Rather, the submissions properly focused upon the term "waiver" and sought to give it relevant and specific content.

47 The trial judge dealt with the allegation of waiver briefly. He said[23]:

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22 cf *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12 at 27, 31.

23 [2006] NSWSC 202 at [51]-[52].

> "The alleged waiver seems to be said to have arisen because after 27 October 1998 Mr Gardiner says that there was an arrangement with Ms Vanessa Edwards, the financial controller of the plaintiff [ARF], that Ms Edwards would send Mr Gardiner a reminder before any payment was due and she failed to do so.
>
> *Ms Edwards denies this and I would accept her denial.* Secondly, if I was wrong in this, it is common ground that Mr Gardiner asked to speak to Ms Edwards' superior Mr Lloyd and Mr Lloyd did in fact ring him. This tends to suggest that any arrangement made with Ms Edwards was not a final arrangement. Thirdly, Mr Gardiner in fact endorsed one of the bills 'Vanessa, my apologies, I now have all future payments scheduled in my diary' which tends to suggest there was no such conversation, and fourthly, even if there was such a conversation it would be very debatable if it could have any effect either because of authority of Ms Edwards or because, as in the case of *Gilbert J McCaul (Aust) Pty Ltd v Pitt Club Ltd*[24], waiver has no part to play where the fact of punctual performance is one of the matters to be established before a right comes into existence or a right continues to exist." (emphasis added)

48 In argument in this Court, the submissions about waiver were elaborated to a greater extent than seems to have been the case at trial. First, Mr Gardiner challenged the trial judge's finding that there was not, in October 1998, a conversation between Mr Gardiner and Ms Edwards to the effect alleged by Mr Gardiner. Secondly, emphasis was given to the allegation made in the particulars that there was a conversation between Mr Gardiner and Mr Lloyd on or about 16 July 1998. Thirdly, emphasis was also given to the letter of 2 June 1999 (signed by Ms Edwards on behalf of ARF) saying that a payment due on 7 April 1999 would be accepted as "on time" up until 30 June 1999. Taken together these matters were said to show a "waiver" of insistence upon punctual payment as a condition of the indemnity agreements being effective and enforceable.

49 The Borrower submitted that there was a "waiver" in one or more of three different senses: an election between inconsistent rights; an application of the common law doctrine of forbearance; or the abandonment or renunciation of a right. The Borrower accepted that the plea of waiver was not a plea which sought to allege that there had been a variation of any relevant agreement, or that the doctrine of promissory estoppel was engaged. There was no consideration

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24 (1957) SR (NSW) 332.

for a variation of agreement. There was no detrimental reliance for a promissory estoppel.

50 As the Borrower's submissions implicitly accepted, "waiver" is a word applied in a variety of senses. Leading scholars have long cautioned against, even condemned, its use. Roscoe Pound, in his Foreword to Ewart's work *Waiver Distributed*, described[25] waiver as one of a number of "solving words" which are "but substitutes for thought" and as one of a number of "pseudo-conceptions" or "soft spots in what appears a hard legal crust". He went on to say[26] that:

> "As we become able to define the respective provinces of rule and discretion, of logical deduction from conceptions and of individualised adjustment to standards, of analytical application on the one hand and equitable application on the other hand, every reason for the existence of these soft spots will cease. Like fictions, which have done their work, they will be no more than traps to catch the unwary."

And Corbin spoke[27] of waiver as a word of "indefinite connotation" which "like a cloak … covers a multitude of sins".

51 Waiver has often been used in senses synonymous with election or estoppel. It has been suggested[28] that waiver is indistinguishable from one or other of those doctrines. Sometimes, although expressed in terms of waiver, the reasoning adopted in cases reveals the elements for applying a more specific principle, typically election[29] or estoppel[30]. And it may be that in cases of the several kinds last mentioned, the term is used as no more than a conclusionary

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25 Ewart, *Waiver Distributed* ("Ewart"), (1917) at v.

26 Ewart at v.

27 "Conditions in the Law of Contract", (1919) 28 *Yale Law Journal* 739 at 754.

28 See, for example, *Finagrain SA Geneva v P Kruse Hamburg* [1976] 2 Lloyd's Rep 508 at 534 per Megaw LJ.

29 See, for example, *R v Paulson* [1921] 1 AC 271 at 280, 283; *The "Kanchenjunga"* [1990] 1 Lloyd's Rep 391 at 397-398.

30 See, for example, *Enrico Furst & Co v W E Fischer Ltd* [1960] 2 Lloyd's Rep 340 at 349-350; *W J Alan & Co Ltd v El Nasr Export and Import Co* [1972] 2 QB 189 at 213.

word stating the consequences of the operation of that more specific principle, rather than as indicating the application of any distinct and independent principle.

52 Nonetheless, it is clear that there are cases in which the word has been used in senses other than those embraced by principles of election, estoppel or variation of contract. So, for example, waiver has been used in the sense of rescission where what has occurred is "an entire abandonment and dissolution of the contract"[31]. It has been used in connection with a party not insisting upon a term of a contract which is identified as a term for that party's sole benefit[32]. And from time to time "waiver" has been used[33] to describe some modification of the terms of a contract without the formalities, or consideration, necessary for an effective contractual variation.

53 The uncertainties and difficulties which attach to the use of the term "waiver" have been recognised in judgments of this Court[34]. Yet "waiver" remains firmly embedded in the lawyer's lexicon. For example, in *Osland v Secretary to the Department of Justice*[35] this Court considered the circumstances in which by its conduct a party entitled to legal professional privilege against the production of documents is to be taken to have "waived" that privilege[36].

54 The uncertainties and difficulties which attach to the use of the term have prompted attempts to construct a taxonomy of waiver in which distinctions are

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31 *Mulcahy v Hoyne* (1925) 36 CLR 41 at 53 per Isaacs J [1925] HCA 17, citing *Price v Dyer* (1810) 17 Ves Jun 356 at 364 [34 ER 137 at 140].

32 See, for example, *Mulcahy* (1925) 36 CLR 41 at 55 per Isaacs J, 58 per Starke J; *Gange v Sullivan* (1966) 116 CLR 418 at 429 per Barwick CJ; [1966] HCA 55.

33 See, for example, *Bacon v Purcell* (1916) 22 CLR 307 at 312; [1916] HCA 40; *Embrey v Earp* (1890) 6 WN (NSW) 130 at 131.

34 See, for example, *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 406 per Mason CJ, 422 per Brennan J, 467, 472 per Toohey J; [1990] HCA 39; *Mann v Carnell* (1999) 201 CLR 1 at 13 [28] per Gleeson CJ, Gaudron, Gummow and Callinan JJ; [1999] HCA 66.

35 (2008) 82 ALJR 1288; 249 ALR 1; [2008] HCA 37.

36 (2008) 82 ALJR 1288 at 1301 [45], 1302 [49], 1310-1311 [97], 1316 [131]; 249 ALR 1 at 16, 17, 29, 36.

drawn between "waiver by election" and "pure waiver"[37] or between "waiver by election" and "unilateral waiver"[38]. It is not necessary to consider whether such classifications are useful. Rather, it is important to identify the principles that are said to be engaged in the particular case.

55 In the present case, the term "waiver" was used to denote three different principles by the application of any one of which it was submitted that ARF and OAL were barred from insisting upon satisfaction of a contractually stipulated condition for a relevant obligation of the party (OAL to indemnify and ARF to look only to OAL for repayment)[39]. Those principles were described as election, forbearance and abandonment or renunciation. It is convenient to deal with them in that order.

Election?

56 In this Court an intentional act, done with knowledge, whereby a person abandons a right by acting in a manner inconsistent with that right has been described as the "waiver" of that right[40]. But as later demonstrated[41], many such cases are applications of the doctrine of election between inconsistent rights. The same may be said of election between inconsistent remedies such as damages and an account of profits[42].

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37 Wilken and Villiers, *The Law of Waiver, Variation and Estoppel*, 2nd ed (2002) at 45-46 [4.01], 60 [4.28].

38 *The "Happy Day"* [2002] 2 Lloyd's Rep 487 at 506 [64] per Potter LJ.

39 cf *Hartley v Hymans* [1920] 3 KB 475 at 495.

40 *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305 at 326; [1920] HCA 64; *Grundt v Great Boulder Pty Gold Mines Ltd* (1937) 59 CLR 641 at 658 per Latham CJ; [1937] HCA 58.

41 *Elder's Trustee and Executor Co Ltd v Commonwealth Homes and Investment Co Ltd* (1941) 65 CLR 603 at 616-619 per Rich ACJ, Dixon and McTiernan JJ; [1941] HCA 31; *Owendale Pty Ltd v Anthony* (1967) 117 CLR 539 at 556-557 per Windeyer J; [1967] HCA 52; *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641 per Stephen J; [1974] HCA 40; *Verwayen* (1990) 170 CLR 394 at 406-407 per Mason CJ. See also *O'Connor v SP Bray Ltd* (1936) 36 SR (NSW) 248 at 257-264 per Jordan CJ.

42 *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 520-522; *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 653-654 [39]; [2001] HCA 66.

57 It should be noted that the equitable doctrine of election has a distinct character and application, and, as explained by Viscount Maugham in *Lissenden v CAV Bosch Ltd*[43] has no connection with the common law principle putting a party to an election between alternative rights or remedies. Equity fastens upon the conscience of a party taking under a deed or will and requires the party to choose between taking the benefit and accepting the burden of any stipulated conditions or rejecting the benefit[44]. Viscount Maugham explained in this connection that the phrase "you may not both approbate and reprobate", which was derived from the civil law and "from the northern side of the Tweed"[45], when used in English law was but a synonym for the equitable doctrine of election[46].

58 The doctrine of election is long established at common law. As Jordan CJ pointed out in *O'Connor v SP Bray Ltd*[47], "[s]ince the days of the Year Books it has been recognised that you cannot have the egg and the halfpenny too". If, then, something happens which gives rise to the existence of two alternative rights, and one of those rights is satisfied, the other is no longer available. A breach of contract by one party always gives the other party a right to recover damages for the breach. If serious, the breach will give the innocent party the right to treat the contract as at an end. But the innocent party need not accept the repudiatory breach and avoid the contract; the innocent party may choose to insist upon further performance. And as *Craine v Colonial Mutual Fire Insurance Co Ltd*[48] shows, the exercise, despite knowledge of a breach entitling one party to be discharged from its future performance, of rights available only if the contract subsists, will constitute an election to maintain the contract on foot.

59 In many cases about election, the central issue is whether an election has been made or only foreshadowed. So, for example, an election between alternative remedies in contract and in tort is not made merely by bringing one

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43 [1940] AC 412 at 417-419.

44 *Pridmore v Magenta Nominees Pty Ltd* (1999) 161 ALR 458 at 470 [66].

45 [1940] AC 412 at 417.

46 cf *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12 at 31.

47 (1936) 36 SR (NSW) 248 at 257.

48 (1920) 28 CLR 305.

claim rather than the other. An election is not made at least until entry of judgment[49].

60 Circumstances in which there is an election between inconsistent rights are radically different from some others in which there is said to be a waiver of rights. In particular, it is important to distinguish cases of election between competing rights from the very different setting for this Court's last extended consideration of issues of "waiver" in *The Commonwealth v Verwayen*[50]. In that case the Commonwealth obtained leave, belatedly, to amend its defence to plead a statute of limitations as an answer to the plaintiff's claim for damages for personal injury. In response to that plea, the plaintiff asserted that the Commonwealth had waived the limitations defence or was estopped from relying upon it. This Court divided in opinion about whether the Commonwealth could rely on the limitations defence. The majority of the Court (Deane, Dawson, Toohey and Gaudron JJ) held that the Commonwealth was not free to dispute its liability to the plaintiff. Deane J and Dawson J each rested that conclusion in estoppel; Toohey J and Gaudron J each concluded that the Commonwealth had waived its right to rely on a limitations defence. But the conclusions reached by both Toohey J and Gaudron J about waiver depended upon considerations founded in the nature of the adversarial litigious process. So Gaudron J said[51] that "a party to litigation will be held to a position previously taken (that position having been intentionally taken with knowledge) if, as a result of that earlier position, the relationship of the parties has changed". And as her Honour pointed out[52], the roots of the doctrine applied in her decision were to be identified in "fair dealing in the conduct of litigation [and] promoting the finality of litigation". Likewise, Toohey J emphasised[53] that the "waiver" at issue in *Verwayen* was "waiver as it exists *within the adjudicative process*" (emphasis added) and that[54] "[w]ithin the adjudicative process at any rate, it is enough that the defendant 'renounces' a defence which is available to him and which is there for his benefit." It was on this footing that both Toohey J and Gaudron J

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49 *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1; *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635.

50 (1990) 170 CLR 394.

51 (1990) 170 CLR 394 at 484.

52 (1990) 170 CLR 394 at 485.

53 (1990) 170 CLR 394 at 472.

54 (1990) 170 CLR 394 at 473.

concluded that the Commonwealth had waived the right to plead a limitations defence.

61 By contrast, Brennan J concluded[55] that the Commonwealth had done no more than state its intention (albeit unequivocally) not to rely on the defence. Because the time for waiving the defence had not arrived[56], the Commonwealth could be held to that statement of intention only if the plaintiff could show detrimental reliance sufficient to hold the Commonwealth estopped from changing its position. That is, Brennan J held[57] that an election between rights was foreshadowed by the Commonwealth's statement of intention, but that an election would be made only at the moment before judgment.

62 It is neither necessary, nor appropriate, to canvass in these reasons the correctness of what was decided in *Verwayen*. What is presently important is to recognise that the discussion of waiver in that case reflected the particular setting in which the issue arose. The setting in that case was provided by the existence of litigation between the parties. The issue was whether one party had so acted that it should not be permitted to rely on a defence that it had at first said it would not raise but later sought to rely on to defeat the plaintiff's claim. There is evident danger in divorcing what is said in that case from that context and attempting now to apply it directly in the radically different context of contractual relations. The point was emphasised in the discussion of *Verwayen* by Gleeson CJ, McHugh, Gummow and Callinan JJ in *Giumelli v Giumelli*[58] as follows:

> "It would seem that in the exercise of the discretion upon opposition to the grant of such leave, a question arose as to whether, in the light of the past conduct by the Commonwealth of the litigation, leave should be refused. That presented to the Court the task not of adjudicating legal or equitable rights but of assessing the relevant factors. In a comparable situation in England, the House of Lords in *Roebuck v Mungovin*[59]spoke of the decision upon such an application as 'a classic

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55 (1990) 170 CLR 394 at 426.

56 (1990) 170 CLR 394 at 427-428.

57 (1990) 170 CLR 394 at 427.

58 (1999) 196 CLR 101 at 122 [38]; [1999] HCA 10. See also the remarks of Sir Nicolas Browne-Wilkinson V-C in *Express Newspapers plc v News (UK) Ltd* [1990] 1 WLR 1320 at 1329-1330; [1990] 3 All ER 376 at 384.

59 [1994] 2 AC 224 at 236.

exercise of a discretion [by] simply taking the defendants' conduct into account'."

63 It is, nonetheless, important to recognise that there are aspects of the present case which fall entirely within an orthodox application of the doctrine of election between competing rights. In particular, when the Borrower failed to make a payment punctually, ARF had the option to accelerate the time for repayment of the balance outstanding under the loan agreement. ARF did not exercise that option and, in the letter of 2 June 1999, said (in effect) that it would not exercise that right on account of the amount then outstanding, if payment was received by 30 June of that year. Instead ARF accepted the Borrower's subsequent tender of (unaccelerated) performance according to the contract and ARF thereby elected not to exercise the right to accelerate the time for repayment. Had it attempted to do so in the period between 2 June and 30 June a case of estoppel may well have been made out. But as already explained in these reasons, ARF's election not to accelerate did not deny the fact of breach by the Borrower. On the contrary, the premise for analysis of these events as an election by the Lender is that the Borrower had not made due and punctual payment.

64 It is next necessary to recognise that the election made between inconsistent rights which has just been identified was an election made by the Lender – ARF. Contrary to the premise that necessarily underpinned the Borrower's submissions about election, there was no election made by the Indemnifier – OAL. Even if the letter of 2 June 1999 were to be treated as OAL's letter, OAL made no election because the Borrower's lateness of payment gave OAL no choice between competing rights.

65 As has already been noticed, a condition of OAL's liability on its indemnity was that the Borrower had punctually paid amounts due under the loan agreements. The Borrower's failure to pay punctually gave OAL no choice between terminating the indemnity agreements for breach and insisting upon future performance. It gave OAL no such choice because the Borrower was not obliged by the indemnity agreements to pay the Lender punctually. The Borrower's *obligation* for punctual performance was imposed by the loan agreements. It was an obligation which the Borrower owed to the Lender, not OAL. OAL was not a party to the loan agreements. The Borrower's failure to pay punctually gave OAL no claim against the Borrower for breach of the loan agreements. That the Lender, ARF, was a party to the indemnity agreements and that the Borrower and the Indemnifier were also parties to Licence and Management Agreements made with the Trustee of the project which, among other things, obliged the Borrower to comply with the loan agreements, neither require nor permit a different conclusion.

66 The indemnity agreements assumed the existence of the obligation to pay punctually and attributed consequences according to whether the obligation was met. But the indemnity agreements did not oblige the Borrower to pay punctually. OAL was therefore not in a position where *it* could choose between insisting upon future performance of the loan agreements and accelerating the time for the discharge of those agreements by requiring repayment of all that was outstanding. And because the Borrower owed the Indemnifier no obligation under the indemnity agreements, other than the obligation to pay the indemnity fee, OAL could make no choice between insisting upon the Borrower performing future obligations under those agreements and bringing the agreements to an end.

67 It follows that, in so far as the Borrower submitted that OAL had made any election between competing rights, the Borrower's submission should be rejected.

Forbearance?

68 The Borrower submitted that the common law has long recognised a doctrine (described as waiver, or forbearance from exercising a contractual right) that is distinct from cases of contractual variation, election between inconsistent rights, estoppel or what the Borrower called "the unilateral renunciation or abandonment of a right or benefit where a party acts in a manner inconsistent with the maintenance of that right or benefit".

69 In support of its submission that the matters alleged in the particulars of the plea of waiver engaged a principle identified as forbearance from exercising a contractual right, the Borrower relied on a number of decisions in which a party's conduct had been held to disentitle it from insisting upon a condition of performance. Those cases included three to which particular reference must be made: *Ogle v Earl Vane*[60], *Panoutsos v Raymond Hadley Corporation of New York*[61] and, in this Court, *Electronic Industries Ltd v David Jones Ltd*[62].

70 Each of these cases was said to be an example of the common law's response to the concern that a party not approbate and reprobate and of a doctrine which "operates where a party in an existing contractual relationship (the

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60 (1868) LR 3 QB 272.

61 [1917] 2 KB 473.

62 (1954) 91 CLR 288; [1954] HCA 69.

promisor) agrees not to enforce a condition, or right, and the other party (the promisee) acts upon the basis that the condition is not being enforced".

71 Expressed in those terms, the proposition for which the Borrower contended seems little different from estoppel. The reference to an *agreement* not to enforce was evidently intended to encompass cases where the promisor *represented* that a contractual condition would not be enforced. And the reference to the other party, the promisee, acting upon the basis that the condition is not being enforced seems to evoke notions of detrimental reliance identical to those referred to by Dixon J in *Grundt v Great Boulder Pty Gold Mines Ltd*[63]: that the party asserting the estoppel "must have so acted or abstained from acting upon the footing of the state of affairs assumed that he would suffer a detriment if the opposite party were afterwards allowed to set up rights against him inconsistent with the assumption". Yet the Borrower submitted that forbearance differs from estoppel and accepted that, in this case, his pleading did not raise any defence of estoppel.

72 It will also be recalled that the appeal to this Court was conducted on the footing that estoppel was not in issue and was not in issue because Mr Gardiner could not show detrimental reliance upon any representation that the indemnity remained effective and enforceable despite failure to make payments punctually. That no argument of detrimental reliance was advanced on behalf of Mr Gardiner may owe much to the fact that when Mr Gardiner was first told that some payments were late he sought to reassure Ms Edwards that he would make future payments on time.

73 Given, then, that estoppel was expressly disclaimed, it is not clear exactly what was meant by saying that forbearance required the other party to act upon the basis that the condition is not being enforced. Nor is that made clear by reference to the decisions to which the Borrower referred.

74 It is necessary to preface consideration of those decisions by making some general observations. Much of what is said in cases concerning allegations that contractual obligations have been modified after the contract was made must be read against the background provided by statutory requirements, derived from the *Statute of Frauds* 1677, for written evidence of certain contracts. If a contract is not required to be evidenced by writing, any variation of the contract may be made orally. By contrast, if the contract must be evidenced by writing, any variation of it must also be evidenced in that way. Subject to the doctrine of part performance, an oral variation of an agreement which must be evidenced by

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63 (1937) 59 CLR 641 at 674.

writing cannot be enforced and the "original contract in writing stands unaffected"[64].

75 These consequences of the requirements of the *Statute of Frauds* led to the drawing of a distinction ("not a satisfactory distinction"[65]) between "a mere parol variation of an original contract in writing on the one hand and on the other hand a parol rescission of an original contract in writing"[66]. And it led also to the drawing[67] of nice distinctions between subsequent parol arrangements which relate only to "the mode and manner of the performance of an existing obligation" (a "waiver") and substituting one agreement for another (a "variation"). And echoes of a distinction between subordinate provisions (like provisions about the mode and manner of performance) and other provisions can be heard in those aspects of American law of waiver in contract which do not permit waiver of a condition if its occurrence was a *material* part of the exchange agreed on by the parties[68].

76 Application of these principles to the common commercial case where one contracting party promises the other not to insist upon strict performance of a contractual term (for example, as to time of performance) led to what McCardie J described[69] as an "unhappy confusion of authority" and an "embarrassing ambiguity of principle". Cheshire and Fifoot said[70]:

> "The truth is that the judges, willing to sustain a reasonable commercial practice, have not only failed to be consistent, but have propounded one

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64 *Tallerman & Co Pty Ltd v Nathan's Merchandise (Victoria) Pty Ltd* (1957) 98 CLR 93 at 113 per Dixon CJ and Fullagar J; [1957] HCA 10.

65 *Tallerman* (1957) 98 CLR 93 at 113 per Dixon CJ and Fullagar J.

66 *Tallerman* (1957) 98 CLR 93 at 113 per Dixon CJ and Fullagar J.

67 *Phillips v Ellinson Brothers Pty Ltd* (1941) 65 CLR 221 at 244 per Williams J, see also at 233 per Starke J; [1941] HCA 35. See also *Hickman v Haynes* (1875) LR 10 CP 598 at 604-605.

68 *Restatement of Contracts*, 2d, §84(1)(a).

69 *Hartley v Hymans* [1920] 3 KB 475 at 494.

70 "*Central London Property Trust Ltd v High Trees House Ltd*", (1947) 63 *Law Quarterly Review* 283 at 290.

particular distinction – that between variation and waiver – which is an affront to one's intelligence."

77 What the Borrower identified as a distinct doctrine of forbearance encompassed (perhaps was limited to) the case of a party "voluntarily acceding to a request by the other that he should forbear from insisting on the mode of performance fixed by the contract". This was further identified by the Borrower as a unilateral, not consensual, act and as not leading to any permanent change in the rights of the parties; the waiving or forbearing party might, on giving reasonable notice, insist upon performance in accordance with the contract.

78 At once it may be observed that the Borrower's statement of the asserted principle was directed to insistence on the mode of performance fixed by the contract. In its terms the principle was not directed to the case which arises here, where the Borrower alleged that the Lender, or the Indemnifier (or both) had said that it (or they) would not insist upon satisfaction of a condition for the Indemnifier's liability (that the Borrower had paid sums punctually). The dispensation which the Borrower said he sought, and to which the Lender or Indemnifier was alleged to have acceded, was dispensation from the consequences of the Borrower's past performance under the loan agreements, not dispensation from a future mode of performance. And if, as the Borrower submitted, this dispensation did not lead to any permanent change in the rights of the parties, it is not clear what was said to be its legal consequence. The premise for this limb of the Borrower's argument was that there was neither a variation of any relevant agreement nor an estoppel created by the matters relied on as constituting forbearance. But if there was no variation and if, as the Borrower submitted, forbearance has only a temporary effect, why could the Indemnifier not later insist upon the letter of the indemnity agreements? This was not explained in argument.

79 It is, however, important to go beyond the particular formulation of doctrine proffered by the Borrower in his submissions.

80 The Borrower submitted that the doctrine he identified as "forbearance" first emerged in *Ogle v Earl Vane*[71]. In that case the plaintiff (a purchaser of goods which the defendant did not supply at the time stipulated) had not commenced proceedings or bought alternative goods as soon as the defendant had said he would be unable to perform the contract on time. Instead the plaintiff had, at the request of the defendant, waited to see whether the defendant could deliver suitable alternative goods. When nothing came of that proposal, the

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71 (1868) LR 3 QB 272.

plaintiff sought damages calculated by reference to the higher price prevailing at the later date rather than the price in the market at the time the defendant first said he could not perform. The plaintiff was held entitled to the larger sum.

81 The contract for supply of the goods fell within the *Statute of Frauds*. It may be, as some authors have suggested[72], that *Ogle v Earl Vane* marked a change in judicial attitude to the effect to be given to parol modifications to contracts required to be evidenced in writing. Certainly there was reference in *Ogle v Earl Vane* in the Exchequer Chamber[73] to the discussion in the judgments in the Queen's Bench[74] of the defendant's argument that nothing could alter the amount of damages (fixed at the date of breach) except something which would constitute a new contract and that any arrangement to wait and see, not being in writing, was void for want of a sufficient writing. And as Anson pointed out, in the 10th edition of his work on contract[75], Willes J, in giving judgment in the Exchequer Chamber, held that by the forbearance on the part of the plaintiff buyer, at the request of the defendant, to insist upon delivery at and after the time for performance "an agreement arose which, though for want of consideration for the forbearance it could not furnish a cause of action, was nevertheless capable of affecting the measure of damages".

82 In the end *Ogle v Earl Vane* concerned only the issue of damages. It provides little or no support for any general proposition about forbearance. In *Johnson v Agnew*[76], Lord Wilberforce cited *Ogle v Earl Vane* as an authority for the statement:

> "In cases where a breach of a contract for sale has occurred, and the innocent party reasonably continues to try to have the contract completed, it would to me appear more logical and just rather than tie him to the date of the original breach, to assess damages as at the date when (otherwise than by his default) the contract is lost."

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72 Greig and Davis, *The Law of Contract*, (1987) at 126.

73 (1868) LR 3 QB 272 at 280 per Willes J.

74 (1867) LR 2 QB 275 at 281 per Blackburn J.

75 Anson, *Principles of the English Law of Contract and of Agency in Its Relation to Contract*, (1903) at 294 n1.

76 [1980] AC 367 at 401. See also *Johnson Matthey Bankers Ltd v The State Trading Corporation of India Ltd* [1984] 1 Lloyd's Rep 427 at 436-437.

83 In oral argument the Borrower gave particular emphasis to the decision of the English Court of Appeal in *Panoutsos*[77]. There, a contract for sale and shipment of goods no later than a specified date, by one or more vessels, provided that each shipment was to be deemed a separate contract and that payment be "by confirmed bankers' credit". The buyer opened a credit but it was not "confirmed". With notice of that fact the sellers made some shipments and drew on the credit for payment. The sellers sought and obtained an extension of time for completing the shipments. Before that extended time had expired the sellers cancelled the contract on the ground that the credit provided was not "confirmed". In an ex tempore judgment, Viscount Reading CJ said[78] that "[i]t is open to a party to a contract to waive a condition which is inserted for his benefit" and that, in this case, the sellers had waived the condition for a confirmed bankers' credit. He continued[79]:

> "If at a later stage the sellers wished to avail themselves of the condition precedent, in my opinion there was nothing in the facts to prevent them from demanding the performance of the condition if they had given reasonable notice to the buyer that they would not ship unless there was a confirmed bankers' credit. If they had done that and the buyer had failed to comply with the condition, the buyer would have been in default, and the sellers would have been entitled to cancel the contract without being subject to any claim by the buyer for damages."

On its face, then, what was said in *Panoutsos* may be read as supporting the Borrower's submissions about forbearance. It is to be observed, however, that the facts in *Panoutsos* can readily be fitted within principles of estoppel, for it is evident that the buyer of the goods had relied on the implicit representation that its performance was sufficient. And *Panoutsos* was later treated[80] as an example of the application of those principles rather than as establishing any separate principle of forbearance. Indeed, Cheshire and Fifoot, writing in 1947 about the decision in *Central London Property Trust Ltd v High Trees House Ltd*[81], saw[82]

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77 [1917] 2 KB 473.

78 [1917] 2 KB 473 at 477.

79 [1917] 2 KB 473 at 478.

80 *Charles Rickards Ltd v Oppenhaim* [1950] 1 KB 616 at 623 per Denning LJ.

81 [1947] 1 KB 130.

82 Cheshire and Fifoot, (1947) 63 *Law Quarterly Review* 283 at 299.

Panoutsos as one of several decisions in which judges, "no doubt ... influenced by the dictates of natural justice", based decisions expressed in terms of "waiver" in "estoppel or first cousin to it, though they cannot or dare not say so in unambiguous language". And Cheshire and Fifoot saw[83] the re-emergence in *High Trees House* of a doctrine of promissory estoppel as having "elucidated the confused rules relating to waiver" and the courts as having "carried the doctrine of estoppel to its logical conclusion". The authors went on to say[84]:

> "If they [the courts] are satisfied that there has been forbearance with regard to performance and that one of the parties has proceeded on the assumption that the forbearance is to be effective, they will not allow the arrangement to be repudiated. They have drawn no fine distinctions between waiver or forbearance and variation, or, in this connection between a statement of fact and a promise *de futuro*. They lay no stress on whether it was the plaintiff or defendant who requested the forbearance, or whether the forbearance occurred before or after performance was contractually due, or whether consideration has been given. Further, the forbearance can be used, as *Bruner v Moore*[85] shows, as a weapon of offence, at any rate as a means of obtaining the equitable remedy of specific performance. The basis of this sensible and commercially useful attitude is that the arrangement made by the parties and taken by at least one of them at its face value raises an equity against the party resisting."

84 As earlier indicated, in many cases in which it is said that a party to a contract has "waived" a condition for that party's benefit, the party said to have waived the condition will have made an election between inconsistent rights (to insist on further performance or treat the contract as discharged for failure of the condition). In other cases, of which *Panoutsos* is an example, the case may be better identified as one of estoppel[86]. And as was later pointed out in *Charles Rickards Ltd v Oppenhaim*[87], analysis by reference to estoppel may avoid the difficulties of identifying the arrangement as an effective variation of the contract that are presented by questions of consideration or, if the contract must be

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83 (1947) 63 *Law Quarterly Review* 283 at 300.

84 (1947) 63 *Law Quarterly Review* 283 at 300.

85 [1904] 1 Ch 305.

86 Handley, *Estoppel by Conduct and Election*, (2006) at 38-39 [2-018].

87 [1950] 1 KB 616 at 622-623.

evidenced in writing, the absence of a sufficient note or memorandum[88]. But as the decision of this Court in *Electronic Industries Ltd v David Jones Ltd*[89] shows, those difficulties are not always present and the events may be better analysed by reference to ordinary principles of contract and variation of contract.

85 In *Electronic Industries*, the plaintiff agreed to install and operate television equipment in the defendant's store during an agreed period. Because of an industrial dispute, which affected retail trade, the defendant asked the plaintiff, and the plaintiff agreed, to postpone its installation and demonstration. After the date originally fixed for installation of the equipment the parties discussed fixing a new time for the installation and demonstration but made no agreement. Ultimately the defendant refused to proceed with the demonstration and the plaintiff treated the contract as repudiated and sued for damages. The defendant accepted that a time for performance of the contract had been fixed but alleged that, the parties having removed that time, the contract was void for uncertainty. Alternatively, the defendant argued[90] that "when the date originally fixed went by, whether as a result of a contractual variation or of a forbearance by the plaintiff at the defendant's request to tender performance punctually, thereupon an indispensable part of the contract was eliminated".

86 As the Court noted[91]:

> "[T]he situation at the time when performance according to the tenor of the contract was due simply was that the plaintiff, though ready and willing to perform, had refrained from tendering actual performance at the request of the defendant. It had expressed its willingness to agree on a variation of the contract by substituting a new date but no agreement of variation had been made. *The original agreement therefore stood but, without any breach of contract on the part of the plaintiff, the date for performance had gone by.* Up to this point at all events, the parties had not agreed on a variation of the contract. The plaintiff had simply complied with a request on the part of the defendant to forbear from punctual performance, awaiting meanwhile an answer to the defendant's proposal for a variation of the contract by fixing a new date. *The result of*

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88 See, for example, *Plevins v Downing* (1876) LR 1 CPD 220; *Besseler Waechter Glover & Co v South Derwent Coal Co* [1938] 1 KB 408.

89 (1954) 91 CLR 288.

90 (1954) 91 CLR 288 at 297.

91 (1954) 91 CLR 288 at 295.

> *such a request followed by forbearance was to dispense the plaintiff from any actual tender of performance on the due date, the parties remaining bound nevertheless within a reasonable time to give and accept performance. If it be possible at all to infer that up to this point the parties had agreed on any variation, it could only be an agreement to the limited extent of removing from the contract the fixed day named for the commencement of the fortnight's exhibition. The difference between the two positions is not of importance in the present case.* For the transaction is not one to which the Statute of Frauds applies and on either view *there was a contract on foot requiring performance at a reasonable time to be worked out by the implications which the law makes when the co-operation of the parties is necessary to effect performance and there is no exact time appointed by the tenor of their mutual obligation.*" (emphasis added)

Thus, no matter whether analysed by reference to the plaintiff's reliance upon the defendant's request that the plaintiff *not* tender performance at the stipulated time, or as a variation of the agreement by elimination of the term fixing time for performance, the parties remained bound by their contract and bound to the "performance of the co-operative acts necessary to carry out the contract"[92].

87 This conclusion did not proceed from applying a principle of the kind for which the Borrower contended in this matter: that a contracting party is to be held (pending reasonable notice to the contrary) to that party's acceding to the opposite party's request to forbear from insisting on performance as stipulated. The conclusion reached in *Electronic Industries* depended upon recognising that the parties in that case had *not* agreed to rescind their contract. They had agreed that the plaintiff's not performing its obligations on the day appointed was not a breach of the agreement, yet the parties remained bound by their agreement and each thereafter acted on that footing. As the performance of their obligations under that agreement required co-operation (in fixing a date reasonable to the needs of both) each was bound[93] to do all that was necessary to be done on its part to carry it out. *Electronic Industries* does not support the Borrower's argument about forbearance.

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92 (1954) 91 CLR 288 at 298.

93 *Mackay v Dick* (1881) 6 App Cas 251.

Abandonment or renunciation?

88 The third basis put forward by the Borrower for the submission that the Lender or Indemnifier (or both) had waived satisfaction of the condition of punctual payment as a condition for the indemnity being effective and enforceable was described as "abandonment" or "renunciation". Particular reference was made in this respect to what was said by Brennan J in *Verwayen*[94] about "abandonment" of a right to plead a limitations defence – a defence he described[95] as "solely for the benefit of a defendant". And although not placed at the forefront of this aspect of the Borrower's argument, it will also be recalled that in *Panoutsos*, Viscount Reading CJ described[96] the condition for a confirmed bankers' credit as a condition inserted in the contract for the sellers' benefit and said that it is open to the party to a contract having the benefit of such a condition to waive it.

89 As earlier explained, the notions of abandonment or renunciation of a right of which Brennan J wrote in *Verwayen* were being examined in the context of the conduct of litigation. Application of these notions was, therefore, overlaid by considerations of the fair and just conduct of the proceedings. Considerations of that kind are not relevant to the identification of the rights and obligations of parties to contracts.

90 Propositions expressed in terms of abandonment or renunciation of a right, like the proposition that a contractual condition inserted in a contract for the benefit of one party has been waived by that party, are statements of conclusion. They are not statements that reveal the process of reasoning which leads to the assignment of the chosen description. In *Verwayen*, Brennan J held that despite the clear and unequivocal statement by the Commonwealth that it would not raise a limitations defence, there was no waiver (or abandonment or renunciation) of the right to plead the relevant defence. As pointed out earlier in these reasons, Brennan J rested[97] that conclusion on the basis that the time to waive the right (or finally abandon or renounce it) had not arrived and would not arrive until the time came for its exercise. The time for waiving a time limitation which bars the

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94 (1990) 170 CLR 394 at 426-427.

95 (1990) 170 CLR 394 at 426.

96 [1917] 2 KB 473 at 477.

97 (1990) 170 CLR 394 at 427-428.

remedy was identified[98] as the time for granting the remedy: that is, the moment before judgment.

91 If an analysis of that kind were to be made of the facts of the present case it would not lead to the conclusion sought by Mr Gardiner.

92 It is to be recalled that the question is whether the Lender and Indemnifier may now insist upon punctual payment as a condition for the Indemnifier's liability. No doubt it is a condition that could be described as being of benefit to the Indemnifier. To this extent, then, the condition had a characteristic of the kind to which reference was made by Brennan J in *Verwayen* and Viscount Reading CJ in *Panoutsos*. And it is not necessary to consider whether the condition was properly to be seen as being for the benefit of both Lender and Indemnifier. The conduct relied on by Mr Gardiner as constituting the waiver (whether in the sense of abandoning or renouncing reliance on the condition or in any of the other senses earlier identified) was said to be conduct attributable to both ARF and OAL.

93 Even accepting that the condition had the characteristic of being for the benefit of the alleged waiving party, no question about OAL's insistence upon that condition arose until the indemnity was called on. That did not occur until the Borrower had ceased to carry on the relevant business. If, as Mr Gardiner asserted, the Lender or the Indemnifier (or both) had earlier said (even unequivocally) 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. The analysis made by Brennan J in *Verwayen* does not assist Mr Gardiner. Even if the matters alleged in the particulars given of the plea of waiver were established, there was no waiver (in the sense of abandonment or renunciation) of insistence upon punctual payment as a condition for the indemnity being effective and enforceable.

No "waiver"

94 For the reasons that have been given, even if the facts were as Mr Gardiner alleged them to be, none of the three senses in which he alleged there was a waiver (election, forbearance, abandonment) was made out. It is, therefore, not necessary to consider any of the several factual controversies presented by the particulars provided of the plea of waiver or to decide whether,

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98 (1990) 170 CLR 394 at 427.

in the light of the findings made in the courts below, any of the particular factual arguments advanced by Mr Gardiner should be accepted. It is, however, as well to say something further about why the facts alleged by Mr Gardiner, even if established, do not lead to the conclusion that the relevant indemnity was effective and enforceable despite Mr Gardiner not having paid punctually all amounts due under the first and second loan agreements.

95 If, as the particulars alleged, both ARF and OAL unequivocally represented to Mr Gardiner, in effect, that the indemnity remained effective and enforceable despite his past failures to pay punctually, his several arguments about waiver depended upon attributing determinative significance to the fact of the representation. That is, no matter which of the three ways in which the argument for waiver was put, the fact that ARF as Lender and OAL as Indemnifier represented that the indemnity remained effective and enforceable, despite past defaults, was said to be sufficient to hold those parties to that represented state of affairs. But if, as is the case here, there was no election between inconsistent rights, there was no variation of the contract, and there was no detrimental reliance upon the representation, no reason is given for holding the party concerned to its earlier expressed attitude beyond the fact that the representation was made. To hold that the making of the representation, without more, suffices to alter the rights and obligations for which the parties stipulated by their contract is a step that should not be taken.

96 It should not be taken for two reasons. First, to hold that the making of a representation, without more, alters the rights and obligations of parties to a contract would be to supplant accepted principles governing whether an estoppel is established and whether a contract has been varied. It would supplant those principles by dispensing with the need to show detrimental reliance to establish an estoppel and by discarding as irrelevant the need to show consideration for an agreement to vary an existing contract. The second reason, which in a sense is no more than the obverse of the first, is that no reason is proffered to hold the person making the representation to it. The person to whom the representation is made has not relied on it; it is not demonstrated that departure from the representation would be unjust; there was no consideration to support a bargain.

97 Mr Gardiner's arguments that the indemnity given by OAL remained effective and enforceable, despite his failure to make payments due under the first and second loan agreements punctually, should be rejected.

A residual category or general principle?

98 As explained earlier in these reasons, the submissions in this litigation have not been based upon the existence of some residual category or general principle of "unfairness" at common law which is distinct from the case of

"waiver" upon which reliance was placed, and from the principles of "election", "forbearance" and "renunciation". That makes it unnecessary to determine whether such a residual category or general principle exists in the common law of Australia. However, this silence on the subject should not be taken as an encouragement to further speculation.

99 It may be thought that some degree of support for such a category or principle of unfairness is to be found in some decisions in other jurisdictions. However, two observations may be made respecting what has been said in certain decisions in the United Kingdom, Canada, New Zealand and the United States.

100 First, "waiver" is sometimes used, as it is in Australia, in contexts that are far removed from the contractual context presented in this case. Decisions made in those other contexts, such as decisions about the "waiver" of constitutional rights[99] do not bear upon issues of the kind now under consideration. Secondly, decisions in other jurisdictions lend weight to the observation of Lord Wilberforce, in *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia*[100], that "the word 'waiver', like 'estoppel', covers a variety of situations different in their legal nature, and tends to be indiscriminately used by the courts as a means of relieving parties from bargains or the consequences of bargains which are thought to be harsh or deserving of relief". The need for coherence of legal principle and the effects of overly broad interpretations of waiver and estoppel upon other doctrines must be borne in mind[101]. Further, in some cases the reference to "unfairness" may not be to a defining principle. For example, when analysed in the case of an estoppel, it may convey no more than that there has been no detrimental reliance to found the estoppel[102].

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99 For example, *Johnson v Zerbst* 304 US 458 (1938) and *Barker v Wingo* 407 US 514 (1972).

100 [1977] AC 850 at 871.

101 See, for example, *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co* [1994] 2 SCR 490 at 500 per Major J: "An overly broad interpretation of waiver would undermine the requirement of contractual consideration."

102 See, for example, *Connor v Pukerau Store Ltd* [1981] 1 NZLR 384 at 388 per Cooke J, a case of detrimental reliance on a representation in which it was observed that if the statement "has had no effect at all on the conduct of the other party, there does not seem to be anything unfair in allowing him to withdraw it".

Conclusion and orders

101 The appeal should be allowed. The first respondent should pay the costs of the appellant and the second respondent in this Court. The orders of the Court of Appeal of the Supreme Court of New South Wales made on 6 September 2007 allowed the appeal to that Court, set aside the orders of the trial judge and in their place ordered judgment for ARF against Mr Gardiner in the sum due in respect of the fourth loan. The orders made in this Court should provide for judgment in the sum of the amounts owing under the relevant loan agreement for principal and interest on the first, second and fourth loans. The parties should have 21 days within which to agree upon the amount for which judgment is to be entered and if they are not able to agree on the amount for which judgment should be entered, that aspect of the matter should be remitted to the Court of Appeal for its determination of the issue between the parties.

102 In the Court of Appeal, Mr Gardiner obtained orders for costs which, in effect, gave him 50 per cent of his costs at trial and on appeal. Those orders reflected the degree to which Mr Gardiner was held to have been entitled to succeed. Mr Gardiner is now held to have substantially failed in his defences to the claims made against him.

103 Accordingly, orders should be made in the following form:

1. Appeal allowed.

2. Set aside paragraphs 1-3, 7 and 8 of the order of the Court of Appeal of the Supreme Court of New South Wales made on 6 September 2007, and in place thereof order:

    (a) appeal allowed in part;

    (b) set aside paragraphs 1, 2, 4, 5 and 6 of the order made by Young CJ in Eq on 11 April 2006;

    (c) appellant have judgment in the sum of the amounts owing under the relevant loan agreement for principal and interest on the first, second and fourth loans ("the sum"); and

    (d) first respondent to pay the appellant's costs in the Equity Division of the Supreme Court of New South Wales and in the appeal to the Court of Appeal.

3. The parties have 21 days from the date of this order to agree upon the sum, and in default of agreement the matter be remitted to the Court of Appeal for determination of the sum.

4. First respondent to pay the costs of the appellant and the second respondent in this Court.

104 KIRBY J. This appeal from a judgment of the Court of Appeal of the Supreme Court of New South Wales[103] raises two questions. The first concerns the meaning of a contractual obligation for punctual periodic interest and instalment payments under a loan agreement. The due observance of such payments was linked to an indemnity agreement which presents the second question. If the first question is decided adversely to the Borrower, the second question arises[104]. This concerns whether there was a "waiver" of the Borrower's breach of the punctual payment obligation.

105 The crux of the first question is the meaning of the common English word "punctually". There was disagreement between the judges in the Court of Appeal over this issue[105].

106 The second question is more complex. Before this Court, the Borrower did not rely upon any arguments of estoppel or contractual variation. Estoppel would prevent the Lender or the Indemnifier from using the failure of the Borrower to make payments "punctually" to prove that he did not fulfil his contractual obligations[106]. Inferentially, estoppel was disclaimed because the Borrower could not establish the requisite element of detrimental reliance. He could not show such reliance on a representation, made by the Lender, the Indemnifier or both, that the applicable contracts remained effective and enforceable despite the failure to make the punctual payments.

107 Likewise, the Borrower did not argue that the express contractual conditions requiring punctual payments had been varied. Inferentially, this was because of a lack of any consideration passing from the Borrower to the Lender or Indemnifier that would be necessary to render such a variation effective and enforceable. Merely paying belatedly some or all of the outstanding sums could not amount to consideration. Such payments only fulfilled the legal obligations that the Borrower had already assumed.

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103 *Gardiner v Agricultural and Rural Finance Pty Ltd* (2008) Aust Contract Reports ¶90-274.

104 I have used the same abbreviations and descriptions as appear in the joint reasons.

105 Spigelman CJ concluded that the punctuality requirement included where payment was accepted by the Lender as punctual: (2008) Aust Contract Reports ¶90-274 at 90,356 [129]. However, Basten JA at 90,380 [243] and Handley AJA at 90,399 [359] held that payments made after the due date (as determined by the circumstances) would not be punctual.

106 See joint reasons at [71]-[72].

108 Thus, the Borrower was unable to rely on estoppel or variation of the contractual obligations, and there were also no statutory foundations for relief[107]. That is why he was obliged to invoke his arguments of "waiver".

109 The Borrower contended that, by oral and written communications, the Lender (and it was suggested also the Indemnifier) had each "waived" their respective legal entitlements to insist on punctual payment and to rely on the Borrower's default which the unpunctual payment entailed.

110 The "waiver" submissions present questions as to the applicable legal doctrine on this subject in Australia. There have been differences on this issue both within this Court[108] and amongst knowledgeable commentators[109]. Further, there is a dispute about the evidentiary foundation said to amount to "waiver", in whichever form it might be established[110]. The Lender and the Indemnifier asserted that no separate, free-standing, unilateral principle of "waiver" (distinct from estoppel or contractual variation) exists in Australian law. If it does, the Lender and the Indemnifier argued that the established facts of the present case fell far short of proving such a "waiver".

111 In my opinion, the majority of the Court of Appeal correctly held that the Borrower did not pay the amounts due under the respective loan agreement "punctually". Consequently, the indemnity agreement was not "effective and enforceable". As to "waiver", whatever is the ambit of "waiver" in the Australian common law of contract, the accepted evidence in the present case fell short of enlivening such a principle. This is not, therefore, an occasion to determine precisely the ambit of "waiver". However, I am inclined to accept that such a principle exists in the common law as a reflection, in appropriate cases, of the

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107 Such as may be afforded by the *Trade Practices Act* 1974 (Cth), ss 80, 82, 87 or the *Contracts Review Act* 1980 (NSW), s 7(1) in respect of consumer contracts. See eg *West v AGC (Advances) Ltd* (1986) 5 NSWLR 610; *Antonovic v Volker* (1986) 7 NSWLR 151; *Dillon v Baltic Shipping Co* (*The "Mikhail Lermontov"*) (1989) 21 NSWLR 614; *Beneficial Finance Corporation Ltd v Karavas* (1991) 23 NSWLR 256.

108 Most notably in *The Commonwealth v Verwayen* (1990) 170 CLR 394; [1990] HCA 39.

109 See, for example, Ewart, *Waiver Distributed*, (1917) at 5; Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Aust ed (2008) at 1046 [21.31]; cf Wilken and Villiers, *The Law of Waiver, Variation and Estoppel*, 2nd ed (2002) at 63-65 [4.36]-[4.38].

110 See the joint reasons at [56]-[67] (waiver by election); [68]-[87] (waiver by forbearance); [88]-[93] (waiver by abandonment or renunciation).

"simple instinct of fairness"[111]. The law of estoppel is itself also based on this instinct, but, where it applies, it is treated separately.

The facts, decisional history and issues

112 *The facts*: I accept the general description of the background facts given in their reasons by Gummow, Hayne and Kiefel JJ (the "joint reasons")[112]; the details of the Tea Tree plantation scheme in which the loan agreement arose[113]; and the terms of the relevant loan agreement and indemnity agreement involving Mr Bruce Gardiner ("the Borrower"), Agricultural and Rural Finance Pty Ltd ("the Lender") and Oceania Agriculture Pty Ltd ("the Indemnifier")[114]. It is unnecessary for me to repeat any of those details.

113 *The decisional history*: Likewise, I will not repeat the history of the litigation between the parties. The joint reasons describe the initial order made for the separate determination of issues; the rejection by the primary judge (Young CJ in Eq) of all of the Borrower's propounded defences[115]; and the divided decision of the Court of Appeal[116].

114 *The issues*: There are three issues in this appeal:

(1) *The contractual meaning of "punctually" issue*: Whether, in fact and law, the Borrower paid the amounts due under the first and second loan agreements "punctually", as there required?

(2) *The "waiver" in law issue*: If the payments were not made "punctually", whether the Australian common law recognises a free-standing and unilateral doctrine of "waiver", separate from the law of estoppel and contractual variation? Such a doctrine would prevent a party to an agreement from relying upon a breach of a condition where that party's own conduct had waived that breach. If that is the case, what are the requirements for such a "waiver"?; and

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111 *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd* [2000] Ch 12 at 27.

112 Joint reasons at [1]-[9].

113 Joint reasons at [10]-[16].

114 Joint reasons at [17]-[24].

115 Joint reasons at [26]-[27]. See *Agricultural and Rural Finance Pty Ltd v Atkinson* [2006] NSWSC 202.

116 Joint reasons at [28]-[31].

(3) *The "waiver" in fact issue*: Whether the acts and omissions of the Lender and/or the Indemnifier in this case amounted to a "waiver", as so defined?

The contractual meaning of "punctually"

115 *"Punctually" is not always rigid*: As the division within the Court of Appeal demonstrates, there is some support for the Borrower's arguments that he complied with the contractual condition to make payments "punctually":

(1) Dictionary definitions of the adverb "punctually" (and the adjectival variant "punctual") lend support to the need to consider the facts and circumstances of the case in which the words have legal significance. Such a contextual approach is now the standard way in Australia to give meaning to words in the course of statutory interpretation. This derives from a recognition that context can throw light on the meaning of language[117]. As this insight involves a matter of general principle, there is no reason to adopt a different approach when securing the meaning of words appearing in other legal texts, including written contacts[118].

Dictionaries commonly state (often as the primary meaning) that "punctually" involves exactness and precision. However, other meanings recognise that such words will sometimes involve ambiguity to be clarified by reference to the circumstances. The *Encarta World English Dictionary*[119], as the primary meaning, defines "punctual" as "keeping to arranged time; arriving or taking place at the arranged time". The *Macquarie Dictionary*[120] likewise offers, as the secondary meaning, "prompt, as an action; made at an appointed or regular time". That dictionary actually nominates "punctual payment" as an example that is satisfied by prompt compliance. Thus, whilst dictionaries recognise a need for strict observance of time, subordinate meanings accept (as the circumstances permit) some measure of variation from such strictness and exactness;

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117 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397; [1996] HCA 36; applying *R v Brown* [1996] AC 543 at 561 per Lord Hoffmann.

118 Kirby, "Towards a Grand Theory of Interpretation: The Case of Statutes and Contracts", (2003) 24 *Statute Law Review* 95 at 97, cf at 105.

119 (1999) at 1524.

120 Federation ed (2001), vol 2 at 1536.

(2) In a legal document such as this loan agreement, it would have been possible for the parties (through their drafters) to put the issue beyond doubt. This further supports the potential breadth of the word, depending on the context. Thus, the documents could have specified, as such agreements sometimes do, the exact dates and even the times upon which the payments were to be made[121]. Or the documents could have stated expressly that, in respect of punctual payments, time would be "of the essence"[122]. Parties sometimes lack the benefit of legal advice in the preparation of written agreements that define legal rights and obligations. Where so, the language that they use should arguably be given a sensible meaning in order to avoid unnecessary rigidity. If not, it might cause disproportionate injustice and inconvenience to the parties;

(3) Spigelman CJ in the Court of Appeal considered it permissible to consider the post contractual conduct of the parties in deriving the meaning of "punctually". That conduct, to put it no higher, suggested a possible acceptance (certainly between the Borrower and Lender) that "punctually" allowed some leeway, without an insistence upon absolute strictness as to time[123]. The joint reasons reject this approach. They conclude that because the agreement was written, by definition, it had a meaning before any subsequent conduct of the parties[124].

I would not accept this conclusion as stating an absolute rule. I do not agree that later communications and conduct of parties to an agreement are inadmissible when tendered to indicate acceptance by the parties of a particular meaning of the language used in their agreement. For example, if an agreement included technical words, the communications and conduct of the parties after the execution of that agreement might be admitted to throw light on a common understanding as to the meaning of such words. In particular circumstances, the common understanding of the language of a written agreement might assist in deriving the objective meaning of the text. If "punctually" were intended here to mean *exactly* and with absolute *specificity as to date and time*, the Borrower is entitled

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121 See, for example, *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 at 517 in which a contract for sale specified the date, time and place for completion and was held to require strict compliance.

122 See *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 at 320 [4]; [2003] HCA 57.

123 *Gardiner* (2008) Aust Contract Reports ¶90-274 at 90,354 [111], 90,356 [126].

124 Joint reasons at [35] referring to *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583 at 603 per Lord Reid.

to argue that the Lender or Indemnifier would have insisted immediately and firmly upon such a meaning. Instead, as Spigelman CJ concluded, the oral and written communications from the Lender afford some support for a looser mutual expectation about "punctually" in the particular context of this agreement; and

(4) Variants of the word "punctually" in written contracts have been construed by judges as sufficiently complied with a day or so after the nominated time. For example, in *Nova Scotia Steel Co, Ltd v Sutherland Steam Shipping Co, Ltd*[125], a clause in a charterparty authorised a ship owner to withdraw the vessel if there were a failure in the "regular and punctual payment" of the monthly hire. Bigham J held that a tender of payment, made immediately after a notice was issued, withdrawing the vessel because of one default, was not too late in the circumstances[126]. That tender was offered only two days after the due date. In other cases, judges have considered the extremely drastic consequences that a rigid view of "punctually" could produce and held such a requirement not necessarily to demand inflexibility. For example, in *Schaverien v Morris*[127], a promissory note, repayable in instalments, provided that if any instalment were not paid "punctually" the whole balance was to become payable immediately. It was there held that "punctually" did not deprive the maker of the note of the three day period of grace allowed by s 14 of the *Bills of Exchange Act* 1882 (UK). Of course, that case turned on the operation and purpose of the applicable legislation. No such legislative protection was available in the present case to afford relief to the Borrower.

116 *"Punctually" here means on the assigned day*: In the present case the better view is that "punctually" in the agreement demanded payment by the Borrower on (or before) the day named[128]. Several reasons support this conclusion:

(1) This approach is consistent with the primary definition of "punctually" (or "punctual") adopted in most dictionaries of the English language. Dr Johnson's first dictionary[129] provides synonyms for "punctually",

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125 (1899) 5 Com Cas 106.

126 (1899) 5 Com Cas 106 at 109.

127 (1921) 37 TLR 366.

128 cf *Leeds and Hanley Theatre of Varities v Broadbent* [1898] 1 Ch 343 at 349; *Hicks v Gardner* (1837) 1 Jur 541 at 541.

129 Johnson, *A Dictionary of the English Language*, (1755) (1979 reprint).

namely "[n]icely; exactly; scrupulously". The joint reasons set out the primary definition provided by the *Oxford English Dictionary*[130]. The *Macquarie Dictionary*[131] also provides a similar primary definition, viz "strictly observant of an appointed or regular time; not late".

In its ordinary meaning in Australia, the primary meaning of the word is therefore one of strictness. That meaning can no doubt be traced to the Latin origin of the word, *punctus*, meaning a point. The word, and its variations, denote a high degree of precision. It follows that this is how the word will normally be read when appearing in a written agreement, such as the loan agreement in this case;

(2) This conclusion is further supported by the fact that the agreements were *pro forma* documents. As such, they were designed to give effect to a scheme intended to apply to a large number of persons, doubtless of varying skills, knowledge and means. That scheme itself, therefore, postulates the exactness that the word ordinarily connotes. Such a scheme would quickly break down if precision became even partly optional. The operation of such a scheme, with multiple participants, self-evidently depended on regular payments made precisely as agreed by borrowers such as the Borrower;

(3) The loan agreement is a legal document with commercial purposes. Consequently, "punctually" here would be given an objective meaning to facilitate a business-like approach to the implementation of the agreement between the several parties that depend upon the payments. For the reasons already indicated, commercial reality requires that such obligations be complied with strictly, without a need to specify an identified time or to stipulate that time was of the essence. This was sufficiently clear from the commercial context of the agreement entered into by the Borrower;

(4) Moreover, the loan agreement and the obligations under the indemnity agreement are interrelated. Thus, it could not be said that the Lender could lawfully waive the separate and distinct entitlements and expectations of the Indemnifier to compliance with punctual payments. Unless it was established that the Lender was expressly authorised to act as agent for the Indemnifier, in waiving the Indemnifier's separate rights at law, any latitude afforded to the Borrower by the Lender would not necessarily bind the Indemnifier. I agree with the joint reasons that the

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130 2nd ed (1989), vol 12 at 840. See joint reasons at [32].

131 Federation edition (2001) vol 2 at 1536.

failure to afford due weight to the separate rights to punctual payments to the Lender, enjoyed by the Indemnifier, constituted an error in the reasoning of Spigelman CJ[132]. By express terms, the Indemnifier's obligations were contingent upon due and punctual payments of interest by the Borrower to the Lender. Thus, on the face of things, without express authority otherwise, the Lender had no legal right by its actions to affect the entitlements of the Indemnifier. Punctual payments to the Lender were not only an agreed contractual stipulation. They also afforded practical evidence of the Borrower's ongoing compliance with his obligations. Necessarily, such compliance (or non-compliance) with these obligations would be reflected in the financial records both of the Lender and of the Indemnifier[133];

(5) In practice, where duties of punctuality have been included in commercial agreements between parties, courts have generally insisted upon a high degree of strictness. Partly, this has been because of the normal understanding of the word itself. It has also followed from an appreciation of the commercial context and the financial purpose of requiring punctuality. As Robertson LP said in *Scott-Chisholme v Campbell's Trustee*[134], where a landlord had agreed to forgo arrears of rent if the subsequent rent were "punctually" paid, the word "punctually" was to be treated as a word of time[135]. The question was not whether the subsequent rent was "faithfully" or "honourably" paid. It was whether it was paid at the time stipulated. In the present case, that time was stipulated with particularity and precision; and for identified purposes.

Where there was reliance to a borrower's detriment upon a variation of the time, the principles of estoppel might sometimes afford relief. Likewise, by deed or by simple contract for consideration, if the parties were to agree to vary the original agreement, the consequences of a lack of punctuality would then depend upon the terms of the variation. But without these occasions for relief, in a context such as the present, the contractual stipulation as to "punctually" must be given its primary meaning; and

(6) In particular circumstances, such strictness as to time could indeed lead to an occasional sense of unfairness. Thus, there may arise a suggested

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132 Joint reasons at [37].

133 Joint reasons at [37].

134 (1893) 30 SLR 558.

135 (1893) 30 SLR 558 at 560.

> disproportion between the unpunctual default and the drastic consequences then invoked. However, subject to any relief that a doctrine of "waiver" might afford, the answer that the law provides to such a complaint is plain. Equitable principles, the law of estoppel, consensual variation and statutory relief may modify the duties of punctuality upon which parties have agreed. Courts, however, do no service to such parties by adopting atextual meanings of words of strictness such as "punctually". Such interpretations simply encourage the kind of litigation that has occurred in the present case.
>
> Increasing numbers of contractual agreements today involve international parties that use the English language to express their bargains. They often provide for the resolution of their disputes in courts or by arbitration which will apply the foregoing principles. Adopting atypical meanings of words such as "punctually" tends to defeat the expectation of such parties. It diminishes their capacity to agree in advance on their respective legal obligations and entitlements. It erodes confidence in the capacity of the law to uphold the bargains, upon which the parties have agreed, according to their terms.

117 *Conclusion: breach of punctuality*: It follows that, on the first issue, I agree in the conclusion reached in the joint reasons. The Borrower did not pay the amounts due on the first and second loan agreements "punctually". Accordingly, subject to the Borrower's arguments of "waiver", the indemnity relating to the loan agreement was not "effective and enforceable".

The content of "waiver" in law

118 *The disputed concept of "waiver"*: The foregoing conclusion requires me to consider the second and third issues. "Waiver" has had its defenders as a principle to be deployed in the analysis of various legal situations, including in the law of contract[136]. However, its invocation has attracted sustained criticism. Courts and knowledgeable commentators have described the notion of "waiver" as "imprecise"[137]; "troublesome"[138]; "over-used in the law generally, but

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136 Other legal situations include, for example, reliance on statutory provisions: *Truong v The Queen* (2004) 223 CLR 122 at 164 [110], 178 [157]-[159]; [2004] HCA 10; a right to complain about judicial bias: *Vakauta v Kelly* (1989) 167 CLR 568 at 577-579 per Dawson J, 587-588 per Toohey J; [1989] HCA 44; *Smits v Roach* (2006) 227 CLR 423 at 439 [43], 466 [125], 469 [137]; [2006] HCA 36; and legal professional privilege: *Osland v Secretary, Department of Justice* (2008) 82 ALJR 1288 at 1301 [45], 1309 [90], 1316 [131]; 249 ALR 1 at 16, 27, 36; [2008] HCA 37. See joint reasons at [53].

137 *Verwayen* (1990) 170 CLR 394 at 451 per Dawson J.

particularly in relation to contractual rights"[139]; "a cover for vague, uncertain thought"[140]; "a term of shifting meaning"[141]; and "not at all a precise term of art"[142].

119 Some of this confusion and the resulting criticism is because "waiver" has been variously understood as including instances of estoppel[143]; election[144]; deliberate forbearance of insistence upon rights[145]; and conscious abandonment or renunciation of rights[146].

120 To determine where, if at all, "waiver" fits in the taxonomy of defences to alleged contractual breaches presents a question that cannot, in my opinion, be resolved solely by citing old cases. Certainly, authorities have discussed the meaning and ambit of "waiver" in various contexts[147]. However, such authorities must be read carefully because of the evolution of interrelated legal doctrines, particularly those concerned with the equitable and common law rules of estoppel.

121 In *Foran v Wight*[148], Deane J recognised the relevance of this evolution[149]:

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138 Dugdale and Yates, "Variation, Waiver and Estoppel – A Re-Appraisal", (1976) 39 *Modern Law Review* 680 at 681.

139 Carter, "Waiver (of Contractual Rights) Distributed", (1991) 4 *Journal of Contract Law* 59 at 59.

140 Ewart, *Waiver Distributed*, (1917) at 5.

141 *Verwayen* (1990) 170 CLR 394 at 422 per Brennan J.

142 *Oliver Ashworth* [2000] Ch 12 at 28 per Robert Walker LJ.

143 Joint reasons at [51].

144 Joint reasons at [56].

145 Joint reasons at [68].

146 Joint reasons at [88].

147 See, for example, *Panoutsos v Raymond Hadley Corporation of New York* [1917] 2 KB 473; *Craine v Colonial Mutual Fire Insurance Co Ltd* (1920) 28 CLR 305; [1920] HCA 64.

148 (1989) 168 CLR 385; [1989] HCA 51.

149 (1989) 168 CLR 385 at 434. His Honour qualified his comments on estoppel in *Verwayen* (1990) 170 CLR 394 at 449-450.

> "The line between the somewhat arbitrary doctrine of waiver and the doctrine of estoppel by conduct has always been a vague one[150] and the former doctrine is being increasingly enveloped and rationalized by the latter."

122 Gaudron J likewise acknowledged these doctrinal uncertainties in *The Commonwealth v Verwayen*[151]:

> "Given that the same conduct may constitute what was characterized as waiver in *Craine*[152] and provide the foundation for an estoppel, there has been a tendency, in recent times, to question whether and, if so, in what circumstances waiver exists independently of the general law of estoppel. And this question has led to the further question whether the word 'waiver' is not productive of confusion."

123 In Australia, estoppel has generally been enlarged and expanded. In the result, problems have arisen that affect the demarcation between the doctrine of estoppel and the place of "waiver"[153]. In the search for a useful taxonomy, judges of this Court have acknowledged that estoppel, waiver and election are closely associated and to some degree overlap. Brennan J in *Verwayen* recognised that these three categories are[154]:

> "cognate concepts: each relates to the sterilization of a legal right otherwise than by contract. A 'right' may include a liberty or an immunity, according to the circumstances."

124 Depending upon the evidence in particular cases, arguments based on estoppel, waiver and election can all arise. In default of greater clarity in the law, this encourages the parties to plead multiple, alternative ways to classify the same facts[155].

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150 See *Craine* (1920) 28 CLR 305 at 326-327.

151 (1990) 170 CLR 394 at 481.

152 (1920) 28 CLR 305.

153 See also *Verwayen* (1990) 170 CLR 394 at 404 per Mason CJ.

154 (1990) 170 CLR 394 at 421.

155 *Craine* (1920) 28 CLR 305 at 326-327; Wilken and Villiers, *The Law of Waiver, Variation and Estoppel*, 2nd ed (2002) at 15 [2.02].

125 Recognising these similarities, Robert Walker LJ explained in *Oliver Ashworth (Holdings) Ltd v Ballard (Kent) Ltd*[156]:

> "All share a common foundation in a simple instinct of fairness, and in particular the perception that as between two parties to a transaction or a legal relationship it is or may be unfair for one party, A, to adopt inconsistent positions in his dealings with the other, B."

126 In considering the principles that govern the modification of contractual obligations, estoppel, waiver and election may be contrasted with variation and discharge[157]. Generally, contractual variation and discharge require bilateral consensus, the passing of consideration as required by the normal principles of contract law, or executing a deed to obviate the necessity for consideration. By way of contrast, estoppel, waiver and election typically involve a unilateral loss of rights without the need for consideration to pass. They "do not alter the *terms* of the contract, they restrict a party's range of possible responses to non or deficient performance"[158].

127 *"Waiver": a distributive term*: As mentioned in the joint reasons[159], Mr John Ewart described "waiver" in his 1917 text *Waiver Distributed* as a term that is[160]:

> "referable to one or other of the well-defined and well-understood departments of the law, Election, Estoppel, Contract, Release. 'Waiver' is, in itself not a department."

128 According to this view, "waiver" is more of an umbrella term to describe the working doctrines of estoppel and election[161]. Professor Carter and his colleagues speak of "waiver" as follows[162]:

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156 [2000] Ch 12 at 27.

157 See Carter, Peden and Tolhurst, *Contract Law in Australia*, 5th ed (2007) at 166 [7-26]; *Verwayen* (1990) 170 CLR 394 at 471 per Toohey J.

158 Wilken and Villiers, *The Law of Waiver, Variation and Estoppel*, 2nd ed (2002) at 16 [2.03] (citation omitted) (emphasis added).

159 Joint reasons at [50].

160 Ewart, *Waiver Distributed*, (1917) at 5.

161 Carter, "Waiver (of Contractual Rights) Distributed", (1991) 4 *Journal of Contract Law* 59 at 61; Feltham, Hochberg and Leech (eds), *Spencer Bower's Law Relating to Estoppel by Representation*, 4th ed (2004) at 355 [XIII.1.1].

> "To conclude that a right has been 'waived' might be thought to suggest that the right has been lost. But that is not necessarily the case. In order to determine what precisely is the effect of waiver it is necessary to examine the basis for the conclusion. A 'waiver' which is an election between inconsistent rights is final in the sense that the inconsistent right is permanently lost. On the other hand, a waiver which is an estoppel may involve no more than a temporary suspension of contractual rights. Unless it would be inequitable so to allow, the right may be reasserted upon the giving of reasonable notice."

129 To similar effect, Mason CJ in *Verwayen* recognised the different ways that "waiver" might be utilised in the law[163]:

> "As often as not, the term 'waiver' is used to describe the result of the application of various principles rather than to designate a particular legal concept or doctrine. … '[W]aiver' is an imprecise term capable of describing different legal concepts, notably election and estoppel."

130 Against this background it is clear that examination of judicial authority alone will not clarify the law of "waiver" in the context of contractual breaches. A final court such as this must examine, as well, any relevant considerations of legal principle or legal policy[164]. The central question thus becomes how this Court should determine the proper place, if any, of "waiver" in the taxonomy of remedies available in the event of alleged contractual breaches. The answer to this question obviously depends upon the place in the taxonomy taken by estoppel, election, variation and abandonment of contract.

131 *Against unilateral "waiver"*: To determine the ambit of any freestanding or unilateral legal principle of "waiver", it is important to notice the conflicting views expressed, both in this Court and by respected commentators.

132 In *Verwayen*, Mason CJ took a very narrow view of "waiver". He did not accept that one party to an agreement could unilaterally waive its legal rights so

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162 Carter, Peden and Tolhurst, *Contract Law in Australia*, 5th ed (2007) at 168 [7-29] (citations omitted).

163 (1990) 170 CLR 394 at 406.

164 *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 at 252; [1988] HCA 32; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347; [1995] HCA 65.

that the contract would become unenforceable (absent estoppel or election) if that party were later to change its mind[165]:

> "Generally speaking … an existing legal right is not destroyed by mere waiver in the sense of an express or implied intimation that the person in whom the right is vested does not intend to enforce it. In these cases, unless consideration is present, something in the nature of an election or an estoppel is required."

133 Mason CJ preferred to consider the "category of waiver" as only "an example of the doctrine of election"[166]. Nevertheless, he acknowledged that, in certain circumstances, a party to litigation could, with legal effect, agree not to raise a particular defence or engage in conduct that would estop that party from later raising that defence[167].

134 Similarly, McHugh J in *Verwayen* was prepared to acknowledge the existence of a form of "waiver", separate from estoppel and election. However, he considered that such cases were "*sui generis*" and "anomalous"[168]. He preferred the simplicity of "the more established doctrines of election, contract and estoppel"[169].

135 This also appears to be the preferred position of Dr Seddon and Associate Professor Ellinghaus in their much respected Australian edition of *Cheshire and Fifoot's Law of Contract*[170]:

> "As with any promise, there are only three ways in which it can be legally enforceable: by contract, deed or estoppel. Therefore it is incorrect to assert that, by itself, non-enforcement of a contractual right, or even a positive promise not to enforce a right, amounts to a waiver in the sense of being precluded from enforcing that right. Only if the limitation period has expired is it correct to say the right has been given up (in the absence of contract, deed or estoppel), and, even then, it is still substantively in existence."

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165 *Verwayen* (1990) 170 CLR 394 at 406 (citations omitted).

166 (1990) 170 CLR 394 at 407.

167 (1990) 170 CLR 394 at 407.

168 (1990) 170 CLR 394 at 497.

169 (1990) 170 CLR 394 at 497.

170 9th Aust ed (2008) at 90-91 [2.29] (citations omitted).

The authors question whether proposed cases of "waiver" could be usefully distinguished from cases of "election to affirm" or "estoppel". Still, other knowledgeable writers appear to take a similar position. They are concerned as to where an enlarged category of "waiver", with its inherent uncertainties, would take the law away from its safe moorings in the clearly recognised categories of contract, deed and estoppel[171].

136 *Support for unilateral "waiver"*: On the other hand, opinions have been expressed in support of a unilateral and enforceable "waiver" by judges of this Court[172] and by judges in the United Kingdom[173], New Zealand[174], Canada[175], the United States of America[176] and South Africa[177]. Such a "waiver" would operate against parties to a contract who know of a breach and who, without any relevant disability or disqualification, consciously waive the breach so as to preclude a later change of mind and a later decision to enforce legal rights. Supporters of waiver then regard the defence as applying notwithstanding the absence of a variation of the contract or of the necessary preconditions to establish an estoppel or an election between inconsistent rights[178].

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171 See, for example, Feltham, Hochberg and Leech (eds), *Spencer Bower's Law Relating to Estoppel by Representation*, 4th ed (2004) at 371 [XIII.1.22].

172 *Craine* (1920) 28 CLR 305 at 326; *Verwayen* (1990) 170 CLR 394 at 423 per Brennan J, 457 per Dawson J, 472-473 per Toohey J.

173 *Panoutsos v Raymond Hadley Corporation of New York* [1917] 2 KB 473 at 477; *Glencore Grain Ltd v Flacker Shipping Ltd* (*The "Happy Day"*) [2002] 2 Lloyd's Rep 487 at 506 [64] per Potter LJ delivering the reasons of the Court.

174 *Neylon v Dickens* [1978] 2 NZLR 35 at 37-38; *Connor v Pukerau Store Ltd* [1981] 1 NZLR 384 at 386.

175 *British American Oil Co Ltd v Ferguson* [1951] 2 DLR 37 at 44; *Marchischuk v Dominion Industrial Supplies Ltd* [1991] 2 SCR 61 at 65; *Saskatchewan River Bungalows Ltd v Maritime Life Assurance Co* [1994] 2 SCR 490 at 499-500.

176 *Johnson v Zerbst* 304 US 458 at 464 (1938); *Barker v Wingo* 407 US 514 at 529 (1972); *Milas v Labor Association of Wisconsin, Inc* 571 NW 2d 656 at 659 [13] (Wis 1997); *Cassey v Stewart* 727 So 2d 655 at 658 (La App 2 Cir 1999).

177 *Laws v Rutherfurd* [1924] AD 261 at 263; *Road Accident Fund v Mothupi* (2000) 4 SA 38 at 49 [15].

178 cf *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 641; [1974] HCA 40.

137 This is not, in my view, to postulate a "residual category" of "waiver"[179]. It is, instead, to attempt an identification of the unifying features of earlier instances or examples where courts have accepted the operation of "waiver" as a barrier to reopening a surrendered contractual right. Some may not be curious as to the shared foundations of "waiver" by "election", "forbearance" or "renunciation". Mumpsimus is never a stranger to lawyers. But conceptual thinking, identification of unifying notions and exposition of basic doctrine by reference to *principles* rather than *cases* or accidental *instances* is an essential function of a final national court such as this. That function is enlivened by the problem presented by the present appeal.

138 In *Verwayen*[180], Brennan J explained his view of "waiver" by reference to what Lord Hailsham of St Marylebone LC had said in *Banning v Wright (Inspector of Taxes)*[181]. Brennan J stated[182]:

> "What his Lordship is saying is that a right which is susceptible of waiver can be 'confessed' by a party against whom it might prima facie be exercisable but that party's liability can be 'avoided' by showing that the right has been abandoned. In other words, upon waiver, the party waiving the right ceases to be able thereafter to assert it effectively. When a right has been waived [in this sense] … it is unnecessary to consider whether any other party has acted in reliance on the release or abandonment: the right is abandoned once and for all."

139 To justify a unilateral "waiver", separate from the rules of contract, estoppel and election, Brennan J explained[183]:

> "These distinct doctrines serve different purposes: election … ensures that there is no inconsistency in the enforcement of a person's rights; estoppel or equitable estoppel ensures that a party who acts in reliance on what another has represented or promised suffers no unjust detriment thereby; waiver recognizes the unilateral divestiture of certain rights. True it is that the divisions in nature and purpose between one of these doctrines and another have not always been expressed in the way in which I have stated them and there have been occasions when the

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179 Joint reasons at [98]-[100].

180 (1990) 170 CLR 394.

181 [1972] 1 WLR 972 at 978-979; [1972] 2 All ER 987 at 998.

182 (1990) 170 CLR 394 at 423.

183 (1990) 170 CLR 394 at 423.

> sterilization of a right has been dubiously attributed to one doctrine rather than to another."

140 Dawson J took a similar approach in *Verwayen*[184]:

> "In order to waive a statutory right … it must be a personal or private right and must not rest upon public policy or expediency … Provided that it bars a remedy rather than extinguishes a cause of action, a statute of limitations gives rise to a right of that kind and it must be pleaded if it is to be invoked … If it is not pleaded, it is said to be waived".

His Honour went on, however, to acknowledge the imperfection of the propounded category.

141 In the United Kingdom, Robert Walker LJ in *Oliver Ashworth*[185] left open whether there existed a "third route", besides estoppel and election. He did so after reference to a principle of Scottish law that recognises an equitable doctrine of enforceable election, known as "approbate and reprobate"[186]. Ultimately, his Lordship put the question aside as he did not consider it necessary to decide the matter in that case.

142 Nevertheless, in *Glencore Grain Ltd v Flacker Shipping Ltd* (*The "Happy Day"*), Potter LJ, delivering the reasons of the Court, pressed the modern conceptualisation of "waiver" a little further[187]:

> "Broadly speaking, there are two types of waiver strictly so-called: unilateral waiver and waiver by election. Unilateral waiver arises where X alone has the benefit of a particular clause in a contract and decides unilaterally not to exercise the right or to forego the benefit conferred by that particular clause. … In such a case, X may expressly or by his conduct suggest that Y need not perform an obligation under the contract, no question of an election by X between two remedies or courses of action being involved. Waiver by election on the other hand is concerned with the reaction of X when faced with conduct by Y, or a particular factual

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184 (1990) 170 CLR 394 at 456 (citations omitted). See also the approach of Toohey J at 472-473.

185 [2000] Ch 12 at 31.

186 See *Ker v Wauchope* (1819) 1 Bligh 1 at 21 [4 ER 1 at 8]; referred to by Hoffmann J in *Banner Industrial & Commercial Properties Ltd v Clark Paterson Ltd* [1990] 2 EGLR 139 at 140.

187 [2002] 2 Lloyd's Rep 487 at 506 [64] (citations omitted).

situation which has arisen, which entitles X to exercise or refrain from exercising a particular right to the prejudice of Y. Both types of waiver may be distinguished from estoppel. The former looks principally to the position and conduct of the person who is said to have waived his rights. The latter looks chiefly at the position of the person relying on the estoppel. In waiver by election, unlike estoppel, it is not necessary to demonstrate that Y has acted in reliance upon X's representation."

143 *Conclusion: an emerging concept of "waiver"*: A number of conclusions may be drawn from a consideration of the foregoing authorities:

(1) The content of the doctrine of "waiver" in the taxonomy of remedies available where there is an alleged contractual breach is not settled. This is partly because of the differing ways in which the concept of "waiver" has been used: as an umbrella term to encompass various forms of unilateral loss of legal rights, and as a technical category that falls short of estoppel or election but to which the waiving party will nevertheless be held;

(2) Where the doctrines of estoppel, election or contractual variation (for consideration or by deed) apply, they must be given effect according to the established law on those subjects. Nevertheless, because there is an obvious overlap between the categories, it is possible for an additional or alternative category of "waiver" to be recognised as part of Australian law. In practice, parties commonly plead and not infrequently seek to prove overlapping legal categories. The overlap is an inherent feature of judge-made law. A lack of conceptual purity and uncertain application is occasionally balanced by the provision of practical remedies apt to the facts of the particular case;

(3) Reliance on technical instances of unilateral "waiver" is certainly not new in the common law. It finds resonance in both old[188] and recent authority in this Court[189], and in the judicial decisions of other common law countries[190]. Judicial and scholarly analysis of unilateral "waiver", however, is divided[191]. At least at the level of past decisions of this Court,

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188 *Craine* (1920) 28 CLR 305 at 326. See Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Aust ed (2008) at 1046 [21.31].

189 *Verwayen* (1990) 170 CLR 394 at 423 per Brennan J, 457 per Dawson J, 472-473 per Toohey J.

190 See above these reasons at [136].

191 See above these reasons at [131]-[142].

it is inconclusive[192]. If necessary, it therefore falls to this Court to resolve the ambiguity;

(4) Particular instances of "waiver" have been upheld in the context of litigation. This is the case in proceedings where a party indicates its intention not to invoke a statutory limitation defence[193]. However, as McHugh J observed in *Verwayen*[194], such instances are *sui generis* and anomalous. They do not decide the issue of legal principle and policy presented by a case such as the present. At most, they illustrate particular examples of circumstances that enliven a broader and as yet imprecise principle of the common law. For example, it cannot be the case that there is a special legal category in relation to the suggested "waiver" of a bar provided by a statute of limitations. Such a category could be no more than an example, or occasion, of the application of a broader principle of law still awaiting expression;

(5) The precise role of "waiver" cannot therefore be resolved by absolute statements, at least at this stage. Nonetheless, drawing from recent authority, and by analogy with the Scottish doctrine of "approbation and reprobation", it is relatively easy to conceive of circumstances where it "may be unfair for one party, A, to adopt inconsistent positions in his dealings with the other, B"[195]. Circumstances in the dealings between parties sometimes alter. Persons involved in a dispute change their minds. Supporting the availability of an enforceable doctrine of "waiver" in particular circumstances lies at the core of the common law freedom enjoyed by parties of full capacity to contract. That freedom includes the freedom of the party both to insist on its legal rights and to renounce, abandon or waive such rights. Rather than upholding the permanent effectiveness of *all* instances of "waiver", to forestall a change of mind, there is a competing notion that ordinarily, until judgment is entered, a party may invoke and demand their legal rights[196]. That is the case unless there is some countervailing substantive or procedural impediment that prevents that party from doing so; and

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192 See, for example, *Verwayen* (1990) 170 CLR 394.

193 cf Seddon and Ellinghaus, *Cheshire and Fifoot's Law of Contract*, 9th Aust ed (2008) at 1046 [21.31].

194 (1990) 170 CLR 394 at 497.

195 *Oliver Ashworth* [2000] Ch 12 at 27 per Robert Walker LJ.

196 *Verwayen* (1990) 170 CLR 394 at 427 per Brennan J.

(6) It is obviously necessary to avoid undermining competing principles that are established in the law[197] when developing the limited instances where unilateral "waiver" would prevent a party from changing its mind and seeking to revive an insistence on its legal rights. These potentially competing principles include the necessity to establish consideration (or a deed) for a bilateral variation of a contract; to demonstrate reliance and detriment to establish a legally effective estoppel; and to show a conscious choice between inconsistent rights for a legally effective election[198].

144 In light of the foregoing analysis, I am inclined to accept that a party may unilaterally release or abandon a right and be held to such a "waiver" beyond instances of contractual variation, estoppel and election. In my view, "waiver" certainly extends beyond the very particular circumstance of an indication of non-reliance on a statute of limitations.

145 However, for the doctrine of "waiver" to find a sure footing amongst the categories of legal relief, the circumstances of the "waiver" must be clear in the first place. To be binding, the parties must be subject to no relevant disability or disadvantage. Further, as to the parties to, and the circumstances of, the "waiver", the facts must be such that it would be manifestly unfair for the party which had earlier waived its legal rights later to adopt an inconsistent position and to seek to enforce them. Cases of estoppel and binding election are the clearest examples of such a manifest unfairness. However, I would accept a residual category of manifest unfairness at common law that is distinct from estoppel and election. The law will provide relief by upholding a "waiver" in circumstances where not to do so would be manifestly unfair to the beneficiary of the "waiver".

"Waiver" in fact was not proved by the evidence

146 *Preconditions to enforceable "waiver"*: When "waiver" is applied in the way I have described, I agree with the conclusions reached in the joint reasons that the facts in this case do not afford a basis for relief to the Borrower[199].

147 The existence of a "waiver" will depend upon the facts and circumstances[200] that produce a representation or conduct that is "clear and

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197 cf *Verwayen* (1990) 170 CLR 394 at 497 per McHugh J.

198 Feltham, Hochberg and Leech (eds), *Spencer Bower's Law Relating to Estoppel by Representation*, 4th ed (2004) at 375-376 [XIII.1.26].

199 Joint reasons at [91].

unequivocal"[201]. It involves ascertaining the "conscious intention"[202] of the waiving party, in this case, of the Indemnifier. As the party potentially liable upon the indemnity, it is essential to consider the conduct of the Indemnifier to establish a "waiver"[203]. The onus is upon the Borrower, as "the party relying" on the waiver[204], to prove the necessary facts. Critically, here the Borrower must show that it would be manifestly unfair for the Indemnifier to rely on the Borrower's failure to pay "punctually" as demonstrating that the indemnity agreement was not "effective and enforceable"[205]. In this case, the Borrower failed to satisfy this threshold requirement.

148 The facts were complex and contested. As described in the joint reasons, there was a "lively controversy about whether the relevant statements and letters were made or written on behalf of the Lender or the Indemnifier, or both"[206]. The Borrower relied on "four separate events" to establish the alleged "waiver"[207].

149 *Relationship between the Lender and Indemnifier*: The Indemnifier was a wholly owned subsidiary of Gerard Cassegrain & Co ("GCC")[208]. The Lender was owned by persons related by marriage to the Managing Director of GCC[209]. The Lender and the Indemnifier had separate offices, albeit in the same premises.

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200 *Craine* (1920) 28 CLR 305 at 326. See also *Osland* (2008) 82 ALJR 1288 at 1302 [49], 1309 [93]; 249 ALR 1 at 17, 27.

201 *Marc Rich & Co AG v Portman* [1996] 1 Lloyd's Rep 430 at 442 (affirmed [1997] 1 Lloyd's Rep 225); *Road Accident Fund* (2000) 4 SA 38 at 50 [19].

202 *Saskatchewan River Bungalows Ltd* [1994] 2 SCR 490 at 500.

203 See above these reasons at [116].

204 *British American Oil Co Ltd* [1951] 2 DLR 37 at 44; *Road Accident Fund* (2000) 4 SA 38 at 50 [19].

205 See above these reasons at [145].

206 Joint reasons at [7]. In light of the subsequent conclusions in the joint reasons, they do not resolve this controversy.

207 Joint reasons at [42]. See below these reasons at [155].

208 *Gardiner* (2008) Aust Contract Reports ¶90-274 at 90,359 [150] per Basten JA.

209 (2008) Aust Contract Reports ¶90-274 at 90,359 [153] per Basten JA.

150 *Conduct of Mr Lloyd and Ms Edwards*: The conduct of Mr Lloyd and Ms Edwards was crucial to the Borrower's submission that there had been a "waiver". As Managing Director of the Indemnifier[210], there was obviously a very close connection between the conduct of Mr Lloyd and the Indemnifier.

151 The status of Ms Edwards, on the other hand, was more ambiguous. She was variously described as the "financial controller"[211] or bookkeeper of the Lender and the compliance officer of the Indemnifier[212]. In her oral evidence before the primary judge, she gave evidence about the nature of her position and the tasks that she undertook. Her role as compliance officer for the Indemnifier involved, among other things, taking "some minutes at some … meetings" of the Indemnifier; managing the banking; preparing some reports for the Board of the Indemnifier; and ensuring that the Indemnifier's funds were being used for appropriate purposes. Whilst she said that she "had very little dealings with [the Lender]", Ms Edwards acknowledged that she was "responsible for collecting, ensuring payments were received by [the Lender]" and that "[a] small proportion of [her] work was conducting, recording receipts of monies coming in that were due to [the Lender] in relation to the tea tree farms". She received payments "from time to time" owing to the Lender and to the Indemnifier and was responsible for keeping "on top of all of the payments".

152 However, this evidence was provided by Ms Edwards whilst testifying as a witness for the Indemnifier – not for the Lender. The significance of the distinction between her role with the Lender and with the Indemnifier only became apparent at a later stage. Thus the Lender submitted that Ms Edwards never gave evidence that she did not work for the Lender. She only gave evidence about the work that she performed for the Indemnifier. She was never directly asked whether she only worked for the Indemnifier, or as to the nature of her functions for the Lender, or whether her duties with the Indemnifier involved loan recovery for the Lender.

153 The Borrower submitted that Ms Edwards was employed by the Indemnifier, not the Lender, to monitor the receipt of payments for the projects. The Lender and the Indemnifier contested that submission. They submitted that Ms Edwards spent part of her time working as the compliance officer for the Indemnifier and part of her time working as a loans officer for the Lender. They

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210 (2008) Aust Contract Reports ¶90-274 at 90,389 [298] per Basten JA. See joint reasons at [41].

211 *Agricultural and Rural Finance Pty Ltd* [2006] NSWSC 202 at [51]. See joint reasons at [41].

212 Joint reasons at [41].

also submitted that there was no evidence that Ms Edwards undertook her work as a loans officer for the Lender at the direction of the Indemnifier.

154 The primary judge concluded that Ms Edwards lacked authority to bind the Lender and the Indemnifier to a "waiver"[213]. In the context of dismissing claims of estoppel and misrepresentation, the primary judge held that there was no relationship of principal and agent between the Lender and the Indemnifier[214]. His Honour concluded that Ms Edwards was employed by the Lender[215]. The Borrower did not appeal against this finding of fact. The Court of Appeal correctly treated it as unchallenged. In the result, both Basten JA and Handley AJA accepted that Ms Edwards was employed by the Lender[216].

155 *The four separate events relied on*: The Borrower nonetheless submitted that four separate events[217] collectively amounted to a "waiver". The Borrower bore the burden of proving that these events, on the balance of probabilities, occurred as described. The four events were:

(1) Oral representations made by Mr Lloyd to the Borrower in January 1998 that the Borrower would receive payment reminder notices[218];

(2) Oral representations made by Mr Lloyd in July 1998 that, among other things, the Borrower "need not be concerned about the indemnity" and that the Indemnifier "effectively acted as agent" for the Lender[219];

(3) A telephone conversation in October 1998 in which the Borrower asked Ms Edwards to confirm "that there would be no adverse circumstances as a result of the delay in payment" and for Mr Lloyd or Mr Henry to contact him if there was a problem (no such contact was made)[220]; and

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213 *Agricultural and Rural Finance Pty Ltd* [2006] NSWSC 202 at [52].

214 [2006] NSWSC 202 at [88].

215 [2006] NSWSC 202 at [51].

216 *Gardiner* (2008) Aust Contract Reports ¶90-274 at 90,381 [249] per Basten JA, 90,400 [361] per Handley AJA.

217 See above these reasons at [148].

218 Joint reasons at [40].

219 Joint reasons at [40].

220 Joint reasons at [40].

(4) A letter sent by Ms Edwards on 2 June 1999 that included a payment schedule and due dates[221] and stated that "as we failed to send reminder notices we will accept payment as 'on time' up until 30 June 1999"[222].

156 As to the first and second events, the alleged conversations with Mr Lloyd were rejected by the primary judge on credit grounds[223]. An appeal against this finding was impliedly dismissed by the decision of the Court of Appeal. In particular, the submission that Mr Lloyd, on behalf of the Indemnifier, had set up a payment reminder procedure was rejected[224]. The evidence from Ms Edwards, who sent the reminder notices from about July 1998, was that she had established the procedure on her own initiative. She had not done so at the request of Mr Lloyd or any other person connected with the Indemnifier. In fact, in cross-examination, Ms Edwards stated that she had sent these reminders "on behalf of" the Lender. It was, however, never directly put to her in cross-examination that she had sent the notices on behalf of the Indemnifier or with its consent.

157 As to the third event, the primary judge rejected the Borrower's evidence that he had had a conversation with Ms Edwards in October 1998, at least in the manner described[225]. In terms of any payment reminder arrangement between the Borrower and Ms Edwards after that conversation, the primary judge stated "Ms Edwards denies this and I would accept her denial"[226]. This finding was also impliedly upheld by the Court of Appeal.

158 Finally, there was much evidence to suggest that the letter of 2 June 1999, the focus of the fourth event, was not sent out by Ms Edwards on behalf of the Indemnifier. It was written on the letterhead of the Lender and the subscript under Ms Edwards' signature stated that she was signing "for" the Lender[227]. The Borrower, however, argued that this was immaterial as Ms Edwards had previously also sent letters to the Borrower about payments using the

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221 Joint reasons at [40].

222 Joint reasons at [28].

223 *Agricultural and Rural Finance Pty Ltd* [2006] NSWSC 202 at [51]-[52].

224 [2006] NSWSC 202 at [51]-[52]. The Borrower appealed against this finding to the Court of Appeal which impliedly rejected it.

225 Joint reasons at [47].

226 [2006] NSWSC 202 at [52].

227 See joint reasons at [47].

Indemnifier's letterhead. Nevertheless, it was not suggested that the previous letters amounted to a waiver. The letter of 2 June 1999 was a crucial part of the factual matrix by which the Borrower sought to establish the waiver. But it was clearly indicated as coming from the Lender rather than the Indemnifier. Basten JA in the Court of Appeal held that the Lender alone wrote the letter on 2 June 1999 by its employee, Ms Edwards. There was no finding of fact by either of the Courts below that the Indemnifier authorised or consented to the letter being sent on its behalf.

159 *Conclusion: "waiver" in fact unproved*: It will be apparent that there was substantial disagreement between the parties as to the facts. There is significant doubt as to whether the events as described by the Borrower took place and a sharp dispute as to the nature of the relationship between Ms Edwards and the Indemnifier. Even if some of the factual submissions of the Borrower were accepted, the link between Ms Edwards and the Indemnifier was certainly not strong. It was not decisive enough to bind the Indemnifier to her alleged conduct that was said to have contributed to the "waiver". As stated by Potter LJ in *The "Happy Day"*[228]:

> "The Courts will also examine with care any agency relationship between X and any person alleged to have made the unequivocal communication on his behalf. If that person lacked the actual or ostensible authority to waive the right or rights concerned there will be no waiver."

In that case, it was clear that, in the "overall context"[229], the persons alleged to have made the communication were agents of the "waiving" party. They were actually identified in the subject agreement as agents of the waiving party[230].

160 By contrast, in the factual findings made below, it was by no means clear that Ms Edwards had sufficient, or any, authority to waive the rights of, or even to act on behalf of, the Indemnifier. To render it manifestly unfair for the Indemnifier to be entitled to rely on the lack of "punctual" payments of the Borrower, so as to indicate that the indemnity agreement was not "effective and enforceable", it would have to be plain that it was the Indemnifier that clearly and deliberately, by direct and unequivocal conduct of its own or by its agent, waived

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228 [2002] 2 Lloyd's Rep 487 at 507 [68]. See also *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia* [1977] AC 850 at 871-872.

229 [2002] 2 Lloyd's Rep 487 at 509 [75].

230 [2002] 2 Lloyd's Rep 487 at 490 [3]. Also see *Mardorf Peach & Co Ltd* [1977] AC 850 at 871-872 where although the bank was considered to be an agent of the alleged waiving party, it was held to have insufficient authority to waive a right of the principal.

its contractual rights under the indemnity agreement. Within the evidentiary findings made and confirmed below, which this Court could not or would not disturb[231], the link between Ms Edwards and the Indemnifier falls well short of what was required to enliven "waiver" in law. Evidence of "waiver" in fact was therefore missing. The Court of Appeal was correct to so decide.

Orders

161 I agree in the orders proposed in the joint reasons.

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231 See *Fox v Percy* (2003) 214 CLR 118 at 131-132 [41]; [2003] HCA 22.

162 HEYDON J. I agree with the orders proposed by Gummow, Hayne and Kiefel JJ. I also agree with their reasons[232], except for the following two qualifications.

163 I agree with all the arguments advanced against the construction urged by the Borrower of the words "punctually" and "punctual", save for the proposition that the Borrower's construction is at odds with the principle that it is not legitimate to use as an aid in the construction of a contract anything which the parties said or did after it was made.

164 The second qualification is that the Borrower asserted that he did not "rely upon any estoppel" because he "did not plead an estoppel". He did not submit that the failure to rely on any estoppel was for the reason that he could not show detrimental reliance, or for any other particular reason.

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232 Save for those stated at [94]-[97].