HIGH COURT OF AUSTRALIA

GAGELER CJ,
GORDON, EDELMAN, STEWARD AND GLEESON JJ

YAKUN SHAO APPELLANT

AND

CROWN GLOBAL CAPITAL PTY LTD
(IN PROV LIQ) & ANOR RESPONDENTS

Shao v Crown Global Capital Pty Ltd (in prov liq)
[2025] HCA 43
Date of Hearing: 2 September 2025
Date of Judgment: 5 November 2025
S46/2025

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders made by the Court of Appeal of the Supreme Court of New South Wales on 19 December 2024 and in their place it be ordered that:*

    (a) the appeal be allowed with costs;

    (b) the orders made by the Supreme Court of New South Wales on 14 July 2023 be set aside and in their place it be ordered that:

        (i) judgment be entered for the plaintiff against the defendants in the sum of $1,133,117.40, together with interest pursuant to s 100 of the Civil Procedure Act 2005 *(NSW) in the sum of $431,048.82; and*

        (ii) the defendants pay the plaintiff's costs of the proceedings.

On appeal from the Supreme Court of New South Wales

Representation

J Horowitz with M A Hazan for the appellant (instructed by Yau & Wang Lawyers)

S A Lawrance SC with C M R Ernst and S T Bradbury for the respondents (instructed by Mangioni Biggs + Co)

CATCHWORDS

Shao v Crown Global Capital Pty Ltd (in prov liq)

Contract – Breach – Loan note – Where term of contract between borrower and two lenders required repayment of loan into account nominated by both lenders – Where borrower repaid money into account of one lender without obtaining nomination from both lenders – Whether term requiring nomination of account by both lenders operated only as a condition precedent to discharge of debt – Whether other lender waived breach of contract term by prosecuting earlier proceedings against recipient lender – Whether abuse of process for lender subsequently to proceed against borrower and guarantor for breach of contract.

Words and phrases – "abuse of process", "account nominated", "affirmation", "borrower", "breach of contract", "breach of duty", "condition precedent", "consequential loss", "creditor", "debtor", "defective performance", "direction", "discharge of a debt", "double operation", "guarantor", "joint account", "jointly and severally", "lender", "liability for breach", "loan contract", "loan note", "mitigation of loss", "negative duty", "note certificate", "obligation as to the manner of discharging the debt", "obligation to repay the debt", "ratification", "redemption notice", "remedies which were cumulative", "separate obligations", "waiver".

GAGELER CJ, GORDON, EDELMAN, STEWARD AND GLEESON JJ.

Introduction

1 In the law of obligations, the "two simple ideas from which the common law started" were "two kinds of legal claim: the demand for a right and the complaint of a wrong".[1] In a loan contract, a term of the contract can impose a precondition (ie, a condition precedent) to the borrower's discharge of the debt as well as an obligation as to the manner of discharging the debt. If the condition precedent to discharge is not met, then a claim for payment of the non-discharged debt is the demand for a right. By contrast, a claim for failure to perform the contractual duty as to the manner of discharging the debt is a complaint of a wrong. The affirmation by a creditor of a discharge of a debt precludes the creditor demanding payment of the debt but it does not waive the creditor's claim for the breach of contract.

2 Under a Note Facility Agreement, the appellant, Ms Shao, and her then husband, Mr Peng, lent money to the first respondent, Crown Global Capital Pty Ltd ("Crown Global"), with a guarantee by the second respondent, Crown Group Holdings Pty Ltd ("Crown Group") (collectively, "the Crown respondents"). A term of a Note Certificate, the terms of which formed part of the Note Facility Agreement, provided that money payable by Crown Global to Ms Shao and Mr Peng could be repaid by deposit to an account nominated by both Ms Shao and Mr Peng ("the Account Nomination Term"). Contrary to the Account Nomination Term, Crown Global repaid the money into an account nominated only by Mr Peng. Mr Peng transferred the money to his parents in China. Ms Shao brought proceedings against Mr Peng, bankrupting him and obtaining recovery of only a small part of the funds Mr Peng had received. Ms Shao then claimed damages against Crown Global, including for its breach of the Account Nomination Term.

3 The various defences raised by the Crown respondents relevantly were, in substance, that: (i) the Account Nomination Term operated only as a condition precedent to discharge of the debt; (ii) by prosecuting the action against Mr Peng, and recovering in his bankruptcy, Ms Shao had affirmed the discharge of the debt and thereby ratified Mr Peng's nomination of his bank account and, in effect, waived any breach of the Account Nomination Term by Crown Global; and (iii) it was an abuse of process for Ms Shao to proceed against the Crown respondents having not done so in the earlier proceedings against Mr Peng.

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1 Milsom, *Historical Foundations of the Common Law*, 2nd ed (1981) at 243.

4 The trial judge in the Supreme Court of New South Wales and the Court of Appeal of the Supreme Court of New South Wales concluded, in effect, that Ms Shao had waived the breach of contract by Crown Global by her actions which affirmed the discharge of the debt owed by Crown Global. For the reasons below, that conclusion was incorrect. None of the defences of the Crown respondents was made out. The Note Facility Agreement relevantly contained two separate obligations: (i) an obligation to repay the debt owed to Ms Shao and Mr Peng jointly; and (ii) the Account Nomination Term, concerning the manner in which the debt was to be discharged, which was owed to Ms Shao and Mr Peng jointly and severally. It was open to Ms Shao to accept that the debt had been discharged but to proceed against the Crown respondents for the breach of the Account Nomination Term by Crown Global. It was not an abuse of process for Ms Shao to seek first to recover from Mr Peng before proceeding against the Crown respondents.

Background

5 In late February or early March 2015, Ms Shao and Mr Peng entered into an agreement to lend $1 million to Crown Global. The agreement was in writing, in the form of a loan note described as a Note Facility Agreement. The terms are described in detail later in these reasons. Repayment was guaranteed by the second respondent, Crown Group. The money that was lent was provided by Ms Shao, who drew two bank cheques on two of her own accounts.

6 On 16 March 2015, the Head of Private Clients at Crown Group, Ms Edwards, spoke to Mr Peng by telephone and asked him for the details of the account into which he wished to have the interest on the loan deposited. Mr Peng sent an email to Ms Edwards later that day nominating a joint account in the names of Ms Shao and Mr Peng. Crown Global deposited interest into that account on 31 March 2015, 25 June 2015, 25 September 2015, and 23 December 2015.

7 In June and July 2015, Ms Shao engaged in correspondence with Ms Edwards on the communication application WeChat and met with Ms Edwards in person. They discussed a property development with which Crown Group was associated and deposits that had been paid by Mr Peng in respect of that development. After learning that those deposits had been refunded, Ms Shao asked Ms Edwards for the details of the account into which the refunds had been paid and Ms Edwards replied that payment had been made into Mr Peng's account. Ms Edwards also told Ms Shao about two deposits that Mr Peng had made, of which Ms Shao was not aware, in relation to another development by Crown Group. Ms Shao told Ms Edwards that she had separated from Mr Peng and that she was having difficulties communicating with, and dealing with, Mr Peng.

8 On 24 August 2015, Ms Shao exchanged messages over WeChat with Ms Edwards. The conversation began in relation to a development that Crown Group was going to launch. During the exchange, Ms Shao told Ms Edwards that she and Mr Peng were still not talking and that they would divorce soon. Ms Shao also wrote that Mr Peng "transferred all my money away, just want to make me angry". Although Ms Shao did not explain the background to that statement to Ms Edwards, her statement concerned Mr Peng's withdrawal in around August 2015 of $600,000 from a joint mortgage interest saver account with Mr Peng's joint interest held on trust for Ms Shao. That unauthorised withdrawal had prompted Ms Shao to obtain freezing orders, following which Mr Peng repaid $460,000. The remaining $140,000 was never fully repaid.

9 On 17 February 2016, Ms Edwards sent an email to Mr Peng relevantly as follows:

> "I am writing as a kind reminder that your Loan Notes Facility dated 18 January 2015 will expire on 26 February 2016.
>
> In accordance [with] Clause 4 of the Note Certificate, please let us know if you would like to receive the repayment by way of cheque or transfer. ...
>
> If by cheque, please confirm the name/s of addressee.
>
> If it is the latter, please provide the account details so that we can proceed accordingly."

The reference to expiry on 26 February 2016 was an error because the expiry date had been extended by agreement to 5 March 2016.

10 Mr Peng responded on the same day, 17 February 2016, thanking Ms Edwards for the reminder and providing the details of a bank account, which was in his name only. All payments of interest had previously been paid into the joint account which was in the names of both Ms Shao and Mr Peng.

11 On 25 February 2016, Crown Global paid the capital and outstanding interest, which amounted to $1,018,740, into the account in the name of Mr Peng only.

12 On 3 March 2016, two days before the extended expiry date of the loan note under the Note Facility Agreement, Ms Shao telephoned Ms Edwards to discuss the imminent expiry of the loan note. Ms Edwards told Ms Shao that the loan note had already been redeemed with payment made to Mr Peng. In that conversation,

or a later conversation, Ms Edwards suggested that Ms Shao should speak with Mr Peng about what had happened.

13 On the same day, 3 March 2016, Ms Shao commenced proceedings in the Supreme Court of New South Wales. Those proceedings were described below as the "2016 proceedings". In the 2016 proceedings, Ms Shao sought, and obtained, immediate interim freezing orders against Mr Peng. But Mr Peng had already transferred almost the entire amount to his parents in China.

14 The defendants to Ms Shao's 2016 proceedings included Mr Peng, Crown Global, and Crown Group. But Crown Global and Crown Group were never served with the proceedings. On 10 March 2016, Ms Shao sought leave to discontinue the proceedings against Crown Global and Crown Group, which was subsequently granted. Ms Shao's amended claim in the 2016 proceedings was ultimately against only Mr Peng, seeking damages in the amount of the proceeds paid to him by Crown Global, as well as the outstanding $140,000 from the $600,000 that Mr Peng had misappropriated.

15 In Ms Shao's claim against Mr Peng in the 2016 proceedings, she made the following allegations, none of which is in dispute:

> "39. On 17 February 2016, without notifying Shao, Peng directed Crown to pay the proceeds of the expiring Facility into an ANZ bank account in Peng's name only ("Direction").
>
> **...**
>
> 40. Peng was not authorised by Shao to make the Direction.
>
> 41. On 25 February 2016, pursuant to the Direction, Crown paid the sum of $1,018,740 into the ANZ bank account specified by Peng.
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> 42. The sum of $1,018,740 paid by Crown to Peng was beneficially owned by Shao."

16 In an affidavit filed in the 2016 proceedings, Ms Shao also asserted that her assets included "[t]he sum of $1,000,000, being monies I invested with [Crown Global] on 6 March 2015 which were redeemed by [Mr Peng] without my authority on or around 25 February 2016". In written submissions later filed in the 2016 proceedings, Ms Shao advanced the primary submission that the funds received by Mr Peng from Crown Global were held on trust for her.

17 By August 2016, Mr Peng and Ms Shao were divorced. The 2016 proceedings were subsequently heard on 10 October 2016. Although Mr Peng had filed a cross-claim making property and money claims under the *Family Law Act 1975* (Cth), Mr Peng's solicitor withdrew prior to the hearing and Mr Peng neither pressed his cross-claim nor defended Ms Shao's claim against him. The primary judge in the 2016 proceedings relevantly made a declaration that:

> "the amount of AUD $1 million ... which formed part of the sum of AUD $1,018,740 paid by [Crown Global] on 25 February 2016 to [Mr Peng's] account with Australia and New Zealand Banking Group ... was received and held by [Mr Peng] on trust for the plaintiff."

Ms Shao subsequently obtained judgment in the 2016 proceedings for $1,156,828.77.

18 On 23 January 2019, Ms Shao had Mr Peng served with a bankruptcy notice. Mr Peng failed to comply with that notice and committed an act of bankruptcy. Ms Shao filed a creditor's petition[2] and, in the bankruptcy proceedings, filed an affidavit of debt relying in part upon the judgment debt of $1,156,828.77. Mr Peng was made bankrupt on 12 December 2019. Ms Shao received two dividends, with a combined total of $17,416.55, in Mr Peng's bankruptcy.

The Note Facility Agreement terms and the Note Certificate terms

19 The Note Facility Agreement into which Ms Shao and Mr Peng entered with the Crown respondents in late February or early March 2015, described the parties to the agreement in the precursor words and terms of cll 1 and 2 as follows: Crown Global as "Borrower", Crown Group as "Guarantor", and Mr Peng and Ms Shao as "Lender".

20 The Note Facility Agreement provided in cl 4 for the Lender to make available drawings under the facility upon receipt of a drawdown notice. By cl 3, the maximum principal amount of cash advances that would be made available, unless otherwise agreed by the parties, was $1 million. By cl 7(a), the Borrower was required to issue notes to the Lender "upon settlement of each cash advance made available under this facility pursuant to a Drawdown Notice". Annexure B to the Note Facility Agreement set out a proforma Note Certificate, in substantially

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2 *Bankruptcy Act 1966* (Cth), s 43.

the form in which the Borrower was required by cl 7(a) to provide it to the Lender upon the issue of the notes.

21 The Note Certificate, which was signed by directors of Crown Global, was in the form of Annexure B, the terms of which formed part of the Note Facility Agreement. The Note Certificate reflected a drawdown of the entire $1 million facility. The Note Certificate certified that the "Lender" (Mr Peng and Ms Shao) "is the registered holder of 1,000,000 Notes of AUD 1.00 each fully paid, maturing on the Expiry Date subject to the Facility Agreement made between the Borrower and the Lender dated 18 February 2015 and the Terms and Conditions set out below".

22 The terms and conditions of the Note Certificate included an interest rate of 12% per annum on the $1,000,000 drawdown with an expiry date of 5 March 2016, altered by agreement from 26 February 2016. Clause 3(a) of the terms and conditions of the Note Certificate provided that:

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

"Redemption Notice" was defined in the Note Facility Agreement as "a notice substantially in the form of Annexure C duly completed and signed by or on behalf of the Borrower or in any other form (including verbal) as the Lender in its absolute discretion accepts". Annexure C was a proforma written Redemption Notice addressed to Ms Shao and Mr Peng with provision for the Borrower to insert the number of notes to be redeemed, the date of redemption, and the amount to be redeemed.

23 Clause 4 of the terms and conditions of the Note Certificate, which contained the Account Nomination Term, provided as follows:

> "**Payment of money**
>
> All money payable by the Borrower to the Lender under the Notes must be paid by cheque drawn by the Borrower and either delivered personally to the Lender on the due date for payment or deposited into the Lender's bank account as notified by the Lender to the Borrower from time to time."

24 By cl 16(b)(i) of the Note Facility Agreement, the agreement was governed by the law of the State of New South Wales.

The proceedings in the Supreme Court and the Court of Appeal

25 On 18 February 2022, Ms Shao brought proceedings against the Crown respondents in the Equity Division of the Supreme Court of New South Wales. Her principal claim was for damages for breach of various terms of the Note Facility Agreement by Crown Global. One breach was said to be of cl 3 of the Note Certificate by issuing a Redemption Notice only to Mr Peng rather than to both Ms Shao and Mr Peng. Another alleged breach was of the Account Nomination Term in cl 4 of the Note Certificate by failing to make the payment "into the Lender's bank account as notified by the Lender to the Borrower from time to time".

26 Ms Shao claimed damages for either of these breaches as the loss of the entire amount of $1,018,740 that was paid to Mr Peng, together with the cost of bringing proceedings against Mr Peng, less the $17,416.55 in dividends received in Mr Peng's bankruptcy. Ms Shao's claim for the entire amount of $1,018,740, arising from the payment to Mr Peng of the principal and interest repayable for the joint loan, was based upon her claim, which was common ground throughout these proceedings, that the rights that she and Mr Peng had against the Crown respondents under the Note Facility Agreement were held on trust by them for Ms Shao alone, who had provided the funds.[3] As the case was presented to the trial judge, the issues in relation to liability were: (i) whether Crown Global had discharged its obligations under the Note Facility Agreement by its payment of $1,018,740 in accordance with Mr Peng's instructions; and (ii) whether by pursuing her proceedings against Mr Peng, Ms Shao had ratified Mr Peng's conduct and in doing so had made an election from which she could not resile.

The trial decision

27 The trial judge (Ball J) dismissed Ms Shao's claim. As to the interpretation of cl 3 of the Note Certificate, the trial judge held that although "Lender" was defined as both Ms Shao and Mr Peng, it was open to Crown Global, who determined the form of the Redemption Notice, to provide that notice only to Mr Peng and not to Ms Shao. Service of the Redemption Notice upon one joint lender would be service upon them both.[4]

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3 See *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 at 120.

4 *Shao v Crown Global Capital Pty Ltd* [2023] NSWSC 820 at [56].

28 The trial judge took a different approach to the interpretation of the Account Nomination Term in cl 4 of the Note Certificate. The trial judge held that cl 4 permitted the redemption payment to be made by cheque or by bank transfer but that, if payment were to be made by bank transfer, payment to "the Lender's bank account as notified by the Lender" was a requirement for Crown Global to obtain "good discharge" of its debt.[5] The reference to "Lender" in the context of a power to notify an account for payment, required that the notification be from both Ms Shao and Mr Peng.[6] The trial judge rejected the submission of the Crown respondents that Mr Peng had acted with Ms Shao's actual or ostensible authority on 17 February 2016 when he directed Crown Global to make the payment into the account in his sole name. The trial judge found that: (i) from 23 June 2015, all the dealings between Ms Shao and Crown Global were conducted by Ms Shao personally; (ii) by early July 2015, Crown Global knew that Ms Shao and Mr Peng had separated and that they rarely communicated with each other; and (iii) by at least 24 August 2015, Crown Global knew that Ms Shao and Mr Peng would soon be divorced.[7]

29 Nevertheless, the trial judge held that Crown Global had not breached the Account Nomination Term in cl 4 of the Note Certificate by making the redemption payment to an account provided only by Mr Peng. His Honour held that there were only two possibilities that arose from the payment by Crown Global to Mr Peng. The first possibility was that Ms Shao could treat the act of Mr Peng in providing his personal account for the payment as unauthorised, in which case the debt would not have been discharged and there would be no breach of cl 4 by Crown Global. Ms Shao could sue Crown Global for the debt, joining Mr Peng as a defendant if he were not prepared to be joined as a plaintiff. The second possibility was that Ms Shao could ratify Mr Peng's act and sue him for the proceeds of the payment. The trial judge held that Ms Shao had chosen the latter course and was bound by it.[8] It was therefore unnecessary for the trial judge to consider an alternative claim by the Crown respondents that it was an abuse of process for Ms Shao to bring the claim against the Crown respondents on the basis that such a claim should have been brought in the 2016 proceedings.

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5 *Shao v Crown Global Capital Pty Ltd* [2023] NSWSC 820 at [40].

6 *Shao v Crown Global Capital Pty Ltd* [2023] NSWSC 820 at [50]-[52], [56].

7 *Shao v Crown Global Capital Pty Ltd* [2023] NSWSC 820 at [65], [67].

8 *Shao v Crown Global Capital Pty Ltd* [2023] NSWSC 820 at [78]-[79].

30 The trial judge found that if Ms Shao had been entitled to damages from Crown Global then those damages would have included: (i) $1,018,740 representing the amount that was paid to Mr Peng; plus (ii) $113,567.04 representing the legal costs of mitigation in pursuing the claim against Mr Peng through the 2016 proceedings, which was a reduced amount due to part of the legal proceedings being concerned with Mr Peng's family law claims; less (iii) the amounts recovered in mitigation as dividends from Mr Peng's bankruptcy (which were later agreed by the parties to be $17,416.55).

The Court of Appeal decision

31 Ms Shao appealed to the Court of Appeal. One of her grounds of appeal was that the trial judge erred in concluding that Crown Global had not breached cl 3(a) of the Note Certificate. Another alleged that the trial judge erred in concluding that Crown Global had not breached cl 4 of the Note Certificate.

32 In the Court of Appeal, Adamson JA (with whom Leeming and Payne JJA agreed) held that there had been no breach of cl 3(a) of the Note Certificate. The purpose of the Redemption Notice was not protective of either or both of the joint lenders. Rather, the purpose was merely to communicate Crown Global's irrevocable exercise of its unilateral right to repay early. Hence, it was held that "Lender" in cl 3 meant either Ms Shao or Mr Peng (or both of them), and the Redemption Notice issued by Crown Global was valid.[9]

33 As to the assertion of a breach of cl 4 of the Note Certificate, Adamson JA held that the purpose of cl 4 was protective of each of the joint lenders from the other nominating an account to which the other lender had sole access. The protective purpose required "Lender" in cl 4 to be interpreted to mean both Ms Shao and Mr Peng, not either of them.[10] Nevertheless, Adamson JA held that Ms Shao had no claim for breach of cl 4 of the Note Certificate because, by prosecuting the 2016 proceedings against Mr Peng, she had taken a position that was "entirely inconsistent" with maintaining the current proceedings against the Crown respondents, since she had "ratified the deficiencies in Mr Peng's authority to nominate the account" and had accepted that the debt had been discharged.[11] Her Honour distinguished the line of authority, including *Ardern v Bank of New*

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9 *Shao v Crown Global Capital Pty Ltd* [2024] NSWCA 302 at [59].

10 *Shao v Crown Global Capital Pty Ltd* [2024] NSWCA 302 at [60].

11 *Shao v Crown Global Capital Pty Ltd* [2024] NSWCA 302 at [70].

South Wales,[12] which had held that a creditor could ratify the acceptance of a payment without being precluded from suing the debtor for breaches of other obligations of the agreement.[13]

34 The Court of Appeal did not need to decide the issues raised by the Crown respondents in their notice of contention, including the Crown respondents' contention that the proceedings were an abuse of process. The Court of Appeal also did not address two grounds of appeal concerning the quantification of damages, although Adamson JA noted the proper concession of the Crown respondents that the legal costs recoverable should have been calculated as $131,793.95. There was no further dispute in this Court that the correct quantification of any damages, consistent with that concession, is $1,133,117.40.

The issues in this Court

35 In this Court there was no longer any dispute about the interpretation of cl 3(a) of the Note Certificate or the conclusion that Crown Global had validly issued the Redemption Notice. Ms Shao's appeal focused only upon the alleged breach by Crown Global of cl 4 of the Note Certificate. Ms Shao raised two grounds of appeal: first, that the Court of Appeal erred in holding that she was not entitled to claim damages from the Crown respondents in breach of contract, in circumstances where she had previously sued Mr Peng to recover those monies but had made only a partial recovery; and secondly, that the Court of Appeal erred in holding that her proceedings against Mr Peng necessarily involved a ratification of the notice given by Mr Peng to Crown Global nominating his bank account for repayment of the loan.

36 The Crown respondents submitted that the Court of Appeal had correctly concluded that there was no breach of cl 4 of the Note Certificate for two independent reasons. First, it was submitted that cl 4 did not create any obligation upon Crown Global to repay the loan only into an account nominated by both Ms Shao and Mr Peng. Secondly, it was submitted that even if cl 4 created such an obligation, Ms Shao had ratified: (i) the act of Mr Peng in nominating his account for repayment by Crown Global; and (ii) acceptance of the non-conforming tender. And, by a notice of contention, the Crown respondents raised a third issue. The Crown respondents submitted that even if Crown Global had breached cl 4, Ms Shao's claim was an abuse of process because Ms Shao should have pursued

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12 [1956] VLR 569.

13 *Shao v Crown Global Capital Pty Ltd* [2024] NSWCA 302 at [53]-[56], [67]-[69].

the claim against the Crown respondents as part of the 2016 proceedings. None of these submissions should be accepted.

The first issue: Proper construction of cl 4 of the Note Certificate – the Account Nomination Term

37 The effect of the Crown respondents' submissions was that the Account Nomination Term only created a condition precedent for the discharge of the debt owed by Crown Global, and not an additional obligation, the non-compliance with which would be a breach of contract by Crown Global, and no implication of a separate obligation should be recognised. There are two different matters raised by the authorities in this area. The first is whether a term of an agreement between a borrower and lenders, such as cl 4 of the Note Certificate, can create both a condition precedent to discharge of a debt and a separate obligation on the borrower as to the manner of the discharge of the debt. The second is whether any such separate obligation is owed to lenders jointly or to lenders jointly and severally.

Clause 4 of the Note Certificate created both a condition precedent and an obligation

38 The submissions by the Crown respondents fail to recognise that "a term of a contract may have a 'double operation' and create both a duty and a condition".[14] In *Westacott v Hahn*,[15] Scrutton LJ said:

> "it is impossible since *Behn v Burness*[16] to dispute that one term of a contract may be in its performance essential, or a condition precedent, to obligation or liability on another term of the contract, though if it is waived the only remedy may be an action for the breach. In this sense a condition precedent is a limitation or qualification of another term of a contract, while it may also be itself a term of a contract whose breach gives a cause of action."

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14 English, *Discharge of Contractual Obligations* (2025) at 15 [1.38] (citation omitted).

15 [1918] 1 KB 495 at 512-513.

16 (1863) 3 B & S 751 [122 ER 281].

39 An example of this "double operation" is the decision of the Supreme Court of Victoria in *Ardern*.[17] In that case, Mr Ardern and Mr Brookes opened a joint business account with the defendant bank. Each of them told the manager of the bank that all cheques drawn on the account were to be signed by both of them. The manager agreed. Martin J held that a term of the "agreement ... was that ... no cheque would be honoured unless signed by both of [the partners]".[18] The bank acted contrary to that term when it paid out from the account on 13 cheques to Mr Brookes as payee, where Mr Brookes had forged the signature of Mr Ardern. Martin J recognised that the term was both a duty and a condition precedent, holding that Mr Ardern was entitled to elect between damages for the breach of contract by the bank or a declaration that the amounts of the forged cheques had been wrongfully debited by the bank.[19]

40 Another example is *Catlin v Cyprus Finance Corporation (London) Ltd*.[20] In that case, Mr and Mrs Catlin deposited money with a finance company. The finance company "agreed to honour instructions signed by both account holders". Bingham J held that this agreement "no doubt imported a negative duty not to honour instructions not signed by both account holders", a duty which was owed severally.[21] This negative duty was not an implied term; it was an "express mandate" which was breached by the transfer of funds from the account on the instructions only of Mr Catlin.[22] The promise by the finance company was also a condition precedent to discharge of the debt.[23]

41 The decision in *Catlin* was followed on this point in *DAR International FEF Co v Aon Ltd*.[24] In that case, an agreement between Aon Ltd and two creditors contained an express term that payments would be made "into a designated Bank

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17 [1956] VLR 569.

18 *Ardern v Bank of New South Wales* [1956] VLR 569 at 573.

19 *Ardern v Bank of New South Wales* [1956] VLR 569 at 574.

20 [1983] 1 QB 759.

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

22 *Catlin v Cyprus Finance Corporation (London) Ltd* [1983] 1 QB 759 at 768.

23 *Catlin v Cyprus Finance Corporation (London) Ltd* [1983] 1 QB 759 at 770.

24 [2004] EWCA Civ 921.

Account to be agreed".[25] Aon Ltd made the payment into the account of only one of the creditors without any prior notice and without the consent of the other creditor. Mance LJ (with whom Ward LJ and Jackson J agreed) held that the unpaid creditor had a claim for damages because the provision existed "for the protection of each of [the creditors]" and included a "negative duty" to each creditor "not to honour instructions and not make payments not involving a jointly agreed and designated bank account".[26]

42 The same is true of cl 4 of the Note Certificate. Clause 4, which expressly provided that if the money were not paid by cheque, the money "must be ... deposited into the Lender's bank account as notified by the Lender to the Borrower from time to time", is properly interpreted as a requirement that the money must be deposited *only* into the bank account as notified by both Ms Shao and Mr Peng. That is the content of the express term; no term is implied.[27] That requirement is both a condition precedent to discharge of the debt and also an obligation not to deposit the money into a bank account other than as notified by Ms Shao and Mr Peng. The latter obligation is a "negative duty" of the kind described above, namely a duty not to deposit the repayment into an account not nominated by both Ms Shao and Mr Peng.

The obligation in cl 4 of the Note Certificate was owed jointly and severally

43 Where the term of a contract between a borrower and two or more lenders, properly interpreted, imposes both a condition precedent and a separate obligation as to the manner of repayment, there is a further question of whether the obligation is owed to the lenders jointly, or jointly and severally. This issue assumes importance because an obligation that is owed jointly generally requires the joinder of all parties who are entitled to the performance of the obligation. Although the Crown respondents did not argue that Ms Shao's claim should fail due to the absence of Mr Peng as a party, they nevertheless relied upon authorities and commentary which treated the obligation as one that was owed jointly.

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25 *DAR International FEF Co v AON Ltd* [2004] EWCA Civ 921 at [4].

26 *DAR International FEF Co v AON Ltd* [2004] EWCA Civ 921 at [28], [32], [35].

27 *Kingdom of Spain v Infrastructure Services Luxembourg Sàrl* (2023) 275 CLR 292 at 310 [24].

44 The difficulties in relation to this issue arose from the decision of the Queen's Bench Division in *Brewer v Westminster Bank Ltd*,[28] aspects of which were relied upon by the Crown respondents. In *Brewer*, two executors opened a joint account with a bank, providing a mandate for the bank to pay on any cheque signed by both executors. Over a period of years, one executor forged the signature of the other and withdrew money for his own purposes. The other executor brought an action for a declaration that the bank had wrongfully debited the joint account with the amount of the cheques.

45 Although the innocent executor in *Brewer* could have brought an action for breach of contract,[29] that executor sought only to obtain a declaration as to the state of the account. Nevertheless, the trial judge, McNair J, treated the power of the innocent executor to obtain a declaration as based on the "right possessed ... against the bank" and the "obligation entered into by the bank".[30] McNair J accepted that the bank could not obtain a good discharge by a payment that was contrary to the mandate.[31] Nevertheless, he held that the claim for a declaration depended upon a joint right and could only be enforced if conditions were met, including that both executors were a party to the action and entitled to sue.[32] Since the fraudulent executor was not entitled to sue upon his own fraud, the application for a declaration was dismissed.[33]

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28 [1952] 2 All ER 650.

29 Megrah, *Paget's Law of Banking*, 6th ed (1961) at 51. See also *Twibell v London Suburban Bank* [1869] WN 127; *Catlin v Cyprus Finance Corporation (London) Ltd* [1983] 1 QB 759 at 769; Ogilvie, "Joint Bank Accounts and Overdraft Liability" (1985) 23 *University of Western Ontario Law Review* 67 at 74.

30 *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650 at 654.

31 *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650 at 656.

32 *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650 at 654, citing *Brandon v Scott* (1857) 7 E & B 234 at 237 [119 ER 1234 at 1235].

33 *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650 at 654-655.

46 The decision in *Brewer* was not "allowed to sleep in peace".[34] Although Professor Glanville Williams defended the result,[35] the decision was criticised in a note by Professor Arthur Goodhart who explained that the obligation owed by the bank was both joint and several: "the bank makes an agreement with the executors jointly that it will honour any drawings signed by them jointly, and it also makes a separate agreement with each of the executors severally that it will not honour any drawings unless he or she has signed them".[36]

47 The approach of Professor Goodhart properly reflects the protective purpose of a provision requiring a borrower to act on the instructions of all lenders. That approach was followed by Martin J in *Ardern*,[37] who observed that the analogous condition in that case "was obviously inserted for the benefit of each partner, to prevent any dishonest drawings of the other". It was also followed by Bingham J in *Catlin*,[38] who said that although the relevant duty could have been owed jointly, "it must (to make sense) have been owed to the account holders severally, because the only purpose of requiring two signatures was to obviate the possibility of independent action by one account holder to the detriment of the other".

48 In *Vella v Permanent Mortgages Pty Ltd*,[39] Young CJ in Eq observed that the rejection by Martin J in *Ardern* of the difficult decision in *Brewer* has been repeated at least twice in England[40] and "approved by the writers of most of the leading textbooks".

49 The Crown respondents submitted that the recognition of separate, several promises in favour of multiple lenders could give rise to difficulties of inconsistent

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34 *Catlin v Cyprus Finance Corporation (London) Ltd* [1983] 1 QB 759 at 770.

35 Williams, "Notes of Cases – Joint Bailments and Joint Accounts" (1953) 16 *Modern Law Review* 232.

36 Goodhart, "Notes" (1952) 68 *Law Quarterly Review* 446 at 447.

37 [1956] VLR 569 at 573.

38 [1983] 1 QB 759 at 771.

39 (2008) 3 BFRA 269 at 326 [432].

40 See *Jackson v White and Midland Bank Ltd* [1967] 2 Lloyd's Rep 68 at 77-79; *Catlin v Cyprus Finance Corporation (London) Ltd* [1983] 1 QB 759 at 770-771.

elections. No case was identified where this practical concern had arisen. Save to emphasise that the grant of a declaration is a discretionary remedy, such an issue is best left to be dealt with in a case where the facts raise the issue.

50 In short, the obligation in cl 4 was owed jointly and severally to Ms Shao and Mr Peng. As a result, Ms Shao was entitled to sue Crown Global for breach of that obligation and was not required to join Mr Peng to the proceedings against the Crown respondents.

The second issue: Could Ms Shao accept discharge without waiving Crown Global's breach?

51 The next submission made by the Crown respondents was that by prosecuting the 2016 proceedings, bankrupting Mr Peng, and claiming dividends in his bankruptcy referable to the payment by Crown Global, Ms Shao had ratified: (i) Mr Peng's act of providing the details of his bank account; and (ii) acceptance of the non-conforming tender. This submission had several steps.

52 First, without any conduct by Ms Shao, Crown Global's payment to Mr Peng would not have discharged the debt. At common law, the payment to one joint creditor will discharge a debt owed to all joint creditors.[41] But, contrary to Ms Shao's submissions in the courts below, that common law position can be altered by agreement.[42] In this case, it was altered by the condition precedent in cl 4 of the Note Certificate. The effect of cl 4 of the Note Certificate was to prevent discharge of the debt unless the payment complied with a direction given by both Ms Shao and Mr Peng.

53 Secondly, as was properly accepted by Ms Shao in this Court, Ms Shao had affirmed that the debt owed by Crown Global to her and Mr Peng had been discharged. Ms Shao affirmed the discharge of Crown Global's debt by prosecuting the 2016 proceedings, bankrupting Mr Peng, and claiming dividends

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41 *Powell v Brodhurst* [1901] 2 Ch 160 at 164; *McIntyre v Gye* (1994) 51 FCR 472 at 479.

42 *Brewer v Westminster Bank Ltd* [1952] 2 All ER 650 at 656; *Mizzi v Reliance Financial Services Pty Ltd* [2007] NSWSC 37 at [84]. See also *Stone v Marsh* (1826) Ry & M 364 at 370 [171 ER 1050 at 1053]; *Innes v Stephenson* (1831) 1 Mood & R 145 at 147-148 [174 ER 50 at 51]; *Husband v Davis* (1851) 10 CB 645 at 650 [138 ER 256 at 257]; *Catlin v Cyprus Finance Corporation (London) Ltd* [1983] 1 QB 759 at 770.

in his bankruptcy referable to the payment made by Crown Global. Those actions were dependent upon Ms Shao asserting an entitlement to the proceeds, which she ultimately vindicated in part. That entitlement could only have arisen if the debt had been discharged. Ms Shao's conduct thus involved an acceptance that the performance by Crown Global in paying Mr Peng had discharged the debt.

54 Thirdly, and controversially, the Crown respondents submitted that "the debt could only have been discharged if the condition in clause 4 was complied with". The Crown respondents submitted, in effect, that Ms Shao could not accept Crown Global's performance, which was subject to a condition precedent, without waiving Crown Global's breach of duty in the manner of that performance. This step, which was expressed in the language of "ratification", should be rejected.

55 As a matter of principle, the simplest answer to this submission is that, as Scrutton LJ said in the passage quoted above from *Westacott v Hahn*,[43] a party can accept performance or discharge of an obligation, despite the non-satisfaction of a condition precedent to that performance or discharge, without waiving the counterparty's liability for breach.

56 This rule is well known in contracts for the sale of goods. If a seller promises to deliver goods at a certain time or in a certain manner, the buyer can accept the goods as discharging the obligation to provide the goods but can claim for breach of contract if the goods are not provided at the time or in the manner promised. For instance, in *Peter Cremer v Brinkers' Groudstoffen BV*,[44] the sellers breached a condition precedent to payment in their contracts by failing to ship the promised goods to Rotterdam. The buyers nevertheless accepted delivery of the goods in Hamburg but successfully sued for breach of contract for transhipment costs to Rotterdam. The rule is equally applicable to contracts concerning the lending of money. If a borrower repays money late or in breach of some other term of the contract, the lender can accept the late or defective payment, discharging the debt, and bring an action against the borrower for consequential loss, such as the

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43 [1918] 1 KB 495 at 512-513.

44 [1980] 2 Lloyd's Rep 605 at 608. See also *Albright & Wilson UK Ltd v Biachem Ltd* [2001] 2 All ER (Comm) 537 at 550 [36]-[37].

loss of use of the money, arising from the breach of contract in the timing or manner of repayment.[45]

57 The preceding analysis shows that the Court of Appeal erred in finding that Ms Shao was limited to choosing between: (i) suing the Crown respondents for recovery of the proceeds of the Note Facility Agreement, on the ground that Crown Global's payment to Mr Peng did not validly discharge the debt; and (ii) accepting that the payment discharged the debt and suing Mr Peng. Ms Shao had a third option, which she pursued: accepting that the debt was discharged, but not discharged in conformity with the Account Nomination Term as to the manner of repayment, which enabled her to sue for damages arising from that defective performance. In such circumstances, Ms Shao did not ratify Crown Global's breach of cl 4.

58 It may be that the language of ratification in this case confuses the analysis of the two separate questions of whether performance has been accepted and whether a breach of duty in the performance has been waived. Ratification, which is "the act of giving sanction and validity to something done by another",[46] might be a way to establish that performance has been accepted or that a breach of duty has been waived. But the act to be ratified "must have been done for and in the name of the supposed principal".[47] To the extent that the Crown respondents submitted that Ms Shao had ratified Mr Peng's nomination of the account into which the repayment was to be made, it might be doubted whether Mr Peng's emailed reply to Ms Edwards on 17 February 2016 was conduct by which Mr Peng professed to be acting also on behalf of Ms Shao.[48]

59 In any event, Ms Shao's actions in bringing proceedings against Mr Peng, bankrupting him, and obtaining dividends in his bankruptcy referable to the

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45 *Hungerfords v Walker* (1989) 171 CLR 125 at 144-146, 152; *Hardie v Shadbolt* [2004] WASCA 175 at [57]-[58].

46 *Brook v Hook* (1871) LR 6 Ex 89 at 95.

47 *McLean Bros & Rigg Ltd v Grice* (1906) 4 CLR 835 at 857, quoting *Marsh v Joseph* [1897] 1 Ch 213 at 246. See also *Keighley, Maxsted & Co v Durant* [1901] AC 240; *Crowder v McAlister* [1909] St R Qd 203 at 206; Dal Pont, *Law of Agency*, 4th ed (2020) at 107-108 [5.8].

48 See Watts and Reynolds, *Bowstead and Reynolds on Agency*, 23rd ed (2024) at 90-91 [2-059].

payment by Crown Global could only amount to an implied ratification of acts of Mr Peng to the extent that the actions of Ms Shao were unequivocal affirmations of Mr Peng's conduct. Ms Shao's actions necessarily affirmed the acceptance by Mr Peng of payment from Crown Global and the discharge of Crown Global's debt. But her actions did not ratify the direction that Mr Peng gave to Ms Edwards on 17 February 2016. Even if Mr Peng's direction had purportedly also been given on behalf of Ms Shao, none of Ms Shao's subsequent conduct ratified such action on her behalf. Indeed, Ms Shao's pleading in the 2016 proceedings had described Mr Peng's direction as unauthorised.

60 An analogy can be drawn with the decision in *Harrisons & Crossfield Ltd v London and North-Western Railway Co*.[49] In that case, an employee of the defendant railway company, wearing the uniform of the company and with a horse and cart of the company, stole a consignment of tea which the plaintiff tea merchants intended to be delivered to the railway company for carriage. The railway company prosecuted the employee for theft and obtained possession of the tea. The tea merchants brought an action against the railway company for breach of its duty as a common carrier, alleging that by prosecuting the employee for theft and obtaining title to the tea the railway company had ratified the act of its former employee, being the employee's act of purporting to accept the tea on behalf of the railway company. Rowlatt J dismissed the claim, holding that implied ratification is only "implied from or involved in acts when you cannot logically analyse the act without imputing ... approval to the [principal]".[50] All that the railway company had ratified by its prosecution was "a bare bailment".[51]

61 The Crown respondents relied upon cases in which it was held that a principal cannot affirm part of an agreement entered into by an agent and disaffirm the remainder.[52] That proposition can be accepted. As Chitty J explained in one case relied upon by the Crown respondents, this proposition means that a principal who receives goods purportedly purchased by an agent will adopt the transaction

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49 [1917] 2 KB 755.

50 *Harrisons & Crossfield Ltd v London and North-Western Railway Co* [1917] 2 KB 755 at 758.

51 *Harrisons & Crossfield Ltd v London and North-Western Railway Co* [1917] 2 KB 755 at 759.

52 For example, *Republic of Peru v Peruvian Guano Co* (1887) 36 Ch D 489 at 499-500; *Australian Blue Metal Ltd v Hughes* [1962] NSWR 904 at 925.

unless the principal returns the goods or offers to return them within a reasonable time.[53] But, by such adoption, the principal does not waive any breach of contract by the seller. So too, the affirmation by Ms Shao of Mr Peng's receipt of money from Crown Global in discharge of the debt was not a waiver of any breach of contract by Crown Global in its performance of the duty under cl 4 of the Note Certificate concerning the manner in which the debt was discharged.

The third issue: Was it an abuse of process for Ms Shao to proceed against the Crown respondents for breach of contract?

62 The third issue was raised by the Crown respondents in a notice of contention. Neither the trial judge nor the Court of Appeal was required to address this issue. The submission was short and succinct. The Crown respondents submitted that Ms Shao ought to have brought her claim against them in the 2016 proceedings and that it was an abuse of process for her to bring these proceedings almost six years later.

63 The doctrine of abuse of process is capable of wide application, encompassing almost any aspect of the procedures of a court, and is unconfined by any closed categories.[54] In broad terms, an abuse of a court's process "is capable of application in any circumstances in which the use of a court's procedures would be unjustifiably oppressive to a party or would bring the administration of justice into disrepute".[55] Some of the limits to that application are well established. One limit is that it is "wrong to hold that because a matter could have been raised in earlier proceedings it should have been".[56] Yet such a holding is, in effect, what is sought by the Crown respondents.

64 It can be accepted that Ms Shao could have maintained the 2016 proceedings against the Crown respondents. Both respondents were named in her writ, although it was never served on them and was ultimately discontinued against them. There were good reasons for that course. In particular, the

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53 *Republic of Peru v Peruvian Guano Co* (1887) 36 Ch D 489 at 500.

54 *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256 at 265 [9].

55 *Tomlinson v Ramsey Food Processing Pty Ltd* (2015) 256 CLR 507 at 518-519 [25], citing *PNJ v The Queen* (2009) 83 ALJR 384 at 385-386 [3]; 252 ALR 612 at 613.

56 *UBS AG v Tyne* (2018) 265 CLR 77 at 102 [67], 118 [110], quoting *Johnson v Gore Wood & Co* [2002] 2 AC 1 at 31.

proceedings against the Crown respondents were for remedies which were cumulative, not alternative, to those sought against Mr Peng; no choice was required between them.[57] Ms Shao's claim for damages against the Crown respondents would have been reduced by the rules of mitigation of loss, potentially to nothing resulting in wasted litigation against the Crown respondents, to the extent to which she recovered from Mr Peng.

65 There were other good reasons for the course taken by Ms Shao in excluding the Crown respondents from the 2016 proceedings. A number of the issues raised in the 2016 proceedings against Mr Peng were either of no concern to the Crown respondents or matters upon which the Crown respondents could say very little: the family law issues raised by Mr Peng; the separate allegations of Mr Peng's misappropriation of $140,000; and the issues of actual or ostensible authority of Mr Peng to give the 17 February 2016 direction to Ms Edwards. The addition to the 2016 proceedings of the difficult legal questions that have been finally resolved by this Court would have been inefficient and burdensome in circumstances in which the 2016 proceedings were likely to be expedited because Ms Shao had sought, and obtained, an interim freezing order against Mr Peng and had likely given an undertaking as to damages in support.

66 The Crown respondents sought to draw an analogy with the decision of this Court in *UBS AG v Tyne*.[58] The conclusion of the majority of this Court in *UBS AG* that the claim was an abuse of process rested upon the conclusion that there was, or at least it was open to the primary judge to conclude that there was,[59] "unjustifiable oppression" to the defendant in the bringing of a proceeding in the Federal Court of Australia involving essentially the same claim, and arising from essentially the same facts, as a claim that had previously been brought, and discontinued, by the same party in the Supreme Court of New South Wales and permanently stayed when another party had continued to prosecute those proceedings. The unjustifiable oppression was said to arise from the significant

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57 *Baxter v Obacelo Pty Ltd* (2001) 205 CLR 635 at 653-654 [39], quoting *Tang Man Sit v Capacious Investments Ltd* [1996] AC 514 at 522.

58 (2018) 265 CLR 77.

59 (2018) 265 CLR 77 at 106 [76], 124 [123]. See now *GLJ v Trustees of the Roman Catholic Church for the Diocese of Lismore* (2023) 280 CLR 442 at 460-461 [26], 483-484 [95], 502 [161].

delay, increased costs, and the requirement to deal again with claims that should have been resolved in the Supreme Court of New South Wales.[60]

67 The circumstances of these proceedings are a long way from those considered by this Court in *UBS AG*. The decision in *UBS AG* does have in common with this case the possibility that the impugned claim could have been brought in an earlier proceeding. But that is where the similarity ends. None of the good reasons for the course taken by Ms Shao were present in *UBS AG*. Ms Shao's proceedings were not an abuse of process.

Conclusion

68 The appeal should be allowed with costs. Orders should be made as follows:

1. Appeal allowed with costs.

2. Set aside the orders made by the Court of Appeal of the Supreme Court of New South Wales on 19 December 2024 and in their place it be ordered that:

    (a) the appeal be allowed with costs;

    (b) the orders made by the Supreme Court of New South Wales on 14 July 2023 be set aside and in their place it be ordered that:

        (i) judgment be entered for the plaintiff against the defendants in the sum of $1,133,117.40, together with interest pursuant to s 100 of the *Civil Procedure Act 2005* (NSW) in the sum of $431,048.82; and

        (ii) the defendants pay the plaintiff's costs of the proceedings.

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60 *UBS AG v Tyne* (2018) 265 CLR 77 at 100 [58].