SUPREME COURT OF QUEENSLAND

CITATION:	*Kostopoulos v G E Commercial Finance Australia P/L* [2005] QCA 311
PARTIES:	**CHRISANTHOS KOSTOPOULOS** (applicant/appellant) **v** **G E COMMERCIAL FINANCE AUSTRALIA PTY LTD** ACN 104 321 628 (respondent/respondent)
FILE NO/S:	Appeal No 3985 of 2005 Appeal No 4927 of 2005 SC No 3336 of 2005
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	26 August 2005
DELIVERED AT:	Brisbane
HEARING DATE:	8 August 2005
JUDGES:	McMurdo P, Keane JA and Dutney J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDER:	**1. Both appeals are dismissed** **2. In each appeal, the appellant is ordered to pay the respondent's costs to be assessed on the standard basis**
CATCHWORDS:	PROCEDURE - COURTS AND JUDGES GENERALLY - COURTS - ADJOURNMENT - where the appellant was the registered proprietor of property mortgaged to the respondent - where the mortgage document provided that, in the event of any default on the part of the appellant, the amount of money then outstanding on the mortgage would become immediately due and payable - where the mortgage document deemed the appellant to give ongoing warranties to the effect that he had good title to the mortgaged land free of any encumbrances and that there was no actual or impending suit against him that might reasonably be expected to affect him or the property - where the appellant was charged with drug trafficking and other offences and had a caveat lodged over the mortgaged property by the Queensland Director of Public Prosecutions - where the appellant was also in dispute with the Office of State Revenue over the amount of land tax that

was payable on the mortgaged property - where the respondent served a notice on the appellant alleging the existence of a number of events of default under the mortgage and claiming that the full sum of money then outstanding on the mortgaged property was immediately payable - where the appellant filed an application seeking a final injunction to restrain the respondent from proceeding on this notice of default and taking possession of the mortgaged property - where the appellant sought an adjournment of the hearing of the application so that further evidence could be obtained - where there was no precise identification of the further evidence that would be sought - where the trial judge concluded that an adjournment would serve no good purpose and proceeded to hear the appellant's substantive application - whether the appellant suffered any prejudice as a result of the refusal of an adjournment

EQUITY - GENERAL PRINCIPLES - PENALTY - PROVISION FOR ACCELERATION OF PAYMENTS - where the appellant sought relief under s 95 *Property Law Act* 1974 (Qld) against the acceleration of the payment of money due under a mortgage - where the events of default triggering the acceleration had not been remedied by the appellant - where the appellant was not in a position to undertake that the defaults could be remedied - whether relief against acceleration was available to the appellant under s 95 *Property Law Act* 1974 (Qld)

EQUITY - GENERAL PRINCIPLES - REMEDIES AND PROCEDURE - RATIFICATION, AFFIRMATION AND WAIVER - where the appellant was in breach of mortgage covenants prior to that mortgage being transferred to the respondent - where the mortgagee who transferred the mortgage to the respondent had warranted to the respondent that there were no breaches of the mortgage - where it was submitted by the appellant that the breaches complained of should be taken to have been waived in such circumstances - whether the warranty given to the respondent meant the respondent was now to be taken as having waived its rights as mortgagee against the appellant - where the respondent had continued to accept interest payments from the appellant with respect to the mortgage after having become aware that the appellant was in breach of several covenants of the mortgage - whether the continued acceptance of these interest payments by the respondent amounted to a waiver of its right to rely on the defaults of the appellant as grounds for accelerating payment of the amount due on the mortgaged property

EQUITY - GENERAL PRINCIPLES - PENALTY - RELIEF AGAINST PENALTIES AND FORFEITURE - where the appellant sought to invoke the inherent equitable jurisdiction

of the Court to relieve against forfeiture for breach of a covenant or condition contained in a mortgage - whether the acceleration of payment of the sum secured by a mortgage effects the right of a mortgagor to redeem the mortgage - whether the acceleration of payment amounts to either forfeiture or a penalty - whether it was unconscionable for the respondent to insist on exercising the rights conferred on it by the mortgage agreement

APPEAL AND NEW TRIAL - APPEAL – PRACTICE AND PROCEDURE - QUEENSLAND - STAY OF PROCEEDINGS - GENERAL PRINCIPLES AS TO GRANT OR REFUSAL - where the appellant had sought a stay of the orders of the primary judge pending the hearing of the appeal - where a stay of those orders had been refused - where the judge hearing the stay application had found that the balance of convenience favoured the granting of a stay but that the appellant had failed to show a "good arguable case on appeal" - whether the judge hearing the stay application had been right to regard the merits of the appeal as being insufficient to justify the grant of a stay

Property Law Act 1974 (Qld), s 95

ACCC v C G Berbatis Holdings Pty Ltd [2003] HCA 18; (2003) 214 CLR 51, applied
Alexander v Cambridge Credit Corporation Ltd [1985] 2 NSWLR 685, cited
Asia Pacific International Pty Ltd v Peel Valley Mushrooms Ltd [1998] QCA 414; [1999] 2 Qd R 458, followed
Central Estates (Belgravia) Ltd v Woolgar (No 2) (1972) 1 WLR 1048, distinguished
Croney v Nand [1998] QCA 367; [1999] 2 Qd R 342, considered
Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd [1994] 2 Qd R 390, applied
Mulcahy v Hoyne (1925) 36 CLR 41, distinguished
Oliver Ashworth Ltd v Ballard Ltd [2000] Ch 12, cited
Sargent v ASL Developments Ltd (1974) 131 CLR 634, applied
Shiloh Spinners Ltd v Harding [1973] AC 691, considered
Stern v McArthur (1988) 165 CLR 489, considered
Tanwar Enterprises Pty Ltd v Cauchi, [2003] HCA 57; (2003) 217 CLR 315, applied
The Commonwealth v Verwayen (1990) 170 CLR 394, considered
The King v Paulson [1921] 1 AC 271, distinguished

COUNSEL: N M Cooke QC, with S Di Carlo, for the appellant
T P Sullivan for the respondent

SOLICITORS: The appellant appeared on his own behalf
Mallesons Stephen Jaques for the respondent

[1] **McMURDO P:** I agree with Keane JA's reasons for dismissing both appeals with costs.

[2] **KEANE JA:** There are two appeals before this Court. The first is against the orders of Chesterman J made on 3 May 2005 whereby his Honour refused the appellant's application for orders restraining the respondent from enforcing its claims to the recovery of a debt owing by the appellant by taking possession of real property mortgaged to secure repayment of the debt. His Honour ordered that the respondent might take possession of the property as of 24 May 2005. The second appeal is from the refusal of Jerrard JA on 20 May 2005 to grant the appellant a stay of the orders of Chesterman J.

Background

[3] It is convenient to begin by setting out a chronology of relevant events and a summary of the material terms of the mortgage instrument.

[4] The appellant is the registered proprietor of real property which is sufficiently described for present purposes as 9 Maud Street, Newstead ("the property"). In order to finance his acquisition of the property he obtained a commercial equity facility of $500,000 from AMP Bank Ltd ("AMP"). Under the facility with AMP, the appellant was obliged to pay interest upon the $500,000. The facility was for five years and was renewable "annually". To secure the appellant's obligations under the facility he mortgaged the property, as well as another property at Rochedale, to AMP.

[5] Under the mortgage, upon an "Event of Default", the $500,000 became due and payable by the appellant to AMP. In this regard, clause 11.1 provided:

> "After an Event of Default occurs, despite any previous omission to exercise any of its rights or any waiver of those rights and any agreement or arrangement between the Mortgagor and AMP Bank to the contrary:
>
> (a) (**exercise of rights**) AMP Bank may immediately exercise any of its rights arising from the Mortgagor's default; and
>
> (b) (**acceleration**) all Secured Money is immediately due and payable."

[6] Relevantly for present purposes, clause 1.1 of the mortgage provided that an Event of Default would occur:

> (a) when a representation or warranty made or taken to be made by the appellant was incorrect or misleading when made or taken to be made;
>
> (b) when any encumbrance was sought to be enforced against the property;
>
> (c) when the appellant had not satisfied any monetary obligation.

[7] By clause 4.1 of the mortgage, the appellant represented and warranted that:

> (a) he had a good or indefeasible title to the property free from any encumbrance (which term was defined to include a caveat) other than

those mentioned expressly in the mortgage or to which AMP had otherwise agreed in writing;

(b) there were no actual, impending or threatened proceeding, suit or other action which was affecting or might reasonably be expected to affect him or the property "before any Governmental Agency or which may otherwise have a Material Adverse Effect".

[8] By clause 4.2, the representations and warranties made by clause 4.1 were deemed to be made each month on the last business day after the date the mortgage was entered into.

[9] The following terms were defined:

(a) "Government Agency" included the Crown, a Government Department and a judicial or quasi-judicial body;

(b) "Material Adverse Effect" was defined to include a material adverse effect on the appellant's assets or capacity to comply on time with his obligations under the mortgage.

(c) "Secured Money" was defined to mean "all money which … the Mortgagor is or becomes actually or contingently liable to pay to AMP Bank".

[10] Clause 25.8 of the mortgage provided that a waiver by the mortgagee was effective only if in writing, and that no failure on the part of the mortgagee to exercise its rights or delay on its part in exercising its rights would operate as a waiver.

[11] On 29 October 2002, the appellant was charged with drug trafficking and other offences. On 18 November 2002, the Queensland Director of Public Prosecutions ("DPP") obtained an order pursuant to the *Crimes (Confiscation) Act* 1989 (Qld) restraining any dealings by the appellant with the property. The DPP subsequently lodged a caveat over the property. The appellant accepts that, as a result of these actions by the DPP, the appellant was in breach of the mortgage.

[12] In June 2003, the respondent acquired AMP's rights against the appellant under the facility and the mortgage. AMP warranted that the appellant was not in default under the mortgage. The appellant says that this warranty demonstrates that AMP had waived the respondent's breaches of the mortgage. After that date, the appellant continued to meet his interest payment obligations under the facility. The respondent became the registered mortgagee of the property on 13 January 2004. In the meantime, the DPP's restraining order had been extended until 18 November 2004.

[13] On 23 July 2004, an indictment was presented against the appellant in the Supreme Court of Queensland charging him with one count of trafficking in drugs and four counts of unlawfully supplying a dangerous drug.

[14] On 26 July 2004, the respondent received a requisition from the Office of State Revenue ("OSR") to pay land tax in respect of the property which the appellant had not paid.

[15] On 18 November 2004, the DPP's restraining order was extended with the appellant's consent until 31 May 2005.

[16] On 13 January 2005, the respondent served a notice on the appellant asserting that four events of default had occurred, namely:

(a) a breach of the obligation to pay land tax by the due date;
(b) a breach of the representation or warranty that there were no proceedings before a court which could reasonably be expected to affect him or the property;
(c) a material adverse effect existed (in respect of his capacity to meet the interest payments on time and to make the capital repayment);
(d) there had been an encumbrance against the property by reason of the lodgement of the caveat.

[17] The notice claimed that $508,611.62 was due and payable. The appellant has not paid, and cannot pay, that sum. He has, however, maintained the interest payments. He paid the disputed land tax on 31 January 2005.

[18] On 1 April 2005, the respondent gave the appellant notice to leave the property.

[19] On 7 April 2005, the respondent gave the appellant notice of exercise of power of sale pursuant to s 84 of the *Property Law Act* 1974 (Qld).

[20] On 26 April 2005, the appellant filed an application seeking a final injunction to restrain the respondent from "proceeding on a demand dated 13 January 2005, for acceleration of payment of $508,611.62" and from taking possession of the property. The appellant also sought relief pursuant to s 95(3) of the *Property Law Act* from the consequences of late payment of land tax.

The proceedings at first instance

[21] The appellant's application was supported by affidavit evidence to the effect that the respondent had known of the existence of the caveat and restraining order, but had nevertheless continued to accept monthly payment of interest under the facility. This material also showed that the appellant had been in dispute with the OSR in relation to whether the land tax was payable by him. It also addressed the issues which arose from the lodging of the caveat by the DPP and the restraining order.

[22] When the appellant's applications came on for hearing on 3 May 2005, the respondent pressed a cross-application to recover possession of the property which had been filed on that same day with leave of the court. The respondent's cross-application was supported by an affidavit by Mr Khoo, the respondent's real estate risk manager who swore, inter alia, that while the respondent first became aware of the DPP's restraining order on 10 September 2003, the respondent was never informed by the appellant that the expiry date for the order had been extended from 18 November 2004 to 31 May 2005. Mr Khoo also said that, after becoming aware of the extension of the restraining orders and caveat by other means, he became concerned about the capacity of the appellant to comply on time with his obligations and the ability of the respondent to exercise its rights pursuant to the mortgage. Mr Khoo was not cross-examined in relation to this evidence.

[23] The appellant's application came on for hearing by the learned primary judge on Tuesday, 3 May 2005. The appellant sought an adjournment of the hearing on the basis of the late notification of the respondent's material (which had been served on the previous Friday).

[24] The appellant sought to support his claim to an adjournment by the suggestion that he and his advisers thought the only act of default being relied upon by the respondent was the failure to pay land tax. It is apparent from the terms of the default notice of 13 January 2005, which has already been set out earlier in these reasons, that this assertion cannot be maintained. In any event, the learned primary judge refused the application for an adjournment on the basis that it would serve no good purpose.

[25] The learned primary judge found that there were on foot proceedings which may reasonably be expected to affect the appellant, namely the criminal proceedings. Further, relying upon the terms of clause 4.2 of the mortgage, his Honour held that each month and from month to month the appellant misrepresented that state of affairs. The continued existence of the caveat likewise gave rise to fresh defaults pursuant to clause 4.2 of the mortgage. There was no waiver of these recurring "fresh" defaults which were deemed to occur anew every month by the terms of the mortgage.

[26] In concluding that no good purpose would be served by an adjournment, the learned primary judge held that:

> "… both defaults relied upon by the respondent continue. The misrepresentation is made month by month. The caveat remains on the title and, while it remains, each day there is a default under the mortgage so that past conduct by the respondent will not waive future or continuing events of default."

The appellant's default was incapable of being remedied and, accordingly, the court had no power to grant relief under s 95(3) of the *Property Law Act*.

[27] The learned primary judge dismissed the appellant's applications and ordered that the respondent recover possession of the property. His Honour also ordered that the appellant pay the respondent's costs of the applications.

The appeal

[28] The appellant contends that the learned primary judge erred:

(a) in refusing the appellant's application for an adjournment which would have enabled the appellant to file a further affidavit relating to the conduct of the respondent relevant "to issues of waiver, estoppel and unconscionable conduct";

(b) in concluding that the appellant's default was irremediable so that the relief under s 95(3) of the *Property Law Act* was not available;

(c) in holding that the "non-waiver" clause had not itself been waived by the respondent or in failing to hold that reliance on the clause would be unconscionable;

(d) in failing to exercise the general equitable jurisdiction to grant relief against unconscionable conduct.

The adjournment

[29] At the hearing before the learned primary judge, counsel for the appellant was not able to identify with any precision what further evidence the appellant would be able to adduce if an adjournment were granted. Even if that were understandable by reason of the late receipt of the respondent's material (and having regard to the terms of the default notice of 13 January 2005 and the appellant's own affidavit material that would seem to be a distinctly charitable view), at the hearing of the

appeal there was still no precise identification of any further evidence which could actually have been led to improve the appellant's position.

[30] In relation to the possibility of further evidence, it was said, for example, that the appellant could have investigated the respondent's claims, if any, against AMP for breach of warranty. But it is difficult to see how such evidence could bear upon the issues in this case. The appellant also said that, if an adjournment had been granted, he would have been able to adduce evidence that the respondent actively sought the payment of interest each month by the appellant. But, in my view, evidence of that kind would not add materially to the appellant's claims for relief against the respondent.

[31] In the upshot, I consider that it is impossible to conclude that the appellant suffered any prejudice by reason of the refusal of the adjournment. In my respectful opinion, the learned primary judge was right to conclude that the appellant had not shown any basis for resisting the entitlements asserted by the respondent which might have been improved by further evidence of the kind referred to. To explain why I take that view it is necessary to address the appellant's other grounds of appeal.

The section 95 issue

[32] Section 95 of the *Property Law Act* provides relevantly as follows:

> "(1) Where default has taken place -
>
> (a) in payment of any instalment due of principal or interest under a mortgage;
>
> (b) in the observance of any covenant or obligation in a mortgage;
>
> and under the terms of the mortgage an accelerated sum may or has, because of such default or of the exercise upon such default of any option or election conferred by the mortgage, become due and payable, the mortgagor shall be entitled to relief under this section;
>
> (2) A mortgagor who, at any time before sale by the mortgagee or before the commencement of proceedings to enforce the rights of the mortgagee -
>
> (a) performs the covenant or obligation in respect of which the default has taken place; and
>
> (b) tenders to the mortgagee, who accepts payment of, the amount of the instalment in respect of which the default has taken place and any reasonable expenses incurred by the mortgagee;
>
> is relieved from the consequences of such default.
>
> (3) The mortgagor, in any proceedings brought to enforce the rights of the mortgagee or brought by the mortgagor, may -
>
> (a) upon undertaking to the court to perform any such covenant or obligation; and
>
> (b) upon tender or payment into court of such instalment;
>
> apply to the court for relief from the consequences of such default, and the court may grant or refuse relief (whether by staying proceedings brought by the mortgagee or otherwise) as the court, having regard to the conduct of the parties and to all other circumstances, thinks fit, and in the case of relief may grant it on such terms (if any) as to payment of any reasonable expenses of the

> mortgagee and as to the costs or otherwise as the court in the circumstances thinks fit.
>
> …
>
> (6) In this section -
>
> "**accelerated sum**" means "the whole or part of principal or interest secured by the mortgage other than the instalment referred to in subsection (1)(a)".

[33] The learned primary judge expressly did not proceed in reliance upon the appellant's failure to pay land tax as a ground of default. Rather, he proceeded by reference to the defaults in relation to the criminal proceedings, the restraining order and the caveat. The recurrent fresh defaults to which I have referred had not been remedied by the appellant and so relief from default was not available under the terms of s 95(2). Further, because of the nature of those defaults and the absence of any undertaking to remedy those defaults, the appellant was, and remains, unable to qualify for consideration for the grant of discretionary relief under s 95(3) of the *Property Law Act*.

[34] The principal argument advanced by the appellant in this regard was that the appellant was not relevantly in breach of the mortgage because those breaches had been waived by AMP and, by extension, the respondent. It is to the appellant's arguments in relation to waiver that one must now turn.

Waiver

[35] The appellant's argument was that the appellant's breaches of clause 4.1 of the mortgage were committed once and for all before the transfer of the mortgage to the respondent by AMP. Those breaches had been waived, and the recurrent breaches which occurred by reason of clause 4.2 of the mortgage were so trivial that it was oppressive for the respondent to rely upon them. In any event, the respondent itself waived the breaches by continuing to claim and receive interest payments.

[36] Before addressing these arguments it is necessary to say something about the term "waiver". There has been, for some time, a controversy as to whether "waiver" refers to an independent legal doctrine or is more properly considered as "an imprecise term capable of describing different legal concepts, notably election and estoppel".[1] It is unnecessary to attempt to resolve that controversy in order to dispose of this case. It is enough to say that, if it is correct that " … the primary meaning of the word 'waiver' in legal parlance is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted",[2] then what is sometimes termed a "waiver" must usually, in the absence of a new agreement between the parties, refer to what is, in substance, either election or estoppel.[3]

[37] This is especially so in a contractual context. If one party to the contract chooses to act in a manner inconsistent with the exercise of a contractual right, then that will usually amount to an election to abandon that right. Alternatively, if one party communicates to another party to the contract that it will not be exercising one of its contractual rights, and the other party orders its affairs accordingly, then an estoppel

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1 *The Commonwealth v Verwayen* (1990) 170 CLR 394 at 406.

2 *Banning v Wright* [1972] 1 WLR 972 at 979.

3 Cf *Wiltrading (WA) Pty Ltd v Lumley General Insurance Ltd & Ors* [2005] WASCA 106; CACV 22 of 2005, 10 June 2005 at [40] - [48].

may arise. If the first party gives no sign, either by word or deed, that it does not intend to rely on one of its contractual rights then it can only be assumed that the right has not been abandoned. In such circumstances there would be no basis for thinking otherwise.

[38] The appellant's argument that AMP's warranty to the respondent that there were no breaches of the mortgage amounted to a waiver can be readily disposed of. The appellant's argument is that the giving of this warranty was somehow inconsistent with the exercise of rights under the mortgage that depend upon a current breach. It must be remembered, however, that the giving of this warranty by AMP to the respondent was not communicated to the appellant. The appellant was given no indication, whatever AMP might have warranted to the respondent, that AMP was abandoning the legal rights it possessed as mortgagee against the appellant. The appellant was unable to point to any authority to support the proposition that "waiver" of a contractual right could be imputed from a warranty given to a person other than the party to the contract. The law does not now favour this sort of fiction.

[39] The next limb of the appellant's argument was that, whether or not there was any waiver on the part of AMP, the respondent had itself waived its right to rely on the defaults of the appellant when it continued to accept the appellant's payment of interest. There are two reasons why, in my view, this submission cannot be accepted.

[40] The first relates to the nature of the "waiver" which the appellant must establish in order to preclude the respondent from relying on its contractual rights in the absence of a variation of the contract supported by consideration. In *Freshmark Ltd v Mercantile Mutual Insurance (Australia) Ltd*[4] Dowsett J reviewed the authorities relating to the doctrines of waiver, election and estoppel, and in particular the judgments in the High Court in *The Commonwealth v Verwayen*. His Honour concluded that:

> "The better view is that a mere indication of an intention not to rely upon contractual rights will not generally constitute a waiver sufficient to bar a future action to enforce such rights. Waiver should not be seen as an alternative weapon to estoppel in the war against the doctrine of consideration. However, where a party elects between alternative rights available under a contract, such election will usually be final."

[41] In the present case, the terms of the mortgage meant that the respondent was not making an election between alternative rights when it claimed and received interest payments. The receipt of interest was not inconsistent with the choice by the respondent to rely upon a subsequent default by virtue of clause 4.2 to enforce its right to accelerate. In this, the present case is clearly to be distinguished from the authorities upon which the appellant relied such as *The King v Paulson*,[5] *Mulcahy v Hoyne*[6] and *Central Estates (Belgravia) Ltd v Woolgar (No 2)*[7] which were cases where the "waiver" in question involved the deliberate choice between acceptance

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4 [1994] 2 Qd R 390 at 397 - 403.
5 [1921] 1 AC 271.
6 (1925) 36 CLR 41.
7 (1972) 1 WLR 1048.

of rent consistent only with a lease continuing on foot, and determination of the lease for non-payment of rent.

[42] That the cases on which the appellant relied can and should be categorized together in this way is confirmed by the recent decision of the English Court of Appeal in *Oliver Ashworth Ltd v Ballard Ltd.*[8] The legal theory on which these cases stand was also explicitly identified as election between inconsistent rights by the High Court in *Sargent v ASL Developments Ltd.*[9] In that case, Stephen J, with whom McTiernan ACJ agreed, said:[10]

> "The words or conduct ordinarily required to constitute an election must be unequivocal in the sense that it is consistent only with the exercise of one of the two sets of rights and inconsistent with the exercise of the other; thus for a lessor to continue to receive rent under a lease will be consistent only with his rights as lessor and inconsistent with the exercise of a right to determine the lease."

[43] Secondly, there is a significant difference between waiving a particular breach and the effective abandonment of rights such as those conferred by clauses 4.1, 4.2 and 11.1 of the mortgage. It may be accepted that a non-waiver clause may itself be waived by conduct, but here there was no evidence of conduct which might amount to a waiver of clauses 4.2, 11.1 or 25.8. The continued receipt of monthly interest payments and the non-exercise by the respondent of rights as a result of the appellant's defaults cannot be regarded as the equivalent of an unequivocal statement of intention not to rely upon any of these provisions.

[44] In this regard, and contrary to the appellant's submissions, the waiver of particular breaches of a covenant cannot be regarded as a general waiver of the benefit of the covenant by the covenantee. That this is so is made clear from the judgment of Knox CJ in *Mulcahy v Hoyne*[11] on which the appellant sought to rely. His Honour said:

> "… it seems that a passive acquiescence in one breach of covenant cannot be considered a waiver for all future time of the right to complain of any other breach (per Lord Chelmsford LC in *Western v McDermott* (1866) LR 2 Ch 72 at 74). The finding in the present case is that the appellant knew of and acquiesced in unauthorized trading, and in my opinion this is not sufficient to support a conclusion that the appellant waived the benefit of the covenant. It is not suggested that there was any valuable consideration for the alleged agreement to waive the benefit of the covenant. It is said that the conduct of the appellant was equivalent to an expression by her of an intention not to insist upon her right to have this covenant observed by the lessee; but, even so, the mere statement of an intention not to insist on a right is not effectual unless made for consideration."

[45] In the present case, even if it be accepted that particular past breaches were waived by the receipt of interest, there is not the faintest suggestion that the respondent

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8 [2000] Ch 12 at 28 - 31.

9 (1974) 131 CLR 634.

10 (1974) 131 CLR 634 at 646. See also *Khoury v Government Insurance Office (NSW)* (1984) 165 CLR 622 at 633.

11 (1925) 36 CLR 41 at 50 (citations footnoted in original).

purported to waive the benefit of the covenants in clauses 4.1, 4.2, 11.1 and 25.8 of the mortgage. Nor is there any suggestion that they received consideration without which any such conduct on its part would not have been binding.

[46] For these reasons, the learned primary judge was clearly correct to regard the recurring fresh defaults which he identified as not being waived by the respondent's receipt of interest payments.

[47] The appellant, rightly in my view, disclaimed any contention that the terms of the mortgage were unfair or unreasonable. The effect of the clauses discussed was to permit the respondent to claim and receive interest while effectively reserving the right further to enforce its rights under the mortgage upon a fresh default.

Equitable jurisdiction

[48] At this point, it becomes necessary to consider the appellant's argument that equitable doctrines associated with relief from forfeiture, penalties and unconscionable conduct were apt to preclude the respondent from exercising its right to accelerate payment of the principal.

[49] The appellant sought to put his case in terms of the exposition by Lord Wilberforce in *Shiloh Spinners Ltd v Harding*[12] of:

> "the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result."

[50] This doctrine is concerned with the principle of equity that the "failure to redeem a mortgage upon the covenanted date for repayment [does] not destroy the equity of redemption without the proper exercise of a power of sale or a foreclosure suit in equity."[13] In my view, this doctrine is irrelevant in the circumstances of the present case for several reasons. First, the point at issue is not whether the acceleration is apt to deny the appellant's right to redeem the mortgage; he remains entitled to redeem the mortgage notwithstanding the acceleration. But he is not able to do so. Secondly, it is the repayment of the debt which is one of the principal objects of the transaction. Because of the appellant's inability to pay, this Court cannot, by its orders, achieve that object, ie the repayment of the principal debt by granting of relief to the appellant conditioned upon the payment of the principal.

[51] The appellant has no arguable ground for invoking equitable intervention drawn from the other stream of equitable jurisdiction discussed by Lord Wilberforce, namely "the heads of fraud, accident, mistake or surprise".[14] In this regard, there is no basis for the suggestion that the appellant's breaches of covenant or his failure to remedy them or even his continued payment of interest were brought about by an inducement from the respondent. There can be no suggestion that the respondent in

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12 [1973] AC 691 at 722 - 723.

13 See *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57 at [48]; (2003) 217 CLR 315 at 331.

14 *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 722. See also *Legione v Hateley* (1983) 152 CLR 406 at 447 - 448.

any way lulled the appellant into a false sense of security in relation to his defaults.[15]

[52] There are, in my view, further answers to the appellant's attempt to invoke this equitable doctrine. The first is that it cannot sensibly be said that there is any "forfeiture" involved in the triggering of the respondent's rights immediately to recover the principal sum. The principal sum was owed to the respondent by the appellant, but it was not repayable while the appellant was not in default in respect of the facility. That the debt became repayable on the occurrence of default by the appellant is neither a forfeiture nor a penalty.

[53] In this regard, there is no estate or interest which the appellant forfeits by reason of the respondent's entitlement to payment of the principal debt. The appellant's complaint is that he has lost the benefit of the contract of loan remaining on foot for the balance of the five years of the facility. Such a benefit is dependent upon the terms on which it depends for its existence. That sort of benefit does not attract the protection of the equitable doctrine of relief against forfeiture.[16]

[54] As to penalty, there is strong authority for the proposition the mere fact that a principal sum becomes payable "upon a failure by a borrower to comply with the conditions on which credit was extended cannot constitute a penalty."[17] There is no authority which supports the appellant's submission to the contrary. It was argued on the appellant's behalf that the reasons of Gaudron J in *Stern v McArthur*[18] provided support for the appellant's contention; but it is apparent that her Honour was prepared to regard a contractual provision for the payment of money as being a penalty or "in the nature of a penalty" only where the provision for the payment is "security for a stated result". In this mortgage, the obligation of the appellant to repay the principal to the respondent was not "security" for some other result. It was, in truth, the substantial entitlement of the respondent, the postponement of which depended upon the appellant's compliance with the terms of the mortgage.

[55] Next, the appellant was driven to invoke a broader equitable doctrine pursuant to which:

> "Equity will come to the relief of a plaintiff who has acted to his detriment on the basis of a basic assumption in relation to which the other party to the transaction has 'played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it' … Equity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption."[19]

[56] The principal difficulty for the appellant in seeking to rely upon this statement of principle in the present case is that the appellant cannot show that he has acted, in any way, in reliance on an assumption induced by the respondent so that it would be a detriment to the appellant if the respondent were to be allowed to enforce its claim

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15 *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57 at [30] - [31]; (2003) 217 CLR 315 at 326 - 327.

16 *Westminster Properties Pty Ltd v Comco Constructions Pty Ltd* (1991) 5 WAR 191 at 197 - 198, 202 - 206.

17 *Oresundsvarvet Aktiebolag v Lemos (The "Angelic Star")* [1988] 1 Lloyd's Rep 122 at 125 - 126.

18 (1988) 165 CLR 489 at 539 - 540.

19 *Walton Stores Limited v Maher* (1988) 164 CLR 387 at 404.

to repayment of the principal sum. The instalments of interest were payable by the appellant under the mortgage; paying them discharged his obligation in that regard. One cannot sensibly speak of the discharge of an obligation as a detriment.

[57] Further, the terms of the mortgage made it clear that the receipt of such instalments did not, of itself, involve any assurance to the appellant that the rights of enforcement which had arisen in the respondent would not ever be exercised. The very purpose of clause 4.2, 11.1 and 25.8 was to ensure that no such assurance could be taken by the appellant from the respondent's receipt of interest payments.

[58] The appellant also invokes even more open textured statements of equitable principle in relation to relief against unconscionable conduct.[20] In this regard, the recent decision of the High Court in *Tanwar Enterprises Pty Ltd v Cauchi*[21] confirms that, in the present case, there is nothing unconscionable in the respondent insisting upon the rights conferred on it by the facility pursuant to which the appellant acquired the property.

[59] It was argued on the appellant's behalf that the obvious disparity in financial resources between the respondent and himself established that he was in a position of "special disadvantage" for the purposes of the doctrine of unconscionability.[22] But this equitable doctrine is not engaged by differences in financial strength or bargaining power. Rather, it is concerned with disadvantages which detract from "the ability of the innocent party to make a judgment as to his own best interests".[23] The decision of the High Court in *ACCC v C G Berbatis Holdings Pty Ltd*[24] has confirmed that, as Gleeson CJ said:[25] "A person is not in a position of relevant disadvantage … simply because of an inequality in bargaining power." His Honour went on to say:[26] "Unconscientious exploitation of another's inability, or diminished ability, to conserve his or her own interests is not to be confused with taking advantage of a superior bargaining position." In the present case, there is no suggestion that the appellant has at any time been disadvantaged in terms of his ability to "make a judgment as to his own best interests", much less that the respondent has sought to take advantage of that disability.

[60] As I have said, there is no suggestion in this case that the terms of the mortgage are unfair. The appellant's assertion is that the respondent's insistence on its strict legal rights in the events which have happened is unconscionable or unconscientious in that the respondent is seeking to "insist upon [its] legal rights to take advantage of [the appellant's] special vulnerability or misadventure for the unjust enrichment of [itself]."[27]

[61] The appellant can refer to no authority to support the proposition that it is "unjust" for the respondent to enforce its rights to repayment of its loan. That is hardly

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20 See *Mutual Federal Savings and Loan Association v Wisconsin Wire Works*, 205 NW 2d 762 at 766 - 767 (Wis, 1973).

21 [2003] HCA 57; (2003) 217 CLR 315.

22 Cf *Blomley v Ryan* (1956) 99 CLR 362 at 405; *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462, 466 - 467.

23 *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 462; *ACCC v C G Berbatis Holdings Pty Ltd*; [2003] HCA 18 at [55] - [56]; (2003) 214 CLR 51 at 77.

24 [2003] HCA 18; (2003) 214 CLR 51.

25 [2003] HCA 18 at [14]; (2003) 214 CLR 51 at 64.

26 [2003] HCA 18 at [14]; (2003) 214 CLR 51 at 64.

27 *Stern v McArthur* (1988) 165 CLR 489 at 526 - 527.

surprising. The respondent will not succeed in "enriching" itself by taking advantage of the appellant's defaults. To the extent that the respondent now enforces its rights, it can do so only to be repaid what it lent. Any surplus on sale of the property must be accounted to the appellant.

[62] Underlying the appellant's submissions seeking equitable relief is the theme that the appellant has been placed in default under the terms of the mortgage by circumstances that were beyond his control. This position is weakened by the fact that the most recent extension of the restraining order, which is what apparently prompted the respondent to take action under the mortgage, was consented to by the appellant without informing the respondent. In any event, these considerations are not relevant to determining whether or not equitable relief is available to the appellant. It is clear that equity does not authorise the Court "to reshape contractual relations into a form that the court thinks more reasonable or fair where subsequent events have rendered one side's situation more favourable".[28]

The refusal of the stay

[63] One turns now to the appellant's appeal against the refusal of a stay of the orders of the learned primary judge. The appellant sought orders setting aside the order of Jerrard JA and granting a stay of execution of the orders of Chesterman J pending the outcome of the substantive appeal. The appellant also sought an order for costs of this appeal.

[64] The appeal against the orders of Chesterman J came on for hearing on the same day as the hearing of the appeal for the refusal of the stay. There is, therefore, little utility in now determining the appeal against the refusal of the stay. Especially is this so since the orders of Chesterman J requiring the appellant to deliver up possession have been complied with. That having been said, the appeal on this issue may be dealt with shortly.

[65] In the appellant's written submissions, it was put that Jerrard JA failed to appreciate that the appellant had shown a "good arguable case on appeal" sufficient to justify the grant of a stay of the orders made by the learned primary judge.[29] In the appellant's oral submissions, the appellant's point seemed to be that Jerrard JA erred in regarding the existence of a "good arguable case" as a consideration relevant to the exercise of the discretion reposed in him. The appellant sought to argue that Jerrard JA should not have given the merits of the appellant's case on appeal the close scrutiny which he did.

[66] No doubt it was open to Jerrard JA properly to dispose of the application for a stay without coming to a firm view about the appellant's prospects on appeal. Usually it is not possible for a judge to come to such a firm view of the appellant's prospects of success (or lack of them) that the application for a stay pending appeal can be resolved by according greater weight to prospects of ultimate success than to considerations of inconvenience in striking the proper balance between the competing interests of the parties.

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28 *Stern v McArthur* (1988) 165 CLR 489 at 503; *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57 at [37]; (2003) 271 CLR 315 at 328.

29 Cf *Alexander & Ors v Cambridge Credit Corporation Ltd* (1985) 2 NSWLR 685 at 694 - 695; *Asia Pacific International Pty Ltd v Peel Valley Mushrooms Ltd* [1998] QCA 414 at [8] per Chesterman J; [1999] 2 Qd R 458 at 463 - 464.

[67] The appellant relied in particular upon observations in this Court in *Croney v Nand*[30] and in the New South Wales Court of Appeal in *Alexander v Cambridge Credit Corporation Ltd*[31] to the effect that "the prospects of success of the appeal is not a matter which the Court … should generally speculate about." But these observations cannot be understood as suggesting that the poverty of the appellant's prospects of success is irrelevant to the exercise of the discretion.

[68] The point of the passage cited above from *Croney v Nand*[32] is that "generally" the Court which considers an application for a stay will not have the means or the opportunity to do more than make "an assessment of whether the appellant has an arguable case … to ensure that the appeal has not been lodged simply to delay execution." It would, however, make a mockery of the Court's process to suggest that an appellant with a plainly hopeless appeal should be able to obtain a stay so long as he was not motivated by the cynical desire to delay execution. A hopeless appeal is no less hopeless because it is pursued with quixotic enthusiasm; and the litigant who has been successful at trial is no less entitled to the fruits of its judgment.

[69] In summary, as this Court held in *Asia Pacific International Pty Ltd v Peel Valley Mushrooms Ltd,*[33] whether the appellant has "a good arguable case on appeal" is a consideration relevant to the exercise of the discretion to grant a stay of execution pending appeal. The Court's ability to come to a firm view about prospects on appeal will usually be limited by a number of factors, not the least of which will be the exigencies of the Court's list. Where there is an arguable case, considerations of convenience will usually tend to tip the balance in terms of the exercise of the discretion. But in some cases, such as the present, the lack of merit may be readily apparent.

[70] In my respectful opinion, Jerrard JA rightly regarded the appeal as clearly devoid of merit. On that basis, his Honour refused the stay. It cannot be said that he erred in exercising his discretion as he did.

Conclusions and orders

[71] Both appeals should be dismissed. In respect of each appeal, the appellant should be ordered to pay the respondent's costs to be assessed on the standard basis.

[72] **DUTNEY J:** In this matter I have had the advantage of reading the reasons of Keane JA with which I entirely agree. In my view, the appeal should be dismissed with costs.

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30 [1998] QCA 367 at [37] - [38]; [1999] 2 Qd R 342 at 348 - 349.

31 [1985] 2 NSWLR 685 at 694 - 695.

32 [1998] QCA 367 at [38]; [1999] 2 Qd R 342 at 349.

33 [1998] QCA 414 at [8] per Chesterman J; [1999] 2 Qd R 458 at 463 - 464.