SUPREME COURT OF QUEENSLAND

CITATION:	*Questband P/L v Macquarie Bank Limited* [2009] QCA 266
PARTIES:	**QUESTBAND PTY LTD (ACN 110 666 046)** (plaintiff/appellant) **v** **MACQUARIE BANK LIMITED (ACN 008 583 542)** (defendant/respondent)
FILE NO/S:	Appeal No 2422 of 2009 Appeal No 2426 of 2009 SC No 4596 of 2006
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeals
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 September 2009
DELIVERED AT:	Brisbane
HEARING DATE:	13 August 2009
JUDGES:	McMurdo P, Fraser JA and Philippides J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeals dismissed with costs**
CATCHWORDS:	CONTRACTS – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – IMPLIED TERMS – GENERALLY – where the respondent was to provide finance to the appellant for its purchase and proposed redevelopment of land – where the parties executed a mandate and, subsequently, a facility agreement to this effect – where a condition precedent of the agreement required the appellant to provide the respondent with a satisfactory engineering report – where the respondent received this report approximately one hour prior to settlement and provided the appellant with the relevant cheques – where the respondent was unable to reach the settlement on time and the vendors terminated the sale contracts – where the appellant argues that the mandate and facility agreement contained implied terms that the respondent would (i) decide within a reasonable time whether to offer the appellant a loan facility; (ii) do all things reasonably necessary to give the appellant the benefit of the facility agreement; (iii) obtain all relevant information from its consultant engineer within sufficient time to allow it to provide the cheques to the appellant; and (iv) to make all reasonable endeavours to provide the cheques

to the appellant within sufficient time for it to attend settlement – whether these terms were implied terms of the mandate or facility agreement – whether the respondent had breached these implied terms

Sequel Drill & Blast P/L v Whitsunday Crushers P/L [2009] QCA 218, applied
York Air Conditioning and Refrigeration (A/SIA) Pty Ltd v The Commonwealth (1949) 80 CLR 11; [1949] HCA 23, cited

COUNSEL: D J S Jackson QC, with R P S Jackson, for the appellant
W Sofronoff QC, with A M Pomerenke, for the respondent

SOLICITORS: Brian Bartley & Associates for the appellant
Deacons for the respondent

[1] **McMURDO P:** The appeals should be dismissed with costs for the reasons given by Fraser JA.

[2] **FRASER JA:** On 24 August 2002 the appellant ("Questband") entered into four conditional contracts to buy land with a view to subdividing the land and reselling the subdivided lots. Settlement of the four contracts was due at an office on the Gold Coast no later than 5.00 pm on Monday 23 June 2003, subject to fulfilment of the conditions.

[3] On 1 May 2003 Questband approached the respondent ("Macquarie") about the possibility of it funding Questband's proposed purchase and redevelopment of the land. On 22 May 2003 Questband waived the outstanding conditions of the four contracts. On 26 May 2003 Macquarie and Questband entered into a "mandate" under which Macquarie undertook to prepare a loan facility submission for consideration by its credit committee to provide funding for Questband's proposed purchase and redevelopment. On Friday 20 June 2003 Macquarie's credit committee approved Questband's application for finance and in the early evening of the same day Questband and Macquarie executed a "facility agreement".

[4] Under the facility agreement there were numerous conditions precedent to Macquarie's obligation to lend Questband the money it required to complete the four contracts. The last condition precedent to be fulfilled was the receipt by Macquarie of a satisfactory engineering report concerning the feasibility and cost of Questband's proposed redevelopment. Macquarie received that report, from Cardno MBK Pty Ltd ("Cardno"), shortly after 4.00 pm on 23 June 2003. Macquarie had no facility for drawing cheques on the Gold Coast so it drew the cheques at its Brisbane office. Its solicitor immediately collected the cheques and drove to the place for settlement at the Gold Coast. Unsurprisingly, he arrived after 5.00 pm. One of the vendors was not prepared to extend time, presumably because the value of her land had appreciated. She validly terminated her contract on the ground that Questband had failed to complete the purchase on time. The other vendors would have accepted late payment but Macquarie declined to fund a project which did not include all four parcels of land.

[5] In proceedings in the Trial Division Questband claimed that its failure to settle the contracts and its consequential loss of the opportunity to earn profits from its projected redevelopment were caused by Macquarie's breaches of the mandate and

the facility agreement. Questband's case was that Macquarie breached implied terms to co-operate with Questband and to take the steps necessary for the making of the advances before the time fixed for settlement of the four contracts. Macquarie denied that the mandate and facility agreement contained the alleged implied terms. Alternatively, it denied that it had breached any of the implied terms. Macquarie alleged that it was dilatory conduct by Questband which had caused the failure of the transaction. Macquarie counterclaimed against Questband and the guarantors of its obligations under the facility agreement for damages (loss of fees and interest) for Questband's alleged breach of implied contractual obligations to co-operate under the facility agreement.

[6] After a trial of the issues of liability only, the trial judge gave judgment for Macquarie against Questband on its claim and for Questband and the other defendants by counter-claim (Questband's guarantors) against Macquarie on its counter-claim.[1] After hearing argument about costs, the trial judge subsequently ordered that Questband and the guarantors pay Macquarie's costs of the action and the counter-claim to be assessed on the indemnity basis.

[7] The appeal[2] concerns only Questband's challenge to the dismissal of its claim against Macquarie and Questband's and its guarantors' challenge to the consequential order for costs against them.

The issues in the appeal

[8] Questband contended that the trial judge erred by failing to find that Macquarie breached an implied term of the mandate that Macquarie was obliged to reach a decision whether or not to offer a loan facility to Questband within a reasonable time.

[9] Questband also contended that the trial judge erred by failing to find that Macquarie breached implied terms of the facility agreement that:

(a) Questband and Macquarie would do all things reasonably necessary to enable the other to have the benefit of the facility agreement;

(b) Macquarie was obliged to use its best or reasonable endeavours to obtain the information it required from its consultant engineer in sufficient time to permit it to make an advance to Questband to complete Questband's contracts to buy land for development;

(c) Macquarie was obliged to make reasonable endeavours to make the advance available to Questband to allow it to complete those land contracts and, in particular, to provide funds to Questband in sufficient time for settlement to occur at Southport before 5.00 pm on 23 June 2003.

The mandate

[10] Questband pleaded that the mandate constituted a contract in which Macquarie agreed, impliedly, that a decision whether or not to offer the proposed facility would be made within a reasonable time; that a reasonable time to make the decision whether or not to offer the proposed facility expired before 19 June 2003; and that, in breach of the mandate, Macquarie failed to make a decision before 19 June 2003 whether or not to offer the proposed facility.

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1 *Questband Pty Ltd v Macquarie Bank Ltd* [2009] QSC 7.

2 Questband and its guarantors have filed separate notices of appeal against the substantive orders and the orders about costs. The fate of the second appeal turns upon the disposition of the first appeal.

Implied term of the mandate?

[11] The trial judge summarised the principles concerning the implication of contractual terms in the following passage:[3]

> "1. A term will not be implied into a contract if the implication is contrary to or inconsistent with an express term of the contract or with the intention of the parties as revealed by the terms of the contract. *Tamplin (FA) Steamship Co Ltd v Anglo-Mexican Petroleum Products Co Ltd* [1916] 2 AC 397 at 422; *Castlemaine Tooheys Ltd v Carlton and United Breweries Ltd v Tooth & Co Ltd* [1987] 10 NSWLR 468 at 487; *BP Refinery (Western Port) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26 (condition 5).
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> 2. When a contract provides that something is to be done but does not fix a time for the act the law implies a term that the act must be done within a reasonable time. *York Air Conditioning and Refrigeration (A/SIA) Pty Ltd v The Commonwealth* (1950) 80 CLR 11 at 62.
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> …
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> 4. The term implied by law into every contract that each party agrees to do all such things as are necessary on his part to enable the other party to have the benefit of the contract (*Butt v M'Donald* (1896) 7 QLJ 68 at 70-71) extends to contractual promises but not to a commercial benefit which a party to a contract expected to obtain from its performance. *Jackson Melanese Pty Ltd v Hansen Building Products Pty Ltd* [2006] QCA 126 at [50] - [51]; *Australia Media Holdings Pty Ltd v Telstra Corporation Ltd* (1998) 43 NSWLR 104 at 124-5.
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> 5. Terms may be implied by law or because the contracts in question belong to a particular class; or to give business efficacy to the particular contract the parties made. *Breen v Williams* (1995-1996) 186 CLR 71 at 102. The implied terms here are of the second type..."

[12] The Court was referred to many authorities on those points, but I understood the trial judge's summary to be uncontentious. I would respectfully adopt it as an accurate and sufficient summary for present purposes.

[13] In my view, the critical issue is whether the implied term pleaded by Questband is consistent with the express terms of the mandate.

[14] The mandate was in the form of a one page letter from Macquarie to Mr Ingles dated 22 May 2003 together with eighteen pages of "Mandate Contents", with provision on the last page for execution by Questband. Questband executed the mandate and posted it back to Macquarie with a cheque for the application fee of $25,000, on 26 May 2003. The mandate letter stated:

> "Further to our recent discussions, we confirm that the Macquarie Bank group ("the Lender") would be pleased to prepare a loan

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3 [2009] QSC 7 at [102] (1), (2), (4) and (5).

> facility ("the Facility") submission, for consideration by Macquarie Bank Limited's credit committee, to provide funding for the above. The following pages of this document ("Mandate") detail the general terms and conditions of the proposed Facility.
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> Mandate Contents:·
> 1. Terms and Conditions of the Proposed Facility
> 2. Application for Credit – Acknowledgment/Authority
> 3. Further Information Required
> 4. Acceptance of the Mandate and Application Fee
> 5. Cashflow
>
> The Lender will proceed with the preparation of the Facility submission subject to receipt of an executed copy of this Mandate, along with the application fee submitted in accordance with the provisions of the Mandate.
>
> We look forward to receiving your application and assisting you with this matter."

[15] The following disclaimer appeared in small print at the foot of the first page of the mandate:

> "Credit approval for a Facility has not yet been obtained. Until formal Facility and security documents have been executed and all conditions precedent satisfied, the Lender reserves the right to amend, add or delete any terms of the Facility and until then will not be under any legal obligation whatsoever to provide the Facility. No officer of the Lender is authorised to commit the Lender to provide the Facility other than in accordance with the foregoing."

[16] In the section headed "1.0 Terms and Conditions of the Proposed Facility", clause 1.2 referred to the facility limit of $9,158,000. Clause 1.3 described the purpose of the proposed facility as being to provide funds to assist with the acquisition of the "the Security Property" (the land described in the four contracts) for $3,637,000, the demolition of any improvements on the Security Property, and the design, construction and sale of a residential subdivision comprising 123 lots (called "the Project") in accordance with a draft project cashflow (the "Feasibility") prepared by Macquarie and attached to the mandate. A summary of the Feasibility set out in that clause indicated that about $3,000,000 would be spent on construction. Another term of the proposed facility identified the required security, which was to include a registered first mortgage over the Security Property.

[17] Clause 1.9 provided that:

> "The provision and settlement of the Cash Advance shall be conditional upon the fulfilment of the following conditions, which are each to be effected to the satisfaction of the Lender and are to be provided at the Customer's cost."

[18] The "Property Conditions Precedent" in clause 1.9.1 included the following:

> "…
> (iv) Geotechnical Report
> The Customer is to provide a geotechnical report from an acceptable geotechnical engineer confirming that there are

no impediments on the Security Property that could inhibit the construction of the Project and that the ground structure and proposed building structure are suitable for the proposed Project.

…

(vi) Certifying Engineer

Confirmation from a certifying engineer acceptable to and acting on behalf of the Lender that the cost of the proposed construction component of the Project (including demolition and decontamination but excluding contingency and GST) - will not exceed the construction cost amount contained in the Feasibility, (based on current prices) or such other costs as the Lender may approve. Further, the certifying engineer is to confirm that the construction of the Project can be completed within the time allowed in the Feasibility."

[19] The "Financial Conditions Precedent" in clause 1.9.2 included:

"(i) Statement of Assets & Liabilities

Signed and dated statements of assets and liabilities by the personal Guarantors are to be supplied…..

(ii) Financial Statements

Signed and dated financial statements of the Customer and corporate Guarantors are to be supplied…

…

(v) Group Cashflow

The Customer is to supply an 18 month group cashflow projection…to the satisfaction of the Lender…"

[20] Under the heading "3.0 Further Information Required", the mandate stated that, "Progress of the application will be dependant upon the Customer and Guarantors' provision of the following information …". The specified information included:

"(c) break down of the Project land costs and development costs/other costs and the consultancy fees;

(d) group structure diagram for the Customer group (outlining all ownership interests);

…

(g) Balance sheets and profit and loss accounts for the Customer and corporate Guarantors for each of the previous two financial years;

(h) the Customer and corporate Guarantor group's monthly cash flow forecast for the next twelve months;

…

(l) relevant consultancy reports (eg. environmental, geotechnical, structural, survey, etc). "

[21] I interpolate here that clause 3.0(l), which made the progress of Questband's application for finance dependant upon provision to Macquarie of a geotechnical report, and the condition precedent of the contemplated facility agreement concerning a geotechnical report foreshadowed in clause 1.9.1(iv) of the mandate, are of particular relevance to the issues in the appeal. The trial judge ultimately concluded that it was Questband's delay in supplying a geotechnical report in a form satisfactory to Macquarie, rather than any default by Macquarie, which

delayed fulfilment of the last condition precedent under the facility agreement, Macquarie's receipt of a satisfactory engineering report by Cardno.[4]

[22] Under the heading "4.0 Acceptance of the Mandate and Application Fee", the letter stated:

> "If you wish to proceed further with a request for consideration of a Facility from the Lender, please sign the attached copy of this Mandate and return along with a cheque for $25,000 being the application fee.
>
> Consultant reports or documentation work (or both) may be required prior to approval. The Customer will be liable to reimburse the Lender for any unrecouped costs with regard to these matters, whether the Facility is approved or not, or proceeds or not. If requested by the Customer and prior to Macquarie Bank Limited's credit committee finalising its consideration process, the Lender will instruct consultants and the Customer agrees to fund all such consultants' costs at the time of the Lender's instruction, over and above the application fee.
>
> …
>
> The Customer confirms its request that the Lender proceeds to consider an application from the Customer for a Facility on the terms and conditions proposed in section 1 of this Mandate. The enclosed cheque for $25,000 is forwarded on the understanding that it will be:
>
> a) applied towards any outstanding costs and the balance refunded if the Lender does not approve the Facility; or
> b) credited towards the establishment fee upon the Customer's acceptance of a formal offer of a Facility; or
>
> …
>
> If the Customer wishes to proceed with a request for consideration of a Facility from the Lender, please sign the attached copy of this Mandate and return it, along with the application fee, to the Lender."

[23] The trial judge rejected the implied term alleged by Questband in the following passage:[5]

> "[106] The short answer is that the term to be implied is inconsistent with the express terms of the mandate. By that agreement Macquarie promised, in return for the payment of $25,000, to prepare a submission to its credit committee for consideration whether to provide funding for Questband's development. The disclaimer … makes it clear that Macquarie undertook no obligation to make any offer of finance at all. It stated that until all formalities had been completed and all conditions precedent satisfied Macquarie would not be under any legal obligation whatsoever to 'provide the Facility', i.e. to offer to lend money to Questband. The term which Questband seeks to imply is one which would oblige Macquarie to make a decision to lend by 19 June, that being a reasonable time, whether or not the

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4 [2009] QSC 7 at [145].

5 [2009] QSC 7 at [106], [108].

> contractual conditions were satisfied. It is an obligation which the contract itself expressly forbore to impose.
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> …
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> [108] A term that Macquarie, should it have decided to offer finance to Questband, must have done so by 18 June cannot be reconciled with the express terms of the mandate that Macquarie might not make an offer of finance at all and that it came under no obligation whatsoever to Questband until all required documents had been executed and that Macquarie was satisfied it should make the advance. The whole tenor of the mandate agreement was that Macquarie would prepare a submission for its credit committee which might accept, reject or amend the submission as it saw fit. This collides with, and excludes, an obligation to make a decision to lend (on the terms submitted) by reference to a time extraneous to the contract, fixed by the needs of the would-be borrower to effect a transaction of its own."

[24] Questband argued that the trial judge was wrong in thinking that there was an inconsistency between the express terms of the mandate, which provided that there was no promise that a facility agreement would be entered into or that an offer of loan would be made, and an implied term which required that the decision whether or not to make an offer of finance must be made within a reasonable time. It argued that in circumstances in which the mandate was made on 26 May 2003 and settlement of Questband's contracts to buy the land which would constitute the Security Property was due on 23 June 2003, business efficacy demanded that the mandate be construed as obliging Macquarie to decide whether or not to offer a facility agreement and to make that decision within a reasonable time. Macquarie argued that its only relevant obligation under the mandate was to prepare a loan facility submission for consideration by its credit committee.

[25] The competing arguments require that attention be focussed upon the precise nature of the relevant substantive obligation which Macquarie expressly or impliedly assumed under the mandate, for as Dixon J said in *York Air Conditioning and Refrigeration (A/SIA) Proprietary Limited v The Commonwealth*:[6]

> "The ordinary prima-facie rule is that when a contract provides for the doing of an act and there is no express provision as to time the law implies that it must be done within a reasonable time."

[26] What act did Macquarie undertake a contractual obligation to perform? Questband's case was predicated upon an implication that Macquarie was obliged to decide whether to offer a loan facility to Macquarie and to do so within a reasonable time, but the mandate appears deliberately to have stopped short of imposing any such obligation. Clause 4.0 of the mandate referred to Questband's request to Macquarie to "consider" Questband's application for a loan facility, but the first and third paragraphs of the mandate letter made it plain that Macquarie undertook only to prepare a loan facility submission for consideration by its credit committee. The evidence showed that there was such a functional division within Macquarie. Of course Macquarie remained the only person which undertook obligations to Questband under the mandate, but that does not detract from the force of the

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6 (1949) 80 CLR 11 at 62.

consideration that the mandate expressly confined Macquarie's obligation in those narrow terms.

[27] When that very precise and limited obligation is read with the express provisions concerning the progress of Questband's application and the disclaimer at the foot of the mandate letter it becomes clear that there is no room for the implied obligations for which Questband contended. As to the express provisions relating to progress, it is necessary to mention only clause 3.0, which in terms made the progress of Questband's application for finance dependant upon the provision to Macquarie of various pieces of information: that necessarily collided with the unqualified implication asserted by Questband.

[28] As to the disclaimer, I do not accept Questband's argument that the trial judge was mistaken in thinking that the phrase "to provide the Facility" in the disclaimer connoted the provision of a loan facility agreement, rather than an advance under such an agreement. Whilst in other contexts the word "facility" may connote an advance rather than an agreement, the mandate drew a clear distinction between the "Facility", meaning the contemplated facility agreement, and advances under that agreement. In the disclaimer, the expression "formal Facility" made sense only if it connoted the contemplated facility agreement. Similarly, the phrase "terms of Facility" connoted the terms of a facility agreement. The first paragraph of the mandate letter also drew a distinction between the "Facility", meaning a facility agreement, and funding under it. It directed attention to the general terms and conditions of the "Facility", which was again a reference to the terms of a facility agreement. Those terms included the conditions precedent in clause 1.9, which were foreshadowed as terms of a facility agreement. That clause itself also drew the distinction between the "Facility" in which clause 1.9 would be a term and any advance under that facility agreement: "The provision and settlement of the Cash Advance shall be conditional upon the fulfilment of the following conditions …"

[29] The form of the mandate demonstrated that Macquarie declined to offer to enter into even the highly qualified facility agreement foreshadowed in the mandate until after its credit committee had first assessed and approved Questband's application. In that context, it is an objectively unsurprising construction of the disclaimer that it excluded any liability which Macquarie otherwise might have attracted in relation to matters occurring in the period before the parties executed a facility agreement, which thereafter would govern the parties' legal relationship. I would affirm the trial judge's conclusion that the implied term alleged by Questband, which was to the effect that if Macquarie should decide to offer finance it was obliged to do so by 19 June 2003, cannot be reconciled with the express terms of the mandate. Questband's claim based upon the mandate was correctly rejected for that reason.

Breach of an implied term of the mandate?

[30] The trial judge concluded that if Macquarie was obliged to decide whether or not to lend within a reasonable time, Macquarie did not delay beyond a reasonable time in making the offer to lend.[7] This supplied an alternative ground for the trial judge's rejection of Questband's claim based upon the mandate.

[31] In *Sequel Drill & Blast P/L v Whitsunday Crushers P/L*[8] I attempted a concise summary of the general principles which apply to the determination of a reasonable time under an implied term of this kind:

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7 [2009] QSC 7 at [109].

8 [2009] QCA 218 at [17]. The Chief Justice and Chesterman JA agreed.

> "The question of what is a reasonable time is a question of fact. It is to be determined at the time when performance is alleged to be due and the relevant circumstances then existing must be taken into account. [*Hick v Raymond & Reid* [1893] AC 22. These principles have been applied in numerous authoritative decisions: see, for example, *Maynard v Goode* (1926) 37 CLR 529 at 538, *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 567 – 568 and *Business and Professional Leasing Pty Ltd v Akuity Pty Ltd* [2008] QCA 215 at [46] (citing *Australian Blue Metal Ltd v Hughes* [1963] AC 74 at 99 (PC), *Rudi's Enterprises Pty Ltd v Jay* (1987) 10 NSWLR 568 at 576, *Stickney v Keeble* [1915] AC 386 at 419, and *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 638 and 639).] That is not to say, however, that a party is entitled to justify its delay by relying upon the materialisation of a risk which that party was contractually obliged to bear. The circumstances which are relevant in determining a reasonable time do not include those which were under the control of the party performing the services: [*Hick v Raymond & Reid* [1893] AC 22*; Sopov v Kane Constructions Pty Ltd (No 2)* [2009] VSCA 141 per Maxwell P, Kellam JA and Whelan AJA.] as Connolly J held in *Telina Developments Pty Ltd v Stay Enterprises Pty Ltd*, [[1984] 2 Qd R 585 at 591, citing *Re Longlands Farm* [1968] 3 All ER 552 at 556 per Cross J and *Postlethwaite v Freeland* (1880) 5 App Cas 599 at 608.] the relevant considerations which govern the reasonableness of the time taken must be determined as at the date of the contract."

[32] The trial judge summarised the principles in similar terms, elaborating upon those principles which were directly relevant to the issues at trial: [9]

> "When by a contract an act is required to be performed within a reasonable time what is a reasonable time is a question of fact which depends upon the circumstances including the context in which the contract was made. The limit of a reasonable time is determined by reference with what is fair to both parties. *Perri v Coolangatta Investments Pty Ltd* (1982) 149 CLR 537 at 567-8. Whether a reasonable time, or more than a reasonable time, has elapsed must be decided at the point when the lapse of time is said by one party to have become unreasonable. It cannot be determined at the date of the contract. *Rudi's Enterprises Pty Ltd* (1987) 10 NSWLR 568 at 576. A relevant fact is delay by the party complaining about the lapse of time. *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1988-1989) 166 CLR 623 at 638-9. When what is in issue is the exercise of a right or the giving of a notice what is a reasonable time is to be determined by reference to the circumstances when the right is to be exercised *(Business and Professional Leasing Pty Ltd* v *Akuity Pty Ltd* [2008] QCA 215 at [46] or when the notice is given; *Australian Blue Metal Ltd* v *Hughes* [1963] AC 74 at 99. "

[33] Questband did not contend that the trial judge erred in that formulation of the relevant principles.

The absence of a geotechnical report before 20 June

[34] One ground upon which the trial judge rejected Questband's allegation that Macquarie had breached any implied term to make a decision by 19 June was that a

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9 [2009] QSC 7 at [102](3).

reasonable time for making an offer of finance could not have elapsed until after Questband had provided the information required by the mandate, which included a geotechnical report, but although the mandate was concluded on 26 May Questband did not provide a geotechnical report to Macquarie until 12.49 pm on 20 June.[10] (That geotechnical report proved to be unsatisfactory to Macquarie. I will discuss that problem when I deal with Questband's claim for breach of the facility agreement). Macquarie offered the facility on the same day.

[35] The trial judge first found that Questband, through Mr Ingles, knew from the outset that there was a risk that Macquarie might not be able to provide finance in the time available.[11] Questband challenged that finding, but the conclusion that Questband was aware of such a risk was an inevitable inference from the trial judge's finding that it knew that the timeframe was "tight".[12] Questband's Mr Anderson agreed that the time for Macquarie to consider whether to lend the money was "tight". Evidence to that effect was also given by Macquarie's Mr Wiltshire. He was not cross-examined upon his statement that at a meeting with Mr Ingles on 1 May 2003 he said words to the effect that Macquarie "couldn't be sure that it could process the deal in time" but "would do our best". When Mr Ingles was asked in cross-examination whether Mr Wiltshire told him that the time would be tight he responded that he couldn't recall.

[36] Questband referred to evidence which suggested that as at 1 May and at all times from then until 23 June, Macquarie and Questband were confident that Macquarie could meet the timeframe for the approval of credit, entry into the Facility, and the advance of the necessary funds for Questband's acquisition of the land, but that does not suggest any error in the trial judge's findings that Questband knew from the outset that time was in short supply and that there was a risk that Macquarie might not be able to provide finance in time.

[37] Despite the known urgency, Questband did not even retain the necessary geotechnical engineer ("Coffey") until 17 June.[13] That was more than three weeks after it entered into the mandate, and even though the mandate expressly referred to the requirement both in clause 1.9.1(iv) and in clause 3.0(l). Questband was undoubtedly responsible for that lengthy and inexplicable delay. It was that delay which resulted in its failure to provide the Coffey report until the afternoon of 20 June, the last business day before settlement of the four land contracts was due.

[38] Questband argued that the trial judge failed to appreciate that the requirement in clause 1.9.1(iv) of the mandate that Questband provide a geotechnical report was expressed only as a proposed condition precedent of any facility agreement, rather than as a condition precedent of Macquarie's obligations under the mandate. The trial judge did refer to non-satisfaction of the conditions precedent in this context,[14] but his Honour also found that a reasonable time for making an offer of finance could not have elapsed until Questband had provided the information required by clause 3 of the mandate.[15] That finding was unremarkable: clause 3.0(l) expressly made the provision by Questband and its guarantors of relevant "consultancy

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10 [2009] QSC 7 at [60], [115], [120].
11 [2009] QSC 7 at [113].
12 [2009] QSC 7 at [111].
13 [2009] QSC 7 at [111], [114].
14 [2009] QSC 7 at [117].
15 [2009] QSC 7 at [115].

reports", including a "geotechnical" report, matters upon which the progress of Questband's application depended. For this projected development, which required the expenditure of millions of dollars of borrowed money on construction, a geotechnical report was obviously a relevant consultancy report for Macquarie to consider.

[39] In the end, the bank officers who approved Macquarie's offer of a facility agreement on 20 June did so in the absence of any geotechnical report. Contrary to another of Questband's arguments, that does not indicate that the absence of such a report was irrelevant to the ascertainment of a reasonable time for a decision by Macquarie. Clause 4.0 of the mandate demonstrated that it was within Macquarie's credit committee's discretion to decide whether it required any such report before it approved of Macquarie offering a facility agreement. The credit committee might dispense with such a report and approve the offer of a loan facility agreement in the knowledge that the provision of such a report would become a condition precedent to any advance under that agreement, but Macquarie was not obliged to adopt that course at any time before its credit committee considered Questband's application for finance.

[40] On this ground alone it is clear that Macquarie did not breach the alleged implied term of the mandate.

Expiry of a reasonable time?

[41] The trial judge also rejected Questband's argument on the alternative basis that, even putting aside Questband's delay in supplying the necessary geotechnical report, a reasonable time for a decision by Macquarie whether to offer finance had not expired before 19 June 2003.[16]

[42] The trial judge found that Questband's unilateral actions in waiving the conditions of the land contract on 22 May 2003 imposed a constraint of time which overlay the making of the loan it sought, in that, whereas Macquarie usually took between six and eight weeks to process an application of this kind, Questband made the contracts unconditional so that settlement would be due within 30 days, thereby putting Macquarie under pressure to perform in a shortened period.[17] Questband argued that the trial judge erred because Questband's conduct in waiving the benefit of the relevant special conditions did not fix the date for settlement as being 23 June 2003 (which was always known by Macquarie and Questband to be the date for settlement under the contracts) but merely made the contracts unconditional and prevented their termination on account of failure of the relevant conditions. That characterisation of the effect of the waiver of the special conditions is accurate and I accept also that some of the trial judge's remarks[18] are open to the construction advocated by Questband, but the point made by the trial judge remained relevant. In considering whether a reasonable time for Macquarie to decide whether to offer finance had expired by 19 June it was material that both parties appreciated from the outset both that the period allowed for organising finance was shorter than that which was usually required and that this was a result of Questband's failure to apply for finance from Macquarie at an earlier time. Questband, as the party responsible for the abridgment of the usual period, would be expected to fulfil its obligations

16 [2009] QSC 7 at [116].
17 [2009] QSC 7 at [116].
18 [2009] QSC 7 at [13], [23].

with particular alacrity so as to ensure that the time allowed to Macquarie to consider Questband's application was not unnecessarily abridged even further.

[43] Questband also made the point that between 1 May (when it first approached Macquarie) and 20 May 2003 Macquarie was in the process of preparing the mandate based upon documents which Questband had supplied on 1 May (in an email from Questband's Mr Anderson to Macquarie's Mr Barnes, which attached a feasibility study for Questband's proposed development). That conclusion is suggested by concessions in cross-examination by Messrs Wiltshire and Barnes to the effect that between 1 and 20 May there were no outstanding requests by Macquarie for information necessary for the preparation of the mandate letter. Questband argued that the trial judge therefore erred in remarking[19] that after Questband obtained a preliminary, positive response from Macquarie on 1 May 2003, "nothing further was done by Questband until 20 May 2003". I accept that the evidence did not justify a finding of undue delay against Questband in this period, but given that Questband did not establish that Macquarie was guilty of any undue delay in the time it took to prepare the mandate this point does not seem to have been significant in the trial judge's conclusion that Macquarie did not breach the alleged implied term.

[44] Questband challenged the trial judge's conclusion[20] that time was lost as a result of Questband's delay until 26 May in accepting the terms of the mandate letter sent to it by facsimile on 22 May. Questband pointed out that a weekend intervened and that a cheque for the payment was required, which could not be returned by facsimile with its executed copy of the mandate. I do not accept that there was any error in the trial judge taking into account Questband's unnecessary delay in accepting the terms of the mandate letter and paying the application fee: part of that delay was unnecessary and that further abridged the unusually short period available for the task.

[45] Questband next challenged the trial judge's findings about various events of delay by Questband in the period between 26 May and 10 June. The trial judge found[21] that although Questband was aware of the requirements of the mandate when it received it on 22 May, Mr Anderson did not begin to respond until 4 June; that he then sent a "group structure diagram" and balance sheets and profit and loss accounts for all corporate guarantors for the previous two financial years, but that was deficient; when Mr Barnes pointed out the deficiency on 6 June, Mr Anderson did not deliver further information until 10 June, and even that was inadequate; and another item of required information, a breakdown of the costs of development, was not given to Macquarie's Ms Degotardi until 12 June in response to a request that she made of Mr Anderson.

[46] The information which Questband provided to Macquarie on 4 June 2003 was described in Questband's letter of that date. It included copies of the purchase contracts, a statement of a current group structure, a consolidated group profit and loss statement and balance for the year ending 30 June 2002 and for the year to 28 February 2003, a statement of the group cash flow budget for the calendar years 2003 and 2004, updated asset and liability statement for Mr Ingles, and the draft development conditions from the Gold Coast City Council concerning Questband's

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19 [2009] QSC 7 at [110].

20 [2009] QSC 7 at [111], [112].

21 [2009] QSC 7 at [114].

proposed development. Questband argued that the trial judge was in error in finding that it delayed in this respect. It argued that Mr Anderson and Mr Ingles were not seriously challenged on their evidence that the preparation of accounts required by the mandate involved a substantial period of time. I cannot accept the argument. The trial judge was well placed to decide that this exercise was not reasonably capable of explaining the delay. Furthermore, Mr Ingles agreed in cross-examination that apart from the financial statements for the year to 28 February and the group cash flow budget for the years 2003/2004, all of the information sought by Macquarie and listed in Questband's 4 June letter could have been sent earlier. Further, he deferred in this respect to Mr Anderson, who was responsible for preparing the necessary material; but contrary to Questband's argument, Mr Anderson did not give evidence which demonstrated that the lengthy delay was required by the time needed for the preparation of the accounts. Mr Anderson's statement suggested that he began collecting and preparing what was required by Macquarie only after he had sent to Macquarie the copy of the mandate signed by Mr Ingles on 26 May 2003. He did not give any other evidence on the present issue, save that in cross-examination he made the concession that the reason why he did not send to Macquarie the individual finance statement for each of the companies within the group was because he decided that it was "better to give a consolidated profit and loss statement". Obviously Macquarie was entitled to receive the material it sought, rather than the material which Mr Anderson decided was appropriate.

[47] Macquarie's letter to Questband of 6 June referred to variances between the information in different documents provided in Questband's letter of 4 June 2003 (concerning the consolidated results of the group, the group structure/corporate tree and a statement of assets from Mr Ingles and associated companies). Macquarie sought other information including copies of financial statements for the year ended 30 June 2002 for all Ingles group entities, asking that this information be forwarded "as soon as possible". The letter also reminded Questband of the necessity to provide further information which had been requested in the mandate on 22 May 2003, specifically referring to "any relevant consultant reports relating to the project which may have been completed (eg environmental, geotechnical, survey etc)." Questband argued that this suggested that Questband was not required to forward reports, for example, geotechnical reports, unless they had already been completed. That is an unlikely construction of the letter in circumstances in which Questband knew that such reports inevitably would be required and time was tight.

[48] Questband also challenged the trial judge's conclusion that even the information provided on 10 June was "inadequate".[22] Questband argued that this was contrary to concessions in cross-examination by Messrs Barnes and Wiltshire that by 10 June they had all which was required to consider whether to provide an offer, but when that proposition was put to Mr Barnes in cross-examination he did not agree. Rather, he responded, "Financial information, yes".

[49] The evidence does support Questband's submission that Macquarie possessed the necessary financial information for preparation of a submission to its credit committee on 10 June, but this is of no moment: although the trial judge found that further information was required after that time (in addition to the outstanding geotechnical report)[23] his Honour also accepted that as at 10 June Macquarie had

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22 [2009] QSC 7 at [114].

23 [2009] QSC 7 at [44], [114].

sufficient information to commence the preparation of the submission and it did then commence that work.[24] For Macquarie, Messrs Barnes and Wiltshire gave evidence that: Mr Barnes completed the preparation of the proposal for application for credit approval on 16 June; that was as soon as it could be done; Mr Wiltshire approved it later on the same day; it was necessary for the application to be approved by six separate bank officers; and the last approval was given on 20 June. The trial judge accepted the relevant evidence of the bank officers, carefully analysed the evidence given for Macquarie about the processes involved and the information supplied to the credit committee members for their consideration (which were both very extensive),[25] and found that Questband had failed to prove that Macquarie took an unreasonable time to perform its contractual obligations.[26]

[50] In light of these findings, regardless of the question whether Questband had been guilty of the particular delays which it put in issue in this appeal I can see no reasonable basis in the evidence for a conclusion that Macquarie had breached the implied obligation alleged by Questband. None was articulated either in Questband's written and oral arguments or amongst the many contentious submissions on the facts and law in the 48 page "chronology" which Questband provided to the Court during the hearing of the appeal.

[51] I would affirm the trial judge's finding that Macquarie was not in breach of the implied term for which Questband contended.

The facility agreement

[52] I have mentioned that Macquarie and Questband entered into the facility agreement in the early evening of 20 June 2003. It provided for a "Project Facility with multiple Advances made or Bank Guarantees issued in accordance with this Agreement where the First Advance is $3,915,000 to be applied to fund the acquisition of the Property and to associated establishment costs." It described the security property and the project in terms which reflected the mandate. It also expressed conditions precedent to the grant of credit in terms similar to those foreshadowed in the mandate. Relevantly, clause 5.1 provided that Macquarie's obligation to make the first advance (to fund Questband's payment of the purchase prices under the four land contracts) was subject to conditions including the receipt by Macquarie of the conditions precedent listed in item 25 of the Schedule "not later than 5 Banking Days (or such lesser period agreed to by the Lender) prior to the Drawdown Date for the First Advance and/or issue of the first Bank Guarantee." The conditions precedent listed in item 25 included:

> "(x) (Geotechnical Report): A geotechnical report from a geotechnical engineer acceptable to the Lender confirming that there are no impediments on the Security Property that could inhibit or delay the Construction Phase of the Project and that the ground structure is suitable for the proposed Project.
>
> …
>
> (xiv) (Certifying Engineer): Confirmation from a certifying engineer acceptable to and acting on behalf of the Lender that the cost of the proposed Construction Phase of the

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24 [2009] QSC 7 at [45].

25 [2009] QSC 7 at [46], [47], [50] – [54], [57].

26 [2009] QSC 7 at [109], [146].

> Project (including demolition and decontamination but excluding contingency and GST) will not exceed the construction cost amount contained in the Feasibility, (based on current prices), or such other costs as the Lender may approve. Further, the certified engineer is to confirm that the Construction Phase of the Project can be completed within the time allowed in the Feasibility,"

[53] Clause 5.5 provided that each document supplied to Macquarie in fulfilment of a condition precedent must be provided at Questband's cost "in a form and substance satisfactory to the Lender and from a consultant acceptable to the Lender in its absolute discretion (in each case)." Clause 35 provided that where any act depended upon the consent or approval of Macquarie, then (subject to an irrelevant exception) the consent or approval "may be given or withheld or given subject to conditions in the absolute discretion of the Lender"; and where any document was to be provided to Macquarie, then (subject to an irrelevant exception) that document must be provided at Questband's cost "in a form and substance satisfactory to the Lender in its absolute discretion."

[54] At 12.49 pm on Friday 20 June Questband sent to Macquarie the geotechnical report Questband had obtained from Coffey. In that report, Dr Shaw wrote:

> "At the request of Ingles Group Pty Ltd, Coffey Geosciences Pty Ltd has prepared an overview of the geotechnical conditions at the above site and provided comment on the Issues relating to proposed residential development of the site.
>
> A Consultant from our Brisbane office visited the site on the morning of 19 June 2003 to carry out a walk-over assessment of the site conditions. No subsurface investigations have been carried out in the preparation of this assessment.
> …
>
> There are no visible rock outcrops and nearby exposures indicate a soil cover of about 600mm over extremely to highly weathered rock. Shallow excavations for bulk earthworks should be feasible using conventional earthmoving equipment but would need to be confirmed by site specific investigations.
> …"

[55] It was common ground that this geotechnical report was not suitable for Macquarie's purposes. That was no criticism of Coffey: as a result of some misunderstanding within Questband, the instructions which Questband's employee gave to Coffey did not require it to carry out any sub-surface investigations. As Questband then should have appreciated, a report produced without sub-surface investigations was unlikely to be satisfactory to Macquarie.[27] The Coffey report provided to Macquarie on 20 June 2003 was unsatisfactory to Macquarie for that reason. Macquarie promptly (at 1.30 pm on the same day) pointed out that no boreholes had been excavated and asked Questband to arrange a second report.[28] Later that day Questband arranged for Coffey to carry out the necessary subsurface investigations, which it undertook to do on the morning of 23 June.

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27 [2009] QSC 7 at [38] – [40], [48] –[49], [59] –[60].

28 [2009] QSC 7 at [61].

[56] In anticipation that Macquarie's credit committee would approve the facility, Macquarie had retained Cardno to prepare a report of the estimated construction costs and timing for the project by Friday 20 June. Macquarie received Cardno's report at 5.58 pm on 20 June. That would have been in sufficient time had the report been satisfactory, but it appeared from its terms that Cardno had not been able to obtain relevant geotechnical information from Questband. In Cardno's report Mr Van der Merwe wrote:

> "As requested we have carried out an analysis of the above development. Our analysis has been **based on the information received from yourself and the Project Engineers, KBR**.[29]
>
> The findings of our analysis are detailed below:
>
> …
>
> SITE CONDITIONS
>
> Due to the time restraint we did not inspect the site as yet. However from our experience on a similar development in close proximity to this site there does not appear to be any **apparent** site conditions likely to have a material effect on the estimated costing. **Feedback from KBR indicate** [sic] that no adverse physical conditions are expected on site.
>
> …
>
> EARTHWORKS
>
> …
>
> **KBR indicated that geotechnical investigations have not yet been done; no evaluation had been done with regard to rock, possible preloading of the site or treatment of Potential Acid Sulphate Soils (PASS). No provision is made in the development estimate for any such costs**.
>
> …
>
> DRAINAGE
>
> …
>
> No allowance had been made in the development estimate for any installation or upgrading of a stormwater system downstream of this development."
>
> [I have added the emphasis.]

[57] It was common ground that this report was not satisfactory to Macquarie. There was a dispute at the trial about when that was communicated to Questband, but neither party challenged the trial judge's finding that at 8.30 am on Monday 23 June, in a conversation between Mr Wiltshire and Mr Ingles, Macquarie conveyed its requirement that Cardno should prepare a revised report which should include a review of the anticipated second Coffey report.[30]

[58] Pursuant to a request by Macquarie, Mr Van der Merwe of Cardno inspected the site on the morning of 23 June and returned to his office by about midday.[31]

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29 "KBR" denoted Kellogg Brown & Root Pty Ltd, which was a consulting engineering firm retained by Questband for various developments.

30 [2009] QSC 7 at [75].

31 [2009] QSC 7 at [76]-[77].

[59] Coffey provided its second report to Questband at 11.05 pm on the same day, but Questband did not pass it on to Macquarie or Cardno. Two hours later, at about 1.05 pm on 23 June, Questband supplied an amended version of it to Macquarie and to Cardno: the reason for that additional delay was that the first version contained an inconsequential typographical error, which someone within Questband or Coffey insisted on having corrected before the report was supplied to Cardno or Macquarie.[32] In the result, the second Coffey report was supplied only four hours before the final time for settlement of the land contracts, and this in the context that the reason why the first Coffey report arrived so late and was unsatisfactory was that Questband had delayed for some three weeks before commissioning it and had then excluded any subsurface investigation from Coffey's retainer.

[60] The second Coffey report noted that excavation test pits were done on 23 June 2003. It stated that four such pits were done at selected locations to assess subsurface conditions, in the presence of a senior geotechnician who was responsible for logging the soil and weathered rock profiles and receiving representative samples of soil and weathered rock. Copies of the engineering logs of the test pits and explanation sheets were attached to the report. Dr Shaw expressed the view that:

> "Shallow excavations for bulk earthworks should be feasible using conventional earthmoving equipment but would need to be confirmed by site-specific investigations. The excavated soils would be suitable for use as engineered fill but may require moisture conditioning due to the relatively shallow groundwater levels over much of the site."

[61] Mr Van der Merwe's evidence was that upon receipt of the second Coffey report he immediately began work to produce his report. Mr Van der Merwe's final report was faxed to Macquarie at 3.59 pm. There was an issue at trial about the three hours Mr Van der Merwe occupied for that purpose, but the trial judge found[33] that not only was three hours not an excessively long time for compilation of the report, it was "remarkably prompt". That was plainly justified by Mr Van der Merwe's evidence. Questband did not argue that the finding should be set aside.

[62] Macquarie very promptly decided at 4.06 pm that it was satisfied with the final Cardno report.[34] In the meantime Macquarie had set about preparing itself for settlement in all other respects, but in accordance with its usual procedure it could not issue the cheques for settlement until the final condition precedent was satisfied at 4.06 pm. The cheques were then drawn without delay,[35] but Macquarie was unable to transport the cheques to the Gold Coast office where settlement was due in time for settlement.

[63] The trial judge found that, assuming that Macquarie was obliged to act reasonably or within a reasonable time with respect to its decision to make the advance, the evidence did not show that Macquarie had not acted reasonably, or within a reasonable time, in making that decision.[36] The trial judge's reasons for that conclusion, so far as they concern the issues in this appeal, may be summarised as follows:

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32 [2009] QSC 7 at [79]-[81], [133].
33 [2009] QSC 7 at [84].
34 [2009] QSC 7 at [90].
35 [2009] QSC 7 at [93].
36 [2009] QSC 7 at [134].

(a) It was Questband's extraordinary and unexplained delay in obtaining the first Coffey report which prevented the issue of cheques in time for settlement.[37] Coffey could easily have been retained earlier than 17 June; it could have been told what was required by the relevant condition precedent when it was retained (rather than being instructed, without approval by Macquarie, to provide a brief report based on a "walk over inspection and published geological data", with no subsurface investigation);[38] and it was extraordinary that Questband did not provide to Macquarie an acceptable geotechnical report until 1.00 pm on the day of settlement.[39]

(b) On the evidence there was insufficient time from receipt of the second Coffey report for Cardno to consider it and for Macquarie to have the cheques drawn in time for settlement.[40]

(c) Macquarie's requirement that the Coffey report be considered by Cardno, communicated to Questband on the morning of 23 June, was not unreasonable and indeed was to be expected if the Cardno report was to have any value at all.[41]

(d) In circumstances in which the facility agreement was executed in the early evening of 20 June and by 4.00 pm the next working day Macquarie had obtained the requisite reports, considered them, approved the advance and drawn the cheques, and where the facility agreement did not usually require such things to be done in fewer than five working days, it was impossible to characterise its conduct as dilatory.[42]

Questband's arguments

[64] Questband's arguments in the appeal focussed upon the last two points. Questband referred to the fact that the facility agreement did not expressly require that Macquarie's engineer consider the geotechnical report which Questband was obliged to provide. It argued that Macquarie was required to act with particular diligence in circumstances in which it entered into the facility agreement with Questband late on Friday 20 June knowing that settlement was scheduled on Monday 23 June (initially for 3.30 pm), and that the second Coffey report required by Macquarie required test pits which were to be dug on Monday morning, with Coffey's second report available later on Monday; that in a context in which, under this substantial proposed transaction, Macquarie had made a conditional promise to advance the money required by Questband to complete the acquisition of the land, Macquarie was obliged to obtain the Cardno report and to inform Questband of any information requirements it had in relation to obtaining that report in time to decide whether or not the engineering condition was satisfied and then proceed to settlement; and that in these circumstances Macquarie could not reasonably wait until Monday morning to impose its requirement, and inform Questband and Cardno of its requirement, that Cardno inspect the site and consider the anticipated, second Coffey report.

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37 [2009] QSC 7 at [143].
38 [2009] QSC 7 at [48].
39 [2009] QSC 7 at [135].
40 [2009] QSC 7 at [140].
41 [2009] QSC 7 at [135].
42 [2009] QSC 7 at [136].

[65] In Questband's written submissions in reply, and in oral argument at the hearing of the appeal, it advanced as its core propositions the contentions that Macquarie breached the implied terms in failing to act reasonably by imposing for the first time on the morning of Monday 23 June the new requirement that Cardno consider the geotechnical report and without:

(a) earlier communicating that to Questband or Cardno;

(b) stating to Questband the time by which the proposed geotechnical report would have to be with Cardno to allow for the consideration of it and the consequential amendment of its first report.

Implied terms of the facility agreement?

[66] I earlier set out the trial judge's summary of the relevant principles concerning the implication of contractual terms. It is relevant to note here that the trial judge also formulated the following principle, which I understood to be uncontentious:[43]

> "When the terms of a contract confer upon one of the parties to it an absolute or unfettered discretion to do or refrain from doing an act the term must be given effect and the words conferring the discretion their full force. *Murphy v Zamonex Pty Ltd* (1993) 31 NSWLR 439; *Australian Mutual Providence Society v 400 St Kilda Road Pty Ltd* [1991] 2 VR 417. The conferral of an absolute discretion on a party to a contract excludes an obligation to act reasonably in the exercise of the discretion. *Vodafone Pacific Ltd v Mobile Innovations Ltd* (2004) NSWCA 15 para 195."

[67] The trial judge accepted that Macquarie was obliged to co-operate and to do what was within its power to give Questband the benefit of what Macquarie promised.[44] The trial judge also accepted that it might be possible to imply a term that Macquarie would act within a reasonable time to express its satisfaction or dissatisfaction with Cardno's report.[45] The trial judge went on to find, however, that Macquarie could not be found to have breached any such implied term to the extent that it obliged Macquarie to express its satisfaction before it had an engineer's report with which it was in fact satisfied.[46] That was a consequence of the express terms of the facility.

[68] The second alleged implied term of the facility agreement was that Macquarie was obliged to use its best or reasonable endeavours to obtain the information it required from its consultant engineer in sufficient time to permit it to make an advance to Questband to complete Questband's contracts to buy land for development. The third alleged implied term was that Macquarie was obliged to make reasonable endeavours to make the advance available to Questband to allow it to complete those land contracts and, in particular, to provide funds to Questband in sufficient time at Southport before 5.00 pm on 23 June 2003. The trial judge dealt with those terms together, on the footing that their effect was that Macquarie was obliged to use its best or reasonable endeavours to obtain the engineer's report in sufficient time to effect settlement and to make reasonable endeavours to make the advance in time for settlement.[47] The trial judge held that those terms contradicted the express

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43 [2009] QSC 7 at [102] (6).

44 [2009] QSC 7 at [123].

45 [2009] QSC 7 at [129].

46 [2009] QSC 7 at [129].

47 [2009] QSC 7 at [128].

terms under which any loan was subject to receipt of a satisfactory engineer's report, as to which Macquarie had a complete discretion whether or not to be satisfied; and that the implied terms curtailed the contractual discretion conferred on Macquarie to consider the report and decide whether it should make the advance.[48]

[69] There is, in my respectful opinion, much to be said in favour of that view. I note in this respect that clause 5.1(ii) made Macquarie's obligation to lend the money conditional upon fulfilment of those conditions precedent "not later than 5 banking days (or such lesser period agreed to by the Lender) prior to [23 June 2003]". The facility agreement did not impose any qualification upon Macquarie's unfettered discretion whether to agree to abridge the usual minimum period of five banking days. Questband submitted that this must have been superseded by the circumstance that the facility agreement was made on the last business day before the date for settlement, but the contrary view is certainly arguable in circumstances in which it was Questband's delays which had led to the predicament in which the parties found themselves.

Breach of the implied terms of the facility agreement?

[70] In the end I have thought it unnecessary to resolve those questions. Assuming in Questband's favour that the facility agreement contained the alleged implied terms the trial judge's finding that Macquarie did not breach any such term was clearly correct.

[71] On any reasonable view of the evidence it was Questband's unreasonable delay in fulfilling its obligation to provide a satisfactory geotechnical report until about 1.05 pm on the day of settlement which occasioned the delay in Macquarie's receipt of a satisfactory engineering report, and thus the failure to satisfy the conditions precedent in sufficient time to allow settlement of the four land contracts. Questband could not explain why it did not retain Coffey earlier than 17 June or why it failed to instruct Coffey in terms which would undoubtedly produce a satisfactory report. That occurred in circumstances in which Questband knew that the timeframe for obtaining finance was "tight" and where it had known since its receipt on 22 May of the mandate letter (under cover of a facsimile transmission marked "urgent") that provision of a satisfactory geotechnical report would be a condition precedent of any advance under the proposed loan facility. It was Questband which created the problem that arose on 23 June.

[72] In support of the proposition that Macquarie should have flagged its requirement for Cardno to consider the Coffey report earlier than the morning of 23 June, Questband referred to a variety of matters which were said to support the reasonableness of its initial view that subsurface investigations might not be required: the presence of widely published data about the area, the fact that it was common for engineers to provide reports on assumptions about geotechnical conditions, the presence of satisfactory geotechnical conditions on nearby sites, and the absence of any express requirement in the mandate or facility agreement or in any statement before 23 June by Macquarie for subsurface investigations or for Cardno to consider the geotechnical report.

[73] This submission forms no basis for setting aside the trial judge's finding that Macquarie's requirement for review by Cardno of the Coffey report was to be

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48 [2009] QSC 7 at [129], [130].

expected. There was ample evidence which supported that finding. As Mr Wiltshire made plain in cross-examination, Macquarie would not assume from the absence of rock in the vicinity of the security property that there would not be rock on the security property itself. A subsurface investigation was required for that purpose, and Macquarie would hardly be expected to consider a geotechnical report of such an investigation without the assistance of its retained engineer. The engineer's report described in item 25(xiv) of the facility agreement was to consider the projected construction costs and feasibility. Mr Van der Merwe gave evidence about the relevance of the sub-surface investigations in these respects. It is sufficient here to refer to the trial judge's summary of that evidence:[49]

> "…He explained that his task involved an examination of the recorded observations from the excavation pits which was 'the most important part of the information' contained in the report. He had to relate the information to the location of the pits on the site to make an assessment of the subsurface conditions which might impact upon the engineering works for the subdivision. He explained that he had to relate the capacity of the machine used to dig the pits to the capacity of machines which would be engaged in the subdivisional engineering works to assess whether those machines could remove the rock encountered on the site. He had also to make an assessment of the suitability of the material for fill to 'take this information in the report back to the design and ... my cost estimate and see whether this information provided might have an impact on the cost..."

[74] Furthermore, Mr Ingles said in cross-examination that he understood that the purpose of the obtaining of a geotechnical report was to "ensure that there was not large quantities of rock in the ground which could cause construction - extra construction costs." He agreed that the geotechnical report might allow the funder to work out how much the development would cost, "given what we know is below the ground after reading a geotechnical report". Mr Anderson gave the evidence that the presence of certain kinds of rock might render the necessary excavation work for the development more expensive.

[75] Mr Wiltshire acknowledged the absence of any express requirement that Macquarie's engineer review the geotechnical report, but he explained that in order for Macquarie's engineer to do its job properly it needed to be cognisant of issues thrown up by the geotechnical report; otherwise there was no point to the engineer's report from a risk analysis perspective. He gave evidence in cross-examination to the effect that it was a common occurrence that a geotechnical report be given to the cost engineer and he expected that that would occur without any specific requirement. The trial judge was entitled to accept and act on this evidence.

[76] Even putting that to one side, where Macquarie did not receive the unsatisfactory, first geotechnical report until 12.49 pm on 20 June and it did not receive the unsatisfactory, first engineering report until after ordinary business hours on the same day, at 5.58 pm (when none of the relevant decision makers might have been in the office), there was plainly no unreasonable delay in Macquarie's decision and communication of its decision at 8.30 am on the very next business day, 23 June, that the engineering report was not satisfactory to Macquarie because of the absence of reference to the information which would appear in a satisfactory geotechnical report.

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49 [2009] QSC 7 at [81].

[77] Questband was disposed to argue that its delays should be disregarded because they were relevant only to causation, which was not in issue at this trial. That distracts attention from the unshakeable findings of fact which plainly demonstrate that a reasonable time for fulfilment of Macquarie's obligations had not expired before 5.00 pm on 23 June. In summary: both parties appreciated from the outset that the overall timetable was tight; the facility agreement reflected the usual allowance of a minimum of five banking days for the processes under that agreement, but for reasons outside Macquarie's control the time available was compressed to one banking day; further delay outside its control then resulted in the supply of a satisfactory, important geotechnical report for consideration and report by Macquarie's engineer being delayed until just four hours before the last time for settlement; as a result, Macquarie received the engineer's report only one hour before the last time for settlement; after that Macquarie was entitled to a reasonable time to consider the geotechnical and engineering reports, to decide to advance the money, and to convey the necessary cheques from Brisbane to the Gold Coast; and even then, Macquarie fell short by only a very small margin.

[78] In my opinion, the trial judge's finding that Questband failed to prove that Macquarie breached the alleged implied obligations was plainly correct.

Orders

[79] I would dismiss Questband's appeals with costs.

[80] **PHILIPPIDES J:** I agree with the reasons for judgment of Fraser JA and the order proposed.