Court of Appeal
New South Wales

Case Title:	Summer Hill Business Estate Pty Ltd v Equititrust Ltd
Medium Neutral Citation:	[2011] NSWCA 149
Hearing Date(s):	18 May 2011
Decision Date:	16 June 2011
Jurisdiction:	
Before:	Campbell JA at [1] Macfarlan JA at [2] Young JA at [45]
Decision:	Appeal dismissed with costs. *[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]*
Catchwords:	CONTRACT - election - whether by providing account statements to borrowers debiting interest at lower contractual rate and accepting payments of that interest lenders made unequivocal election to charge interest at lower rather than higher rate. ESTOPPEL - promissory estoppel - whether lender's conduct in respect of two loan facilities was capable of inducing borrowers to form assumption that lender would not charge interest at higher contractual rate in

respect of other facilities.

Legislation Cited:

Cases Cited:
Agricultural & Rural Finance Pty Ltd v Gardiner [2008] HCA 57; (2008) 238 CLR 570
Haynes v Hirst (1927) 27 SR (NSW) 480
Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW) [1993] HCA 27; (1993) 182 CLR 26
Pinnel's Case (1602) 5 Co Rep 117a; 77 ER 237
Waltons Stores (Interstate) Ltd v Maher [1988] HCA 7; (1988) 164 CLR 387

Texts Cited:
Fisher & Lightwood's Law of Mortgage, 2nd Australian Edition

Category:
Principal judgment

Parties:
Summer Hill Business Estate Pty Ltd (First Appellant)
West Apartments Pty Ltd (Second Appellant)
Demian Constructions Pty Ltd (Third Appellant)
Shimden Pty Ltd (Fourth Appellant)
CTP Pty Ltd (Fifth Appellant)
Tramdell Pty Ltd (Sixth Appellant)
C A R Holdings Pty Ltd (Seventh Appellant)
Demian Holdings Pty Ltd (Eighth Appellant)
Riverland Estate Pty Ltd (Ninth Appellant)
Demian Investments Pty Ltd (Tenth Appellant)
Belgrave Holdings Pty Ltd (Eleventh Appellant)
Equititrust Ltd (Respondent)

Representation

- Counsel:
Counsel:
M Ashhurst SC/M J Dawson (Appellants)
R Derrington SC/J A N Hogan-Doran (Respondent)

- Solicitors:	Solicitors: Blackstone Waterhouse (Appellants) Tucker & Cowen (Respondent)
File number(s):	CA 2010/283982
Decision Under Appeal	
- Court / Tribunal:	
- Before:	Pembroke J
- Date of Decision:	30 July 2010
- Citation:	Summer Hill Business Estate Pty Ltd v Equititrust Ltd [2010] NSWSC 776
- Court File Number(s)	SC 2010/67275
Publication Restriction:	

Judgment

1 **CAMPBELL JA** : I agree with Macfarlan JA.

2 **MACFARLAN JA** :

Nature of Case and Conclusions

3 In the period 13 July 2006 to 26 September 2007, the respondent ("Equititrust"), as Lender, entered into five Credit Facility Deeds, each with one of the appellants as borrower ("the Borrowers"). The Deeds provided for the lending to the Borrowers for commercial purposes of amounts totalling in excess $20 million. With one limited exception, the Deeds were relevantly in the same terms. The Borrowers were companies that were

each owned and controlled by Mr Charbel Demian who was an experienced businessman.

4 The credit facilities for which the Deeds provided were cross-collateralised and performance of the Borrowers' obligations was supported by guarantees and securities. The amounts lent have all been repaid but, in the case of each of the facilities, that did not occur until after the date fixed for repayment. The terms of the facilities varied between six and 12 months.

5 The Borrowers and various guarantors brought proceedings in the Equity Division of the Court to resolve a dispute that they had with Equititrust concerning the amount of interest that Equititrust was entitled to charge under three of the facilities. Equititrust contended that, from the due date for repayment of each of the facilities until repayment, it was entitled to charge interest at a rate described in the Deeds as the "Higher Rate". That rate was 6% per annum higher than the rate (described in the Deeds as the "Lower Rate") that was payable if the relevant Borrower was not in default.

6 The Borrowers contended that Equititrust had made an election that precluded it from charging interest at the Higher Rate, or alternatively, that Equititrust was estopped from charging interest at that rate.

7 The primary judge found that Equititrust was not so precluded and estopped and, for the reasons that I give below, I have concluded that the Borrowers' challenges on appeal to these conclusions fail. As a result, I consider that the appeal should be dismissed with costs.

The Terms of the Credit Facility Deeds

8 The relevant terms of the Deeds are set out below. The only difference between the terms of the Deeds (other than those as to amounts lent,

interest rates and the like) was that only one of the Deeds contained Clause 3.10, which is set out below.

> **1. Definitions and Interpretation**
>
> 1.1 In this Credit Facility Deed, unless the context indicates otherwise requires (sic);
>
> ...
>
> (5) **"Event of Default"** means the events set out in clause 8 of this Credit Facility Deed;
>
> ...
>
> (9) **"Higher Rate"** means the rate of interest stipulated in Item 6;
>
> (10) **"Lower Rate"** means the rate of interest stipulated in Item 7 as varied from time to time in the letter of offer between the Lender and the Borrower for the current term:
>
> (11) **"Loan Amount"** means that sum specified in Item 4 (and includes all further advances or re-advances, if any, made by agreement of the Lender and the Borrower under this Credit Facility Deed);
>
> (12) **"Money Secured"** includes:
>
> (a) the Loan Amount;
>
> (b) all money now or hereafter owing or payable to the Lender by the Borrower, and/or the Security Provider either alone or jointly with another person now or in the future, whether directly or indirectly or contingently under this Credit Facility Deed or on any other account whatsoever, and including all such money arising from:
>
> (i) any guarantee, deed, indemnity, bond, account, document or other agreement in writing including the Security;
>
> (ii) interest payable on the Money Secured including interest which has been capitalised;

(iii) interest on any judgment entered by the Lender against the Borrower, and/or the Security Provider in respect of the Money Secured;

...

3. Repayments

3.1 The Borrower will pay to the Lender the total amount outstanding of the Money Secured on the date stipulated in Item 5 or such other day as agreed in writing by and between the parties hereto.

3.2 Interest under this Credit Facility Deed shall be calculated on the Money Secured or on so much thereof as remains outstanding and upon any judgment or order in which the liability of the Borrower under this Credit Facility Deed may become merged at the Higher Rate in accordance with the provisions of this clause 3.2. Such interest will be:

(1) computed from the date on which the Lender makes the first advance on account of the Money Secured (that being the date on which the Lender allocates funds at the request of the Borrower);

(2) calculated and charged on the daily outstanding balances to the Borrower's account with the first such payment of interest being payable on the date and in the manner set out [in] Item 8 on account of the Money Secured with subsequent payments being due and payable on the days and in the manner referred to in Item 8 whilst the Money Secured or part thereof remains outstanding; and

(3) if an Event of Default occurs, such interest shall be added to the Money Secured and thereafter such capitalised interest shall bear interest at the Higher Rate determined in accordance with this clause 3.2.

...

3.4 If the Borrower:

(1) on every day which interest is payable under this Credit Facility Deed or any Security, pays to the Lender interest on the Money Secured or so much thereof as shall from time to time remain unpaid under this Credit Facility Deed at the Lower Rate; and

(2) duly observes and performs all the terms, covenants and conditions contained in and implied by this Credit Facility Deed;

then the Lender shall accept payment of the interest calculated and charged at the Lower Rate for every such instalment of interest payable under this Credit Facility Deed.

...

3.10 The Borrower agrees that the Lender may in its discretion increase the interest loan provision and/or recapitalise interest at anytime. In that event, shall be entitled to charge an establishment fee in respect of the loan increase of 1.50%.

...

8. Events of Default

The Borrower and each Security Provider who is a party to this Credit Facility Deed shall at the option of the Lender be immediately in default without the necessity for any notice or demand upon the occurrence of any of the following events of default:

(1) the Borrower and/or the Security Provider fails or neglects to pay on the due date for payment any part of the Money Secured, or any interest or other moneys payable at the time and in the manner provided by this Credit Facility Deed or under any Security; or

(2) the Borrower and/or the Security Provider fails or neglects to observe or perform any of the covenants, conditions or agreements contained in this Credit Facility Deed or any Security; or

...

9. Rights Upon Default

9.1 At any time after the occurrence of an Event of Default, at the discretion of the Lender, the Money Secured will be immediately become payable.

9.2 At any time after the occurrence of an Event of Default the Lender may in the manner and at the times the Lender in its absolute discretion deems appropriate but without any obligation to do so:

(1) appoint a manager to manage the default on behalf of the Lender who may in its absolute discretion take such action it deems appropriate;

(2) appoint a Receiver of the Mortgaged Property or the Borrower or any Security Provider;

(3) exercise any powers rights or privileges conferred by law, this Credit Facility Deed, the Security and/or any other collateral document or securities;

...

The Lender may exercise its rights under this clause notwithstanding any omission neglect delay or waiver of the right to exercise such option and without liability for loss.

...

12. No Waiver

Notwithstanding any provision contained in this Credit Facility Deed or any rule of law or equity to the contrary, the granting of any time or any other indulgence by the Lender to the Security Provider or Guarantor in relation to any existing or future default under any Security or this Credit Facility Deed shall not be deemed a sanction or waiver of any continuing or recurring breach nor shall the Lender's right to exercise its rights under the Security or this Credit Facility Deed at any subsequent time be effected or diminished by the grant of time or any other indulgence.

...

27 General

...

27.2 This Credit Facility Deed and the Security embody the entire agreement between the parties in relation to the advance under this Credit Facility Deed and supersedes all prior negotiations, agreements, arrangements and understanding with respect to such advance.

...

SCHEDULE

...

Item 6.

Higher Rate: the prevailing lower rate of interest plus 6% per annum.

Item 7.

Lower Rate: Initially ...% per annum and then as specified in the Letter of Offer for the current term.

...

Item 14.

Special Covenants:

At the expiration of the term, if the Borrower has not repaid on the due date, a fee of ...% per annum of the outstanding balance pro-rated and charged monthly is due and payable by the Borrower, and if not paid on demand then the net amount shall be a debt due and owing under the Mortgage. This clause shall not be deemed to be consent by the mortgagee for a further extension of the term and shall not prejudice the rights of the mortgagee in any respect including the charging of default interest.

The Judgment at First Instance

9 The primary judge referred to the Borrowers' case of estoppel as being a paradigm case of promissory estoppel in which the "defendant is alleged to have made a representation to the plaintiffs, by words and conduct, justifying an assumption by the plaintiffs that the defendant would not exercise or insist upon its existing legal rights" (Judgment [41]). His Honour then said:

"41. ... The well developed principles governing this type of estoppel are set out in *Legione v Hateley* (1983) 152 CLR 406; *Waltons Stores (Interstate) Ltd v Maher* (1988) 164 CLR 387; *Giumelli v Giumelli* (1999) 196 CLR 101.

> 42. On the facts of this case, these well developed principles require consideration of three primary requirements. First, the words or conduct of the defendant must be clear and unambiguous: *Legione v Hateley* 152 CLR 406 at 435-437. Second, the conduct of the plaintiff in relying to its detriment on those words or that conduct must be reasonable: *State Rail Authority (NSW) v Heath Outdoor Pty Ltd* (1986) 7 NSWLR 170; *Legione v Hateley* (1983) 152 CLR 406. Third, the defendant must know or intend that the plaintiff will act or abstain from acting in reliance on those words or that conduct: *Franks v Equitiloan Securities Pty Ltd* [2008] NSWSC 33 at [72] per Brereton J."

10 The primary judge summarised his conclusions on this aspect of the case as follows:

> "44. For the reasons that follow, I have concluded that all of the necessary features of an equitable promissory estoppel are absent in this case. The defendant's conduct was not clear and unambiguous; the plaintiffs' reliance was not reasonable; the defendant had no reasonable expectation that its words or conduct would induce some detrimental reliance by the plaintiffs; and the commercial reality and inherent probabilities are against the plaintiffs. Even more fundamentally, I am not satisfied that Mr Demian held and maintained the assumption that is the foundation of the plaintiffs' case. ..."

11 The primary judge's conclusions as to election were as follows:

> "93. In my view, the circumstances of this case do not give rise to an election. The conduct relied upon was not unequivocal in the sense of being consistent only with the exercise of one of two sets of rights and inconsistent with the exercise of the other: *Sargent v ASL Developments Ltd* (1974) 131 CLR 634 at 646.
>
> 94. The contractual terms expressly contemplated, and absolved the defendant [that is, Equititrust] from the consequences of, any indulgence, omission, neglect, delay, waiver or failure to exercise a right. The defendant was not making a choice to charge the Lower Rate of interest and to abandon its entitlement to the Higher Rate. Further, it made its position pellucid in the loan statements which it issued to the Borrower. ... In my view, Mr Demian well understood this, despite his protestations that he did not read the reservation of the defendant's right to charge default interest that appeared on the statements. ..."

12 His Honour also rejected the Borrowers' construction argument to which I refer immediately below (Judgment [81]-[91]).

The Construction Argument

13 The Borrowers conceded on appeal that unless they were successful on an argument that they put concerning the proper construction of the Deeds, their election argument could not succeed (Appellants' Amended Submissions [3.15]). I shall deal with that construction argument first, followed by the election argument.

14 The Borrowers' construction argument was that references to "default interest" in the Special Covenant in Item 14 of the Deeds and in certain account statements provided by Equititrust to the Borrowers' accountants were to the interest to which Clause 3.2(3) of the Deeds referred and not to interest at "the Higher Rate" referred to in the first sentence of Clause 3.2. The primary judge rejected this argument on the basis that there was no distinction between the interest referred to in the two provisions: that referred to in the former was the same as the "interest" at the "Higher Rate" referred to in the latter (see Judgment [81]-[86]). I agree with this view for the following reasons.

15 By reason of its definition in Clause 1.1(12), the expression "Money Secured" in the first sentence of Clause 3.2 included "interest payable on the Money Secured including interest which has been capitalised" (see (b)(ii) of the definition). Thus if a Borrower did not make an interest payment when it was due, the amount of the interest due (calculated at the Higher Rate because the payment was not made when due) was required to be added immediately to the Money Secured, upon which interest would accrue (again at the Higher Rate as the Borrower would not have complied with the conditions stated in Clause 3.4 entitling it to be charged interest at the Lower Rate).

16 Application of Clause 3.2(3) led to the same result. If an "Event of Default" occurred, the interest not paid was to be immediately "added to the Money Secured". However the inclusion in the definition of "Money Secured" of "interest payable on the Money Secured including interest which had been

capitalised" had this effect anyway. Pursuant to Clause 8(1), an "Event of Default" would occur if a Borrower failed to make an interest payment on the due date (subject to the argument to which reference is made below at [23(c)] concerning the need for the exercise of an option).

17 Clause 3.2(3) then provided that "such capitalised interest" was to bear interest at the Higher Rate. Again this was also the effect of applying the earlier parts of Clause 3.2 and the definition of the Money Secured.

18 The two parts of Clause 3.2 thus had the same effect and a reference in the Special Covenant in Item 14 and the account statements to "default interest" was not to a type of interest different from that for which Clause 3.2 (excluding Clause 3.2(3)) provided. The expression "default interest" was apt to describe interest charged at the Higher Rate because the Borrowers' failure to meet the conditions in Clause 3.4 disqualified them from entitlement to the Lower Rate, whether that result was attributed to Clause 3.2 excluding sub-clause (3), or to Clause 3.2(3).

19 The Borrowers argued that such an interpretation of Clause 3.2 could not be correct because the Court had to give separate operation to each provision of the Deeds and ought not to treat two provisions as duplicating each other. It is true that the Court does incline towards a construction that gives each provision separate work to do. However, if two provisions are unambiguous, as I consider the subject ones to be, the Court should give them their ordinary meaning even if it results in duplication. It is not unusual for commercial agreements to contain provisions that are surplusage. That may occur for a variety of reasons. For example, as is perhaps the case here, one party may have wished to make doubly sure that a provision that was important to it was put beyond doubt. In any event, the present is not a case of surplusage but of overlap as Clause 3.2(3) is not confined in its operation to defaults in interest payments

20 In oral argument on the appeal, the Borrowers submitted that the effect of Clause 3.2(3) was to render payable an amount of interest additional to

that which would have been payable as a result of the application of the remainder of the Clause (together with the definition of "Money Secured"). They said that this was so because application of Clause 3.2(3) resulted in the amount of interest not paid when due being capitalised one day earlier than would have been the case if the remainder of the Clause had applied. However, I do not consider that there is any difference in the time at which capitalisation occurs. In each case it occurs immediately upon the default in the making of the interest payment. I accordingly reject the argument.

The Election Argument

21 The Borrowers' election argument was that Equititrust made an unequivocal election to charge interest at the Lower Rate, rather than the Higher Rate, by providing account statements to the Borrowers debiting interest only at the Lower Rate and by accepting payments of that interest. The Borrowers argued that Equititrust's rights to charge interest at the Higher and Lower Rates were inconsistent rights and that the common law principle concerning election between alternative rights or remedies (see *Agricultural & Rural Finance Pty Ltd v Gardiner* [2008] HCA 57; (2008) 238 CLR 570 at [58]) precluded Equititrust from charging interest at the Higher Rate after it had made an unequivocal election to charge only at the Lower Rate.

22 The account statements in question contained the following note at their foot:

> "This is a statement of transactions only and does not show a payout figure or default interest calculations".

23 The Borrowers submitted that for the following reasons this note did not amount to a reservation by Equititrust of its rights that deprived Equititrust's conduct of the character of an unequivocal election:

(a) The words "default interest" in the note referred to the interest for which Clause 3.2(3) of the Deeds provided and were not apt to describe interest at the Higher Rate charged in accordance with the remainder of Clause 3.2.

(b) Clause 3.2(3) was conditioned upon an "Event of Default" occurring.

(c) By reason of the opening words of Clause 8, an Event of Default could not have occurred unless Equititrust exercised its option conferred by that clause to hold the Borrowers in default.

(d) As Equititrust did not exercise that option, it was not entitled to "default interest" under Clause 3.2(3).

(e) As a result, the note on the account statements did not purport to preserve Equititrust's right to charge interest at the Higher Rate. It only applied to a different type of interest, namely "default interest" charged under Clause 3.2(3). This was not the type of interest in dispute in the proceedings because Equititrust had not exercised the option referred to in Clause 8.

24 This submission cannot be accepted because I have concluded earlier that there is no difference between the interest to which Clause 3.2(3) refers and that to which the remainder of Clause 3.2 refers. Accordingly, the notes contained in the account statements were apt to refer to the interest charged at the Higher Rate that was in issue in the proceedings.

25 As pointed out in [13] above, on the appeal the Borrowers accepted that if the Court reached this conclusion, it would follow that Equititrust had not unequivocally elected to charge the Lower, rather than the Higher, Rate, because Equititrust had expressly reserved the right to later claim interest at the Higher Rate. It follows that the Borrowers' election argument fails.

26 That concession was appropriately made because, as I indicate at [30] below, Equititrust's rights were not inconsistent. If they had been inconsistent, a reservation of rights would likely have been ineffective

because the outright exercise of one such right usually constitutes an election not to exercise the other, whatever reservation might have been made (see *Haynes v Hirst* (1927) 27 SR (NSW) 480 where a party unsuccessfully sought to "protect himself against the legal consequences of his acts by stating that he [did] them without prejudice" (at 489)). If the time has not arrived at which a party is confronted with the need to choose between two inconsistent rights, it may keep its position open by refraining from engaging in conduct that unequivocally indicates that it has made a choice between them (see *Immer (No 145) Pty Ltd v Uniting Church in Australia Property Trust (NSW)* [1993] HCA 27; (1993) 182 CLR 26). If there has not been any outright exercise of one of the rights, reservations by a party of its rights may assist in depriving its conduct of the necessary unequivocal character.

27 The submission referred to in [23] above also fails for the following further reasons.

28 First, the occurrence of an "Event of Default" within the meaning of that expression in Clause 3.2(3) did not in my opinion depend upon the exercise by Equititrust of the option referred to at the commencement of Clause 8. This was so because an "Event of Default" was defined in Clause 1.1(5) to mean "the events set out in clause 8". The definition did not suggest that Equititrust needed to exercise an option for one of the events listed in Clause 8 to be characterised as an "Event of Default". The failure to make an interest payment when due was one of the events listed Clause 8 (see Clause 8(c)(i)).

29 Secondly, if (contrary to my view) the characterisation of a failure to make an interest payment when due as an "Event of Default" was dependent on the exercise by Equititrust of an option to hold the Borrowers in default, Equititrust exercised that option. It did so at least by means of charging the Borrowers Loan Expiry Fees pursuant to the Special Covenant contained in Item 14. That Covenant provided that that fee was only chargeable if "[a]t the expiration of the term, ... the Borrower has not repaid on the due

date". Failures to repay on the due dates were clearly defaults by the Borrowers. Equititrust's decision to charge Loan Expiry Fees to the Borrowers necessarily indicated that Equititrust was treating the Borrowers as in default because it was only if the Borrowers were in default that Equititrust was entitled to charge the Loan Expiry Fees.

30 A further reason that the Borrowers' election argument fails is that, by charging interest at the Lower Rate, Equititrust did not exercise a right that was inconsistent with its rights to charge interest at the Higher Rate. Equititrust's conduct amounted to the charging (and acceptance of payment of) a part, rather than the whole, of the interest debt. That conduct did not of itself preclude Equititrust from subsequently claiming the balance as it has long been established that acceptance of part payment of a debt does not, without more, satisfy the whole of the debt (*Pinnel's Case* (1602) 5 Co Rep 117a; 77 ER 237). The common law doctrine of election did not therefore apply here because Equititrust's claim for, and acceptance of payment of, the lesser amount of interest was not inconsistent with its later claim for a greater amount. This is not to say that some other principle of law such as estoppel might not in some circumstances preclude a creditor's later claim but that depends on other considerations to which, in relation to estoppel, I will turn later.

31 For these reasons the common law doctrine of election did not protect the Borrowers from Equititrust's claim for interest at the Higher Rate.

The Estoppel Argument

32 At first instance the Borrowers contended that Equititrust's conduct led them to make the following assumption:

> "That [Equititrust] would accept payment of interest calculated at the Lower Rate notwithstanding the expiry of the initial term of a loan facility, provided such interest was paid in a timely manner and [the Borrowers] paid a Loan Expiry/Extension Fee".

33 Whilst Equititrust argued that on appeal the Borrowers sought to rely upon a materially different assumption, it seems to me that in substance the Borrowers adhered to this contention on appeal. However, as the primary judge pointed out (Judgment [45]) Mr Demian, who gave evidence on behalf of the Borrowers, did not give clear evidence that he, and therefore the Borrowers, made this assumption. What Mr Demian said was that Equititrust led him to believe that Equititrust "continued to offer the various facilities to the [Borrowers] until at least July 2010 without any charge for default interest because of the expiry of [the] facilities" (Affidavit of 27 April 2010 at [7]). This evidence did not, at least in terms, suggest that Equititrust at any stage promised not to charge interest at the Higher Rate. Rather, it was framed as an explanation for what Equititrust did in fact do.

34 Mr Demian listed a number of matters that he indicated that he "took ... into account" in forming the belief to which he deposed.

35 One of these was a conversation in which Mr Demian asserted that an officer of Equititrust told him that after the facility expiry dates Equititrust would only charge the Loan Expiry Fee (referred to in the Special Covenant in Item 14) and would not charge "default interest". The primary judge rejected Mr Demian's evidence of this conversation and also that of a conversation to similar effect that Mr Demian included in his list and said occurred in June 2009 (Judgment [51]-[54]).

36 On the appeal the Borrowers did not challenge these rejections. As Mr Demian had not given evidence that the other matters that he listed independently gave rise to his asserted belief, the Borrowers were left without any evidence that the conduct of Equititrust led them to form a relevant belief. This result is fatal to the Borrowers' estoppel argument as an essential element of a promissory estoppel is that the party claiming the benefit of the estoppel must have been induced by the other party to adopt a particular assumption or expectation on which the former acted to its detriment (see for example, *Waltons Stores (Interstate) Ltd v Maher* [1988] HCA 7; (1988) 164 CLR 387 at 428-9).

37 A further reason that the Borrowers' estoppel argument fails is that if the Borrowers did make the relevant assumption as a result of Equititrust's conduct, that conduct was, for the reasons given below, not clear and unambiguous. The consequence is that it was not reasonable for the Borrowers to rely upon it and Equititrust cannot be expected to have anticipated that the Borrowers would rely on it in that way.

38 Being unable to rely upon Mr Demian's rejected evidence of conversations with an officer of Equititrust, on the appeal the Borrowers relied only upon the following alleged conduct of Equititrust:

> "(i) When the [Guildford] facility ($2,315,000) expired on 13 April 2007 the Respondent charged a loan expiry fee but kept charging and accepting interest at the lower rate. Further the Respondent proceeded to enter into the Summer Hill ($8,200,000) and Demian Construction ($3,630,000) facilities even though the [Guildford] facility had expired notwithstanding the fact that, as a result of the deed of collateralisation any default in one facility was a default in each of the facilities;
>
> (ii) On 15 August the CTP facility expired. Again the Respondent charged a "loan expiry fee" but continued to charge and accept interest at the lower rate;
>
> (iii) On 5 November 2008 the Respondent sent the Appellants an email advising of the interest payable on the various facilities for the period November 2008 to January 2009. The interest claimed was interest at the lower rate; and
>
> (iv) The terms of the letter of offer whilst referring to the expiry fee make no reference to interest at the higher rate also being payable if the loan passes its expiry date without being repaid" (Written Submissions [5.1]).

39 The Borrowers reliance on the first two matters ((i) and (ii)) involved the implicit submission that because Equititrust charged interest at the Lower Rate after the Guildford and CTP facilities expired but were not repaid, it impliedly promised the Borrowers that no claim for interest at the Higher Rate would be made in similar circumstances in respect of the other three facilities. It is only interest on these other three facilities that is in issue in

the proceedings. In my view however, the matters relied upon did not give rise to that implication, certainly not one that was conveyed in a clear and unambiguous fashion. A borrower is not, without more, entitled to assume that because a lender acts in a particular manner in one transaction, it will act similarly in another.

40 The relevant parts of the email referred to in sub-para (iii) were as follows:

> "[I] thought [I'd] drop you a note to inform you of your upcoming interest payments to assist with your cashflow.
>
> [Interest amounts for three months in respect of two of the facilities then appeared. They were calculated at the Lower Rate.]
>
> ...
>
> Payments are due on the 15 th of each month. There is currently a 'zero tolerance' on unpaid/late interest across the book at present. If interest isn't received by the due date default notices will be issued within 7 days. If you've got any question with any of the above please don't hesitate to contact me".

41 This email cannot reasonably be construed as conveying that Equititrust intended to abandon its right to charge interest at the Higher Rate. As indicated by its terms, the figures given were directed to "cashflow" in the immediately following months, rather than to ultimate legal entitlement to interest.

42 The assertion in sub-para (iv) quoted in [38] above involves a misstatement of the terms of the letters of offer that preceded the parties' entry into the Deeds. The letters of offer referred, albeit at different places in the letters, both to the charging of interest at the "default rate" in the event of default and to the charging of a loan expiry fee if the loans were not fully repaid at the date of expiry of the facilities. In any event, the arrangements recorded in the letters of offer were superseded by those in the Deeds (see Clause 27.2).

43 For these reasons Equititrust did not engage in any clear and unambiguous conduct that was capable of inducing the Borrowers to form the assumption that they contend that they formed. As a result, any reliance by the Borrowers upon the conduct that they identified on the appeal was not reasonable and Equititrust can have had no reasonable expectation that the Borrowers would rely upon that conduct in the way that they contended that they did. In these circumstances the Borrowers' estoppel argument fails.

Orders

44 For the reasons that I have given, the appeal should be dismissed with costs.

45 **YOUNG JA** : I agree with Macfarlan JA, but wish to make some additional comments.

46 It is significant that under clause 3.2 of the key document the Higher rate was the contractual rate. It is only if the preconditions in clause 3.4 apply that the Lower rate constitutes a sufficient discharge of the obligation to pay interest.

47 The reason why the document takes this form is that, traditionally, making the lower rate the ordinary rate and setting a higher rate for late payment might be set aside as a penalty in equity (see Fisher & Lightwood's *Law of Mortgage* , 2 nd Australian Edition [39 55]).

48 Whilst lawyers appreciate this, it is understandable that lay borrowers may not, especially if the lender does not strictly enforce the payment of interest at the contractual rate.

49 I can thus understand the appellants' apparent feeling that they are hardly done by, but in my view, as Macfarlan JA has so clearly pointed out, they

are contractually bound to pay in accordance with the primary judge's determination.

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