WAIVER OF CONTRACTUAL RIGHTS – AN ANALYSIS OF *AGRICULTURAL AND RURAL FINANCE PTY LIMITED V GARDINER*

Ryan Purslowe*

I Introduction

The concept of 'waiver' is often met with confusion even though it appears in many areas of law. The courts have expressed differing views on its meaning and scope, describing the term as 'vague',[1] 'imprecise'[2] and flexible in its application.[3] The High Court case of *Agricultural and Rural Finance Pty Limited v Gardiner* ('*Agricultural*')[4] demonstrates this confusion in the contractual context and exposes two conflicting schools of thoughts: the first being the narrow view taken by Gummow, Hayne and Kiefel JJ (with Heydon J agreeing) and the second being a broader interpretation taken by Kirby J. The narrow view proposes that the concept of waiver is not a separate doctrine; rather, it falls within the established doctrines of estoppel, election and contractual variation. Kirby J's broader interpretation, however, proposes that a distinct doctrine of unilateral waiver exists outside these established doctrines. The two conflicting schools of thought indicate that the concept of waiver is not settled in Australian law. Until there is further clarification from the courts, claimants whose circumstances satisfy the doctrines of estoppel and contractual variation will continue to rely on these established doctrines, while claimants who cannot rely on detrimental reliance or consideration may attempt to rely on unilateral waiver arguments.

II Material Facts

In April 1997, the second respondent, Oceania Agriculture Pty Ltd ('the Indemnifier') invited the public to participate in an agricultural

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1 *Ross T Smyth & Co Ltd v Bailey Son & Co* (1940) 164 LT 102,106 (Lord Wright).

2 *The Commonwealth of Australia v Verwayen* (1990) 170 CLR 394, 406 (Mason CJ).

3 *Mulcahy v Hoyne* (1925) 36 CLR 41, 53 (Issacs J). See also Sean Wilken, *Wilken and Villiers, The Law of Waiver, Variation and Estoppel* (2nd ed, 2002) 35.

4 (2008) 251 ALR 322; [2008] HCA 57.

investment scheme.[5] To aid in the funding of annual licence and management fees associated with the investment, investors were invited to obtain finance under a loan agreement from the appellant, Agricultural and Rural Finance Pty Ltd ('the Lender').[6] The loan agreement provided that periodic payments were required and that if the borrower defaulted on the due and punctual payment of any sum payable thereunder, the whole of the principal sum remaining outstanding would become immediately due and payable to the Lender.[7]

Those who entered into the loan agreement also had the option of entering into an indemnity agreement with the Indemnifier.[8] For a flat fee, the Indemnifier agreed to indemnify investors' obligations under the loan agreement, if: (i) the amounts due under the loan agreement were paid punctually; (ii) there was no default of any covenant or obligation pursuant to the loan agreement; and (iii) the business subsequently ceased due to an event described in clause 31(a) of the licence and management agreement[9] entered into between the parties.

Under this financing arrangement four loans were advanced by the Lender to Mr Bruce Gardiner ('the Borrower') between October 1997 and May 1999, together with related indemnity agreements. Pursuant to three of the four loan agreements, the Borrower failed to pay certain amounts by the relevant due dates.[10] Although payments were late, the Lender accepted these payments and did not choose to accelerate repayment of the whole outstanding principal.[11] The Borrower later ceased to carry on the tea tree business on account of an event specified in clause 31(a) of the licence and management agreement.

When the investment scheme collapsed, the Lender sought to recover the amounts lent to the participants in the agricultural investment schemes. The Borrower and 215 other borrowers were sued in the

5 *Agricultural* (2008) 251 ALR 322 [10] (Gummow, Hayne and Kiefel JJ). Investors were granted a 17 year licence over an allotment of land that was intended to carry on the business of cultivation and harvesting of tea trees and distilling oil from the tea tree leaves.

6 *Agricultural* (2008) 251 ALR 322 [11] (Gummow, Hayne and Kiefel JJ).

7 *Agricultural* (2008) 251 ALR 322 [1] (Gummow, Hayne and Kiefel JJ).

8 *Agricultural* (2008) 251 ALR 322 [11] (Gummow, Hayne and Kiefel JJ).

9 Clause 31(1) of the licence and management agreement was effectively a force majeure clause.

10 The Borrower's obligations under the third loan agreement, being the agreement made in June 1998, were performed punctually.

11 In the Borrower's submissions great importance was placed on a letter dated 2 June 1999 from the Lender which recorded that, as a consequence of the Lender's failure to send a reminder notice, the payment due on 7 April 1999 would be accepted as 'on time' up until 30 June 1999 - see *Agricultural* (2008) 251 ALR 322 [28].

New South Wales Supreme Court. The Borrower filed a cross-claim in response to the Lender's claim. This cross-claim and the defences raised by the Borrower were rejected by Young CJ.[12] The Lender succeeded in obtaining judgment for the amounts claimed as principal and most of its claim for interest. On appeal to the New South Wales Supreme Court of Appeal, the trial judge's orders were set aside and the Borrower's appeal was allowed in part.[13] The Court of Appeal held that the Borrower had made punctual payments pursuant to the first and second loan agreements because the Lender had accepted payments despite their lateness. The Lender succeeded in obtaining judgment for its claim under the fourth loan agreement.

The Lender appealed to the High Court of Australia.

III Issues and Outcome

The principal consideration for the High Court in this case was whether the Borrower could rely on the indemnity agreements for the first and second loans. This involved the determination of two issues: firstly, whether the Borrower had made due and punctual repayments under the loan agreements, and secondly, whether the Lender and the Indemnifier had waived the need for compliance by the Borrower with the relevant due dates by accepting late repayments from the Borrower.

To determine if the Borrower had made due and punctual repayments under the loan agreements, the High Court had to consider the meaning of the word 'punctual' in a contractual sense. Once resolved, the High Court could then consider whether the Borrower had paid the amounts due under the first and second loans punctually and whether the related indemnity agreements were 'effective and enforceable'. If the High Court ultimately found that the Borrower had not made punctual repayments, the High Court would then need to consider whether the Lender and the Indemnifier had waived compliance with the relevant due dates by accepting late repayments from the Borrower. As the Borrower did not rely on the doctrine of estoppel or contractual variation the High Court's attention was devoted to a consideration of whether any form of waiver existed on the facts.[14] The Borrower submitted that there was a waiver in three different senses: 'an election between inconsistent rights; an application of the common

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12 *Agricultural and Rural Finance Pty Ltd v Atkinson* [2006] NSWSC 202 (Unreported, Young CJ, 29 March 2006) [181-187].

13 *Gardiner v Agricultural and Rural Finance Pty Ltd* [2007] NSWCA 235 (Unreported, Spigelman CJ, Basten JA and Handley AJA, 6 September 2007).

14 *Agricultural* (2008) 251 ALR 322 [94-97] (Gummow, Hayne and Kiefel JJ).

law doctrine of forbearance; or the abandonment or renunciation of a right'.[15] Accordingly, the High Court needed to decide whether the Borrower could rely on waiver in any of the submitted senses.

The High Court allowed the appeal, holding unanimously in favour of the Lender, that the Borrower did not make punctual payments pursuant to the first and second loan agreements, and that the Borrower's right of indemnity as against the Indemnifier in relation to the first and second loan agreements was not effective and enforceable. The High Court based this finding on its assessment that the Lender and the Indemnifier had not waived the need for the Borrower to comply with the relevant dates specified in the loan agreements. Consequently, the Borrower was liable to pay the outstanding sum of the interest and principal on the first and second loans.[16]

IV 'Punctual' Repayments

As noted above, the first issue that the High Court had to consider was whether the Borrower had made due and punctual repayments under the first and second loan agreements. In determining this issue, Gummow, Hayne and Kiefel JJ agreed that the word 'punctual' as used in clause 5 of the loan agreements, and the word 'punctually' as used in clause 2 of the indemnity agreements should be read in their ordinary sense, meaning '[e]xactly observant of the appointed time; up to time, in good time; not late'.[17] Moreover, as the agreements were documented in a public investment scheme, the joint judgment concluded that the loan and indemnity agreements, construed in their commercial context, should be given meaning 'ordinarily conveyed by the words used'.[18] Their Honours also made it clear that clause 5 of the loan agreements and clause 2 of the indemnity agreements were structured in a way that focused on whether the obligation to pay had been performed. This required consideration of what the Borrower had done, not what the Lender did in response to payment.[19] Heydon J agreed with the joint judgment.[20]

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15 *Agricultural* (2008) 251 ALR 322 [49] (Gummow, Hayne and Kiefel JJ).

16 *Agricultura*l (2008) 251 ALR 322 [101] (Gummow, Hayne and Kiefel JJ).

17 *Agricultural* (2008) 251 ALR 322 [32] (Gummow, Hayne and Kiefel JJ). Their Honours agreed with the common dictionary definition that was endorsed in *Mardorf Peach & Co Ltd v Attica Sea Carriers Corporation of Liberia* [1977] AC 850, 871.

18 *Agricultural* (2008) 251 ALR 322 [38] (Gummow, Hayne and Kiefel JJ).

19 *Agricultural* (2008) 251 ALR 322 [34] (Gummow, Hayne and Kiefel JJ).

20 *Agricultural* (2008) 251 ALR 322 [162-164] (Heydon J).

On this point, Kirby J agreed with the majority and determined that 'punctually' in the particular circumstances meant 'on the assigned day'.[21] This interpretation was formulated on the basis that contractual terms in commercial circumstances ought to be strictly complied with.[22]

Accordingly, the High Court found that the Borrower did not pay the amounts due punctually.[23]

V Existence of a Waiver

A *Joint Judgment*

After establishing that the Borrower did not make punctual payment for the first and second loan agreements, Gummow, Hayne and Kiefel JJ (with Heydon J agreeing) then turned to the plea of waiver. The majority noted that 'subject to the plea of waiver, the indemnity agreements made in respect of those loans were not "effective and enforceable".'[24] For the three different senses that the Borrower submitted (election, forbearance, abandonment) the majority found that no waiver had been made out.[25] Moreover, the majority found it unnecessary to consider whether a residual category of waiver existed outside election, forbearance and renunciation[26] as this argument was not raised in the Borrower's submissions.[27]

1 *Election*

The first category of waiver raised by the Borrower was waiver by election. The majority held that for there to be waiver by election something must happen 'which gives rise to the existence of two alternative rights, and [when] one of those rights is satisfied, the other is no longer available'.[28] The majority addressed the High Court decision of *The Commonwealth of Australia v Verwayen* ('*Verwayen*')[29] and concluded that it is important to recognise that 'the discussion of waiver in that case reflected the particular setting in which the issue arose'[30] and that there was evident danger in trying to apply it in a

21 *Agricultural* (2008) 251 ALR 322 [116] (Kirby J).
22 *Agricultural* (2008) 251 ALR 322 [116] (Kirby J).
23 *Agricultural* (2008) 251 ALR 322 [39] (Gummow, Hayne and Kiefel JJ).
24 *Agricultural* (2008) 251 ALR 322 [39] (Gummow, Hayne and Kiefel JJ).
25 *Agricultural* (2008) 251 ALR 322 [94] (Gummow, Hayne and Kiefel JJ).
26 *Agricultural* (2008) 251 ALR 322 [98] (Gummow, Hayne and Kiefel JJ).
27 *Agricultural* (2008) 251 ALR 322 [98] (Gummow, Hayne and Kiefel JJ).
28 *Agricultural* (2008) 251 ALR 322 [58] (Gummow, Hayne and Kiefel JJ).
29 (1990) 170 CLR 394, 426-427. The context in this case related to the conduct of litigation between the parties.
30 *Agricultural* (2008) 251 ALR 322 [62] (Gummow, Hayne and Kiefel JJ).

'radically different context'[31] as in the present case which involved contractual relations.

In response to the Borrower's submission that the acceptance of late payment by the Lender would operate as an election against the option to call up the unpaid balance of the principal, the majority found that this purported waiver should be rejected.[32] The Borrower's failure to make repayments in a punctual manner gave the Indemnifier 'no choice between terminating the indemnity agreements for breach and insisting upon future performance'.[33] In coming to this conclusion the majority recognised that an election had been made by the Lender, but not by the Indemnifier.[34] Accordingly, the Borrower was held to have had an obligation for punctual performance based on the loan agreements, not the indemnity agreements.

2 *Forbearance*

The second category of waiver raised by the Borrower was forbearance.[35] The Borrower submitted that a common law doctrine existed which was distinct from contractual variation, election, estoppel and the renunciation or abandonment of a right.[36] Moreover, the Borrower identified that this distinct doctrine could be applied to a party 'voluntarily acceding to a request by the other that he should forbear from insisting on the mode of performance fixed by the contract'.[37] In response to this submission the majority noted that the forbearance was not directed at the facts that arose in the present case and that:

> dispensation which the borrower said he sought, and to which the lender or indemnifier was alleged to have acceded, was dispensation from the consequences of the borrower's past performance under the loan agreements, not dispensation from a future mode of performance. And if, as the borrower submitted, this dispensation did not lead to any permanent change in the rights of the parties, it is not clear what was said to be its legal consequence.[38]

The majority referred to cases of *Panoutsos v Raymond Hadley Corporation of New York*[39] and *Electronic Industries Limited v David Jones Limited*[40] and held that they did not assist the Borrower in his forbearance claim. Their Honours concluded that the Borrower's

31 *Agricultural* (2008) 251 ALR 322 [62] (Gummow, Hayne and Kiefel JJ).
32 *Agricultural* (2008) 251 ALR 322 [67] (Gummow, Hayne and Kiefel JJ).
33 *Agricultural* (2008) 251 ALR 322 [65] (Gummow, Hayne and Kiefel JJ).
34 *Agricultural* (2008) 251 ALR 322 [64] (Gummow, Hayne and Kiefel JJ).
35 *Agricultural* (2008) 251 ALR 322 [68] (Gummow, Hayne and Kiefel JJ).
36 *Agricultural* (2008) 251 ALR 322 [68] (Gummow, Hayne and Kiefel JJ).
37 *Agricultural* (2008) 251 ALR 322 [77] (Gummow, Hayne and Kiefel JJ).
38 *Agricultural* (2008) 251 ALR 322 [78] (Gummow, Hayne and Kiefel JJ).
39 (1917) 2 KB 473.
40 (1954) 91 CLR 288.

submission did not support a general notion of forbearance and consequently the submission was rejected.[41]

3 *Abandonment or Renunciation*

The third basis of waiver submitted by the Borrower was expressed in terms of abandonment or renunciation of a right.[42] This submission relied heavily on the comments of Brennan J in *Verwayen*,[43] where his Honour discussed the 'abandonment' of a right to plead a limitations defence. The majority rejected this submission as the facts in *Verwayen*[44] were very distinct from the facts of this case.[45] Unlike the 'fair and just conduct of the proceedings'[46] of a trial that were dealt with in *Verwayen*,[47] this case involved the existence of a commercial contract with inequalities that existed between the parties.[48] Moreover, their Honours noted that even if Brennan J's principle did apply to a contractual context, the Borrower's submissions would fail as the 'time for abandonment or renunciation of the right to insist upon the condition had not arrived'[49] when the acts said to constitute waiver in this sense were made. Accordingly, the majority held that there was no waiver on this basis.

B *Judgment of Kirby J*

Regarding the primary issue of waiver, Kirby J parted from the joint judgment and argued that a unilateral principle of common law waiver existed which was distinct from contractual variation, election and estoppel.[50] In his judgment, Kirby J noted that the concept of waiver was 'inconclusive'[51] and needed to be resolved by the court.[52] He emphasised that the term had been used as an 'umbrella term to encompass various forms of unilateral loss of legal rights'[53] and recognised that there was considerable overlap between the doctrines of estoppel, election and contractual variation.[54] Despite the existence of this free-standing principle of waiver he held that the evidence submitted 'fell short of enlivening such a principle'.[55]

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41 *Agricultural* (2008) 251 ALR 322 [79-87] (Gummow, Hayne and Kiefel JJ).
42 *Agricultural* (2008) 251 ALR 322 [88] (Gummow, Hayne and Kiefel JJ).
43 (1990) 170 CLR 394, 426-427.
44 (1990) 170 CLR 394, 426-427.
45 *Agricultural* (2008) 251 ALR 322 [89] (Gummow, Hayne and Kiefel JJ).
46 *Agricultural* (2008) 251 ALR 322 [89] (Gummow, Hayne and Kiefel JJ).
47 (1990) 170 CLR 394, 426-427.
48 *Agricultural* (2008) 251 ALR 322 [89] (Gummow, Hayne and Kiefel JJ).
49 *Agricultural* (2008) 251 ALR 322 [93] (Gummow, Hayne and Kiefel JJ).
50 *Agricultural* (2008) 251 ALR 322 [145] (Kirby J).
51 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).
52 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).
53 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).
54 *Agricultural* (2008) 251 ALR 322 [123] (Kirby J).
55 *Agricultural* (2008) 251 ALR 322 [111] (Kirby J).

In declaring that there is a doctrine of unilateral waiver, Kirby J outlined the requirements that must be met. First, a party must be 'subject to no relevant disability or disadvantage'.[56] Second, it must be 'manifestly unfair' for a party that has waived a right to later try and enforce that right'.[57] Importantly, his Honour highlighted that where the doctrines of estoppel, election or contractual variation clearly exist, these doctrines must be applied.[58] Despite the existence of this doctrine, his Honour held that waiver was not established on the facts as it was not manifestly unfair for the Indemnifier to be entitled to rely on lack of punctual payment by the Borrower, so as to indicate that the indemnity agreement was not effective and enforceable.[59] In coming to this conclusion, his Honour referred to the relationship between the Borrower and Ms Edwards (an employee of the Indemnifier) and found that Ms Edwards did not have the authority to waive the rights of or act on behalf of the Indemnifier.[60]

VI Discussion

This case has firstly drawn upon and clarified the contractual meaning of the terms 'punctual' and 'punctually'. However, a more significant aspect of the case relates to the discussion on 'waiver' in the context of contractual obligations. As outlined above, Gummow, Hayne and Kiefel JJ (with whom Heydon J agreed) found that it was unnecessary to consider whether a residual category or general principle of waiver existed that was distinct from election, forbearance or renunciation. The joint judgment recognised that the concept exposes 'uncertainties and difficulties'.[61] However, they felt that it was unnecessary to discuss any classifications of waiver except for those submitted by the Borrower.[62] Kirby J on the other hand felt that it was in fact necessary to explore the possible existence of a distinct common law doctrine.[63] Kirby J's principle of unilateral waiver makes for interesting discussion as it demonstrates the possibility for claimants to argue outside the established areas of estoppel, election and contractual variation.[64] If claimants are unsuccessful at establishing detrimental reliance or

56 *Agricultural* (2008) 251 ALR 322 [145] (Kirby J).
57 *Agricultural* (2008) 251 ALR 322 [145] (Kirby J).
58 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).
59 *Agricultural* (2008) 251 ALR 322 [147] (Kirby J).
60 *Agricultural* (2008) 251 ALR 322 [160] (Kirby J).
61 *Agricultural* (2008) 251 ALR 322 [54] Gummow, Hayne and Kiefel JJ).
62 *Agricultural* (2008) 251 ALR 322 [54], [98] Gummow, Hayne and Kiefel JJ).
63 *Agricultural* (2008) 251 ALR 322 [137] (Kirby J).
64 *Agricultural* (2008) 251 ALR 322 [143-144] (Kirby J).

consideration they may choose to go further and assert that an outcome would be manifestly unfair.[65]

A *Arguments For and Against the Doctrine of Unilateral Waiver*

Although the substance of the doctrine of unilateral waiver has been outlined above, it is necessary to indulge further into Kirby J's reasoning to establish its applicability. In his judgment, Kirby J addressed arguments both for and against the possible existence of a unilateral doctrine of waiver and concluded that the doctrine can exist after an assessment of all of the circumstances.[66] In addressing the arguments against unilateral waiver he referred to the judgments of Mason CJ and McHugh J in *Verwayen*.[67] Mason CJ took a narrow view and was not prepared to acknowledge that a unilateral doctrine could exist outside estoppel and election.[68] In contrast, McHugh J was prepared to acknowledge the existence of waiver outside the established doctrines, but he preferred to follow 'the simplicity of the more established doctrines of election, contract and estoppel'.[69] In addressing the arguments in support of the broader interpretation of waiver, Kirby J referred to the judgment of Brennan J in the same case and indicated that Brennan J made some important comments on waiver that helped separate the concept from contract, estoppel and election.[70] Further, he looked at opinions expressed in the High Court and decisions from the United Kingdom, Canada, South Africa and the United States.[71]

The main difficulty recognised by Kirby J in the comparisons made between *Verwayen*[72] and *Agricultural*[73] was the striking factual differences between the two cases. In *Agricultural*[74] the issue of waiver arose in the context of contractual rights, whereas in *Verwayen* waiver arose in the context of statutory rights.[75] In referring to particular instances of waiver in the cases, Kirby J stated that although '[t]hey do not decide the issue of legal principle and policy presented by a case such as the present ... they illustrate particular examples of

65 *Agricultural* (2008) 251 ALR 322 [145] (Kirby J).

66 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).

67 (1990) 170 CLR 394.

68 *Verwayen* (1990) 170 CLR 394, 406. See also *Agricultural* (2008) 251 ALR 322 [132] (Kirby J).

69 *Verwayen* (1990) 170 CLR 394, 497; see also *Agricultural* (2008) 251 ALR 322 [134] (Kirby J).

70 *Agricultural* (2008) 251 ALR 322 [138-139] (Kirby J).

71 *Agricultural* (2008) 251 ALR 322 [136] (Kirby J).

72 (1990) 170 CLR 394.

73 (2008) 251 ALR 322.

74 (2008) 251 ALR 322.

75 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).

circumstances that enliven a broader and as yet imprecise principle of the common law.'[76] Moreover, he recognised that these cases were important in identifying the 'unifying features of earlier instances or examples where courts have accepted the operation of "waiver" as a barrier to reopening a surrendered contractual right'.[77]

B *Conclusions made by Kirby J*

From his Honour's analysis of the authorities, Kirby J made a number of conclusions that established 'an emerging concept of waiver'.[78] Firstly, he identified that the doctrine of waiver was not settled and consequently it was up to the High Court to solve any ambiguity.[79] In coming to this conclusion he acknowledged that judicial and scholarly analysis of unilateral waiver was divided and inconclusive.[80] Secondly, he stated that waiver could exist as an independent concept outside the established doctrines of estoppel, election and contractual variation.[81] Importantly, it was pointed out that waiver should not undermine these established competing principles. Therefore, claimants would need to demonstrate arguments outside detrimental reliance, consideration and bilateral variation of contract.[82]

In ensuring that the emerging concept of waiver was not simply a licence to do whatever the judge considered fair in the circumstances, Kirby J made sure that there was the requirement for the claimant to advance evidence that demonstrated that the facts of the case were manifestly unfair.[83] Above all, his Honour pointed out that in order for the facts to be manifestly unfair the party who is alleged to have waived the right must 'adopt an inconsistent position and to seek to enforce the legal right earlier waived'.[84] While a situation such as this would be apparent in the cases of estoppel and election, the situation that Kirby J was referring to was a residual category outside these doctrines.[85]

C *"Manifest Unfairness" – Is this a Sufficient Threshold?*

Kirby J referred to 'manifest unfairness' as the relevant threshold test but unfortunately did not elaborate on this concept. In the context of

76 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).
77 *Agricultural* (2008) 251 ALR 322 [137] (Kirby J).
78 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).
79 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).
80 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).
81 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).
82 *Agricultural* (2008) 251 ALR 322 [143] (Kirby J).
83 *Agricultural* (2008) 251 ALR 322 [145] (Kirby J).
84 *Agricultural* (2008) 251 ALR 322 [145] (Kirby J).
85 *Agricultural* (2008) 251 ALR 322 [145] (Kirby J).

the present case, his Honour outlined that in order for the Borrower to meet the requisite threshold he would need to have shown that it would be manifestly unfair for the Indemnifier to rely on his failure to pay 'punctually' as demonstrating that the indemnity agreement was not 'effective and enforceable'.[86] His Honour found that the Borrower did not satisfy this threshold requirement.[87]

Without further clarification it is difficult to identify the scope and applicability of the 'manifestly unfair' threshold requirement. This concern was outlined by the majority who stated that 'in some cases the reference to "unfairness" may not be a defining principle'.[88] In the respectful opinion of the author, the 'manifest unfairness' threshold test is too general. If this doctrine was to be implemented it is likely that it would significantly undermine the already established doctrines of estoppel and contractual variation. Perhaps a better approach would be to redefine the principles of estoppel and contractual variation to incorporate situations such as those which would otherwise fall under the manifest unfairness test. This would involve either lowering the bar for detrimental reliance or modifying the requirement to show some form of consideration for an agreement to vary an existing contract.

Moreover, it is not clear in a commercial context whether the manifest unfairness requirement sits below unconscionable conduct. If this was the case, it would be possible that the manifest unfairness threshold would encroach into contract law and undermine the acceptable level of unfairness that already exists in commercial contracts. Lowering the threshold to such an extent would allow many contractual parties who are not on equal footing to claim waiver on the basis that their commercial dealings with one another were 'manifestly unfair'. The potential number of claimants arguing such a waiver would be amplified in the current global financial crisis where unfairness may occur through no fault of either party to a commercial contract but from economic factors outside of their control. It is this concern which prompts support for the more cautious approach taken by the majority, over that of Kirby J's approach.

D *Applicability for Future Claims*

Although, the joint judgment indicated that their 'silence on the subject should not be taken as encouragement to further speculation',[89] Kirby

86 *Agricultural* (2008) 251 ALR 322 [147] (Kirby J).
87 *Agricultural* (2008) 251 ALR 322 [147] (Kirby J).
88 *Agricultural* (2008) 251 ALR 322 [99] (Gummow, Hayne and Kiefel JJ).
89 *Agricultural* (2008) 251 ALR 322 [98] (Gummow, Hayne and Kiefel JJ).

J's judgment[90] demonstrates that there is in fact room for speculation. If Kirby J's emerging doctrine of waiver becomes established in Australian law, a new avenue will be opened for wronged parties to argue outside the established areas of estoppel, election and contractual variation. For the time being, however, the law in Australia on waiver of contractual rights remains unsettled. The law is extremely complex and consequently it is difficult to know which direction the courts will take in the future. As with other areas of law, the High Court needs to move forward and adopt a principle that can be applied consistently in the future. Consequently, when the High Court next considers this area of law the bench will need to choose between the reasons of the joint judgment or the emerging concept of waiver advocated by Kirby J.

Regardless of the uncertainty that clouds the meaning of waiver, *Agricultural*[91] comes as a timely reminder to parties in commercial contracts to ensure that before a contract is entered into, that it be drafted in a clear and unambiguous manner. This may require departing from the traditional 'pro forma' document and substituting it for an appropriately 'tailored' agreement.

90 This judgment appears to be Kirby J's final judgment rendered prior to his retirement from the bench.

91 (2008) 251 ALR 322.

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