

IN THE MATTER of an Application for Leave to Appeal

BETWEEN **OTAGO STATION ESTATES LIMITED**

Appellant

AND **JOHN ROBERT PARKER**

First Respondent

AND **DAVID JOHN PARKER AND LORRAINE MAREE PARKER**

Second Respondents

Hearing 12 October 2004

Coram Gault J
Keith J

Counsel A R Galbraith QC and S A Grant for Appellant
N R W Davidson QC for Respondent

APPLICATION FOR LEAVE TO APPEAL

10.01 am

Galbraith If the Court pleases, I appear with Sandra Grant for the Applicant.

Gault J Yes, Mr Galbraith.

Davidson May it please the Court, Davidson, I appear for the Respondents.

Gault J Yes, Mr Davidson thank you. Mr Galbraith. I think we could short-circuit this perhaps to some extent. We obviously have considered the

written material, some of it arriving only late yesterday, some like a draft Affidavit, I at least have not seen. But there seems to be some attraction in a grant of leave in any event on the question of payment and practice and waiver and such issues and if that were to be the case, it seems logical that the point of real contention, that is whether the new ground should be entertained and be the subject of a grant of leave, might perhaps be reserved for the full hearing. I say that because one would expect with an issue of that nature, that a principal question for inquiry will be whether it is something on which evidence might have been led and it seems reasonable that everyone has an opportunity to consider that and present considered argument, not last minute rush before the Full Court. So, that's a tentative indication if it's any help.

Galbraith Well, yes, thank you Sir it obviously is. Do you want to hear me then on the personal cheque issue Sir or not?

Gault J Well, we don't want to hear you on the merits of it. Perhaps you might like to reply to Mr Davidson on whether or not it's appropriate subject matter for leave for a second appeal.

Galbraith Right.

Gault J That may be the best course.

Galbraith Can I then just talk a little bit about the default issue Sir which is the new issue.

Gault J Yes.

Galbraith If I can say with respect, I think what Your Honour says is quite correct that there are some factual matters which would be relevant to it if it can be argued. And that Affidavit which you haven't read and I think that's probably quite appropriate at this stage that you haven't read it, my friend of course hasn't had a chance of responding to. My understanding is that there was no evidence given on that in the Courts below. My understanding is that the parties saw this as a matter simply to be argued in terms of what they saw as an issue of law in relation to the personal cheque or not. It does, and my understanding also is Sir, and I've confirmed this with Mr Millard QC that he did make the concession which is recorded in the Court of Appeal Judgment there had been a default.

Keith J It's not only at that stage, is it, that the point was given away. It's ...

Galbraith From what I understand Sir, it wasn't so much given away, it was given away in a sense in the Court below in that it wasn't argued.

Keith J Mm.

Galbraith I understand from Mr Fraser Barton who appeared there that he didn't make a specific concession but he certainly didn't argue the point. So in that sense Your Honour's quite correct, it was in a sense given away.

Keith J Well I was just looking at some of the points that are made in Part C of Mr Davidson's Memorandum from yesterday which sets out the pleadings as well as the ...

Galbraith Yes, I think that's fair Sir. However, what seems to me if I can say this with respect, is that when I think it was a wrong concession to make and with respect to the Court, I think that should probably have been apparent to the Court also because it seems to me to have proceeded on a misunderstanding of what the three-day notice, the effect of the three-day notice under Clause 2.2. That notice itself doesn't create a right to cancel, it's in fact a notice, it's a postponement of a right to cancel which has to arise separately. And it seems nobody tumbled to that, what seems to me, fairly obvious point that you had to have a right under s.7 of the Contractual Remedies Act before you could ever give the notice and nobody focused on the fact that the only possible right under the Contractual Remedies Act would be the right where time was of the essence and on the apparent face of it, that seems to have been waived possibly twice, certainly by the letter which said payment could be deferred until after the meeting of 28 March and again by a 21 month delay that then subsequent to that meeting took place. So there seems to me to be a whole argument around that. Now I take your point ...

Gault J I don't think there's any doubt that there's an argument around it if it can be run at this late stage. It's a very late stage to tumble to what you say was an obvious point.

Galbraith Yes, I do think it was obvious but it wasn't spotted for some reason Sir. The context in which it seems to me it could be argued is that it would depend whether this Court was prepared to entertain some evidence or not. If this Court wasn't prepared to entertain some evidence, I think on the basis of what's before the Court, the argument could be considered by this Court in the context of just the sort of what I've just described really, just what the law is and what the effect of a three day notice is and that you have to have a right to cancel independently under s.7 of the Contractual Remedies Act, the question then is, was time again made of the essence. And that may be a factual inquiry which would have to go back to the Court below if this Court wasn't prepared to accept some evidence on that.

Gault J Yes, but we are disinclined to decide that point today.

Galbraith Oh, look I understand, I understand that Sir. I just wanted to perhaps express my views as to the substance, the fact the point has got a legal substance to it, forgetting for a moment about the facts and on the face of it it looks like it's of some significance. And I guess the other thing which I'd say is that it would be better ultimately if the point was decided

head-on by the Courts rather than come up in a collateral way which it could, given the fact that people who perhaps should have recognised the point didn't.

Gault J Yes, but your very acceptance that some evidence is necessary rather tells against the application of the general principle that a new point won't be allowed to be run on appeal if it's something on which evidence could have been given. So if you want to pursue it, you've got a fair job ahead of you I would have thought.

Galbraith Yes, well I think it's arguable Sir that it can be dealt with without evidence and just on the mere facts that are before the Court at the moment which is that there was a letter back in March saying defer payment and there's a 21 month delay, there's no argument that's before the Courts now and I can, I think, make perfectly proper submissions based on that alone. What I was ...

Keith J But yesterday's Affidavit Mr Galbraith suggests, doesn't it, that you know that's not a completely solid position on your side.

Galbraith Well I suspect that my friend Mr Davidson as much as me might want to put things in a broader context.

Keith J Mm.

Galbraith But on the face of what's before the Court, if all evidence is excluded then all evidence is excluded and the Court doesn't know that and what the Court then has got to go on is the 20 March letter which says defer payment until after the meeting of 28 March and then a 21 month delay.

Gault J That in itself seemed to be the subject of a factual dispute whether it was to defer it until the meeting or until after the meeting.

Galbraith Yes, yes the words are until after the meeting Sir and it seems to me it's like after Christmas. After Christmas can cover a multitude of dates.

Gault J Yes.

Galbraith And that's why I think it's my friend who might actually want the evidence more than I do Sir in that respect.

Gault J Well he might only have to point to the fact that it is something on which evidence could have been given.

Galbraith Yes Sir I can understand. And he has obviously made that submission in his Memorandum Sir, I do understand that. But it does strike me that this is a point which seems to have slipped under everybody's radar and I suspect, perhaps I'm wrong, I suspect that people don't quite understand what a three-day notice or the requirement for having a situation where you can cancel before you give a three-day notice, it's got to be

independent of that and so there could be some guidance from this Court that might clarify people's thinking in that regard.

Could I just mention one thing in relation to the cheque payment matter also Sir which just may not have stood out from what we said on that. In a sense there's not just the issue of personal cheque or not personal cheque but there's the issue that if the Court of Appeal is correct and what the Court of Appeal have said of course is that it's either legal tender or bank cheque either for an initial deposit or after three-day notice. The problem that they've created with that is that, as the evidence made clear, the practice is that personal cheques are accepted for the payment of the initial deposit. Now, of course, if the Court of Appeal's correct then that means that every time a real estate agent does that, which is their practice, without the permission, without referring that to the vendor, then they're in fact in breach of their obligations to the vendor which are of course to act in accordance with the terms of the contract. So the Court of Appeal Judgment at the moment puts all real estate agents at risk for their normal practice unless they get the express consent of the vendor to accept a personal cheque. Now, of course, 99 times out of 100 it's not going to cause a problem. But there's always the one time out of 100 or 1000 where it may cause a problem. And so it's not just the issue in relation to the particular purchaser here that it's important for; it's important also for the existing practice of real estate agents to accept personal cheques and to believe they're justified in doing so.

Perhaps I should say no more at this stage. Would Your Honours prefer to hear from Mr Davidson on these two subjects.

Gault J Thank you Mr Galbraith. Mr Galbraith, just before you sit down, we need under our Rules to provide, in the order that is made if leave is granted, to specify the grounds on which leave is granted. I didn't immediately see those jumping out of the papers, if you might like to just give that some thought while we hear Mr Davidson.

Galbraith Yes Sir.

Gault J Yes, Mr Davidson.

Davidson Your Honours, having regard to what has been said about an application for leave to adduce evidence. I'm now uncertain as to how far I should address that as I had already done so in the Memorandum yesterday. The opposition raised by the Respondents is to the point being taken in this Court regarding there being no default. And to evidence being adduced in that regard. It seems reasonably clear, although it's on short notice, that if the point was to be the subject of a formal application for leave, and to be heard by the Full Court, then it is probably the Respondents will say evidence is required from them.

Gault J I'm sure you will.

Davidson I probably can elevate it to a certainty myself, Sir.

Gault J Yes.

Davidson And that being the case, it'll be a further ground. But it's not just the fact that evidence may be required but the fact that in effect it undercuts the whole of the way the case has been run until now.

Gault J I understand that.

Davidson And the serious prejudice in a number of respects which result to the Respondents if that is the case. So with regard to my Memorandum, there's only one point I'd like to make about that issue and that is that if my learned friend is correct that the argument can or should be run absent evidence, that the Appellant can run this argument there is no default simply on the agreed facts or those found, then a fundamental position for the Respondents will be that whatever happened in the disputed evidential period, March 2001 to early 2002, then as the Memorandum filed for the Respondents yesterday indicates, there were certain events which make it plain that the contract was back on its ordinary footing. And in particular I refer to section C of the Memorandum filed yesterday, the bullet paragraph at the bottom of page 5 where the purchaser wrote to Berry and Co for the vendors recording there'd been no agreement to vary the contracts, they remain as signed and the purchasing company's wish to settle the transactions. And a statement of claim then filed in October sought an order for specific performance based on those contracts as originally drawn. And there was a curious pleading, curious in my submission, in the original statement of claim which was later amended in that it sought in the prayer a declaration the Plaintiff stands ready to pay the deposits payable. So the Respondents say, whatever the evidence, and there is significant evidential dispute clearly, the time came when the specific performance proceedings were commenced, at which time the contracts were on foot, at which time the contracts had provided that time was of the essence for payment of the deposit and it was in that context that the notice was given. So in essence, I am submitting that there is a point of construction of events which as it were defeats the merit of the Application for Leave in itself.

If I may turn to the Application for Leave absent that issue. Section 13 of the Act is slanted against leave unless the Court is satisfied that the appeal involves in this case, in my submission, a matter of general or public importance, general commercial significance or a substantial miscarriage of justice. And I refer to Your Honour's question of my friend a few moments ago as to the grounds on which leave may be granted. The fundamental point for the Respondents in this regard is that this matter, this appeal, other than to the parties, really cannot be elevated beyond a matter of interest.

Gault J Well that would certainly be the case if it wasn't a standard form contract wouldn't it?

Davidson Yes.

Gault J But can you say that, having regard to the fact that it's a standard form contract which everybody knows is widely used?

Davidson I still retain the submission Sir because the reason or the foundation for the submission is that the law is settled with regard to a payment of a deposit and that it is to be by legal tender unless that form of payment is waived prior to or at the time of receipt. And that in my submission in the Court of Appeal's Judgment was simply an upholding of what is settled law. It's not a circumstance which has come up factually so as to create problems in practice for people. Of the six expert witnesses who gave evidence, three on each side, two had experience on one or perhaps two occasions in their lengthy practice lives of this issue of having to give a notice requiring payment under pain of cancellation and how then they would have dealt with it. So it's not a live issue in my submission at all. It's important ...

Gault J If something doesn't arise very often, does that make it not a live issue?

Davidson It's not an issue which has been, as it were, pressed out of the practice of the law and commerce Your Honour, it's a matter which has arisen in the course of that. But all in essence this means is that a fundamental principle has been applied to a circumstance which has not been litigated before. And the justification to further litigate it at this level when in the Respondent's submission it is simply an orthodox application of a very fundamental principle, is not warranted.

Keith J What about Mr Galbraith's point, Mr Davidson, about the Court of Appeal's statement about regular deposits? That they're to be by bank cheque as well unless other arrangements are made?

Davidson It doesn't, in my submission, flow to any consequence Sir because in practice under this contract, time is of the essence but there is no consequence in terms of default. When the cheque is paid by personal cheque and a real estate agent accepts that, that is an act of acceptance. The question would be whether that is within the authority of the agent to so accept.

Keith J And if the seller had second thoughts and said to the agent that's not good enough and I have a better offer or I want to hold onto this property, then there is then a problem, isn't there?

Davidson There is at that stage, Sir. It's a question of agency and the relationship between the agent and the principal, the vendor. Not a question which specifically arises in this case.

Keith J No, no.

Davidson So it would be an observation in that regard. Because it's not the point of this case. And that can be dealt with either on the facts of the case which deals with that or by a change to the law, or no doubt simply the observations made in the Court of Appeal in this case. In fact, the point is, and it perhaps is easy for me to overlook because it's so fundamentally stated in the authorities and the texts, and I'm for example citing from Professor McMorland's text 2000 and it's not in the submission as such Your Honours but I just refer to it. Although it's the usual practice of purchasers to make payment of all but nominal deposits by cheque, the payment of the deposit is no different from the payment of any other sum and the normal rules governing the form of legal tender apply unless the contract allows or the vendor agrees to accept payment in some other form. That's the founding position which has been upheld effectively in the Court of Appeal. And it doesn't, in my submission, need re-statement. And the fact is, and again it doesn't need re-statement in my submission at this superior Court level, is that a personal cheque has never constituted payment in law. It is not a conditional payment, it is no more than a direction to a bank to pay and that is why in the Written Submission that has been filed in opposition, reference has been made to Professor Good's comment in that regard. It's a misnomer, it's a suspension of a creditor's right to hold the cheque pending clearance. But that's an entirely different proposition as to what the word "payment" means in law. And effectively, what is sought in this appeal and in the argument that's been mounted so far, is that the law be reversed to make a personal cheque a valid payment unless there is objection taken to it prior to receipt.

Gault J I don't want to get into the merits, but it may not be so much a question of what constitutes valid payment but what constitutes waiver in the light of practice and whether or not it is appropriate to draw a distinction on the same clause in respect of payment at one time and payment at another time. As I say, I don't want to get into the merits but it seems to me it's not so much an argument about what constitutes payment by legal tender.

Davidson Well in my submission Sir, the two points go together. There is a fundamental requirement in considering the question of waiver to first of all determine what is the payment required prima facie by the contract or under the contract. And I've been trying to avoid, as I must, the merits of the case, but in arguing that the matter does not warrant coming to this Court for full argument, I am founding that on the basis that the law is clear and therefore the merits are affected by the fact that legal tender is required unless waived. But the argument that's being postulated here for the Appellant is that it's the other way around. That there is an obligation on a payee, the vendor in this case, to accept a personal cheque unless given some form of notice to the contrary. And in that regard, it tips the law on its head. That proposition tips the law on its head.

Keith J It's already partly tipped, isn't it? I'm not sure quite where the metaphor goes at this point in respect of a bank cheque because it's not, in the narrow technical sense, legal tender either is it?

Davidson No, but with respect Sir there is a, in my submission, a danger in taking that analogy. The tip in **Williams v Gibbons** was no more than to recognise what had been the subject of comment. The reverse case is **Henderson v Ross** His Honour Justice Somers, that what the law was really concerned about with regard to legal tender was certainty of payment and on the evidence, a bank cheque constituted certainty of payment. That doesn't lead to any extension or extrapolation to revisit the question of the payment of a deposit as a payment in any different sense.

Keith J But at that point the argument has shifted hasn't it, or the interpretation has shifted from legal tender to certainty of payment. And you would say that's entirely correct because the purpose of payment is being achieved in either case.

Davidson Exactly. It simply puts it on all fours. **Williams v Gibbon** by extension has application to a payment by way of settlement, a payment required under the contract. And of course it can go beyond the conveyancing circumstance as well to other payments required under law. Legal tender has huge implications, of course, in any contract for major commercial settlements.

Keith J Well, in minor ones too. There was some discussion at afternoon tea yesterday about how often people use cheque books now. I mean people still do, don't they, and you just think when you're paying by cheque, that that meets, it is a payment.

Davidson We think of it as such and that is really the essence of the authorities which are before the Court, **George v Cluning** in particular. And **Wicksman v Dale(?)**, the Canadian authority, that we think of it as a payment but of course in many circumstances it is refused. And retailers and others will not take it.

Keith J Sure.

Davidson And that is only an application of the principle that the payee has the right to say no. So the foundation of this opposition is really based on the fact that the law is clear. It does not require revisiting. There is no need in commercial practice to go back and look at it again. The position is that a party may choose to make a payment by personal cheque which the person receiving the cheque may then refuse. In this case the significance is that the payment had to be by a certain time. That's the factual, not so much peculiarity but particularity of this case. By 5pm on a certain day it had to be paid. And that is the essence of the argument for the Respondents. And that is where there has again been no issue once the point was sought to be clarified in the High Court and the Court of Appeal, that receipt of a fax at 4.39 pm, because that was the time it was received, before the 5 o'clock deadline, gave no time in reality for the vendor's solicitors to receive, consider, consult three clients, the three Respondents, to advise on the significance of the payment, to take an instruction and revert and then to give the purchaser time to do anything

about a rejection. And so the Court of Appeal held that it was impractical to consider that there was any opportunity or obligation on the vendor to get back in order that the point would be met, or the point of objection would be met.

But that is what this case on the merits and the law comes down to in this area. That the Appellant or would be Appellant is saying the law should be that a personal cheque will do unless in advance the payer is told otherwise. And that is the foundation for my submission that that is so contrary to established principle and has been found as such by the Court of Appeal that this Court should not be satisfied it is necessary for it to as it were exercise the oversight of an appeal here.

And may I make one observation in this regard because it is difficult, and I'm trying to stay out of the merits but rather to crystallise the real issues on the appeal. If the Appellant, or would be Appellant is correct here, there is an extraordinary circumstance which underscores how fundamentally it seeks to change the law. This contract, in Clause 2.2, which is in the Court of Appeal Judgment at paragraph [7] provides that the vendor shall not be entitled to cancel the agreement for non-payment until having given three working days notice of intention to cancel and there's failure within that time to remedy. No notice of cancellation shall be effective if the deposit has been paid before the notice of cancellation is served. If the Appellant is correct and payment means by personal cheque, then on default under a notice it's not the end of the contract. Notice still has to be given to achieve that. But that will not be effective if the deposit has been paid before the notice of cancellation is served. If the Appellant's correct, another personal cheque will do on a dishonoured cheque, or a cheque which they know will be dishonoured. Provided the notice of cancellation hasn't been served, they can do it again. Which leads, this really demonstrates how, in the Respondent's submission, how fundamentally flawed the proposition must be at law. And the reason why the matter should not come before this Court. The purchaser can keep on giving a personal cheque saying, this is payment, provided the cancellation has not been effected. That's how far the point on appeal goes and it is the necessary connotation in this contract. Which is self-evidently an extraordinary proposition.

The question of practice has been raised briefly in this Court today. In my submission there is no evidence on the record in the case that there could be any implication by custom to found or give merit to the Appellant's case. To imply a term by custom requires the 5 point test which were enunciated in **Everest v McKeivity**. It has to be notorious practice. There is no practice in this area. There is none to speak of - I think three instances on a combined about 120 years of practice of the individual experts.

There is an argument by the Appellant with regard to the construction of the agreement itself. And that is to say that the word pay has a wider meaning. This goes to the merits of the case, the particular merits of the

case as the terms of s.13 as I understand it. The argument there is that the front page of the agreement has reference to cash in settlement. And therefore, because that reference is not made in the provision with regard to deposits, there is a difference between the two. The Court of Appeal answered that, in my submission, in a clear way. There are standard printed terms in Clauses 2.1 and 3.7 as to deposit and settlement. The reference to in cash on the front page of the agreement was said to create an inference that a different form of payment was mandated for deposits but what the Court pointed out, and it was not my argument, it was the Court's addressing its own question, it was primarily intended to indicate there was no swapping of one property for another or partial settlement or terms but rather a strictly monetary transaction. Clause 3.7 of the agreement required the purchaser to pay or satisfy the balance of the purchase price on settlement. And that is where the reference to in cash on possession comes from.

Your Honours, in the written argument for the Appellants, there was also reference to an estoppel. The argument being that, as the vendor, through it's solicitors, told the purchasers they could pay the deposit by banking a cheque to the solicitors' bank account and not stipulating a bank cheque, that that in effect raised an estoppel. In my submission, there can be no substance in that. There must be an unequivocal express representation in this case that a personal cheque would do. There was no such indication of waiver. No such representation.

There is reference in the Appellant's argument to an article by Andrew Beck with the criticism of the Judgment of the High Court entreating the actions of the vendor here as a technicality. The Court, perhaps unusually, chose to respond to the article at paragraphs [55] and [56] of the Judgment, two of the last three paragraphs. This case is based on a breach of contractual term. A breach of consequence. And the Court did not recognise the criticism as valid, that it was simply a matter of a technicality.

I'll come back to the section 13 points to conclude. In my submission, in terms of public importance, general public importance or general commercial significance, we don't have the issue in practice in respect of these notices. The three practitioners on each side, One Real Estate for the ...

Gault J You don't need to repeat what you've told us Mr Davidson thank you.

Davidson Sir. Well I come back to the question simply of importance and significance. And to summarise by saying the Court should not see importance or significance in restating what is the obvious. There is a simple uniform rule which the Courts have over many years observed to be the best way of guiding commerce. It is as simple as saying that a personal cheque won't do unless it's accepted. There is no need for that matter to be revisited.

As to the (unclear word) of s.13 with regard to substantial miscarriage of justice, the Appellant has simply asserted a purchase of large tracts of land...

Keith J That's a factual matter, that's not going to influence us I don't think. You want to keep it, they want to buy it.

Davidson Yes.

Keith J That's the short answer.

Davidson If it won't influence you Sir, then I don't intend to take it any further. Well I think by a roundabout way, I've come to the end of what I wish to say, Your Honours, and I simply urge on you a reflection that the matters are not supposed to get into this Court unless they have the importance or significance the statute requires. This case is of interest no doubt because it reminds people of what the law is. But that's, at the Court of Appeal level that's been stated. And in my submission it requires no further restatement here. Unless Your Honours have anything else to ask of me, that's all I wish to say.

Gault J Thank you Mr Davidson. That dreadful noise is meant to stop you sharing our discussion. Yes, Mr Galbraith, we are disposed to grant leave but reserve any question of whether a separate and new point will be entertained and if so on what basis, with or without evidence. It is as I said previously, a matter of identifying the points on which leave is given. This is in the Rules so we must do it and it's obviously designed to confine the scope of appeal. But can you help us on that?

Galbraith Hopefully Sir. Except that.

Gault J If you'd like to take some time.

Galbraith Can I just read out the points that I have written, or Ms Grant has written down, the only thing is we may have to modify it in respect of that default issue Sir. Because what I'd written down was, 1) as at 13 November 2002 were the purchasers in default of payment of the deposits; and then 2) if not, were the Respondents entitled. Well no I don't think we need to ask the second question because if they're not then the notice can't be issued. I think the next question would be: if so, was the tendering of a personal cheque sufficient to remedy the default. So I've really brought it down to two simple questions. The Court would have to qualify that first question Sir as being: That's a question for the Full Court to consider in due course, whether it's to be pursued or not. Whether it's to be considered or not.

Gault J Yes, well it was simply. It seems to me there is a basis to whether or not it could be pursued and it would be a matter for the parties to apply for leave to adduce evidence if they consider that is going to bear upon it.

Galbraith And that's something we can no doubt talk about, Sir, and then one or other of us might have to make a choice on that.

Gault J Oh yes, well I don't think we will want to impose any requirement or condition about evidence.

Galbraith No Sir.

Gault J Because obviously the first argument will be, it is not a matter that should be entertained because evidence would be needed.

Galbraith Yes Sir.

Gault J Take it from there.

Galbraith Yes Sir.

Gault J And so that the one issue really remains, if there was a default, whether or not it could be remedied in the manner it was by payment by a personal cheque. Alright, and security for costs?

Galbraith I don't know what the standard is in this Court Sir.

Gault J I think that on a previous occasion we fixed \$6,000.00.

Galbraith Well, there's no problem about that Sir.

Gault J And there doesn't seem to be any need for any particular directions. The Rules govern timeframes and there seems no reason not to just let them take their course.

Galbraith As far as we're concerned Sir, that's right. We've got to file a case of course and ...

Keith J Yes, and you also have to focus on the further evidence.

Galbraith Yes, whether we make an application.

Gault J But it's a matter really I think of getting a fixture date from the Registrar and that then dictates the timeframes within which steps are to be taken.

Galbraith Yes Sir.

Gault J Now, I'll just ask Mr Davidson if he has any comments on those points and the security point.

Davidson No submission Sir on the security point that, I simply fall into line with the what seems to be a developing practice as to the appropriate figure.

Gault J Well ...

Davidson This is a day's argument, we're talking about here.

Gault J Yes.

Davidson Sir, I must say, in the questions or the matters that my learned friend just put to you and Your Honours' response to it, in defining as I understand it, defining the issues effectively on appeal. I understood that Your Honour was concerned to record the basis upon which the grant of leave is made.

Gault J We are required by the Rules or the Court must make an Order and we usually leave to the Registrar to make. But the Order must contain the points upon which leave is granted.

Davidson Yes. Well the fundamental point, as I understand it, is now suggested to be made up of two parts: effectively were they purchasers in default as of 13 November 2002 and if so, was tendering of the personal cheque sufficient to remedy the default. So is that what I should understand Sir to be the founding foundation to that.

Gault J Yes, the first question being a contingent question. The real issue on which leave is clearly granted is on the basis that the purchaser was in default: was the tendering of the personal cheque in the manner it was sufficient to remedy that default. And the other point is: is it open to the Appellant to advance argument that there was no default.

Davidson Sir, I'm only hesitating, I suppose gibbing is the correct expression, because I am simply thinking as I must, in the context of this case, the importance to the vendors, Respondents, as to whether there is any possible argument that the notice has application in the absence of default. And I haven't got an answer to that because it hasn't been raised before. So if it is confined in the way that has just been put in two parts, then effectively the opportunity to argue that as I see it would be gone if it was confining as to the argument.

Gault J Well, you could always apply for leave to vary the grounds if you hit upon some argument that hasn't struck you yet. But I can't myself see that that would be an issue.

Davidson Sir, I accept that. I'm just in the context of this case, and what lies behind and what I know about it, being as cautious as I have to be.

Gault J We have to commit ourselves unfortunately.

Davidson Yes, I understand Sir.

Gault J And so we will do that and as I say, the Rules provide that the way is open for an application if something crops up.

Davidson Yes Sir, I'll leave it at that Sir thank you. As Your Honours please.

Gault J Thank you. Alright, in due course the Registrar will make an Order that leave is granted. Two questions, one being contingent, will be set. There will be a requirement that security for costs of \$6,000.00 be given to the satisfaction of the Registrar.

Yes thank you, we'll retire.

Court adjourns 10.50 am