



## **ELIAS CJ**

[1] On 25 November 2003 Brett Larsen agreed to sell Rick Dees Limited 10 home units under contracts in the seventh edition of the REI/ADLS agreement form. Deposits were paid at the direction of the vendor's solicitors, who had supplied a deposit slip, by electronic transfer into their trust account on 19 December 2003. Settlement was first set for 10 February 2004, but the vendor did not deliver settlement statements until 17 February. The statements identified the amounts required to be paid by the purchaser as at 17 February in fulfilment of the purchaser's contractual obligation to pay the balance of the purchase price on settlement under cl 3.7(1) of the agreement for sale and purchase. By letter on the same day, the vendor's solicitors undertook that they held the documents required by cl 3.7(2) of the agreement for sale and purchase to be "concurrently" handed to the purchaser on payment in fulfilment of the vendor's settlement obligations. They attached a trust account deposit slip and undertook to forward the documents to the purchaser's solicitors together with their receipt and without delay

on receipt of :

- Your faxed undertaking that a Bank Cheque for the settlement figure (\$92,552.26) has been credited to our Trust Account in accordance with our settlement statement dated 17<sup>th</sup> January, 2004
- A faxed copy of the Bank Cheque, endorsement and stamped deposit slip.

[2] The purchaser did not settle on 17 February. The vendor served a settlement notice on 18 February 2004, as he was entitled to do under cl 9 of the agreement for sale and purchase. Under cl 9 the purchaser on receiving such notice was obliged to settle on or before the twelfth working day after service of the notice, time being of the essence. It is common ground that the period of notice expired at 5:00 pm on 5 March 2004.

[3] The funds required to settle, which included penalty interest, were deposited in the trust account of the vendor's solicitors at the National Bank of New Zealand no later than 4:54 pm on 5 March. The evidence that these were cleared funds has

not been challenged. (The fact that the purchaser fulfilled its settlement obligations through electronic transfer rather than by deposit of bank cheque is not material.<sup>1</sup>) Earlier, Mr Richards, the solicitor acting for the purchaser, had tried unsuccessfully to speak by telephone with Mr Newdick, the solicitor acting for the vendor, but was told he was unavailable. Mr Richards had advised the staff member to whom he spoke that the funds would be paid by electronic transfer into the trust account at about 4:50 pm. Immediately following transfer of the funds, the purchaser's solicitors tried to send a fax confirming the deposit and undertaking not to reverse the credit. The fax machine at the vendor's solicitors was engaged. The confirmation was eventually received by the vendor's solicitors at 5:07 pm. In the meantime the vendor's solicitors, by fax received by the purchaser's solicitors at 5:03 pm, purported to cancel the agreements for failure by the purchaser to comply with the settlement notice.

[4] The terms of the settlement notices given on 18 February 2004 required the purchaser to "settle the purchase". Under the agreement for sale and purchase, the sole settlement obligation imposed on the purchaser was under cl 3.7(1), which provides that on the settlement date:

(1) The purchaser shall pay or satisfy the balance of the purchase price, interest and other moneys, if any, due as provided in this agreement (credit being given for any amount payable by the vendor under subclause 3.9 or 3.10)

The purchaser's obligation to pay the balance of the purchase price under cl 3.7(1) is expressed by cl 3.7 to be "interdependent" upon the obligations of the vendor under cl 3.7(2):

- (2) The vendor shall concurrently hand to the purchaser:
- (a) the memorandum of transfer of the property provided by the purchaser under subclause 3.5, in registrable form; and
  - (b) all other instruments in registrable form required for the purpose of registering the memorandum of transfer; and
  - (c) all instruments of title.

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<sup>1</sup> *Otago Station Estates Ltd v Parker* [2005] 2 NZLR 734 at para [27] (SC).

[5] Clause 3.7 envisages settlement in which payment is made (through tender by the purchaser and acceptance by the vendor) and in which the vendor “shall concurrently hand to the purchaser” the title documents. But I think it is drawing a rather long bow to suggest that, where payment is made at the direction of the vendor by deposit of cleared funds directly to the account of the vendor’s solicitors on the vendor’s solicitor’s undertaking to forward the title documents on proof of deposit, the purchaser does not “settle” unless he notifies the vendor when such payment is made.

[6] Nor do I think that the terms of the letter of 17 February are correctly read as imposing a condition of notification in exchange for any waiver of a contractual right by the vendor. By acting on the vendor’s indication that deposit of cleared funds to the bank account was acceptable payment, the purchaser performed his contractual obligation. His payment by deposit of cleared funds meant that the purchaser’s contractual entitlement to receive the title documents “concurrently” was waived by him in exchange for the undertaking of the vendor’s solicitors that they would forward the title documents without delay on notification of payment in accordance with the letter of 17 February. The purchaser would not have been able to complain about any delay in receiving the title documents occasioned by his delay in notification to the vendor in accordance with the terms of the undertaking. But the fact that the undertaking (which was for the benefit of the purchaser) could not be enforced by the purchaser except according to its terms did not put the purchaser in breach of his strict contractual obligation to settle by payment before 5:00 pm on 5 March. That obligation was fulfilled. The vendor was not entitled to cancel the contract.

[7] It is suggested that the implication of a requirement of notification into the settlement obligation is necessary for reasons of commercial reality. Otherwise, it is said, vendors who have back to back agreements for sale and purchase will have no certainty. They will not know whether payment has been made within the time specified in the settlement notice. I find this argument unpersuasive. The method of payment authorised by the vendor here was by direct credit into his solicitor’s bank account. For that purpose the purchaser was supplied with a deposit slip, indicating that no further acceptance by the vendor was required to constitute payment. The

bank was the agent of the vendor's solicitor in receiving the funds. If the exact time of receipt was critical to the vendor, no doubt the solicitors could have arranged with the bank to receive confirmation of the deposit. I see no basis grounded in commercial efficacy for transforming the vendor's indication as to the basis upon which its undertaking to forward the documents would be triggered into an "essential feature of a settlement".<sup>2</sup> Here the vendor had the benefit of the payment immediately. He had the "certainty of actual receipt".<sup>3</sup> It seems to me that there is more commercial unreality in holding that a contract can be cancelled against a purchaser who has made full payment to the vendor or his agent in the manner directed by the vendor simply because the vendor is not notified of the payment before the time for settlement elapses. A vendor may be hard to reach (as this vendor proved to be).

[8] I do not accept that the terms of the settlement notices required that the purchaser "evidence to the vendor that payments of cleared funds had been made".<sup>4</sup> In their terms they simply required the purchaser to fulfil his obligation to make payment. The vendor's provision of the deposit slip with the letter of 17 February to enable direct deposit constituted acceptance of that method of payment, making further acceptance of the tender unnecessary. It is not material that the vendor would not have been in default in terms of his undertaking to provide the title documents until he knew of the deposit. The purchaser had fulfilled his obligation to make payment. For these reasons, I am of the view that the Court of Appeal<sup>5</sup> was correct to allow the appeal from the High Court.<sup>6</sup> I would dismiss the appeal in this Court.

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<sup>2</sup> Compare Blanchard J at para [32] below.

<sup>3</sup> *Otago Station Estates* at para [26].

<sup>4</sup> Compare Blanchard J at para [33] below.

<sup>5</sup> *Rick Dees Ltd v Larsen* [2006] 2 NZLR 765 (Anderson P, Glazebrook and Robertson JJ).

<sup>6</sup> *Rick Dees Ltd v Larsen* [2005] 3 NZLR 538 (Winkelmann J).

## **BLANCHARD, McGRATH and GAULT JJ**

(Given by Blanchard J)

### **Introduction**

[9] On this appeal the Court must determine whether 10 contracts for the sale and purchase of home units were validly cancelled by the vendor because of the purchaser's failure to settle in accordance with settlement notices. The settlement notices were validly given and required settlement by 5:00 pm on a certain day. Just prior to that time the sums due on settlement were transferred electronically to the trust account of the vendor's solicitors in cleared funds but the fact that this had occurred was not communicated to the solicitors until shortly after they had, at 5:03 pm, given notice of cancellation. In these circumstances, was the cancellation notice validly given?

[10] The answer to this question depends upon the settlement obligations of the purchaser under cl 3.7 of the REI/ADLS agreement form (seventh edition (2) July 1999):

- 3.7 On the settlement date:
- (1) The purchaser shall pay or satisfy the balance of the purchase price, interest and other moneys, if any, due as provided in this agreement (credit being given for any amount payable by the vendor under subclause 3.9 or 3.10); and
  - (2) The vendor shall concurrently hand to the purchaser:
    - (a) the memorandum of transfer of the property provided by the purchaser under subclause 3.5, in registrable form; and
    - (b) all other instruments in registrable form required for the purpose of registering the memorandum of transfer; and
    - (c) all instruments of title –  
the obligations in subclauses 3.7(1) and 3.7(2) being interdependent.

[11] The vendor has argued that a "remote" settlement, such as by electronic transfer of funds, is not permitted by this clause which contemplates only a face to face settlement at which the parties or their representatives are present. If, contrary to this first argument, such a mode of settlement is permitted, the vendor argues that the purchaser's obligation, in respect of which time was in this case of the essence, is

not fulfilled unless by the time of expiry of the notice the vendor has been made aware that the transfer of cleared funds has occurred. It is common ground that the vendor was not aware at 5:00 pm that the transfers of funds had been made.

### **Additional ground not permitted**

[12] The purchaser has belatedly sought to rely upon an argument, provisionally put from the Bench during the hearing in this Court, that the vendor might have been disabled from giving his cancellation notice because he himself was in breach of his obligations under the contracts. This argument had never previously surfaced in the case and we have decided that it would not be fair to grant the purchaser leave to advance it at this late stage of the proceeding. It would raise an entirely different issue from those upon which the case has previously been contested.

### **Facts**

[13] Those aspects of the factual background relevant to the disposition of the appeal can be briefly stated. Separate agreements for the 10 home units in one block of apartments at 15 Smiths Avenue, Papakura were entered into on 25 November 2003 by the appellant, Mr Larsen, as vendor and the respondent, Rick Dees Limited, as purchaser. Settlement was originally to take place on 10 February 2004 but was in the event rescheduled for 17 February. On that day the solicitors for the vendor, Turner Hopkins, sent settlement statements to the purchaser's solicitors, Jenny Wang & Associates, and in an accompanying letter gave an undertaking to forward the title documents and memoranda of transfer on receipt of (a) a faxed undertaking from the purchaser's solicitors that a bank cheque for the settlement figure had been credited to Turner Hopkins' trust account and (b) a faxed copy of the bank cheque and stamped deposit slip.

[14] The purchaser failed to settle and settlement notices were served in respect of each of the 10 contracts, to expire at 5:00 pm on 5 March 2004, time being of the essence.

[15] It does not appear that there was, at any time prior to 5 March, any discussion between the firms of solicitors either concerning the letter of 17 February in particular or how settlement might be effected in general. At about 3:45 pm on 5 March, in a telephone conversation, Mr Richards of Jenny Wang & Associates told a staff member at Turner Hopkins that the purchaser would be settling by electronic funds transfer but might not be in a position to do so until about 4:50 pm.

[16] The purchaser's solicitors were awaiting the arrival of mortgage funds. They received advice at 4:38 pm that these had been deposited into their trust account. They arranged for the electronic transfers of the revised individual settlement amounts, including penalty interest, from their account at ASB Bank into the trust account of Turner Hopkins at the National Bank of New Zealand. The transfers were completed no later than 4:54 pm. The unchallenged evidence is that these were cleared funds.

[17] The purchaser's solicitors attempted to send a fax confirming the funds transfers and giving an undertaking not to reverse them. Their attempts were unsuccessful because Turner Hopkins' fax machine was engaged. It was not until 5:07 pm that the fax went through on redial. In the meantime, at 5:03 pm, Jenny Wang & Associates had received faxes from Turner Hopkins notifying cancellation of all the contracts.

[18] The purchaser sought specific performance alleging that the cancellation was invalid.

### **The judgments below**

[19] In the High Court<sup>7</sup> Winkelmann J referred to evidence given on conveyancing practice concerning settlements by an experienced solicitor, Mr Timothy Jones. She accepted that the following accurately captured current practice:

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<sup>7</sup> *Rick Dees Ltd v Larsen* [2005] 3 NZLR 538 at paras [25] – [28].

- (i) In the absence of other agreement between the vendor and purchaser (their solicitors in reality), the settlement takes place face to face. This is consistent with the provisions of clause 3.7. “Money goes to title”, so that with a face to face settlement, the purchaser’s solicitor attends at the vendor’s solicitors office, unless another venue is agreed (such as the mortgagee’s solicitor’s office).
- (ii) Face to face settlements are typically utilised where the purchaser’s solicitor is within walking distance of the office, or if it is a complex settlement for example, involving a large number of documents to be handed over.
- (iii) Settlements at a distance, usually referred to as remote or fax settlements are now common because of considerations of distance and the growth of sophisticated means of communication. If the vendor’s solicitor agrees, remote or fax settlement may be utilised.
- (iv) If the vendor’s solicitor agrees to a remote settlement, then it is a valid tender of settlement by the purchaser, if he or she complies with the vendor’s solicitors requirements for the remote settlement.

[20] Winkelmann J treated the letter of 17 February 2004, in which the vendor’s solicitor had stipulated for a remote settlement, as evidence of an agreed mode of settlement. Notwithstanding the failure to settle on 17 February, the issuance of the settlement notices and the vendor’s attempt to insist on face to face settlement in a letter written at 4:25 pm on 5 March, that agreement had never effectively been varied or displaced.<sup>8</sup>

[21] The Judge was satisfied that the parties had agreed that confirmation of the payments was “part of the tender of settlement”<sup>9</sup> and that where confirmation of payment is stipulated for in an agreement for remote settlement, “although payment may have occurred earlier, tender of settlement by the purchaser under the agreement is not complete until the fact of payment to the vendor is notified as agreed”.<sup>10</sup> She said that the vendor’s requirement was for actual receipt at the office of the vendor’s solicitors by 5:00 pm. She considered that cl 1.2(3)(c) of the agreement had been displaced by the letter of 17 February. That paragraph provided that a notice is deemed to have been served, in the case of a facsimile transmission, when sent to the facsimile number of the solicitor’s office. Even if cl 1.2(3)(c) still governed the

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<sup>8</sup> At paras [28] – [31].

<sup>9</sup> At para [35].

<sup>10</sup> At para [36].

position, Winkelmann J said,<sup>11</sup> she was not satisfied that the fax was “sent” simply by reason of the number having been entered and dialled, where the attempted transmission was met with an engaged signal.

[22] Winkelmann J concluded that because the fax confirmation was not received by 5:00 pm, the purchaser had not validly tendered settlement “before such time as the vendor acted to cancel the contract”.<sup>12</sup> Thus the vendor’s cancellation was valid.

[23] For completeness, the Judge also considered whether electronic funds transfer was good performance of the purchaser’s payment obligations.<sup>13</sup> She observed that cl 3.7 of the standard form agreement was silent as to the method of payment. She said that it might well be that the time had come to imply a term to similar effect to the term implied in relation to bank cheques in *Williams v Gibbons*.<sup>14</sup> But that would not have assisted the purchaser, because the letter of 17 February specifically required deposit by bank cheque. The vendor’s agreement to depart from face to face settlement obliged the purchaser to comply strictly with the stipulated form of remote settlement.

[24] Accordingly, the High Court held that the claim for specific performance failed.

[25] The Court of Appeal allowed the purchaser’s appeal.<sup>15</sup> It too regarded the letter of 17 February as having contractual force. It said that as the purchaser did not complain about, or suggest any alternatives to, the settlement procedures stipulated for in the letter, the purchaser must be taken to have assented to those procedures.<sup>16</sup> The Court of Appeal also agreed with the High Court that the electronic transfers in this case were of cleared funds. Although Turner Hopkins’ bank did not have direct real time banking, the transfer would have been processed overnight and the funds

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<sup>11</sup> At para [42].

<sup>12</sup> At para [43].

<sup>13</sup> At para [44] and following.

<sup>14</sup> [1994] 1 NZLR 273 (CA). The Court in *Williams v Gibbons* held that there was an implied term in contracts for the sale of land that tender of a bank cheque in settlement should be a good tender of the amount of the cheque.

<sup>15</sup> *Rick Dees Ltd v Larsen* [2006] 2 NZLR 765 (Anderson P, Glazebrook and Robertson JJ).

<sup>16</sup> At para [50].

would have been “expressed to have been” in the vendor’s solicitors’ account at the time of the transfers.<sup>17</sup>

[26] However, referring to the letter of 17 February, the Court of Appeal said that the vendor’s solicitors did not stipulate in that letter that payment by a direct credit of a bank cheque was the only acceptable method of payment, let alone that performance by that means was essential to the vendor. Neither, in the Court’s view, was the letter intended to replace or exclude cl 3.7. The mechanics within it did not become part of the actual settlement obligation, which was, pursuant to cl 3.7 and the settlement notices, for the purchaser to tender payment on or before 5:00 pm.<sup>18</sup> The Court concluded that this had occurred by the irrevocable transfer of cleared funds before that time.<sup>19</sup> It did not need to decide whether payment into a vendor’s bank account would, despite lack of consent by the vendor, constitute good tender because here the vendor had provided the purchaser with its bank account details, which implied consent to payment into the bank account.<sup>20</sup> That consent was not limited by any stipulation that payment could be made into the account only by way of bank cheque. Electronic transfers were sufficient to satisfy the payment obligation under cl 3.7, and indeed could be equated with bank cheques, so that their use, even if contrary to the 17 February letter, would not have entitled the vendor to cancel the agreements.<sup>21</sup>

[27] The Court of Appeal was of the view that notification and proof of payment was required but was not an essential element of those obligations of the purchaser which had to be completed by 5:00 pm.<sup>22</sup> There would have been a “major logistical difficulty” if that were so. In terms of the agreement, payment could have been made up to and including 5:00 pm. Had payment been made at 5:00 pm, then fax notification of payment could not physically have been dispatched until after 5:00 pm. The parties must therefore be taken to have agreed that

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<sup>17</sup> At para [25].

<sup>18</sup> At para [55].

<sup>19</sup> At para [61].

<sup>20</sup> At para [63].

<sup>21</sup> At para [64].

<sup>22</sup> At paras [67] – [72].

notification would take place within a reasonable time of payment. Here notification took place within 10 minutes of payment, and this must satisfy the reasonableness requirement. The Court considered that the reason for the notification requirement was primarily to trigger the vendor's performance of his obligations under the agreement and thus to minimise the purchaser's risk in agreeing to remote settlement. The Court recognised that if the vendor was unaware that the funds were in the bank account, he could not have chosen to withdraw them immediately. However, it said, the same would have applied if the vendor had been presented at a face to face settlement with a bank cheque at 5:00 pm. The fact that there would not be immediate use of the funds if they were paid after 4:00 pm was recognised under the agreement by the provision in cl 3.8 for the payment of an additional day's interest. There was no suggestion that there was in fact any purchase being made that day by the vendor for which the funds were needed.

### **Analysis**

[28] There is no proper basis for concluding that the letter of 17 February was binding upon the purchaser so as to require it to settle in the manner detailed therein. The letter did not say, at least in direct terms, that no other method of settlement would suffice and, even if it had, the purchaser's silence on the subject until 5 March could not fairly be taken to be an assent. Nor was it at all a situation in which an exchange of correspondence coupled with the conduct of the negotiating parties might lead a court to conclude that despite some variances in the exchange a bargain had been struck. Here the only response by the purchaser was its solicitor's advice that it intended to settle by means of electronic funds transfers. The only significance of the letter of 17 February was therefore in its indication that a payment might be made to the solicitors' trust account.

[29] The only contractual provision governing the mode of settlement was that found in cl 3.7. In para (1) it required that the purchaser "pay" the balance of the purchase price. Paragraph (2) then made it clear that the purchaser was not under an obligation to do so unless concurrently the vendor was able and willing to hand over

the memorandum of transfer and other instruments needed in order to register the transfer together with all instruments of title.

[30] It is said for the vendor that para (2) provides an indication that the contract required that settlement be face to face. Certainly it does contemplate that situation and gives the purchaser the ability to insist on such a mode of settlement. But we do not think it makes that mode compulsory for the purchaser, who can, in our view, elect for a remote settlement, under which the purchaser makes payment of the settlement amount without concurrently receiving the documents specified in cl 3.7(2), if willing to run any risk that may be involved. It is the purchaser's obligation to begin the settlement process by tendering or actually making the necessary payment. The stipulation for concurrency of performance by the vendor recognises that the purchaser's obligation to pay is dependent upon the delivery of the documents and thus it protects the purchaser from vendor default in that respect. The vendor needs no such protection against a failure to pay the money as the vendor is not required to deliver the documents until payment is tendered.

[31] A purchaser is entitled under cl 3.7 to pay the sum due to the vendor in any form which legitimately constitutes a payment for this purpose or, if tendering payment, to do so in any such form. In *Otago Station Estates Ltd v Parker*<sup>23</sup> this Court described what constitutes a payment for the purposes of an agreement for sale and purchase. We approved the decision in *Williams v Gibbons* that in this context a bank cheque is the practical equivalent of legal tender. We said in reference to a deposit, and it is equally true upon settlement, that a person entitled to payment is entitled to the certainty of actual receipt. That is achieved if the payment takes the form of a bank cheque or other form of transfer of cleared funds where there is no practical possibility of a reversal of the transaction by the payer's bank. In the present case that was achieved. The vendor had indicated that payment could be made to the solicitors' trust account, assuming such an indication was needed. The evidence was that the electronic transfers were irrevocable and that the funds received could immediately have been drawn upon by the solicitors for the vendor. In this respect we agree with the courts below.

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<sup>23</sup> [2005] 2 NZLR 734.

[32] But it is equally the position that under cl 3.7 the purchaser is not entitled to impose on the vendor a mode of remote settlement involving any risk or disadvantage not present in the envisaged face to face settlement. When the parties or their representatives meet and payment is tendered by or on behalf of a purchaser, the vendor or representative naturally has knowledge that cleared funds are available and, if they are accepted, that they have been received and are able to be used immediately, for example, by placement on interest-earning deposit or for settlement of a back to back transaction. That advantage, which is an important element in what is contemplated in cl 3.7, is missing if the vendor is not made aware of the payment. Obviously the obligation to tender a payment cannot be fulfilled unless the vendor is made aware of the offer of the money and in this context we consider that, even though the purchaser may actually complete a payment of cleared funds, cl 3.7 is not complied with merely by taking that action without also taking steps to make the vendor aware that the funds are now available. The imparting of that knowledge to a vendor is an essential feature of a settlement in terms of cl 3.7 or indeed under any contract of this kind which is silent about the mode of settlement.

[33] In the present case the purchaser failed timeously to evidence to the vendor that payments of cleared funds had been made and therefore did not comply with the requirements of the settlement notices. It was not good enough for a purchaser to do so within some reasonable, but necessarily indefinite, time after the settlement notice deadline had passed. That would introduce a most undesirable element of uncertainty for vendors and provide room for much argument about how long after the deadline was acceptable as being close enough. Nor are we persuaded that the contract terms themselves provide for some flexibility because of the imposition of an additional day's interest if settlement is after 4:00 pm. That would not compensate a vendor into whose bank account cleared funds had been transferred before 4:00 pm without notice of the payment being given. We are unpersuaded also by the suggestion that because payment could be made at 5:00 pm some breathing space for subsequent advice to the vendor must be allowed for. In our view what the contract requires by 5:00 pm is a payment of cleared funds of which the vendor is aware. Purchasers who choose a remote settlement must pay in sufficient time to allow for providing the vendor with knowledge of the making of the payment in cleared funds before the deadline passes.

[34] We therefore conclude that the position of the parties in this case after 5:00 pm on 5 March 2004 was no different in crucial respects from that of the parties in *Union Eagle Ltd v Golden Achievement Ltd*,<sup>24</sup> where the purchaser arrived a few minutes too late and the vendor was found to be entitled to cancel because the time for performance had passed. In the present case the cancellation preceded the attempt to complete the obligation, whereas in *Union Eagle* it was the other way round, but nothing would turn on that difference.

## **Result**

[35] By majority, the appeal is allowed and the judgment of the High Court dismissing the respondent's claim is restored. The appellant is entitled to costs in this Court of \$15,000 plus reasonable disbursements to be fixed if necessary by the Registrar. He will also have costs of \$6,000 and reasonable disbursements in the Court of Appeal. If costs have not been fixed in the High Court, that should now be done.

## **TIPPING J**

[36] I agree that this appeal should be allowed with the consequences proposed by Blanchard J, with whose reasons I am in entire agreement. I add the following observations of my own as to why I cannot accept the approach of the Court of Appeal.

[37] The parties agreed to settle their transactions in terms of cl 3.7 of the several contracts. No different method of settlement was contractually substituted. The purchaser failed to settle on the original settlement date. The vendor served on the

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<sup>24</sup> [1997] AC 514 (PC).

purchaser a settlement notice under cl 9.1(1).<sup>25</sup> The purchaser thereby became obliged under cl 9.2<sup>26</sup> to “settle” by 5:00 pm on 5 March 2004, “time being of the essence”. Clause 9.2 represents an agreement between the parties that following default and service of a settlement notice time was to be of the essence of the settlement date specified in the notice. If the purchaser failed “to settle” by 5:00 pm on 5 March, as happened, the purchaser broke a stipulation in the contract within the meaning of s 7(3)(b) of the Contractual Remedies Act 1979. Under s 7(4)(a)<sup>27</sup> the vendor was entitled to cancel if, and only if, the parties had expressly or impliedly agreed that the performance of the stipulation was essential to the vendor. The present parties had expressly so agreed by means of the essentiality provision in cl 9.2 of the contracts. Hence everything turns on what the purchaser had to do in order to “settle” by 5:00 pm.

[38] I cannot accept the suggestion that the obligation to settle in cl 3.7 did not carry with it an obligation to notify the vendor that payment had been made. In the present context, the concept of payment necessarily involves the payee being satisfied that the appropriate sum has actually been received. It would be commercially unrealistic to hold that the vendor had been paid by 5:00 pm when he was unaware that this was so at 5:00 pm. The vendor was entitled at 5:00 pm to deploy the funds derived from the settlement to meet a contemporaneous obligation or in any other way he chose. He could not do this unless aware that he had received cleared funds from the purchaser, whose obligation it was to convey the necessary information.

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<sup>25</sup> Clause 9.1(1) provides:

(1) If the sale is not settled on the settlement date either party may at any time thereafter serve on the other party notice (“a settlement notice”) to settle in accordance with this clause ...

<sup>26</sup> Clause 9.2 provides:

9.2 Upon service of the settlement notice the party on whom the notice is served shall settle:

(i) on or before the twelfth working day after the date of service of the notice; or

(ii) on the first working day after the 20th day of January if the period of twelve working days expires during the period commencing on the 6th day of January and ending on the 20th day of January, both days inclusive – time being of the essence, but without prejudice to any intermediate right of cancellation by either party.

<sup>27</sup> Without prejudice to s 5, the parties in this case having effectively provided their own remedy.

[39] In the present case, the letter of 17 February, which the Court of Appeal considered to be the source of an independent notification obligation, did not, for the reasons Blanchard J has given,<sup>28</sup> have contractual force. It did, however, convey the vendor's acceptance that payment could be made to his solicitors' trust account. This acceptance was on terms that the purchaser would give notification of payment by means of faxed proof of the deposits. The vendor thereby preserved the requirement of notification of payment inherent in the terms of cl 3.7. Notwithstanding that the obligation to pay could now be satisfied by means of direct credit, the purchaser remained obliged to notify the vendor that payment had been made. The purchaser could not adopt the vendor's proposal for payment by direct credit without complying with its terms.

[40] The obligation to notify requires the purchaser to give the vendor sufficient information to enable the vendor to be satisfied that it has the certainty of actual receipt of the correct amount of money. In this case the vendor had signalled that receipt of the stipulated faxed documents would adequately serve that purpose. It is not possible to imply a term that notification could or would take place within a "reasonable time" after payment.<sup>29</sup> The inevitable inference from what the parties had agreed was that payment was required in sufficient time before 5:00 pm to enable notification to take place by then.

[41] For these reasons, as well as those given by Blanchard J, I consider the appeal should be allowed.

Solicitors  
Turner Hopkins, Takapuna for Appellant  
Jenny Wang & Associates, Auckland for Respondent

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<sup>28</sup> At para [28] above.

<sup>29</sup> Compare *Rick Dees Ltd v Larsen* [2006] 2 NZLR 765 at para [68] (CA) (Anderson P, Glazebrook and Robertson JJ).