IN THE SUPREME COURT OF NEW ZEALAND

SC CIV 6/2004
[2005] NZSC 16

BETWEEN	OTAGO STATION ESTATES LIMITED Appellant
AND	JOHN ROBERT PARKER First Respondent
AND	DAVID JOHN PARKER AND LORRAINE MAREE PARKER Second Respondents

Hearing: 15 March 2005

Court: Elias CJ, Gault, Keith, Blanchard and Tipping JJ

Counsel: A R Galbraith QC and S A Grant for Appellant
N R W Davidson QC and D M Lester for Respondents

Judgment: 19 April 2005

JUDGMENT OF THE COURT

A. The appeal is dismissed.

B. Costs in favour of the respondents are to be fixed following receipt of memoranda of counsel.

REASONS

(Given by Blanchard J)

[1] The issue on this appeal is whether a purchaser can remedy a default in paying a deposit due under an agreement to sale and purchase of land on the REINZ – ADLS form by tendering a personal cheque if the vendor objects to that mode of payment.

Facts

[2] On 22 November 2000 the respondents, D J & L M Parker (jointly) and J R Parker entered into contracts to sell two parcels of rural land in North Otago for purchase prices of $2,950,000 and $600,000 respectively. The purchaser companies, Willowbank Holdings Ltd and Livingstone Properties Ltd, had express rights of nomination of a purchaser. Each contract was on the form approved by the Real Estate Institute of New Zealand and the Auckland District Law Society.[1] Each was conditional upon confirmation by the directors of the purchaser company within 60 working days (i.e., by 1 March 2001, later extended to 6 March). The J R Parker/Livingstone agreement was also conditional upon the obtaining by the vendor of a resource consent for a subdivision to enable a separate title to be issued for the subject land. No date was fixed by the agreement for fulfilment of that condition.

[3] Each agreement provided for a deposit of 10% of the price "upon confirmation of this Agreement", with the balance of the price being payable "in cash" on the date of possession, which was fixed for 1 March 2001.

[4] The printed conditions of sale contained the following requirements concerning a deposit:

> 2.1 The purchaser shall pay the deposit to the vendor or the vendor's agent immediately upon execution of this agreement by both parties and/or at such other time as is specified in this agreement time being of the essence as to each such time.
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> 2.2 The vendor shall not be entitled to cancel this agreement for non-payment of the deposit unless the vendor has first given to the purchaser three working days' notice of intention to cancel and the purchaser has failed within that time to remedy the default. No notice of cancellation shall be effective if the deposit has been paid before the notice of cancellation is served.

[5] On 6 March the agreements were confirmed by the purchaser companies. The deposits were not, however, paid. There is no material before the Court shedding light on why that did not occur, save that the pleadings reveal that on 20 March 2001 the solicitor for the vendors confirmed by fax that "payment of the

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[1] Seventh Edition (2) July 1999.

deposits could be deferred until after a scheduled meeting between the parties, which took place on 28 March 2001". The Court has no information at all about what occurred at that meeting or even why it was arranged. Nor does the Court know why the deposits remained unpaid after the meeting or, except as follows, what happened over the next year and a half.

[6] We do know that on 27 September 2001 Willowbank and Livingstone nominated the appellant, Otago Station Estates Ltd, to be the purchaser under both agreements and that on 4 February 2002 Otago Station Estates gave notice that it was ready, willing and able to settle and inquired about Mr J R Parker's progress with the subdivision. On 9 April it sought his signature on an application for a resource consent, which was not forthcoming, and, despite still not having tendered the deposits, on 10 October 2002 it issued a proceeding seeking specific performance of the agreements by the Parkers.

[7] The Parkers responded on 13 November when their solicitors, Berry & Co of Oamaru, issued in respect of each agreement a notice to the original purchaser company and to the appellant (care of their respective solicitors) of an intention to cancel each agreement for non-payment of the deposit unless it was paid to the offices of Berry & Co within three working days of the date of the service of the notice upon the original purchaser.[2] But reference was made to the firm's trust account, the bank and number being identified, in a manner which clearly invited payment directly to that account.

[8] A working day terminates at 5pm.[3] The third working day was 18 November 2002. At 4.32pm on that day the solicitors for Otago Station Estates sent Berry

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[2] The notices appear to have been served upon all addressees on the same day, which was a working day.

[3] Cl 1.1(6) of the General Terms of Sale.

& Co a fax advising that the amount of the deposits (and interest for late payment, which was paid under protest), a total of $433,892.78, had been deposited into their trust account that afternoon. Anderson Lloyd Caudwell also sent a photocopy of the deposit slip and the cheque by which the deposit had been effected. It was the personal cheque of Otago Station Estates Ltd.[4]

[9] On the next day Berry & Co advised that payment of the deposit by the cheque of Otago Station Estates was not legal tender and was not in compliance with cl 2.2 of the agreement. They said that the default in payment of the deposits had not been remedied and they gave notice of cancellation of the contracts. Anderson Lloyd Caudwell did not accept that cancellation nor Berry & Co's invitation to stop payment on Otago Station Estates' cheque. On 26 November 2002 Berry & Co refunded the amount which had been deposited into its trust account, doing so by bank cheque.

Leave declined for new point

[10] At the hearing of the appellant's application for leave to appeal to this Court, counsel for the appellant, Mr Galbraith QC and Ms Grant, neither of whom had appeared below, sought leave to argue not only that tender of the personal cheque remedied the default (for which leave was granted) but also that there had in fact been no default in payment of the deposits because time for payment had earlier been set at large. The argument would have been that the Parkers therefore had not validly issued their notices under cl 2.2. That question was reserved for consideration at the hearing of the appeal. Having heard counsel, we declined leave and now give our reasons for doing so.

[11] With apparent deliberation, the appellant chose not to contend in the High Court that there had been no default on its part in relation to the deposits. In the Court of Appeal, counsel then appearing for the appellant said that the Court should proceed on the basis that the purchaser was in default. It is only rarely and with

[4] No point has been taken concerning the fact that the cheque was that of a nominee or contesting the appellant's standing to sue on the agreements.

extreme caution that a second level appellate court will allow a point to be raised which has been conceded below[5] and it should not do so if there is any possibility that the outcome might have been affected if the point had been taken earlier.[6]

[12] In the present case the appellant was not only seeking to depart from the basis on which it elected to present its case below, including a concession in the Court of Appeal, but it also faced the additional hurdle of persuading this Court "beyond doubt" that it had before it "all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial".[7] It will be obvious from the mention above of the lack of information before the Court concerning the dealings between the parties after the agreements were confirmed, that it is impossible for the appellant to overcome this hurdle. It would therefore have been quite wrong to allow the appellant to advance for the first time the argument that it had not been in default.

[13] Nor would it have been right for us to remit the matter back to the High Court for the taking of further evidence, as Mr Galbraith sought in the alternative. This Court has a general power to remit cases to a lower court,[8] and where the court of first instance has failed to make factual findings adequate for the final disposition of a case it could exercise that power, including where necessary by directing the taking of evidence.[9] But in the present case such a course would effectively have required a new trial. It would be a fairly rare course even for the first appellate court to adopt[10] and we are not aware of a final court ever having done so when the appellant has chosen not to pursue the matter in issue before the trial court.

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5 *Grobbelaar v News Group Newspapers Ltd* [2002] 1 WLR 3024; [2002] 4 All ER 732 at [21].
6 *New Zealand Meat Board v Paramount Export Ltd* [2004] UKPC 45 at [47].
7 *The Tasmania* (1890) 15 App Cas 223, 225 per Lord Herschell, cited by Lord Nicholls of Birkenhead and Lord Walker of Gestingthorpe at para [64] in their judgment in the *Meat Board* case (dissenting in the result but agreeing on the legal principle).
8 Section 26 Supreme Court Act 2003.
9 *Taylor on Appeals* (2000) para 18-115.
10 Under s 62 of the Judicature Act 1908.

The judgments below

[14] Chisholm J's judgment in the High Court at Dunedin is reported at [2003] 3 NZLR 567. He said that there was agreement between the only witnesses at the trial (six experienced conveyancing solicitors giving evidence as experts) that personal cheques represented the most common mode of payment of initial deposits.[11] If some other mode of payment was required, it would be customary for the vendor to specify the required mode. Had it been necessary to imply a term in this case to the effect that a personal cheque represented a valid form of tender for the initial deposit, the Judge said he would have been prepared to oblige. But the case concerned a much less common situation where payment was being made in response to a cl 2.2 notice. According to the evidence, he said, this type of situation was sufficiently rare for a custom or practice not to have arisen.

[15] The Judge saw a clear distinction between "a timely initial payment of the deposit" and "a payment in response to a default notice".[12] He observed that, although time was of the essence, failure to pay the deposit did not confer on the vendor a right of cancellation. On the other hand, once cl 2.2 had been invoked, a much more robust contractual regime governed the situation. He concluded that the default could not then be remedied by a personal cheque which might or might not be met. Certainty of payment was important. Clause 2.2 had been structured so that the vendor could immediately cancel if payment had not been made by the time the notice expired. Any suggestion that the vendor should have to wait until a cheque was cleared was incompatible with such contractual certainty.

[16] Chisholm J had earlier noted the decision of the Court of Appeal in *Williams v Gibbons.*[13] On the authority of that case, unlike a personal cheque, a bank cheque was virtually equivalent to cash. He held that a bank cheque was required to satisfy a default notice unless the vendor was prepared to accept something less. It was for the purchaser to take the initiative in obtaining any such concession by way of modification to the contractual arrangement under cl 2.2.

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[11] At para [21].
[12] At para [23].
[13] [1994] 1 NZLR 273.

[17] The Judge found that because the personal cheque tendered by Otago Station Estates did not represent good tender in terms of cl 2.2, the Parkers were entitled to reject the payment. Consequently the default had not been remedied in accordance with the notice and the Parkers could cancel the agreements. Judgment was entered in their favour.

[18] The judgment of the Court of Appeal (Glazebrook, Chambers and O'Regan JJ), delivered by O'Regan J, is reported at (2004) 5 NZ ConvC 193,996 and 5 NZCPR 651. The Court of Appeal saw no reason to disturb Chisholm J's finding that there was no custom in relation to payments to remedy defaults in payment of deposits. The fact that the agreement required payment of the balance of the purchase price "in cash" did not create an inference that a different form of payment was mandated for payments under cl 2. It was primarily intended, in the Court's view, to indicate that the transaction did not involve a swapping of one property for the other or a partial settlement by the transfer of another property – in other words, it was a strictly monetary transaction. The omission of the words "in cash" from the provision relating to deposits (cl 2) did not mean the vendor committed to accepting a personal cheque. At best, it left open the possibility that the vendor would accept a personal cheque without objection.

[19] The Court of Appeal accepted a submission for the appellant that cl 2.2 required the purchaser to do what it should have done under cl 2.1, that is, pay the deposit. The obligation under cl 2.2 was the same as the obligation under cl 2.1, although the circumstances of a payment under cl 2.2 were such that the parties were much more likely to insist on strict compliance with the contract. The Court did not agree that there could be justification for implication of a term that a personal cheque represented valid tender for deposits paid under cl 2.1. It accepted that vendors (or, more accurately, real estate agents acting for vendors) almost always accepted personal cheques for deposits. But in the Court's view that was simply the operation of the principle that, if a payee accepts tender of a cheque without objection to its form, the payee is deemed to have waived the right to payment in cash (or, in today's environment, a bank cheque or other form of cleared funds). The existence of such a practice – presumably because the deposit was usually held by the real estate agent for 10 days anyway – did not change the underlying legal obligation to "pay" the

deposit, and the vendor's right to stipulate in advance that a personal cheque would not be accepted or object to the tender of a personal cheque at the time of receipt. Vendors were entitled, whether under cl 2.1 or cl 2.2, to reject a personal cheque by way of deposit.

[20] The Court also considered that in instructing the purchaser's solicitors to make payment directly to their trust account the vendors' solicitors had not waived the requirement for legal tender. The cheque to be deposited had to be a bank cheque.

Discussion

[21] Clause 2 of the REINZ – ADLS form must be read against the background of settled principles of vendor and purchaser law and the provisions of the Contractual Remedies Act 1979 (the Act). A deposit is relevantly defined in Black's Law Dictionary[14] as:

> 3. Money placed with a person as earnest money or security for the performance of a contract. The money will be forfeited if the depositor fails to perform.

As Lord Macnaghten put it in *Soper v Arnold*, a deposit is a forfeitable pledge put up by the purchaser as "a guarantee that the purchaser means business".[15] It is a security to the vendor against the purchaser's unlawful repudiation of the contract. Hence the importance to the vendor of actual timely receipt of the money. The right to recover a deposit is not divested if the vendor cancels the contract[16] but the right to bring such a proceeding or a proceeding on a dishonored cheque is in no way the equivalent of an unconditional receipt of payment. In recognition of the significance to the vendor of receipt of a deposit, time for payment is generally of the essence.[17] Failure to pay in due time is then a breach of an essential stipulation enabling an immediate cancellation by the vendor under s 7(3)(b) and (4)(a) of the Act.[18]

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14 7 ed.
15 (1889) 14 App Cas 429, 435.
16 *Garratt v Ikeda* [2002] 1 NZLR 577.
17 *Watson v Healy Lands Ltd* [1965] NZLR 511, 517-518; *Boote v R T Shiels & Co Ltd* [1978] 1 NZLR 445, 452.
18 *New Zealand Tenancy Bonds Ltd v Mooney* [1986] 1 NZLR 280.

[22] Clause 2 of the REINZ – ADLS form confirms the essentiality of the time for payment of a deposit, thus preserving an important summary remedy for the vendor. But, recognising that a sudden cancellation and exposure of the purchaser to the possibility of a subsequent proceeding for recovery of a significant sum of money (the deposit and any residual damages for breach of contract) might cause disproportionate hardship, cl 2.2 requires a vendor to give three working days' notice of an intention to take this action which has such drastic consequences. The three working days was aptly described by counsel in argument as a grace period. The second sentence of cl 2.2 may also provide an additional breathing space for the purchaser since a payment made after expiry of the three working days but before any cancellation notice is served under s 8 of the Act will prevent the vendor's cancellation being effective.

[23] We turn now to the mode of payment, on which cl 2 is silent save for using the words "pay", "non-payment" and "paid". The question is what those words mean in the context of the agreement form as a whole and against the background which has been sketched in para [21]. Mr Galbraith appeared to accept that it has long been understood in relation to vendor/purchaser transactions generally (not confined to those on the standard form) that there is a requirement of law that any payment in or towards the purchase price, including an initial deposit, must be made in legal tender as prescribed by s 27 of the Reserve Bank of New Zealand Act 1989 (bank notes) or by bank cheque[19] or other means of provision of cleared funds. Counsel was not able to draw our attention to any authority supporting the view that a purchaser can as a matter of law (rather than with the assent of the vendor, express or implied) perform the obligation to pay a deposit by means of a personal cheque. The authorities are very much to the contrary, beginning with *Johnstone v Boyes*[20] in 1899, where Cozens-Hardy J said that no custom had been proved to oblige vendors to receive the cheque even of a person in good credit, although it was doubtless usual

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[19] In *Yan v Post Office Bank Ltd* [1994] 1 NZLR 154 the Court of Appeal had held that the holder of a bank cheque was unaffected by a failure of consideration between the bank and its customer. Following *Yan*, in *Williams v Gibbons* the Court of Appeal said that the only risk entailed in taking a bank cheque was that of the bank's insolvency. Tender of a bank cheque could therefore be refused because of the form of payment only if the recipient had reasonable grounds for believing that because of insolvency the bank might not honour it.

[20] [1899] 2 Ch 73.

to do so.[21] That decision was followed in this country by the Court of Appeal in *Stembridge v Morrison*[22] and, so far as we are aware, it has never been doubted. Dr McMorland observes:[23]

> Although it is 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. It is now accepted that there is an implied term in every contract for the sale of land, in the absence of express provision to the contrary, that payment of money under the contract may be made by bank cheque.

[24] Mr Galbraith relied upon certain remarks of the members of the High Court of Australia in *George v Cluning*,[24] in particular those of Mason J,[25] but they amount to no more than observations on the wide-spread use of personal cheques. Mason J actually said that a personal cheque was not legal tender, but was a sufficient payment "if not objected to on that account".

[25] Mr Galbraith contended that if this indeed represented the requirements of the law and of the particular contract it was unsatisfactory in practical terms. He said that no one would write a standard form contract containing a requirement that deposits must be paid by bank cheque, and no doubt that is correct. For practical reasons, deposits are normally tendered and accepted by way of personal cheques, as seems to have been the case in 1899. Any obligation to tender a bank cheque for the deposit immediately following an auction or a sale occurring outside banking hours, might well be impossible of fulfilment, for the precise amount would not be known in advance. Mr Galbraith therefore submitted that in relation to deposits the legal requirement had to be regarded as a fiction and that the practice of vendors receiving payment by personal cheque amounted to a "fictionalised waiver". He said the Court should now be prepared to bring the law into line with reality, as the Court of Appeal had done in *Williams v Gibbons*, and that only in this way could the words "pay", "non-payment" and "paid" in cl 2 be given a consistent meaning.

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21 At 78.
22 (1913) 33 NZLR 621.
23 *Sale of Land* (2 ed 2000) at para 7.09.
24 (1979) 28 ALR 57.
25 At 62-63.

[26] A person entitled to payment of a deposit is entitled to what Somers J called the certainty of actual receipt.[26] The entitlement is to more than a conditional payment with the need to await clearance of the cheque in order to know that payment has actually occurred, and with the right to sue for the debt suspended in the meantime.[27] The editors of Brindle & Cox[28] would go even further. They express the view that there is in fact no payment at all until the cheque is honoured.[29] The cheque is then treated as having been paid from the time when it was delivered.

[27] The law relating to the mode of payment of deposits is well understood and workable in practice. It was undoubtedly known to those who prepared the seventh edition of the standard form that a contractual requirement for the making of a payment must, as a matter of law, be performed by means of legal tender, bank cheque or other cleared funds unless the payee by words or conduct indicates a preparedness to accept a personal cheque. A vendor who takes a personal cheque or knowingly allows his or her agent to do so, without objecting specifically to the form of tender of payment as soon as he or she is aware of it, must expect to be taken to have dispensed with the need for payment through legal tender or its equivalent. The vendor would then be estopped from asserting that the mode of payment did not comply with the contractual requirement. Where the sale is at an auction or occurs outside banking hours, vendors who enter into the sale (or allow an agent, the auctioneer, to do so on their behalf), and who then indicate an unwillingness to accept the purchaser's personal cheque might now find, if the matter ever came to court, that it would be held against them that, in circumstances where a bank cheque was not immediately obtainable and the deposit was of a size that a purchaser was unlikely to be carrying sufficient cash, it was implicit that a personal cheque could and would be used. That is not, however, a matter on which we need express more than a tentative view. The issue does not arise in the present case and will rarely, if ever, arise where the standard form is used, for the reason that the vendor cannot cancel for non-payment of the deposit without giving the notice required by cl 2.

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[26] *Henderson v Ross* [1981] 1 NZLR 417, 433.
[27] See *Allen v Royal Bank of Canada* (1925) 95 LJPC 17.
[28] *Law of Bank Payments* (3 ed 2004) at para 1-010.
[29] See also R M Goode, *Payment Obligations in Commercial and Financial Transactions* (1983) p 20.

And most vendors would presumably prefer to have the immediate comfort of the purchaser's cheque, and the ability to sue on it in the event of dishonour, rather than await a bank cheque and take the risk that the purchaser might repent of the bargain and fail to obtain one. Also, as the Court of Appeal noted, where payment is made to a real estate agent, the moneys cannot be released from the agent's trust account for ten days without a court order or an authority signed by all parties to the transaction.[30]

[28] There is therefore no practical need for a court to make a special rule for payment of deposits, particularly when it would go much further than the Court of Appeal went in *Williams v Gibbons* in relation to payments on settlement of a sale and purchase. There was every reason for the Court of Appeal to approve the use of bank cheques in that circumstance and no real risk for the recipients as there would be if they were now required to accept personal cheques for deposits. The Court in *Williams v Gibbons* was confronting a very real problem. If a bank cheque were not to be regarded as the practical equivalent of legal tender, a purchaser's solicitor might be faced with having to obtain a large quantity of cash – perhaps difficult to locate at short notice – and run the security risk of transporting it to the office of the vendor's solicitors. No such problem exists in relation to the tendering of a deposit. In the rare case in which a vendor could and does rightfully reject a personal cheque, the purchaser will under the standard form have plenty of time to obtain a bank cheque.

[29] Nor is there to be found in the standard form anything indicating an intention to depart from the established law. The words used in cl 2 in relation to the mode by which the obligation of the purchaser is to be discharged are neutral. They merely call for payment. If a personal cheque had been intended to be sufficient, the drafters might have been expected to say so explicitly.

[30] A consideration of the mechanics of the cl 2 further weakens the appellant's argument. If the appellant were correct, a notice given by a vendor after the purchaser's personal cheque for the deposit had been dishonoured could be met by

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[30] Section 57 Real Estate Agents Act 1976.

the tendering of a further personal cheque. That tender could be made at any time prior to the service of a cancellation notice, thereby suspending the vendor's right to cancel, or even to sue for the debt, until it was known whether the second cheque was met on presentation. On the evidence, that could take four or five days or, if a special answer were sought, until the following day, at least where the cheque was tendered outside banking hours. That would produce an uncertain and thoroughly unsatisfactory situation. The vendor would not yet know whether he or she had the security of a deposit.

[31] Rejection of the argument that the tender of a personal cheque constitutes payment of an initial deposit under cl 2 collapses the appellant's argument that there should be consistency in the interpretation of "pay" etc throughout the clause. There is consistency since the clause requires cash or its equivalent at every point – immediate payment, payment after default in response to a notice from the vendor (when actual receipt of cleared funds is most obviously of great importance to the vendor) or where a payment is made only after the period of notice but before a cancellation notice has been served on the purchaser.

[32] Three further arguments for the appellant are also without merit. Given the settled legal position and the absence, as the Judge found, of any practice of accepting personal cheques in response to a notice under cl 2, it was not incumbent on the vendors to tell the purchaser when giving their notice that tender of a personal cheque would be an unacceptable response. On the contrary, if the purchaser had hopes of avoiding the need to take the simple step of acquiring a bank cheque, it should have inquired whether the vendors would take its personal cheque.

[33] There is no significance for the construction of cl 2 in the use on the front page of the agreement form of the expression "in cash" relating to the settlement obligation. It was an addition to the form made in the particular case and cannot sensibly be read as an oblique means of altering the deposit payment requirements of cl 2.

[34] We also agree with the Court of Appeal that in directing or authorising the purchaser's solicitors to make payment pursuant to the notice directly to their trust

account, the vendors' solicitors were not in any way indicating that such a payment other than in cash or by way of bank cheque or other cleared funds would suffice.

Result

[35] For these reasons, which are largely the same as those given by the Court of Appeal, we dismiss the appeal.

[36] The respondents are entitled to costs which will be fixed by the Court following receipt of memoranda from counsel.

Solicitors:
Anderson Lloyd Caudwell, Dunedin for Appellant
Berry & Co, Oamaru for Respondents