

**IN THE SUPREME COURT OF NEW ZEALAND**

**SC 96/2006  
[2007] NZSC 24**

BETWEEN	SOUTHBOURNE INVESTMENTS LIMITED Appellant
AND	GREENMOUNT MANUFACTURING LIMITED Respondent

Hearing: 16 April 2007

Court: Elias CJ, Blanchard and Tipping JJ

Counsel: J G Miles QC and S A Grant for Appellant  
P W David and T G Herbert for Respondent

Judgment: 20 April 2007

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**JUDGMENT OF THE COURT**

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**A Leave to appeal is granted.**

**B The approved ground is whether the appellant is estopped by its conduct from asserting that the respondent's tender of its personal cheque was not in compliance with the requirement for payment of a deposit accompanying its exercise of its option to purchase the appellant's property. The respondent will be permitted to support the judgment below on the ground that the terms of the option entitled it to tender a personal cheque for the deposit.**

**REASONS**

[1] The appellant is contending that summary judgment should not have been entered against it and that it has an arguable defence to the respondent's claim for specific performance. It also wished to advance its appeal on an additional ground for which approval has not been given. It was that the addition of a clause to the

standard NZREI/ADLS form of agreement constituted the making of a counteroffer, so that the option was not validly exercised. That clause read:

- 16.0 It is acknowledged that the within land is being transferred as a going concern and GST shall be assessed at zero per cent. In the event that the Inland Revenue Department should assess GST at a rate other than zero per cent the provisions of clause 13.0 of the general conditions herein shall apply.

[2] We are not persuaded that this clause in fact added anything to the rights and obligations of the parties under the standard conditions relating to GST in the printed form:

## **12.0 Goods and Services Tax (GST)**

- 12.1 If this agreement provides for the purchaser to pay (in addition to the purchase price stated without GST) any GST which is payable in respect of the supply made under this agreement then:

- (1) The purchaser shall pay to the vendor the GST which is so payable in one sum on the GST date.
- (2) Where the GST date has not been inserted on the front page of this agreement the GST date shall be the possession date.
- (3) Where any GST is not so paid to the vendor the purchaser shall pay to the vendor:
  - (a) interest at the interest rate for late settlement on the amount of GST unpaid from the GST date until payment; and
  - (b) any default GST.
- (4) It shall not be a defence to a claim against the purchaser for payment to the vendor of any default GST that the vendor has failed to mitigate the vendor's damages by paying an amount of GST when it fell due under the Goods and Services Tax Act 1985 ("the Act").
- (5) Any sum referred to in this clause is included in the purchase price, interest and other moneys, if any, referred to in subclause 3.7.

- 12.2 If the supply under this agreement is a taxable supply the vendor will deliver a tax invoice to the purchaser on or before the GST date or such earlier date as the purchaser is entitled to delivery of an invoice under the Act.

- 12.3 The vendor warrants that any dwelling and curtilage or part thereof supplied on sale of the property are not a supply to which section 5(16) of the Act applies.

- 12.4 “Default GST” means any interest, or late payment penalty, or shortfall penalty, or other sum imposed on the vendor under the Tax Administration Act 1994 by reason of non-payment of the GST payable in respect of the supply made under this agreement but does not include any such sum levied against the vendor by reason of a default by the vendor after payment of the GST to the vendor by the purchaser.

### **13.0 Supply of a Going Concern**

- 13.1 If this agreement relates to the sale of a tenanted property (not being an exempt supply within the meaning of the Goods and Services Tax Act 1985) (“the Act”) then, unless otherwise expressly stated herein:
- (a) each party warrants that it is a “registered person” within the meaning of the Act; and
  - (b) the parties agree that the supply made pursuant to this agreement is the supply of a going concern on which GST is chargeable at zero per cent.
- 13.2 If it subsequently transpires that GST is payable in respect of the supply and if this agreement provides for the purchaser to pay (in addition to the purchase price without GST) any GST which is payable in respect of the supply made under this agreement then the provisions of clause 12.0 of this agreement shall apply.

[3] The parties were a lessor, Southbourne, and its existing lessee, Greenmount, which was exercising an option contained in the lease. Greenmount had an express right to nominate a purchaser of the property. The agreement was clearly one relating to the sale of a tenanted property, so that cl 13.0 applied. The argument for Southbourne was that the acknowledgement in cl 16.0 removed Southbourne’s ability to insist on being paid GST on the possession and settlement date (the GST date). It was said that the acknowledgement amounted to an agreement that no GST would be payable at that time and that Southbourne would then be exposed to a risk, which did not exist under the printed form, of having to pursue Greenmount for GST if the requirements of s 11(1)(m) of the Goods and Services Act 1985 had not actually been met.

[4] In our view this is not a tenable interpretation of the effect of the acknowledgement, which is simply a statement of the position which was intended by the parties to pertain at the time for settlement and which the purchaser was legally bound to achieve. If the purchaser failed to do so, say, for example, if the

nominee was not registered for GST or if the property was not then subject to an ongoing tenancy, the purchaser would have been in substantial default and the vendor could have refused to settle unless the GST was paid along with the balance of the price.

[5] The acknowledgement cannot sensibly be taken to be a waiver of the vendor's right to object to a breach by the purchaser of its obligation under cl 13.0. Clause 16.0 was presumably intended as a clarification but it brought about no different result from the position under cls 12.0 and 13.0. The exercise of the option was therefore not invalid because of the inclusion of cl 16.0. In so concluding we take a different view of that clause from the view taken in the Court of Appeal where it was treated as essential to meeting the requirements of s 11(1)(m). In our opinion that section was already met by cl 13.0 in the circumstances in which the agreement was entered into. There was a sale of a tenanted property. But that difference of approach does not affect the correctness of the Court of Appeal's overall conclusions concerning the GST obligation.

[6] We add that, in any event, this ground related to a non-standard clause. An argument directed to its interpretation and an application of the clear language of the standard terms in light of that clause would not have raised any question of general or public importance.

Solicitors:  
Foley & Hughes, Auckland for Appellant  
Lee Salmon Long, Auckland for Respondent