IN THE SUPREME COURT OF NEW ZEALAND

SC 96/2006
[2007] NZSC 62

	BETWEEN	SOUTHBOURNE INVESTMENTS LIMITED Appellant
	AND	GREENMOUNT MANUFACTURING LIMITED Respondent

Hearing: 28 June 2007

Court: Blanchard, Tipping, McGrath and Anderson JJ

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

Judgment: 2 August 2007

JUDGMENT OF THE COURT

A **The appeal is allowed and the orders for summary judgment and specific performance are set aside.**

B **The proceeding is remitted to the High Court.**

C **The appellant is awarded costs in this Court of $13,000 together with reasonable disbursements to be fixed if necessary by the Registrar.**

D **The costs order in the Court of Appeal is set aside. The appellant is awarded costs in that Court of $3,000.**

REASONS

(Given by Blanchard J)

Introduction

[1] The Court of Appeal concluded that the respondent, Greenmount Manufacturing Ltd, had validly exercised an option to purchase that was contained in its lease from the appellant, Southbourne Investments Ltd, of a property at East Tamaki, Auckland. It was of the view that Associate Judge Doogue had been wrong to refuse Greenmount summary judgment. The Court of Appeal ordered Southbourne to specifically perform the purchase agreement which it found arose from the exercise of the option.

[2] Southbourne has during the course of this litigation raised a number of arguments why the option was not validly exercised. The only one in respect of which this Court has granted leave to appeal concerns the tendering by Greenmount of its personal cheque in payment of the deposit due when the option was exercised. Was Greenmount entitled to do that, and, if not, is Southbourne precluded by its subsequent conduct from asserting that Greenmount's cheque did not constitute payment of the deposit in terms of the option clause in the lease?

[3] The Court for this appeal was constituted with four members under s 30(1) of the Supreme Court Act 2003.

Facts

[4] On 9 February 2004 Southbourne leased warehouse premises at 13 Polaris Place to Greenmount. The lease contained this provision:

> **47.1 Option to Purchase**
>
> The Landlord hereby grants to the Tenant or its nominee an option to purchase the property on the following terms:–

(a) The option can only be exercised at any time within the first eighteen (18) months of the commencement date of the initial lease term in this Lease (time being of the essence).

(b) To exercise the option the Tenant or its nominee shall present to the Landlord within the aforesaid time limit, a signed and dated unconditional Sale & Purchase Agreement ("Agreement") with the following terms:–

i. The form of the Agreement shall be the then current form of Sale & Purchase Agreement published by the Auckland District Law Society and the Real Estate Institute of New Zealand.

ii. The purchase price shall be $3,500,000.00 plus GST if any.

iii. The deposit shall be $350,000.00 and shall accompany the Agreement.

iv. The settlement date shall be twenty-eight (28) days after the date of the Agreement.

v. The interest rate for late settlement shall be 11%.

vi. If the nominee of the tenant fails to complete the Sale & Purchase Agreement the Tenant will remain liable for all the obligations on the part of the purchaser under the said Agreement.

vii. The Agreement shall be subject to this within Lease.

[5] The lease ran from 1 May 2004 and so the last day of the 18 months for exercising the option (time being of the essence) was Monday 31 October 2005, by which time the value of the property is said to have considerably exceeded the purchase price.

[6] Several days earlier, on Wednesday 26 October, Greenmount's solicitor, Mr Doughty, spoke by telephone with Southbourne's property manager, Mr Douglas, and told him that Greenmount intended to exercise the option. Mr Douglas asked Mr Doughty to send the agreement form and deposit cheque to Southbourne's solicitor, Mr Foley. That was done by courier the next morning. What was sent was an agreement form approved by the Real Estate Institute of New Zealand and the Auckland District Law Society (Seventh Edition (3) July 1999) completed and signed by Greenmount, together with Greenmount's personal cheque for $350,000. Alongside the heading on the front page of the

agreement, "Deposit: (refer clause 2)", there had been typed in "$350,000.00 paid to the vendor". The printed general conditions included:

> 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.

[7] In a covering letter Mr Doughty asked Mr Foley to acknowledge receipt of the agreement and the cheque. Later that day Mr Foley faxed Mr Doughty a copy of the letter on which Mr Foley had written "RECEIVED 27/10/05" above his signature.

[8] The affidavits, particularly those on behalf of Southbourne as vendor, give only a limited account of what occurred thereafter. Mr Doughty telephoned Mr Foley on the morning of Friday 28 October and was told that Mr Foley had not yet looked through the agreement in detail but would do so shortly as he was to meet the principal of Southbourne, Mr Dickie, that day. The solicitors spoke again that afternoon. There are significant differences between their versions of what was said which cannot be resolved on the basis of the affidavits and which must therefore be disregarded for present purposes. It is uncontroversial that Mr Doughty was told that Mr Foley had not yet had the meeting with Mr Dickie.

[9] The next conversation between the solicitors was not until about 2:00 pm on Monday 31 October (the last day for exercising the option). Mr Foley told Mr Doughty that Mr Dickie's father had had heart surgery on the Friday and that therefore Mr Dickie had not been able to meet with Mr Foley on that day. (Mr Dickie's affidavit confirms his father's ill-health and says that he died some five weeks later.) Mr Foley advised that he was meeting Mr Dickie that afternoon, 31 October. That meeting did occur but the affidavits do not indicate at what time. Neither Mr Foley nor Mr Dickie give any account of it save to say that

Mr Foley was instructed to request counsel's opinion on the validity of the exercise of the option.

[10] Mr Foley did not communicate with Mr Doughty on 31 October after meeting Mr Dickie. It was not until Tuesday 1 November, when the option period had expired, that Mr Doughty was informed by faxed letter from Mr Foley that there were questions about the validity of the exercise of the option. On Friday 4 November he was told that according to counsel's opinion the option had not been validly exercised. Southbourne subsequently took the position that no contract of sale existed. Greenmount then sought specific performance.

The Court of Appeal judgment

[11] Because of his view that summary judgment should be declined for other reasons, the Associate Judge did not find it necessary to deal with the sufficiency of the cheque.[1] The issue was dealt with as something of a tailpiece to the Court of Appeal judgment.[2] That Court cited a passage from this Court's reasons in *Otago Station Estates Ltd v Parker*:[3]

> 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.

The Court said this statement was decisive against Southbourne. It considered that when Mr Foley received the agreement and Greenmount's cheque for the deposit on 27 October he would have seen at a glance that the cheque was drawn by Greenmount: that it was not a bank cheque or cleared funds. He had acknowledged receipt of the agreement and deposit cheque, as requested. It was not until 4 November that Southbourne objected specifically to the mode of payment. That was eight days later. The Court said it had no doubt that

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1 *Greenmount Manufacturing Ltd v Southbourne Investments Ltd* (High Court, Auckland, CIV 2005-404-6675, 13 April 2006).

2 *Greenmount Manufacturing Ltd v Southbourne Investments Ltd* (Court of Appeal, CA 90/06, 21 November 2006) at paras [55] – [57].

3 [2005] 2 NZLR 734 at para [27].

Southbourne's actions estopped it from asserting on 4 November that the mode of payment did not comply with the contractual requirement.

Discussion

[12] The first question for this Court is what the option clause required of Greenmount in relation to the deposit. It was submitted by Greenmount's counsel, Mr David, that the option clause should be construed against Southbourne, whose solicitors had drafted it, and that on a literal and, counsel said, natural reading, all it required was tender of the appropriate signed agreement form. The sale contract then came into being. If Greenmount had not tendered the deposit at the same time, it was in default under the contract. But, crucially, the contract was already formed. Either it would have been possible for Southbourne to cancel immediately (because time is always of the essence for payment of a deposit),[4] which it has never done; or cl 2.2 applied and three working days' notice was needed and was, again, never given.[5]

[13] We are not persuaded by this argument. It is not a natural or commercial reading of cl 47.1. Moreover, if all that needed to be done was to present an agreement form, that which was tendered was non-compliant concerning the deposit, for reasons we will shortly give, and therefore amounted to a counter-offer. That would be so even if a more tolerant view were to be taken than in the line of cases concerning exercise of options which begins with *Reporoa Stores Ltd v Treloar*.[6]

[14] There would have been little point in the lessor/vendor stipulating for a clause requiring that the deposit shall "accompany the Agreement" if the absence of the deposit did not prevent formation of the sale contract, leaving the vendor to

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4 *Brien v Dwyer* (1978) 141 CLR 378; *New Zealand Tenancy Bonds Ltd v Mooney* [1986] 1 NZLR 280.

5 Southbourne has denied the existence of any contract. It has never accepted that a contract exists and given a notice canceling it. The two postures would be quite inconsistent: *Hirst v Vousden* (2005) 6 NZCPR 135 (PC) at paras [15] and [16].

6 [1958] NZLR 177 (CA).

its remedy under the contract for breach. The natural reading of the clause, which accords with normal practice concerning options, is that Greenmount was required to present both the agreement and the deposit in order to complete the exercise of its option.

[15] But, if that be wrong, and an agreement sans deposit payment was enough, the standard form agreement presented by the purchaser needed to be modified to contain a provision requiring that the deposit accompany the agreement. That was not done. Clause 2.1 in fact prescribes that the deposit is to be paid immediately upon execution *by both parties*, so it would not be due until Southbourne had signed. That is a material variation concerning an important component of the exercise. We do not consider that the words written in about the deposit on the front page were sufficient to rectify the position. Clause 2.1 does contemplate the specification elsewhere in the contract of a different time for payment of the deposit but the words on the front page did not achieve this. They merely purported to record that a payment had been made, which begged the question whether that had actually occurred. The heading was unaltered and it referred the reader to cl 2.

[16] Mr David's next argument was that cl 47.1 permitted the tendering of a personal cheque. He submitted that there is a general expectation among commercial parties that personal cheques will be used in their transactions, as had, he said, been recognised by the High Court of Australia in *George v Cluning*.[7] Southbourne had always allowed Greenmount to pay its rent by personal cheque, including payments totalling over $100,000 before any lease was signed. Counsel drew attention to a right of first refusal clause in the lease (cl 47.2), which stipulated for a bank cheque for the deposit, whereas cl 47.1 did not.

[17] The same argument, based on commercial practice and *George v Cluning*, was rejected in relation to deposit cheques payable under the standard agreement form in *Otago Station Estates*[8] and for the same reasons we reject it again here in

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7 (1979) 28 ALR 57.

8 At paras [24] – [27].

relation to this option agreement. The fact that in commerce, including the real estate industry, people do customarily proffer personal cheques and have them accepted does not mean that they can amount to more than a means of obtaining payment by presentation and clearance in the normal course. Southbourne's acceptance of personal cheques for rent falling due under the lease cannot provide any support for the view that it was thereby indicating a willingness to take a personal cheque for the deposit. Indeed, the right of refusal clause indicates the contrary. And we can see no significance in the fact that cl 47.1, unlike cl 47.2, does not specifically mention a bank cheque. It required a deposit, that is, a payment by way of earnest. It would take very clear words to establish any right to make a payment of a deposit, under the standard form or otherwise, by a means other than cash, a bank cheque or cleared funds.

[18] That brings us to the nub of this appeal, which is, in terms of the passage from *Otago Station Estates* quoted by the Court of Appeal, whether Southbourne's principal, Mr Dickie, knowingly allowed Southbourne's agent, Mr Foley, to take Greenmount's personal cheque without objecting specifically to the form of tender of payment as soon as he, Mr Dickie, was aware of it and must therefore be taken to have dispensed with the need for payment through legal tender or its equivalent.

[19] Mr David submitted that Mr Foley had been clothed with authority to decide whether to accept the personal cheque because solicitors frequently accept personal cheques on behalf of their clients and Southbourne's property manager had requested that the agreement and deposit cheque be delivered to Mr Foley. In our view, against the background of well-settled law that solicitors do not have an implied authority to accept payments made pursuant to the terms of agreements of sale and purchase of land other than in legal tender,[9] it would take something much more specific than the property manager's request in order to confer the authority for which Mr David contended. That request was no doubt made for

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[9] *Blumberg v Life Interests and Reversionary Securities Corporation* [1897] 1 Ch 171 at p 173; 44(1) Halsbury's Laws of England, Solicitors, para [128]; *Bowstead and Reynolds on Agency* (18th ed), para [3-021] and following. In New Zealand a solicitor can be taken to have authority to accept a bank cheque or cleared funds: *Williams v Gibbons* [1994] 1 NZLR 273, approved in *Otago Station Estates*.

convenience in anticipation that Mr Foley would be asked to look through the agreement on Southbourne's behalf. Mr Foley was authorised to be the recipient of the deposit but it does not follow that Southbourne was authorising him or even appearing to authorise him to accept a cheque that did not constitute payment of the deposit. There is no evidence suggesting that the property manager acquiesced in the use of a personal cheque or even that he knew this was what Greenmount was intending to proffer. As a matter of commercial convenience solicitors customarily receive personal cheques on behalf of their clients but it does not follow that they have an implied authority to commit their clients to receiving payment by this means. It is the same when real estate agents for convenience take personal cheques from purchasers as a means of obtaining payment of deposits through the clearance of the cheques.

[20] Once a vendor (in which term we include a person who will be bound by a valid exercise of an option to purchase) knows that the purchaser has tendered a personal cheque, the vendor must promptly decide whether to accept it or to allow his or her agent to do so. If the vendor decides to reject the cheque and insist on a bank cheque or cleared funds, that choice must be forthwith conveyed to the purchaser. Any failure to take either of these steps will leave the vendor vulnerable to being found to have tacitly represented to the purchaser that the personal cheque has been accepted as a payment. Unless the agent has a satisfactory explanation for delay, the vendor will be presumed to have acquired knowledge of the personal cheque as soon as the agent should have conveyed that information. Of course, if the agent has had an advance instruction from the vendor that a personal cheque will be unacceptable, the agent is clothed with authority to reject it and must do so immediately.

[21] If by the failure to act in a timely way the vendor is found to have represented that the personal cheque is acceptable, and the purchaser has disadvantageously relied upon that representation, then, as this Court stated in *Otago Station Estates*, the vendor will be estopped from denying the validity of the payment effected by the personal cheque. The rationale for the estoppel is that it would be manifestly unjust, when the vendor has given the appearance of

accepting the personal cheque, to allow the vendor to resile from that stance after it is too late for the purchaser to remedy the position.

[22] The central question in the present case is whether Southbourne failed to object in a timely way to the use of the personal cheque and whether as a consequence it is estopped from asserting that the mode of payment did not comply with the requirements of the option. If Southbourne is so estopped it cannot deny that the sale contract came into existence when the agreement and personal cheque were tendered to Mr Foley.

[23] It is on this point that Southbourne's appeal must succeed because there is simply not enough evidence presently before the Court in order for the matter to be determined either way. It would be surprising, even allowing for the serious illness of Mr Dickie's father, if Mr Dickie had not made inquiries of Mr Foley about the deposit on Friday 28 October when he certainly knew that Greenmount had purported to exercise the option. In fact, it would also be surprising if, even in the absence of such an inquiry from Mr Dickie, Mr Foley had not been alert on that day to the significance of Greenmount's use of its personal cheque and, in a context where it seems probable that he knew that his client wished to avoid a sale arising from exercise of the option, had not mentioned it to Mr Dickie immediately. If Mr Dickie did know about the cheque at that time, the conclusion that it was far too late to object to the mode of payment on 4 November, or even on 1 November, is inevitable. However, we agree with Mr Miles QC that the Court cannot properly on the present state of the evidence draw the inference for the purposes of a summary judgment application that Mr Dickie must certainly have known about the cheque on the Friday. As Mr Miles has also pointed out, the case for Greenmount was not put in this way until as late as oral argument in this Court. It would therefore be unfair if the Court were at this stage of the proceeding to conclude that Mr Dickie and Mr Foley said nothing further in their affidavits because they were unable to say anything which would advance Southbourne's case.

[24] There is also the same difficulty in the way of resolving the issues of acceptance of the cheque and estoppel on the basis of the present state of the

evidence about what occurred on the Monday afternoon. All that is revealed by that evidence is that at some unspecified time late that afternoon or in the early evening there was a meeting at which Mr Dickie and his solicitor discussed the exercise of the option and decided to seek the advice of counsel. Mr Miles accepted that Mr Foley and Mr Dickie must by that time have turned their minds to the status of the cheque. But counsel drew attention to the absence of any evidence about the exact time of the meeting, saying that it may well have occurred after the end of banking hours and therefore too late for the continued silence from Southbourne subsequently to have caused detriment to Greenmount because the latter would by then have had no way of obtaining and delivering a bank cheque to Southbourne before the time at which the option expired. (Mr Miles suggested that, in accordance with cl 1.1(6) and (7) of the agreement form, that time was 5:00 pm, but we do not think that can be right, since cl 47.1 allows exercise of the option within the first 18 months of the commencement date of the lease term and contains no limitation restricting the exercise to the defined period of a working day.)

[25] It is of course possible that the meeting occurred at an earlier time in the afternoon and that an immediate notification to Greenmount of the unacceptability of the cheque would have left Greenmount with time to obtain and deliver a bank cheque. It is also possible that Greenmount may have had some way of obtaining a means of payment out of banking hours. However, on the present state of the evidence the Court cannot safely draw the conclusion that Southbourne's conduct in relation to the cheque must necessarily estop it from denying the sufficiency of the cheque as payment of the deposit. It therefore cannot be said that, on this ground, Southbourne has no arguable defence. For this reason, the Court of Appeal was wrong to conclude that Greenmount was entitled to summary judgment and to an order for specific performance. Southbourne is entitled to have this matter determined at trial.

Result

[26] The appeal is allowed and the orders made by the Court of Appeal are set aside.

[27] Southbourne is awarded costs in this Court of $13,000 together with its reasonable disbursements, to be fixed if necessary by the Registrar. The order for costs in the Court of Appeal is set aside and in its place there will be an order in favour of Southbourne in the sum of $3,000. These costs awards have been reduced to reflect the fact that much of the argument in the Court of Appeal and on the leave application in this Court was on an issue in respect of which Southbourne was unsuccessful. Greenmount has not had its appeal against the costs awarded by the Associate Judge in favour of Southbourne determined. As requested by its counsel, we give leave for memoranda to be filed in relation to that question.

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