

BETWEEN

OTAGO STATION ESTATES  
LIMITED

Appellant

AND

JOHN ROBERT PARKER,  
DAVID JOHN PARKER AND  
LORRAINE MAREE  
PARKER

Respondents

Hearing 15 March 2005

Coram Elias CJ  
Gault J  
Keith J  
Blanchard J  
Tipping J

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

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**CIVIL APPEAL**

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10.00 am

Galbraith May it please the Court, I appear with Sandra Grant for the appellant.

Elias CJ Thank you Mr Galbraith, Ms Grant.

Davidson May it please Your Honours, I appear with Mr Lester for the respondents.

Elias CJ Thank you Mr Davidson, Mr Lester. Yes Mr Galbraith.

Galbraith Really, perhaps I could just ask, the submissions have been put in a sort of chronological order of the issues so default as the first issue and the

cash personal cheque matter is the second issue. The first issue requires leave to argue that.

Elias CJ Yes, we'd like to hear you on the leave.

Galbraith Right. Now, I'm not sure again Your Honour whether the Court needs to hear me just outlining the facts, they're pretty straightforward. No I didn't think you would.

Elias CJ No.

Galbraith So far as leave's concerned, we deal with that really from paragraphs 27 on. The first point which is obviously accepted is that it's difficult to get leave at this level of appeal to argue an issue that wasn't argued in the Court below. And I'll just.

Tipping J It's more than not argued isn't it Mr Galbraith, it's expressly not taken.

Galbraith Well it appears to have been perhaps even more than that Your Honour. As I understand it, and the Court of Appeal at least conceded this, that the Court could take it that there was a default. And so that is the position. I don't think I need to take the Court to the various authorities because I think the authorities are as of one on this, it's hard to get leave. The Court will look at a particular situation. It won't grant leave if that's not just to the other party. And whether it's just to the other party may often or will often require further consideration as to whether the case might have been run on a different basis, other evidence called etc if this matter had been raised and argued in the Courts below. There are cases of course on both sides of the line where leave has been refused and leave has been granted. We've referred to the **Foodstuffs (Foodstuffs (Auckland) Limited v Commerce Commission** [2004] 1 NZLR 145) case for example. There's the **New Zealand Meat Board case (NZ Meat Board v Paramount Export Ltd (in liquidation)** [2004] UKPC 45) more recently in the Privy Council. Again, those same issues are taken into account by the Judges in those Courts. And I suppose the **New Zealand Meat Board** case illustrates there can be two different points of view on it because that's split three-two on whether the matter should be heard again at the appellate level. So it's very much a balancing of the factors by the Court, as I say with that overriding consideration that justice should be done both ways in my submission.

As I understand it, in the High Court the matter simply wasn't raised. I'm not clear as to whether any specific concession was made. In the Court of Appeal it appears that Mr Millard, who was then appearing, in response to a question from the Court, said that it could be assumed that there had been a default.

Blanchard J The High Court Judgment, quite significantly I thought, opened with the sentence, this case involves a narrow but important conveyancing issue and then goes on to the other point.

Galbraith Yes.

Blanchard J So it just doesn't seem to have been a matter which the parties thought they'd trouble the High Court with.

Galbraith No, I mean it almost looked, I wasn't there so I don't know and I've tried to get the facts clear and I haven't got them much clearer. But it's almost as if it was being argued as an issue of law, a preliminary issue of law on this matter whether a personal cheque.

Blanchard J But this was the trial.

Galbraith But this was the trial so I can't say it was that Your Honour unfortunately, which of course would make it easier for me. What's extraordinary about it, at least in.

Tipping J In hindsight?

Galbraith Well in hindsight but actually in foresight. When I picked up the case and it came to me it seemed to be the obvious first issue was, well is there a default or isn't there a default. And given the facts.

Tipping J Well that's exactly my view Mr Galbraith, and what troubles me is that surely the relative obviousness of it strongly suggests that the evidence wouldn't permit it to be taken.

Galbraith That doesn't appear to be the situation Your Honour. Even if I just.

Tipping J Well how can you say that?

Galbraith Well what I was going to say is if you even set aside the first issue about default which is initially of course there was confirmation, the cheque should have been paid on the 6<sup>th</sup> of February and then there was whatever the arrangement was about delaying until after the meeting of 28<sup>th</sup> of February. But subsequent to that you get a 21 month delay. And that must, I would have thought, have raised a very explicit issue about whether time could conceivably have been of the essence come November, 21 months later. It's difficult to see how any evidence could, well I suppose.

Blanchard J But we just don't know. We don't even know what the meeting was about. And even if time was somehow set at large at about the time of the meeting, we don't know what was going on in the interim. We don't know what a reasonable period for payment of the deposit was in those circumstances. We don't know whether at the end of the 18 months the purchaser was in default or not. Because you can be in

default when you don't do what you're supposed to do within a reasonable time, whatever that is in the circumstances. And if there was a default, there'd be an ability then to give another notice making time of the essence. And by analogy the three days might or might not have been enough. There are so many imponderables.

Galbraith Well there are Your Honour except if I can just pick up a couple of those. At least in my submission the notice given under clause 2.2 isn't a time of the essence notice and it's never been interpreted as that. Well it just expressly isn't that. So three days' notice might have been alright but that wasn't a three days time of the essence notice. So if time was at large, sorry, if time was no longer of the essence, and it seems to me very difficult to argue that 21 months after the 28<sup>th</sup> of February that time could still have been of the essence in respect of the payment of the deposit, then there isn't a notice making time of the essence. As I say, and that was really what I was trying to say in response to His Honour Justice Tipping, that it seems to me difficult to say, well there must have been evidence which meant that you couldn't run that argument. It just seems to have been, I can't explain Your Honour how Counsel just didn't pick up on it because I think, as His Honour Justice Tipping said to me, it's the first argument you'd think of.

Tipping J Well what troubles me is if it had been overlooked, you'd have thought they'd have grasped onto it with a, like the drowning man in the Court of Appeal.

Galbraith Yeah.

Tipping J But far from that they kicked the plank away.

Galbraith We've expressly asked Mr Millard and to be fair to Mr Millard he responded in writing to me. And he didn't try and excuse what he'd done, he simply recorded what he had done and he made that concession. And I, because I know no more about it Your Honour, I can't take it further than what he told me or what he wrote to us which was to say that he did make that concession. But it does stand out like a sore thumb or whatever other expression one likes to use that it was an absolutely obvious argument. And I suppose if I might say this, accepting everything which His Honour Justice Blanchard has said, that given that perhaps in this Court looking at a situation such as this where the argument seems so evident, and given that we now have as I understand it a position where Counsel in Court making concessions may be liable, which wasn't the position until a couple of weeks ago, and given that in this case the other issue between the parties is I think on any view a relatively technical issue, where whatever the legal rights and wrongs are which we obviously have to come to, the fact is that a cheque was tendered, it was met, the deposit was paid, so we don't exactly have a situation where some injustice or the merits if I can put it that way are evidently on the respondents' side, then perhaps

those are considerations where there is a matter such as this which does seem to be fundamental to the rights of the parties, that it might be allowed to be argued. Or on the other hand if His Honour Justice Blanchard's view prevailed that one needs to know more evidence, then the matter be remitted back to the High Court to actually have a full hearing so that it can.

Gault J Can you point to any authority where a point has been allowed to be raised on a second appeal and then sent back for investigation of the facts?

Galbraith I haven't Your Honour.

Gault J But the general principle is against that isn't it? It must be a point on which no further evidence could be given.

Galbraith That is the general principle of it Your Honour, I don't resile from that for a moment. And the thrust of our submission is that the evidence is adequate here in respect to what happened because it's pleaded in the pleadings that the 6<sup>th</sup> February time was extended to after the 28 February meeting and then after that nothing happened in terms of payment of the deposit until November.

Gault J But we don't know what the position was after the meeting do we?

Galbraith Well you do if you read my learned friend's submission Your Honour because he's actually told you a little bit about it which we tried to gainsay doing ourselves. But his submission does say there were three months of negotiations after that meeting.

Blanchard J But we don't know about what. We don't know whether that had anything to do with the deposit.

Galbraith No, my friend's submissions don't suggest that Your Honour.

Tipping J Mr Galbraith, for me there's a further difficulty and it is this, that if the point had been fought all the way up to the Court of Appeal and whichever way it had gone, it's not the sort of point that was likely to attract a second appeal because the law is pretty straightforward in this area, it's simply a question of applying it to the particular facts. So why should you as it were get a double benefit of not having raised it at all and then getting leave to appeal a point that wouldn't ordinarily get leave?

Galbraith Well the only thing I can say, and Your Honour's quite correct, and I don't disagree with Your Honour at all, it would have been sorted out on the facts and the law is clear on it. It just hasn't been dealt with to date and so one party, both parties should really have been conscious of this point and it's a point that affects the rights of each party.

Tipping J Well the other side might have been extraordinarily conscious of it Mr Galbraith and delighted your side wasn't raising it. But we just don't know.

Galbraith Well I suspect, well I don't know. All I can say is it appears on the face of it to be a good point or, put it this way, it's certainly a good arguable point. So it's not a point which on the face of it is, or there is a good argument.

Blanchard J Well it seems to me all you can say is when and if the evidence was investigated it might well be a good point.

Galbraith Yes, though I think I can fairly say Your Honour without guilting the lily that on the face of it it looks like it's a good arguable point because you do have an enormous period of delay. And given the time of the essence, the odds are in a 21 month delay, time is not still going to be of the essence, the odds are. Now there might be some specific facts that change that Your Honour.

Elias CJ Depends on the basis on which payment of the deposit was deferred.

Galbraith Yes I agree with that, but.

Elias CJ And we don't know that.

Galbraith All you know is that the initial date for payment was deferred.

Elias CJ Yes.

Galbraith Until after a meeting in February. And then you know that there were some steps taken by the purchaser, a nomination, a letter in February 2002, a sending of resource management documents. So there were steps being taken by the purchaser. And you know that specific performance proceedings were brought by the purchaser. And the pleadings in that make it clear that the vendor wasn't doing anything. And then the notice and what happened there. So as I say, on the face of it, there appears to be a good argument but Your Honour's quite right.

Gault J On the face of it it's ambiguous isn't it? That it may be that it's not payable 'til after the meeting and that means any time thereafter or it may mean that after the meeting it is payable.

Galbraith That's one argument Your Honour, that's one issue. But even if it was a deferment until a specific time as Your Honour says, it was payable immediately after the meeting, you then get the 21 month period and on the face of it, that would stop time being of the essence but Your Honour the Chief Justice is quite right of course.

Gault J What about seeking specific performance?

Galbraith I'm sorry, yes.

Gault J Doesn't that indicate that you want the contract performed according to its terms?

Galbraith Yes it does but what are the terms by then of course is the issue. I mean there's a, I don't want to overcomplicate it. Her Honour the Chief Justice is quite correct, there may be evidence that there were some other background circumstances that meant that time remained of the essence. But that's a pretty unlikely situation for 21 months when on the face of what the Court does know, the purchaser was doing things and the vendor wasn't. And as you will have seen in the contract, there's a resource management obligation there which requires the vendor of course to cooperate.

Blanchard J Well you would have expected the solicitors involved to have sorted out what was going to happen about the deposit.

Galbraith Yes.

Blanchard J But we don't even know whether they were at the meeting. We don't know whether they had a role at all at that time.

Galbraith It's not in evidence before the Court. Perhaps I should just say, Your Honour wasn't on the leave Bench, but we did seek leave to file an affidavit in support of a leave application. The leave wasn't granted.

Blanchard J Which I haven't seen and I don't want to know about.

Galbraith No, no, I'm just going to explain, leave wasn't granted for that and my learned friend has provided me with an affidavit that if leave were granted he would want to file in opposition to that. But the Court doesn't formally have that in front of it and I'm not trying to, I not referring to anything that's in either affidavit.

Elias CJ Is there anything more to be said?

Galbraith I don't, no, no.

Elias CJ We'll take a short adjournment thank you.

Court adjourns 10.19 am  
Court resumes 10.21 am

Elias CJ Yes Mr Galbraith we will decline leave for reasons we'll give in our final judgment.

Galbraith Can I just say one thing, not in discussion of that but just to be fair to Mr Millard. I've just been talking to Mr Davidson during the

adjournment. It may be that Mr Millard made that concession because the matter hadn't been raised in the High Court and that may have been quite explicit. From what Mr Davidson tells me between himself and I forget who now appeared in the High Court, Mr Barton that's right, so Mr Millard may have done it for that reason rather than he didn't appreciate there could be an issue.

Elias CJ Yes.

Galbraith So I just want to be fair to Mr Millard in saying that.

Elias CJ Yes.

Galbraith Right if we can turn to the other issue which is whether the appellants discharged the obligation to pay the deposit by tendering their personal cheque. If I could, if the Court would indulge me, just step back for a moment and just talk about deposits very briefly. There's nothing between my learned friend and ourselves in relation to the importance of a deposit being a surety etc. But the one thing to remember about deposits and non-payment is that the right to cancel arises under the Contractual Remedies Act, not under the terms of the agreement for sale and purchase. The agreement for sale and purchase itself doesn't contain any contractual right to cancel for non-payment of the deposit. That's a right which arises as I say under the Contractual Remedies Act and there's been some debate about whether that right can arise under s.7(4) subs (a) if there's not a specific provision making time of the essence. Now that's not an argument one has to get into here because of course time is made of the essence by the contractual terms. So that the usual ability to cancel in relation to non-payment of a deposit arises because time's expressly of the essence. If there's a default then the entitlement arises under s.7(4) subs (a) of the Contractual Remedies Act subject to the necessity under clause 2.2 of the standard form to give a three day notice which simply postpones the time that the ability to cancel which has already arisen in the sense of this s.7 (4)(a) applies. And then there's a three day grace period which is conferred by the requirement to give the notice under clause 2.2.

Blanchard J Are you suggesting in this that there's some doubt about their ability to cancel if the personal cheque was not a valid response to the notice?

Galbraith Um.

Blanchard J I just wonder what this is leading up to.

Galbraith No.

Blanchard J Or is this just introductory?

Galbraith This is just introductory Your Honour.



Blanchard J Right.

Galbraith I mean if I'd had the other argument about default, yes I would have had a.

Blanchard J Of course, yes, yes.

Galbraith A lot of things to say about that.

Blanchard J So you're making this argument by default?

Galbraith No, no, no I'm not, no, I'm not trying to get round the side. But it's just that when one reads some of the, despite the fact it's set out in Blanchard ("*A Handbook on Agreement for Sale and Purchase of Land*" 4<sup>th</sup> Ed) and it's set out in McMorland ("*Sale of Land*") if I can use those short-form references to those texts. There seems to me to be sometimes a failure to recognise that the right to cancel actually arises under the Act rather than under the agreement. And I think people very often think it's the clauses in the agreement which give rise to the right to cancel, they don't. And that has got some significance in my submission when it comes to how can you pay the deposit.

Elias CJ What significance?

Galbraith Because, well can I explain when I get into the context?

Elias CJ Yes, yes.

Galbraith Sorry, just to.

Elias CJ No, that's fine.

Galbraith Not to lose the track of it. So the short question then is under the agreement, and the agreement, perhaps it is just worth looking at it. It's in Volume 2, the first agreement's at p.141 and the deposit provisions. 141 is the larger of the properties. The purchase price is set out there, the deposit is set out, refer clause 2. It's payable upon confirmation of this agreement. And clause 2 is the, of course, standard form of clause which says that the purchaser pay the deposit to the vendor or the vendor's agent immediately upon execution by both parties. Such other time as specified. Timing of the essence as to each such time. 2.2 the vendor shall not be entitled to cancel this agreement for non-payment of the deposit unless the vendor has first given the purchaser three working days' notice of intention to cancel. If the purchasers fail within that time to ... default no notice of cancellation shall be effective if the deposit has been paid. So it's the absolutely standard form.

Blanchard J Doesn't that suggest by clear implication that the agreement does give a right to cancel of its own terms subject to those terms?

Galbraith No.

Blanchard J So it's a duality of remedy both under the contract and, as to the extent this is relevant, and under the Act?

Galbraith Um, I don't.

Blanchard J Shall not be entitled to cancel unless.

Galbraith Yes, but that entitlement to cancel has to arise under the Act, it doesn't arise under the agreement. All that clause does is prevent the statutory right to cancel applying for a three day period. It doesn't actually give a right to cancel itself. You've got to have the right to cancel under the Contractual Remedies Act, otherwise there is no right to cancel contained there. It's simply a grace period and so the commentary in Blanchard and McMorland and the cases I think make that clear.

The starting point for the argument which I want to address to the Court is that the Court of Appeal was correct when it held that there's no difference between the obligation to pay the deposit, they say in the non-default situation, and the obligation in a default situation. And we agree with the Court of Appeal on that. Where we of course depart from the Court of Appeal is that we would say that the right to pay the deposit, or the ability to pay the deposit in a non-default situation impliedly permits payment by way of a personal cheque and then if it is symmetrical then that must apply in the default situation as well.

Blanchard J So if your first cheque bounces you just give another one?

Galbraith Um well if your first cheque bounces Your Honour then presumably you're going to face a notice.

Blanchard J And then you give another cheque which may or may not bounce?

Galbraith Yes, if it bounces then it's going to be cancelled, if it doesn't bounce well and good.

Blanchard J Well it may not bounce for some days after the three days.

Galbraith It may not bounce, but you could still be cancelled, I mean the contract could still be cancelled.

Blanchard J Yeah but you don't know at the end of the three days.

Galbraith No, no you don't know at the end of the three days.

Blanchard J If you're the vendor you don't know at the end of the three days that you can cancel.

Galbraith Well no, you could cancel Your Honour.

Blanchard J It'd be a bit dangerous because on your argument if the cheque is then met, the payment backdates to the three days and the cancellation's invalid.

Galbraith Well the cancellation, yes, the cancellation would be invalid.

Blanchard J So effectively the three days is rendered a little elusive.

Galbraith Um, it's, well I would like to come to that in a moment, but just taking it head on, the fact is that if the deposit's paid by cheque and it's either met or not met will become apparent. If you've got the non-default situation then you'll find out when the cheque is met and of course the payment, because it's a conditional payment, relates back to the time the cheque was initially given. You've got the default situation, you've given three days notice and you accept, sorry, if payment is made by personal cheque, then you have the uncertainty until the cheque is met, as Your Honour quite rightly points out. If at the end of the three, if it bounces, no doubt you give notice that it's cancelled, the contract's cancelled because the payment hasn't been made.

Blanchard J But you don't have a situation of being able to feel certain one way or the other at the end of the three working days.

Galbraith No you don't.

Blanchard J Which is surely the intention of having that period of time.

Galbraith Well could we come to that argument, but Your Honour's quite correct, you don't have the certainty unless of course you get a special answer in which case you'll have a certainty subject to the cheque being paid at 5 minutes to 5 on the third day.

Blanchard J Yes.

Galbraith You'll have the certainty very quickly about that.

Blanchard J Not if it's paid at one minute to 5.

Galbraith No, I agree. I mean if it's paid at one minute to 5 or five minutes to 5, you're not going to get your special answer.

Blanchard J How long does a special answer take, 24 hours?

Galbraith Within 24 hours Your Honour. Within 24 hours. But the position which Your Honour poses is quite correct, I accept that, you're not going to know precisely at the end of the three day period, or you may not know, depending on when the cheque's been paid, whether or not it's going to be met. And that's. The mere fact that if the cheque

bounces, I mean that situation arises on whatever interpretation you make of the, you get two bites of the cherry.

Blanchard J Does it have to be the purchaser's cheque? Can it be the cheque of somebody other than the purchaser or the purchaser's lawyer?

Galbraith Well it can under the law at present be the cheque of a bank so um.

Blanchard J Yes but that's on the basis of the rule established in **Williams v Gibbons**.

Galbraith **Williams v Gibbons** yes.

Blanchard J Could you prevail upon a friend to put up the friend's cheque? Would that suffice?

Galbraith I.

Blanchard J The friend being a person utterly unknown to the vendor.

Galbraith To the vendor. In my submission the likely position is that it has to be the cheque of the purchaser. For a reason which I'll come to, and again in a moment if I may.

Blanchard J And do you have to take that cheque even though you may have reason to think that the purchaser is devious.

Galbraith No, no because what with respect I think we are overlooking at the moment is that the vendor can set the terms of the contract. The vendor knows who it's about to contract with. This is the first obligation to be performed under the contract, the payment of the deposit. It's meant to be paid immediately upon signing of the contract. If the vendor thinks that the purchaser to whom the vendor's selling is dubious then there's nothing to stop, on our argument, the vendor to have a term in the contract saying you've got to pay by legal tender or bank cheque. Because the vendor will, this is as I say the immediate obligation so it's.

Gault J Some might say that is the obligation.

Galbraith Well agreed, I mean that's the argument which we've sort of, we're short-circuiting at the moment. But just taking up that point that His Honour Justice Gault makes to me. Because it seems to me that is relevant to the way one should be approaching this. That is, the law at the moment as it appears that that is the obligation, to pay by legal tender or bank cheque. I suspect, and Your Honours may all disagree with me, that if one was writing that obligation into a standard form Real Estate Institute contract, I don't think that you would write that in, the obligation to pay the deposit is to be paid by legal tender or bank cheque. Because that's not what happens. That's not practical in real

life. This obligation which the Courts recognise really exists because it isn't spelt out. Because if you went to spell it out in this contract people would say, with great respect, that's impractical, that's crazy quite frankly, it's nonsensical in commercial terms.

Blanchard J Because a lot of real estate transactions take place on a non-working day?

Galbraith Exactly. Exactly. And the point is.

Blanchard J But notices don't expire on a non-working day.

Galbraith No they don't. You've got to have that provision in to save it. But the.

Blanchard J Well they're working days aren't they?

Galbraith Yes they are. But the legal obligation, so on the one hand you've got a legal obligation which says, as clause 2.1 says, that you must pay immediately on signature. And if you look at the, excuse me briefly, Blanchard or McMorland, they both say, that means immediately. And a safe way for a purchaser to pay the deposit is to tender the cheque along with his or her executed agreement. And if you think of auction sales for example. Nobody that I'm aware of has ever been allowed to walk out of an auction room having signed the agreement without having tendered the cheque. But how on Friday night, if you have an auction sale on Friday night, can you tender either cash or a bank cheque? My friend accepts, or sorry, not my friend, the respondents' submissions accept that that would be an absurd situation to expect people to wander along with a huge bag of cash.

Blanchard J Well it would be implicit in that circumstance from the timing of the auction and from the fact that the bidder, the highest bidder, couldn't possibly know the amount that the cheque had to be for.

Galbraith Exactly yes.

Blanchard J That a tender of an ordinary cheque from the purchaser would be acceptable.

Galbraith Well that seems to me to be correct. Which means that you have implied on Your Honour's view, you have implied in an agreement with the same terms as the standard auction agreement terms, if the auction's on Friday night, Saturday, you don't have auctions on Sunday, that there's an implied term that you can, and the vendor must accept, a personal cheque unless it's otherwise expressed.

Blanchard J Must accept or will accept.

Galbraith Well I think they're the same thing Your Honour because I can't see.

Blanchard J Well if the vendor effectively says I will accept, then the vendor thereafter must accept.

Galbraith Yes, that's right.

Blanchard J But they're not the same thing.

Galbraith Um, well I'm not sure I see the difference. Because if you turn up on the Friday night, you're expected to pay a deposit, you pay it by personal cheque, it seems to me that the vendor doesn't have the opportunity then of saying I don't want your personal cheque, this is after the agreement's signed.

Blanchard J Yes because of the way in which the auction's been set up.

Galbraith Yes but that then means that you have different terms for a sale on a Friday night as against an auction sale on a Monday at 10 o'clock in the morning. But you have different terms again for an auction sale at 4.30 on the Monday because you can't get to the bank and get a bank cheque in time. Now that's why I say if you've tried to set this provision out as an express term of the contract, it would never be included in the standard form contract because it, with great respect, doesn't make sense. And what we've got is we've got, everybody goes along saying, oh well there's legal tender or there's a bank cheque. Now with respect, nobody has cash or it would be an extraordinary situation for people to have cash, a cash payment for a deposit. So you're really down at the moment just to bank cheques. And as I say, for half the week, a bank cheque won't meet the legal obligation to make payment immediately upon signature of the agreement. And it doesn't just have to be an auction sale because there are plenty of negotiated sales where there may be two purchasers negotiating with the vendor and it gets completed on Saturday afternoon or whenever it gets completed. And gets completed after hours. After 5 o'clock at night. And the purchaser cannot comply with the legal obligation expressed in clause 2.1 which is to make payment immediately upon signature.

So my respectful submission is that one gets a situation where the law at the moment says one thing, the reality is something, is the opposite. Which is why both of the, certainly in the High Court, and why in Your Honour's text on *Agreements for Sale and Purchase*, it's said that the unvarying custom, and those were Your Honour's words I think, the unvarying practice I'm sorry, the unvarying practice, is to accept payment of deposits by personal cheques. Because it's the only way a lot of the time that a payment can in fact be made that complies with the legal obligation. And of course one has also to recognise that if that payment is not made immediately, then there is, because time is of the essence, an immediate default which, because of the three day notice period, doesn't have the draconian consequences that there can

be an immediate cancellation. But it does have the consequence that the purchaser is in default and interest can be charged.

So you get the ludicrous situation on the Friday, Saturday, Sunday or whatever else, if a personal cheque isn't accepted in terms of the contract as payment, that the purchaser is in fact immediately in default and interest starts running against the purchaser and yet there's nothing the purchaser can do. Can't get a bank cheque, can't get cash. Now is that, I won't ask a rhetorical question. But the issue is not, as I think with respect the Court of Appeal rather thought it was, and some of the respondents' submissions rather suggest that it is, it's not a question about whether a personal cheque is something the equivalent of legal tender. It's a question whether in these, in contracts of this type, agreements for sale and purchase, where transactions take place not exactly 24 hours a day but they take place outside the standard working week and standard working hours and where there is an express obligation that payment has to be made immediately with time of the essence, which has the consequences of an immediate default if payment isn't made, whether it's appropriate to imply, as was done in **Williams v Gibbons** in the settlement situation, whether it's appropriate in respect to a deposit situation to imply that payment can be made by personal cheque unless the contract specifically says no, it must be made by bank cheque. And of course that is done in some contracts. Not agreements for sale and purchase but I've certainly seen it in construction tender situations where there's a stipulation that the parties applying for a tender or putting a tender in have to make a deposit by bank cheque. And it's expressly spelt out. And there would be nothing to stop a vendor, as I said in answer to His Honour Justice Tipping, who was concerned that the purchaser might be of insubstantial means or whatever else, to specify that the payment of deposit would be by bank cheque because as I say the vendor will know who the purchaser is. After all the vendor's prepared to enter into a contract with the purchaser which is a commitment. And so at the time the vendor enters into that contract, the vendor can make its judgement whether or not it's appropriate to require a bank cheque. Otherwise what we have is a situation where effectively there's really something which is a fiction going on where the law says that this obligation can only be discharged by legal tender which nobody contemplates, or by bank cheque. And yet the fact is in most cases, or many cases, the obligation can't be discharged in that way, it can only be discharged in fact by personal cheque. And is only discharged by personal cheque.

Tipping J Mr Galbraith, might there be a relevant difference between payment of a deposit in answer to a contractual obligation on the one hand and payment of a deposit to remedy a default in that context on the other hand? I could understand a looser arrangement being acceptable for the former. But I have difficulty seeing a looser arrangement being acceptable for the latter.

Galbraith Well I entirely understand what Your Honour's saying and that could be the position. And that of course I think was the same point that His Honour Justice Blanchard put to me very early on. That could be the position. But again if one goes back and thinks about how that would happen in terms of express terms for a moment. One, I've said, it seems to me extraordinarily unlikely that you would have an express term in a standard form of contract saying the deposit has to be paid by legal tender or bank cheque because it just wouldn't work so it'll never get into a standard form of contract. And yet that's what the law is at the moment. That doesn't seem to me to make a lot of sense. But if one was then going to differentiate, Your Honour just accepting if you would for the moment that for the non-default situation that a personal cheque is.

Tipping J Prima facie okay?

Galbraith Prima facie or not precluded by the contract, let's say that.

Tipping J Yes, just assume that for the moment.

Galbraith Let's assume it for the moment. The difficulty one has in terms of construction of the contractual terms is that there is only one obligation to pay the deposit contained in the contract. There's not one obligation in relation to a non-default situation and one in relation to a default situation. And so if one was drafting the contract to do what Your Honour has suggested, which I don't for a moment say isn't the sensible thing to do, you would put that in clause 2.2. You would say in clause 2.2, in the circumstances where a notice is issued then payment will only be accepted by bank cheque or something like that.

Tipping J I understand that Mr Galbraith but if we could just for a moment look at the contrast between 2.1 and 2.2, the obligation in 2.1 is to pay, I'm looking at p.142 of the Volume. The contractual obligation is to pay. The obligation in 2.2 is to remedy the default. So I don't know that you're entirely right when you say that the obligations are identical. This may be thought a little semantic.

Galbraith No, no, no.

Tipping J But.

Galbraith I think I'm being semantic also.

Tipping J Yes, so I have to say that having looked at this clause quite carefully, I can perceive the possibility of building a distinction between the first and the second obligations as to the means of their fulfilment.

Galbraith Well that's of course what His Honour did in the High Court. I mean he implied a term, or said he would be prepared to imply that the personal cheque could be used for the first.



Tipping J I'm not necessarily signalling agreement with that.

Galbraith No, no.

Tipping J But I do tend to agree, subject to your argument, that there could be a material difference between the substance of the two obligations.

Keith J Although the word paid then turns up in the last sentence doesn't it of 2.2?

Galbraith Yes, it's the, the difficulty is that, it seems to me in terms of differentiating, that there's only one obligation to pay the deposit. It doesn't change. And it's created by 2.1.

Tipping J Mm.

Galbraith The purchaser will pay the deposit blah blah. So the default in paying the deposit is not paying the deposit. It goes round in a.

Keith J Well also the first page where the 295,000 is payable.

Galbraith Yes.

Keith J Immediately on confirmation.

Tipping J Well I know what will be said of course is that you must have the word paid meaning the same thing throughout clause 2. And that of course is quite a powerful point. But if you take.

Blanchard J That's paragraph 61 of Mr Galbraith's submission.

Galbraith Yes, yes it is. We sort of put those to one side.

Tipping J There's a bit of an echo in my mind then Mr Galbraith, you've already struck oil. But payment doesn't conventionally mean providing someone with the means of payment.

Galbraith You're differentiating the personal cheque situation.

Tipping J Yes with bank cheques being just a convenient exception to the normal rule.

Galbraith Well that's what they are. They're just a convenient exception. The question is whether there should be a truly convenient exception.

Tipping J Yes, another convenient exception.

Galbraith That is actually what people do in real life. Or does one create a monopoly on banks?

Tipping J Well I would have thought with great respect that it would be a highly inconvenient exception in commerce because no-one would know where they stood for however long it takes to clear a cheque. And if my bank's anything to go by, it could be up to six days.

Galbraith Unfortunately Your Honour's correct about that also.

Tipping J Well (laughter) says my cheques require particular scrutiny.

Galbraith No, no, no, I wasn't suggesting that at all.

Tipping J No, I know you weren't Mr Galbraith. But if we're going to descend into the commercial arena.

Galbraith I understand.

Tipping J And get real.

Galbraith Yep.

Tipping J Part of the reality is the length of time it takes to clear cheques.

Galbraith Right now if you take the non-default situation for a moment, then that in the commercial arena doesn't appear to be a problem because people accept personal cheques. That's the fact of it. So the commercial doesn't see the certainty which the Court of Appeal thought should apply as important. Because the fact of it is that they accept personal cheques.

Tipping J Well it's got to be held for 10 days unless there's something different and if there's something different you'll obviously structure it accordingly. So it doesn't really matter.

Galbraith That's right but that's another reason why it's not so important that it be a bank cheque because it's got to be held by the, as you quite rightly say, by the real estate agent for 10 days. Whether it's the default situation or whether it's the non-default situation, it's got to be held.

Tipping J If it's a default situation surely the vendor's entitled to a little bit more clarity and certainty than wondering for six days what's going to happen.

Galbraith Well the vendor, well if we just talk about the commerciality of it for a moment and get back to the legal aspects of it.

Tipping J Well that is commercial in my book.

Galbraith Yes, it is, yes I accept that.

Tipping J Very commercial. People don't like being put in a state of uncertainty.

Galbraith Well, the first response Your Honour is that people don't seem to mind that in relation to the non-default situation because that's why they do, they accept personal cheques. So they cheerfully accept them.

Tipping J Well that's highly understandable because of the circumstances.

Galbraith Yes, right. In the non-default situation, if we just set aside the legal issue for a moment, which is there's only ever one obligation and it seems to me very difficult therefore to have a different term unless you spell it out when there's only one obligation. The fact, or the facts are that if a three day notice is given and a personal cheque is tendered, one, a special answer can be obtained if the vendor does think it's important. And that will be 24 hours and that may mean one more working day.

Tipping J And at some cost.

Galbraith Pretty minimal.

Tipping J Oh, well whatever Mr Galbraith but why should the vendor get less than?

Galbraith No, no, but if the vendor really is concerned about it, if the vendor doesn't care, so what. If the vendor, because Your Honour's talking about the situation where the vendor really cares, there's some reason the vendor cares about knowing. Look, perhaps to get this back in context. This is the deposit. It's not the settlement of the jolly purchase price. So it's a step in a longer term contract.

Blanchard J It's a very important step though because it's a forfeitable amount.

Galbraith Yes. It's forfeitable.

Blanchard J It's a source of great comfort to a vendor.

Galbraith Yes, it's forfeitable and of course it can be sued for as well.

Blanchard J Mm.

Galbraith And just as the cheque can be sued on if the cheque bounces. So.

Blanchard J Yeah, and it can be sued on after cancellation.

Galbraith Yes, yes. Yes and.

Blanchard J Sued for after cancellation.

Galbraith Sued for and forfeited after, if it has been paid, or it hasn't been paid you can sue on it after cancellation. So it's not as if the vendor in terms of getting paid, if you just leave aside the other issues for a moment, in terms of getting paid is bereft of any remedies. The vendor's got heaps of potential remedies to get paid even if the contract falls over. So that's on the one hand. On the other hand, it's not like settlement, and with great respect, I would submit that the Court of Appeal running **Williams v Gibbons** into deposits really doesn't reflect the reality of the situation, where with settlement you're handing over title, they get registered, there's a whole string of consequences that follow from payment or settlement which if a cheque bounced would be very difficult. This is only the deposit and so if the cheque bounces then the only other, or the only consequential effect is whether you can cancel or not and so you get into the situation which His Honour Justice Blanchard originally put to me that it may mean a period of either 24 hours if you've got to get a special answer or up to six days if one has the same bank as His Honour Justice Tipping has before you know whether the cheque has bounced or not.

Now that's really only going to be of significance if the vendor wants to or has a back-up agreement or wants to immediately deal with the property knowing whether or not he or she's been released from the existing obligation. It's not going to arise very often and it was interesting that the witnesses who were called to give evidence had very few actual experiences of notices being given for cheques, for deposits not having been paid. So it's not like there's a real mischief running round out there. If there is a back-up agreement well then the backup agreement will simply come into effect once it's been clarified whether or not the cheque has been met. And as I said before, because there are no immediate consequences other than in respect to a back-up agreement it's not like settlement where title or anything else passes. It's a financial obligation along the way in respect to a longer term contract.

Blanchard J If it would set your mind at ease I don't for myself see that backup agreements plays a very big role in this argument.

Galbraith No, thank you Your Honour.

Blanchard J It's different with settlement obligations.

Galbraith Yes, well they're real because something, you rush off and you register your title. So there is that.

Tipping J Don't be seduced by that into thinking that others on the Bench might see that as of some significance Mr Galbraith.

Galbraith No, no, no, no. But if a vendor's entered into a back-up agreement, the vendor's entered into the backup agreement, what will be will be.

Blanchard J It's most unlikely to be particularly triggered by the payment of the deposit or the non-payment of the deposit.

Galbraith Yes.

Blanchard J As it might be particularly triggered in terms of its wording by settlement.

Galbraith Yes.

Blanchard J Being on a particular day.

Tipping J It's not precisely that point that troubles me Mr Galbraith. And if you'll allow me while we're on it. It's the fact that you wouldn't know for seven days, six days say, whether or not you could cancel and enter into a substitute agreement.

Blanchard J No, that's not a backup agreement.

Tipping J No, no I appreciate, that's why I said it's not quite the same point.

Blanchard J Yes, yes.

Galbraith And that's right Your Honour. Subject to getting a special answer, that is correct, you won't know. But you'll never know with a personal cheque. It's only, with a bank cheque you're probably 99.9% certain but you're not 100% certain because bank cheques get cleared through the banking system just the same as, so they take 6 days to clear too, you don't get the money in your account for 6 days with a bank cheque any more than you do with a personal cheque if your bank takes that period of time. But it's quite correct.

Blanchard J When was the last time you came across a bank cheque being cancelled?

Galbraith There's been a couple of cases.

Blanchard J It's very rare.

Galbraith Oh look, that's what I said, 99.9% and perhaps it's higher than that Your Honour, it's very rare, I agree with that. Mind you the last time I came across a bank cheque Your Honour is a long time ago also.

Keith J (Laughter) That's the real point.

Galbraith 19, ooh, in the 1970's in any case when I was doing the conveyancing. They're not common instruments Your Honour. No doubt they do exist and they're used for settlements. I mean that's what they're used for.

Blanchard J Well in fact they're very common in the form of bank draughts.

Galbraith In the form of bank draughts they are for international. Allowing that a bank cheque's a promissory note, yes, Your Honour's quite correct, they are. But in the form that we're really talking about them here, I think they tend to be the speciality of conveyancing solicitors Your Honour rather than the community. But Your Honour just tipping is quite correct, there would be an additional period of uncertainty. And that, it was the uncertainty aspect which influenced by the Court of Appeal. And.

Tipping J What's your answer to that, the vendor getting a special answer is a sufficient to that problem?

Galbraith In what on the evidence before the Court appears to be the rare situations when this arises, then the vendor can get a special answer if it is of immediate concern to the vendor.

Tipping J Is that, is there any other answer to the problem because otherwise you're not actually getting payment are you until 6 days after d...?

Galbraith Well the legal position is that you're getting a condnl payment which if the cheque is met relates back to the time that the cheque was tendered. That's what the legal, that's the legal position.

Tipping J Why should you ... special answers be required to run the risk. Why should not the purchaser be required to put you into possession of cleared funds.

Galbraith Well it's, I mean what's the risk Your Honour.

Tipping J That the cheque will bounce.

Galbraith Yes that's right. But what is the risk of that. You still own the property. The only risk is some inconvenience that you don't know the position for however many more days it might be.

Tipping J But you might want to, there might be all sorts of interrelated things that are going on.

Galbraith Well if there is, then I think one would ask for, get a special answer, I mean that seems to me the obvious thing that one would do.

Tipping J So you really want the onus reversed from the present law where the purchaser has to put the vendor in possession of cleared funds to a new law which says that if the vendor wants the certainty, must contract for it.

Galbraith Well yes because the reason being Your Honour that there's no, in my respectful submission, no way that one can distinguish, there's no way

you can say it's a different obligation under the default situation as the non-default situation. So if in the non-default situation this Court accepts, which it probably doesn't at the moment, but if I can persuade the Court to accept that it's time the law actually reflected the reality and if it is the position where, as I submitted, if the law spelt out, if this contract spelt out what the courts say the law is, everybody would say that doesn't make sense, then that is the position Your Honour. It's got to be symmetrical unless you, unless in these standard form contracts they then put a term in saying in clause 2.2 that can only be remedied by payment by bank cheque.

Tipping J Why should the could change the law to reflect reality when it's open to the parties to change their contracts to reflect reality if that's what they want to do?

Galbraith The argument Your Honour is that what the Court is being asked to do is to interpret this form of contract in the same way that it was asked to interpret the form of contract in **Williams v Gibbons** to imply out of the law relating to deposits and the particular terms of this contract which required immediate payment, time of the essence. I mean it's not the Court changing the law, it's the Court saying that the proper interpretation of a contract in this standard form permits payment by personal cheque because otherwise the contract can't be performed in its terms. This contract cannot be performed in its terms if it means you've got to pay by legal tender or bank cheque. I'm sorry, there are some circumstances it could. But in a lot of circumstances it could not be performed in its terms. And that with respect is why I talked about a fiction. That the Courts have so far gone along with this interpreting payment as meaning legal tender or bank cheque by implication when in fact the contract still can't be performed in those terms if those were the express terms of the contract. Which the Court is saying are the express terms of the contract. Because when you say payment means that, you're saying that's the express term of the contract. And yet that wouldn't, can't do it.

Tipping J Well is that right? You'd only need a little bit of flexibility in the interpretation of the word immediately.

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11.02 am

Galbraith Well that's an interesting one because then you say well immediately means the next day the banks are open, so many hours after the banks are open, it's reasonable to get a bank cheque. And one talks about certainty. So the person walks out of the auction room on the Friday night having not given a cheque in payment of the deposit because the implied term now is that immediately means sometime on Monday

after they've had time to get to the bank and get a bank cheque. Now the problem about that of course is that you don't know who the underbidder was. You don't know who the under under bidder was. They've all disappeared. So if the person doesn't turn up on the Monday with a bank cheque, you're history. So you can't.

Blanchard J Well you're also history if they turn up with a personal cheque and it's not met.

Galbraith Well you can sue on it.

Blanchard J Well for what that may be worth.

Galbraith But you've got something. But that's how the market works. It accepts that. The market is happy with that. The market is happy with the certainty of havg a personal cheque given on the Friday night or the Saturday or the Sunday. Why should the Court, with great respect, be imposing an obligation which the market doesn't impose. And the Court doing this in terms of certainty. Which the market doesn't require. I find it difficult to make sense of that.

Blanchard J Well isn't the position Mr Galbraith that the market customarily waives the rigour of the law if it is convenient to do so. Sensible to do so.

Galbraith The trouble is you don't know because what you've got at the moment is a position where you tender your bank, sorry your personal cheque. Galbraithenerally, forget about auctions for a moment, you tender, oh no, it can be in auctions too, you give it to the agent. The law is that the agent can't bind the principal by accepting a personal cheque. It's for the principal to decide whether or not it will accept the personal cheque. And the principal has to know that the agent has accepted the personal cheque. So you've got a will he won't he situation. You're the purchaser, you've come along, seems reasonable, it's a Friday night, you hand over a personal cheque and some time on Monday you're told well that's not good enough, you've got to run round and either turn up 200,000 in cash or a bank cheque.

Blanchard J Isn't this exactly why the clause is drafted in this way. To avoid that kind of trap. The obligation to pay the deposit was always under the common law a requirement where time was of the essence and the deposit had to be paid immediately.

Galbraith Yes.

Blanchard J The clause was drafted in order to get away from some of those consequences. But it only adjusted to a certain extent.

Galbraith But your honour, it seems to me that the clause does exactly what I've suggested. That it requires the deposit to be paid immediately on executn of this agreement.



Blanchard J Which, and time's of the essence. That reflects the common law.

Galbraith Yes, yes.

Blanchard J But it then says, but hold on a minute, you can't actually cancel unless you've given them another opportunity.

Galbraith Oh, sorry, yes, yes. No, no I agree with that. You can't cancel so you're saved from that. But you're still in default. So as I say interest starts running.

Blanchard J Yeah.

Galbraith So that with respect seems to me to be a very odd situation that a party, a purchaser, acting entirely rationally, commercially rationally in accordance with market practice, hands over a personal cheque on Friday night and on Monday, or might be Wednesday or whenever, is told, whoops, the vendor won't accept your personal cheque and what's more we now want a bank cheque plus interest from Friday night.

Blanchard J Well it would be likely to happen a lot quicker than that.

Galbraith Well it may but the problem is Your Honour, and it's a point we've made here, that my understanding and the Court will have to judge for itself, is that agents don't generally say to vendors, we've received a personal cheque, are we entitled to accept that. The market practice is to receive personal cheques so nobody specifically tells the vendor. That's what happens. As Your Honour said in, in fact the third edition of your volume 1984, said it's the unvarying practice. And yet the ct's imposing some obligation which is contrary to that and it has got a legal, it does have a legal consequence.

Blanchard J Well you say the ct's imposing it.

Galbraith Well sorry, I'm not blaming this Court.

Blanchard J The Court is saying what the law is and in this case has been for a long time.

Galbraith Yes.

Blanchard J You're asking us, it seems to me, to change to law.

Galbraith Well I'm asking the Court to do the same as was done in **Williams v Gibbons**.

Blanchard J Yeah, well we have to have good reason for that.

Galbraith Yes, well the good reason is Your Honour that.

Blanchard J In **Williams v Gibbons** the Court was persuaded to change the law because it was becoming unworkable. Now there's nothing unworkable about the current arrangements.

Galbraith Well there is Your Honour because its not what happens in fact.

Blanchard J In fact there is no problem. Life goes on. Pple tender personal cheques.

Galbraith Yes.

Blanchard J And I dare say if somebody tendered a personal cheque on a Saturday and was told no, no, not accepting that, you're in default because you havn't paid the deposit in terms of the contract you've just signed, if that ever came to Court and it never wd, because of the requirement for the notice to be given so it could be rectified on a working day, the judge would likely hold that it was implicit in the fact that the auction was held at that time that a personal cheque would be okay. But it just doesn't give rise to problems.

Galbraith The only reason it doesn't give rise to problems is because the law is completely ignored.

Blanchard J No because it's to nobody's advantage to try to take a silly point like that. Whereas with the **Williams v Gibbons** situation you had the wheelbarrows of cash going up Queen Street syndrome.

Galbraith Mm hm.

Blanchard J And I've been in that situation of having to take cash up Queen Street for a Friday afternoon settlement. Fortunately my conveyancing practice was limited in that the property wasn't very valuable. But there's a real security problem.

Galbraith Of course there is. And that's where it's changed of course. Because you look at **Brien v Dwyer** (1978) 141 CLR 378 (HCA) when we're talking about a deposit of I think \$1600.00 or something there. These days, well here you're talking about \$360,000.00.

Blanchard J Well **Williams v Gibbons** of course was a settlement case.

Galbraith Yes, yes, it's diffnt.

Blanchard J So you've got.

Galbraith Sorry, yes that's quite right. But with respect Your Honour, the reason there isn't a problem is because the legal obligation is unvarying ignored.

Blanchard J Waived, not ignored.

Galbraith Well no it's not waived Your Honour with respect. Because it can only be waived if the vendor expressly knows and elects to waive.

Blanchard J But the clause is designed so that it stops any nonsense.

Galbraith It stops cancellation, that's right.

Blanchard J But it stops the nonsense because it's to nobody's advantage to suddenly after the contract's entered into insist upon a bank cheque at a time when they know it can't be given.

Galbraith Well I agree with Your Honour. That's correct. But that can only be in legal terms because of implication that it's implied that you don't have to provide a bank cheque say if its on a Fri or a Sat or Sunday. And then why does the same form of.

Blanchard J But even if it weren't implicit, as I think it is, it would stop the nonsense because if people are going to hold auctions at the weekend, they want to have their hands on a piece of paper which is called a cheque.

Galbraith Yes.

Blanchard J That they can sue on.

Galbraith Yes.

Blanchard J So they're not going to take that point and run the risk that the purchaser come Monday won't show up with a bank cheque because the purchaser's changed his mind about buying.

Galbraith That's right. But what all of that illustrates in my respectful submission Your Honour is that the specific legal obligation which is the way the ct's interpreted it at the moment, in practice is ignored because it can't work in practice and so you have the situation. Why preserve therefore this obligation which is, as the legal obligation, which as Your Honour rightly says, just doesn't ever apply. Do you preserve the legal obligation, I suppose the only argument that I can see with respect for preserving this as being the express term of the contract, if you've got to pay by legal tender or bank cheque, but like any other clause of the contract, the vendor can always waive that if the vendor knows, would be to satisfy His Honour Justice Tipping's situation that because you may get into a default situation one day and therefore you want to rely upon it as the respondents do here. That seems to me the only legal justification for havg a term in the contract which the world ignores and is impractical.

- Gault J            Would the position be if your argument were accepted, that it would not be possible for a vendor to say, well I'll just hold your cheque until Monday when you give me a bank cheque.
- Galbraith        Well as I think I said before, the vendor could always provide that he or she requires a bank cheque. And that can be an express term of the contract. But if you make it an express term of the contract then you do have certainty. If you don't have it as an express term of the contract, then you do have uncertainty because you do have with respect the will he won't be situation. Because you don't know if you're the purchaser when you sign up the agreement and you tender it to the vendor, you don't know whether a personal cheque's going to be acceptable or not, you just don't know. So surely that's more uncertain and less desirable than a situation where the vendor specifies yes or not. The general rule is personal cheque's accepted unless something else is required and if something else is required it be specified. Then everybody knows where they stand. There's no argument.
- Tipping J        Wd this general rule apply just to deposits or would you have it apply across the board in relation to payments at law.
- Galbraith        No, no, it's only this contract.
- Tipping J        This contract?
- Galbraith        Well this, I mean this is the only one that's before you of course so I can't argue, ask for anything else. But if you take shops, because the respondents sort of say, shock horror, if the Court finds in our favour in this then shops will all have to accept personal cheques. That's nonsense. We're not talking about what's payment at law. Payment at law is legal tender. That's decided by statute.
- Gault J            Under this contract the vendor would have to specify a bank cheque for settlement as well.
- Galbraith        No because that's been interpreted because it's, my memory of it is that it requires payment in cash which it doesn't require for the deposit. And the COA, as part of one leg of the coa's argument was that because it specifies for settlement payment in cash, that by analogy, although with respect I don't think it's a proper analogy, that the deposit is also required to be paid in cash which means legal tender or because of **Williams v Gibbons**, bank cheque. But I'm not suggesting for a moment that the situation's the same in respect of settlement because settlement does have quite different consequences to payment of a deposit.
- Tipping J        If payment at law requires legal tender, that is not challenged I think I heard you say.
- Galbraith        That's right.

Tipping J Why should the word payment in a contract not carry the same connotation?

Galbraith For the reasons of the context in which it appears. Because as His Honour justice Blanchard said, one's not going to wheel a truckload of money up the um.

Blanchard J Where's the reference to cash?

Galbraith 37...

Blanchard J The COA.

Galbraith After balance of purchase price in cash in full on possession.

Tipping J The COA's approach to that was to distinguish it from any other form of value, i.e.

Elias CJ Property.

Tipping J Property. Yes.

Blanchard J Those words, in cash in full on the date of possession, they relate to this particular agreement, they're not part of the standard form are they?

Galbraith Um.

Blanchard J I'm sorry, it's just I'm a little surprised about this reference to cash in the standard form. But it may be there and I've forgotten about it.

Keith J 3.7 is just paid isn't it?

Galbraith I think that's right.

Blanchard J Yes, 3.7 doesn't have it.

Galbraith No it doesn't.

Tipping J Pay or satisfy the balance

Galbraith Yep.

Elias CJ What statute, I'm sorry, what statute were you referring to about payment?

Galbraith Um.

Tipping J      Legal tender. The Reserve Bank Act.

Keith J        Reserve Bank Act.

Galbraith      Yeah it is the Reserve Bank Act.

Elias CJ        Oh right. Also, Mr Galbraith, you put your argument quite high in the sense that you say the vendor can only come up with a different solution if it's provided for in the contract. And you don't, in response to Justice Tipping, you didn't want to go with waiver. But the halfway house of course is that the position is that the vendor can specify.

Galbraith      Yes. That is the halfway house. Yh is quite right, I'm pitching it at the sort of principle end.

Elias CJ        Yes.

Galbraith      I mean "P.L.E." end. Really for the reason that it seems to me that there's a mismatch between what the law has been expressed to be in the past and what the commercial reality of what actually happens is and the reason that, and I'm repeating myself now, is that it happens as it happens because the other is completely impractical and therefore it's a very odd way to interpret a practical contract in a way which in my submission means that everybody ignores it, ignores the obligation.

Tipping J      Mr Galbraith I wonder if perhaps you could reflect on this during the morning adjournment. I thought there was some assistance to be gained from the terms of the judgment in **Williams v Gibbons** where at page 276 their Honours, the Court there was justices Casey, McKay and Sir Galbraithordon Bisson, referred to what they described as the obiter views of Justice Somers in **Henderson and Roth** (?) where in that case Justice Somers said that in his view the essence of the matter in relation to questions of legal tender and payment may well be that the vendor has the certainty of actual receipt.

Galbraith      Yes and.

Tipping J      And then these certain shipping cases were referred to where the rule is quite firm and strict as you're no doubt aware. Now it seems to me with great respect that when you're talking about a default situation as opposed perhaps to a fulfilling a contractual obligation situation, if I may borrow Mr Justice Somers' words, the certainty of actual receipt by the time the default has to be remedied is very close to the heart of the policy issues behind the way the law has developed to this point. And I for one would be very very anxious about removing certainty of actual receipt. Hence my six-day.

11.20 am

Otago Station Part 4

11.20 am

Tipping J Now you might like to either now or a little later just try and set my mind at rest there. I know you say it's this contract and so on. But it's going to affect a lot of contracts really, because people are going to use the old form and they're not going to change the thing necessarily to suit them and. It has wide-spread implications in my view.

Galbraith Well, now I understand kind of what Your Honour's saying and I've got sympathy as I think I expressed before for the view that in a default situation a vendor may well be more anxious than quite clearly vendors are in a non-default situation. But it is easily remedied by simply providing for it in clause 2.2. And I suspect if the Court were to legislate it, that a personal cheque is satisfactory performance of the non-default situation, that clause 2.2 would simply be amended in the future to require bank cheques in a default situation. And that is absolute certainty.

Tipping J Not bank cheques necessarily but a means of exchange that guarantees certainty. In other words unconditional, puts you unconditionally into possession of the money. That's the problem with a cheque.

Galbraith Yes.

Tipping J A personal cheque.

Galbraith Yes it is. Well that's right but I think just being practical about it, I think the solution in 2.2 would be a bank cheque because if you read some of the overseas authorities, it appears that even a certified cheque which is a cheque which is in some overseas jurisdictions almost the equivalent of a bank cheque, it's the personal cheque certified by the bank that there are funds available, is not regarded as in inverted commas payment.

Tipping J But the shipping cases which I think are analogous.

Galbraith Yes they are.

Tipping J Cancellation of charter parties and so on.

Galbraith Yes, yes.

Tipping J Require that you be unconditionally put in possession of the funds.

Galbraith Yes.

Tipping J By the hour or day or whatever is in issue. Now no-one suggests in England that the law should be altered when it went right to the House

of Lords to invert it. And it was all very easy for contracting parties to overcome that if they didn't like it.

Galbraith But that's, that's like settlement, those shipping cases.

Tipping J Mm.

Galbraith That's like settlement, that's where there's real consequences if the money's not there.

Tipping J Well there's a real consequence here because you can immediately cancel.

Galbraith Well that's right.

Tipping J It's exactly the same. The shipping cases are late payment of moneys due within the immediate right to cancel.

Galbraith That's right but.

Tipping J I see them as very close.

Galbraith But with respect they're not. The ships out on charter, the charterer has possession of the jolly ship at the time. He's actually on the ship sailing it around to wherever it might be. So it's a very different situation.

Tipping J But you can cancel and then the charterer's obligations wholly differ.

Galbraith You can cancel, then you've got to take, that's right, then you've got to take possession of the ship. There's some real.

Tipping J Yeah I know but.

Galbraith But here you still own the property.

Tipping J I know.

Galbraith You've signed up to sell. You haven't got your deposit paid. What you're going to cancel is a contract with a person who's not in possession of your property. You still remain in possession of property. I mean I can understand why in charter situations that that is so important because it has real consequences. The only consequence here, and I'm not, I am diminishing it because it's my respectful submission it isn't so significant, is that you don't know for one day or if the bank's really slow, six days, whether the default has been remedied or not. But in most situations it'll be a so what.

Tipping J Well take for example clause 16 on page 162 which gives the purchaser a right of access when the deposit's been paid.



Galbraith Yes.

Tipping J You've paid by a personal cheque, would you have a right of access immediately or would you have to wait until the cheque was cleared?

Galbraith You'd have to wait until the cheque was cleared. It's only a conditional payment.

Tipping J So you're agreeing that in reality then payment doesn't take place until the cheque is cleared.

Galbraith Oh yes, I accept that.

Tipping J You accept that?

Galbraith Yes, I accept that. That's the.

Tipping J So your whole argument really rests on this point that you call the symmetrical point. That everyone pays by personal cheque for the initial deposit, therefore the rule should be the same for the default deposit.

Galbraith Well it's a little more subtle than that.

Tipping J I know it's more subtle Mr Galbraith but just so that a simple mind like mine can identify the argument.

Galbraith No, no, no, sorry, I didn't mean that.

Tipping J It all turns on that doesn't it?

Galbraith Well it all turns on there's only one obligation to pay the deposit. And so whatever the rule is in one situation has got to be, if you're interpreting the contract, and this is a discussion about interpreting this contract, has got to be the same for both situations. I started off by saying I agree with the COA on that. But that then means if you go the way that it's got to be the obligation is by bank cheque or legal tender then that's the, in effect, clause 2.1 says the purchaser shall pay the deposit to the vendor. The vendor immediately upon execution of this agreement by both parties by legal tender or bank cheque. That's the effect of what one says the law is at the moment.

Tipping J So it's really an interpretation point.

Galbraith It's an interpretation point.

Tipping J Not an overriding point of law.

Galbraith No, no.

Gault J           What's the position about electronic funds transfers. Are they condnl or are they effective at the time they're made.

Galbraith        My assumption is that they're effective at the, well they're effective at the time they're received.

Gault J           Because they won't be actually operated if the funds aren't available in the transferor's account.

Galbraith        I think, look I don't know the true answer. But my assumptn always has been that they're effective at the time that they're received by the receiver.

Gault J           That's instantaneous isn't it if you do a funds transfer between two accounts?

Galbraith        Yeah, except that one's experience is just if I can, ... His Honour Justice Tipping is that you give instructions to the bank to make automatic transfers and they don't always do it. I mean I've had that experience.

Gault J           You can do it on a keyboard now though. Lots of people are doing this on keyboards.

Galbraith        Oh, I can't do that.

Blanchard J     But Justice Gault is talking about one that actually is effective.

Galbraith        Yes.

Blanchard J     I don't know the answer to this either but I'd always assumed from the fact that these real time transaction rules have come in that real time means real time, that the payments are effective when made.

Galbraith        Yes, that's my assumption also Your Honour without.

Gault J           It just seems to me that to talk about getting real, this is what will happen over weekends.

Galbraith        Well a short answer, I don't know the answer, so.

Elias CJ         If banks are open.

Gault J           They don't need to be.

Elias CJ         No.

Gault J           They don't need to be.

Tipping J They're trying to discourage cheques.

Galbraith Yeah, well they were trying to discourage branches too and they've all started reopening branches too. So I'm a bit sceptical about, I mean it may happen in time but at the moment that's not what happens I don't think.

Elias CJ Mr Galbraith we'll take the morning adjournment.

Galbraith Thank you Your Honour.

Court adjourns 11.28 am  
Court resumes 11.45 am

Elias CJ Yes Mr Galbraith.

Galbraith Perhaps if I can turn away now from my high principle argument and talk about the alternative of waiver or estoppel. Your Honours will be aware from the written submissions and the situation that the position is that in practice personal cheques are accepted and that's the expectation in the market and the situation really is that which the Australian High Court referred to in **Galbraith v Cluning** (1979) 28 ALR 57 (HC) where it was said the practice of giving and accepting personal cheques in payments of debts and liabilities is now so widespread that there is a general expectation on the part of persons making payment that a personal cheque given in payment of the debt or liability will be accepted unless the payee objects before at the time of receipt the cheque does not constitute legal tender. In my submission that's the position with deposit cheques in relation to agreements for sale and purchase because it is the unvarying practice in the non-default situation at least that personal cheques are accepted. And so one can regard it as the Court of Appeal did in **Williams v Gibbons** in relation to the bank cheques that there had in effect, or there is in effect a fictionalised, because that was the term they used, it was a fiction, a fictionalised waiver in respect of in that case they were saying the necessity for payment by cash which was the law up until that time. And as their honours said at page 276 at the foot of the page, waiver however must be no more than a legal fiction in the thousands of conveyancing settlements by bank cheque taking place each year. The solicitors involved can be assumed never to have turned their minds to the possibility that anyone would want to settle in cash.

Elias CJ Sorry, I've got the ALR reports, are you referring to the CLR's.

Galbraith Sorry, I'm back in **Williams v Gibbons**.

Elias CJ Oh I'm sorry **Williams v Gibbons** yes.

Blanchard J Have we got **Williams v Gibbons**?

- Elias CJ No.
- Galbraith I don't think you have Your Honours for some reason. That's our fault. But I could give Your Honours the reference, it's [1994] 1 NZLR 273 and I'm just reading from the foot of 276, up the top of 277. And what the Court very realistically decided there was, as I say, that transactions are settled by bank cheque. Effectively that must be a waiver of the obligation to pay by legal tender. Nobody's ever turned their mind to it so it's a fiction, the waiver's actually a fiction but, a legal fiction, but that's the fact of it and therefore by implication one can settle by bank cheque in lieu of legal tender. In my submission it's proper to propose here that given the unvarying practice to accept payment of a deposit certainly in the non-default situation by personal cheque, that one has a similar situation of a legal fiction of waiver of the obligation to pay by cash or by bank cheque. And that setting aside my first argument which is that therefore one should imply the personal cheque is sufficient satisfaction which would be a parallel argument to the **Williams v Gibbons** argument, in circumstances where the vendor does nothing to disabuse the purchaser of that stipulation of that expectation, and in the particular circumstances here where the notice required payment to be made directly to a bank account, that absent the vendor specifying that the payment should be by bank cheque, that there is either a waiver or an estoppel against the vendor in respect to the deposit of a personal cheque into that bank account.
- Gault J How does the specification of a bank account strengthen the point?
- Galbraith Um, in my submission Your Honour, because the normal method of payment into a bank account is by cheque or by, as Your Honour rightly said, these days you can do a funds transfer of course. In my experience at least, and one can't take that as evidence, bank cheques tend to be handed over in exchange for something. And that's the reason that of course that you have a bank cheque on settlement because they are handed over in exchange for something. So this was a payment into a bank account where it's got to be cleared, there's the process of clearance is explicit.
- Elias CJ But you can pay cash into a bank account.
- Galbraith Yes you can. But we go back to the point that nobody expects payment in cash. Of course 360-odd thousand in cash into a bank account.
- Gault J I can't see that it strengthens the point myself. You can pay into a bank account in any number of ways. That doesn't seem to me to suggest any more strongly that a personal conditional payment will do.
- Galbraith Well Your Honour only in the context that that is, payment by ordinary cheque is the, by personal cheque is the normal way of discharging the deposit obligation. That would be.

Gault J Yes well that's your point but then you say it is strengthened by the fact.

Galbraith Yeah.

Gault J And I just have difficulty with that.

Galbraith Sure. Well I guess it depends how it strikes Your Honour as against how it struck me. It just seemed that if the payment was going into a bank account I guess I would think, well I'll write my cheque out and deposit it there through the banking system. Whereas with a bank cheque, it's the confidence of handing something over in exchange for the bank cheque. It's I guess it's just the only experience I ever had of bank cheques was in that context on settlement.

Elias CJ I suppose though the fact that the bank accepted the cheque may be indicative of some misunderstanding of what is said to be the legal position because it shouldn't hv.

Blanchard J The bank wouldn't have known what the cheque was.

Galbraith No, no. And that's one of the.

Blanchard J It just arrived.

Elias CJ Oh yes.

Galbraith And that's one of the complications of course about asking for it to be paid into the bank.

Elias CJ Yes.

Galbraith Because neither, unless they made specific enquiry, would the vendor know how the payment had been made. Because they're not going to get, just as Your Honour's bank may be slow in clearing cheques, you don't unless you ask for it, get a bank statement each day which shows all the deposits up to a date with.

Tipping J Mr Galbraith can I just ask you to step back a bit from the point that Justice Gault was enquiring about. I'm not quite sure that I understand this argument. Is it that because people normally waive, you must be, you are obliged to waive unless you tell someone you're not going to.

Galbraith Um.

Tipping J Is that the essence of the argument?

Galbraith Because people normally waive and that's the expectation, though it's a fiction that they waive because they don't do it consciously. In other words vendors don't consciously, each indivl vendor in each

transaction doesn't say, just as the solicitors didn't say as they say in **Williams v Gibbons**, don't think I'm waiving the requirement for legal tender or bank cheque by accepting, by my agent accepting a deposit by ordinary cheque. No vendor, well I shouldn't say no, but the very rare vendor would actually consciously think that. It's a fictionalised waiver in the sense that that's just what happens in practice. So as they said in **Williams v Gibbons**, it's a legal fiction that there's a waiver that's the basis on which personal cheques are accepted. So if you've got that situation where in a legal fictional sense there is an assumed waiver in respect to the requirement to pay by legal tender or bank cheque for a deposit, that's a reciprocal expectation on the purchaser's side that that is what applies and if that is not what's going to apply, then in circumstances where the threat is to cancel the contract unless payment is made by legal tender or bank cheque, then that should be specified. Otherwise the purchaser remains in a situation of a false expectation. And when you require the cheque, or sorry the payment to be made into a bank account where it will not be immediately apparent to the vendor as to how that payment has been made.

- Tipping J Was there any evidence to support.
- Keith J Well they were immediately faxed weren't they?
- Galbraith Yes, but.
- Keith J So, and that includes the copy of the Otago Station Estates Ltd cheque.
- Galbraith Yh's quite right. In fact in this situation the vendor did know because they were told by the purchaser's solicitor.
- Keith J And it was that that led to the fax the next day saying we cancel.
- Galbraith That's right, saying we don't accept.
- Blanchard J Have we got a document that is the direction to pay into the bank account?
- Galbraith Yes, 168 I think it is. Payment is required to be made to the office of Berry and Co, National Bank account number to be made to the credit of the vendors.
- Blanchard J Well that actually doesn't require payment to the bank account. It requires payment to the offices of Berry and Co account so and so.
- Galbraith Um.
- Keith J (Speaking at same time)
- Blanchard J

Blanchard J I don't know that anything turns on this. But it, in response to that notice you could have paid to the offices of Berry and Co.

Galbraith Well they could in any event of course have done that. They couldn't, the vendors couldn't prevent you from paying at the office of Berry and Co put it that way.

Blanchard J Berry and Co were making it easier for them.

Galbraith Yes.

Blanchard J Because of the geographical distance.

Galbraith Yes, yes that's right.

Tipping J Mr Galbraith was there any evidence from anyone for or on behalf of the purchaser that they had this expectation of which you spoke. That it was alright in these circumstances to pay by personal cheque because of this that or the other thing.

Galbraith Subject to Ms Grant correcting me, I don't believe so Sir.

Tipping J I don't think there was.

Galbraith I don't think there was any evidence full stop.

Tipping J No. So you really have to say don't you that either they had a right at law to do it or that under the contract properly interpreted they had a right to do it.

Galbraith Yes, which is what I have been saying, yes.

Tipping J But I don't see how this estoppel, expectation argument gets us very far.

Galbraith Well there's certainly no direct evidence on it Your Honour and that's why I sort of couched it in terms of the legal fiction of the waiver.

Tipping J Do you accept that either you had to have a right of law to do it or a right under the contract to do it? To pay in this way.

Galbraith I don't think we have a right at law so it's a right under the contract.

Tipping J Under the contract.

Galbraith Yes, that's the argument.

Tipping J That's really the nub of the case then, we can put everything else aside really. Did the contract allow you to pay in this way?

Galbraith I'm very cautious about making concessions Your Honour.

Elias CJ You'll have to be more cautious.

Tipping J You're very entitled to be cautious and I'm not trying to be cute. But I mean that seems to me frankly that that's what this case comes down to.

Galbraith Well I think it's the nub of it, yes, yes Your Honour. I mean that's the way I've pitched the argument.

Elias CJ Can you help me with something that I'm sure I'm the only one who's ignorant about. The idea of payment by cheque being a conditional payment, where does that terminology arise?

Galbraith The cases, and we only referred to the Canadian case, but *Nicks v Taylor Ltd* (**Nicks & Son Ltd v Taylors Bakery Ltd** [1962] NZLR 286), it's a new zealand decn which sets it out.

Elias CJ Right.

Galbraith And that's actually in the respondents' casebook. The correct legal position as I believe it is is that a payment by cheque is a condnl payment pending the cheque clearing or for that matter not clearing. If the cheque clears then the payment is taken to be ab initio from the time the cheque was tendered.

Elias CJ Yes.

Galbraith My learned, sorry the respondents have referred to a rather eclectic view of Professor Galbraithoode's (*"Payment Obligations in Commercial and Financial Transactions"* R M Galbraithoode (1983)).

Elias CJ Yes.

Galbraith That a payment by cheque is nothing until it's cleared.

Elias CJ Yes.

Galbraith And that's inconsistent with the weight of authority as I'm aware of it.

Elias CJ Yes.

Tipping J Well all the banking ... way the shipping cases, the English common law cases.

Elias CJ Yes.



Galbraith I think that I'm pretty comfortable that that's the right position. But it does leave that period of uncertainty as His Honour Justice Tipping and I think Justice Blanchard have pointed out to me.

Your Honours I'm not sure, unless there are further questions, that I would be doing anything but labouring the points I've made already.

Tipping J I just have one question Mr Galbraith. If one is talking about symmetry in relation to the different aspects of clause 2, would one also logically be looking at symmetry of meaning for the concept of payment throughout the contract.

Galbraith In my respectful submission, not nearly Your Honour. I mean symmetry is a nice concept of course. But not nearly because it depends on the context and the character of the payment and the consus of the payment. So in my respectful submission one can distinguish what might be required if \$10.00 had to be paid to get a copy of the title or something if that was a term of the contract as against the settlement obligation.

Tipping J Well that's the main one, the settlement obligation.

Galbraith The settlement obligation, no argument there's something really serious happens on settlement.

Tipping J Do you accept that for settlement purposes the law is as per **Williams v Gibbons** and you're not seeking to have that changed.

Galbraith No Your Honour.

Tipping J So you're in effect setting up a dissonance between the meaning of the word paid for settlement purposes and for deposit purposes.

Galbraith Well the answer is yes and if one wants to limit it to the terms of this particular contract you have got the specific terms saying that the balance to be paid in cash on the date of possession for the settlement provision but that's, as His Honour Justice Blanchard pointed out, is a specific term of this contract, it's not the 3.7(1) term which is the normal pay term.

Tipping J That's on the front page of the contract.

Galbraith That's on the front page of the contract.

Tipping J Do you challenge the coa's explanation of in cash in that context?

Galbraith Um, I thought to be honest I thought they kind of had it both ways in a sense. Because they said that in cash meant that you couldn't pay by, sorry couldn't be satisfied in another way except by payment. But then they decided that payment required legal tender or bank cheque, bank

cheque being the equivalent of cash. So it seemed to me they ended up in this position.

Tipping J Thank you.

Galbraith Thank you Your Honours.

Elias CJ Yes, thank you Mr Galbraith. Yes, thank you Mr Davidson.

12.03 pm

D Your Honours the respondents have filed submissions within the guidelines provided by this Court as to 30 pages, about 14 pages of which relate to the question of leave. So the balance of the submissions are confined and in fact in terms of the questions asked by the Ct to Mr Galbraith this morning, I think that most matters are covered in the written submissions for the respondents. They've been anticipated as part of the argument that's signalled in the points on appeal.

I wonder if I may commence by stating as it were the fundamental case for the respondents and try and pick up the matters that have been raised in the course of the morning. In essence the respondents' case is that they are here in this Court because the purchaser failed to do simply what the law requires. That what the law requires is known. What the appellant seeks to do is to have the law taken to be other than it has been for many years. The fundamental position is that payment is required by legal tender and we know that in the context of, particularly with estate transactions and one assumes by extensn major commercial transactions, that legal tender for practical purposes and legal ppses will be met by bank cheques which are held on the evidence which the Court of Appeal considered to be as good as legal tender.

The principle behind the law, that payment be made by the legal tender and not by personal cheque in the respondents' submission is founded on the entitlement of the payee whether to accept the risk of dishonour. Legal tender has more to it than simply the obligation on a person making payment as the law knows it because having made legal tender the payee must accept it. The case for the appellants if successful in this Court would in my submission lead to a reversal of that fundamental tenet behind the principles of legal tender. The risk of dishonour will pass to the payee.

And behind the reasons the law has adopted this approach is in my submission something which comes clearly out of **Williams v Gibbons** and which is inherent in the, or implicit in the contract which the Court is considering here and that is the certainty for both parties that payment is effected at a certain time.

The deposit is clearly, and there is no difference between us in this regard, a particular element of the contract with characteristics of earnest or guarantee of payment, or performance I'm sorry, which is relevant in terms of any relaxation of the rules relating to tender. The rule in fact is extremely simple. And it's worked in my submission well and would have worked well here had it been applied. Legal tender must be made for the deposit, that principle is apparent in the texts and the cases. And it must be in that form unless there is an agreement to the contrary or a waiver. But it has the beauty in it that form of the ability by virtue of the power to waive, or vary by agreement, that the fundamental rule can be changed to fit the immediate needs of the parties.

It is clear, if I may revert from the fundamental layout of the respondents' case that of course if a vendor sets up an auction on for example a Saturday, the purchaser is not to know the amount of 10% for the purpose of obtaining a bank cheque that day. In my submission it is implicit in that circumstance that the vendor would not be able to say I insist on a bank cheque required under the terms of sale for immediacy of payment because the auction's been set up by the vendor on a day which would not allow that to happen. In my submission there are two terms which may be implied in that circumstance.

The first is, as His Honour Justice Blanchard indicated might apply, would be you must take my cheque. You've set the auction up on a day where you have to take my cheque because I can't provide what you otherwise say, or the law, is. The alternative view, which I submit has merit, is to say that the vendor having set up the auction in that way, the character of the word immediately must be affected by that fact. So while the deposit is payable immediately on fall of the hammer, the vendor would be precluded from saying you must give me that bank cheque now because that would be an impossibility save for the ability to make an electronic transfer, which not all purchasers would hv.

Tipping J      So you're saying that the timing of the auction implies either a kind of anticipatory waiver or giving time to get the bank cheque.

D                Yes Sir.

Tipping J      Whichever way you wish to go.

D                Yes Sir.

Keith J        Or both.

D                Or both. You take my cheque and you have the choice, you can take my cheque, that's the principle of tender, take it or leave it. But if you don't take it, you must give me time to perform the contract as the law otherwise would require. And by that, in my submission, there is no

disadvantage to a purchaser, not advantage to a vendor, that simply fits with the law as the respondents submit applies.

The point is that the flexibility allows the person who carries the risk to choose whether to do so. If the appellant is right that a personal cheque must be accepted, both in the initial deposit situation and the respondent squarely is saying there was no obligation to accept at that time, I say initial deposit, the one not under notice, then any cheque, personal cheque, could constitute payment in law. As I understood my learned friend, he moved to the point of saying that it could be or may be that the payment would have to be made by the purchaser in terms of the personal cheque (pc). But if one takes a circumstances for example that the purchaser is for want of a better company Smith No.1 Ltd, then a cheque from Smith No.1 Ltd or a cheque from a purchaser's relation, partner, whatever it may be, constitutes a huge element of risk to any vendor. If the appellant is right in my submission, it means that the vendor will have to take a personal cheque.

Tipping J Well he tries to get round that one Mr D by saying that this isn't an imposition of law, it's simply the way this contract should be read.

D Yes.

Tipping J That's the way in which the problem you've identified is attempted to be circumvented.

D Yes.

Tipping J Now are you able to assist in that respect?

D Well this is just a particular form of contract which makes no specification in that regard at all as to the way the payment be made. And that is no different from many commercial contracts. But in the argument that's advanced it is my understanding is that in effect the Court is being asked to say that the law through this Court should recognise a practice in the same way and by extension as it did in **Williams v Gibbons**. That practice will now determine the law in relation to this type of contract. And one of the curious features of this is that if the appellant is right, there could be a law, the law could be held to apply in a certain way in this contract with its two-phase process of initial deposit, then notice, then cancellation. No cancellation without that step being taken. But a contract of course could be drawn for the sale of land without those provisions in it. This happens to be the most common form of transactional contract. But it could be that a contract's drawn up by solicitors and often contracts are drawn by solicitors with no such provision regarding cancellation and the two-phase step.

So rhetorically is it to be that the law will be held in this contract to be that a personal cheque must be accepted but in the contract without the

two-phase process that may not follow. In effect what the appellant seeks to do in my submission is to create a ruling in respect of a particular form of contract which may have no applicn outside. And I think Sir, addressing Your Honour Justice Tipping, that comes back to the way the argument was addressed by my learned friend in response, to say it's not been put up as a matter of law, but in relation to this particular contract. It's going to be a rule under this contract alone.

Tipping J Well it struck me when that point was raised that you would then have a grave uncertainty as to whether the rule would be extended to other forms of contract depending upon their individual incidence. And the great value of a legal rule which binds everyone from which you can contract out of if you choose is that you have a clear default provision but not depending on the interstices of the individual contract. Whereas Mr Galbraith's position might involve the situation where you have some kind of, I don't know how you'd describe it, presumptive position if you could see enough analogy between the next contract in issue and this one, that the law would be as we say he asks us to say but no-one would ever know until the Court had spoken.

D Yes, every time one is going to have to think in advance what it's going to mean with regard to any form of payment under different contracts and the appln if the appellants are right of this ct's judgment in relation to different forms of contract different meaning.

Elias CJ There's nothing very different in the law in that however, because custom does inform contracts in different areas of law.

D Yes, I accept that Your Honour. But could I use the example of **Williams v Gibbons** to see how the custom applies. In **Williams v Gibbons**, at a passage which I think has been referred to at page 276 at line 53, the judgment records that in many of the cases in which cheques have been accepted as good tender the Courts have assumed waiver of cash by the creditor. Waiver must be no more than a legal fiction in the thousands of conveyancing settlements by bank cheque taking place each year. Solicitors can be assumed never to have turned their minds to the possibility that anyone would want to settle in cash. That had been in relation to settlements no matter how the contracts had been drawn as demonstrating that there is a fundamental policy or practice adopted for a particular form of payment pretty well for all purposes. But the underlying feature of **Williams v Gibbons** is that that practice had become accepted because the commercial unreality of an alternative view, namely cash in barrowloads, obviously had long passed. But also the law had moved to the point of accepting that a bank cheque was the equivalent. So it was not just a practice that people did it this way. It was a practice because it was based on a certainty of payment. And for all practical ppses, that was the equivalent of cash. That in my submission Your Honour is the basis upon which the custom there was held to be the law.

In this case, however, on the facts, what is not in dispute is that there is a practice of making initial payments of deposit by personal cheque. It's not invariable. There was evidence before His Honour Justice Chisholm from some solicitors to say that they would not accept a personal cheque. But it's not invariable. It happens to be the usual practice that that is how it's done. And the respondents make two points from that. The first is that the fact it's the practice to pay it in that way and it is usually taken in that form does not mean to say that the law requires that you have to accept it in that form. The appellants case is effectively saying I am entitled for you to accept the risk of my personal cheque and you must accept the risk because this is such a fundamental and common expectation that it goes without saying. But the solcitors who gave evidence didn't see it that way from their own perspective. They didn't all accept that a personal cheque would suffice in the case of deposit, whether under notice or otherwise. So it doesn't have the rigour of testing over many years as an invariable or such a common practice as in **Williams v Gibbons** accompanied by the certainty of payment. It just doesn't follow here. There is no risk involved in **Williams v Gibbons**. The Court could be comfortable with the implication of a term because it was not then saying to the commercial world by the acceptance of bank cheques or the application of bank cheques anyone is going to suffer. The Court had already dealt with that issue. That was not an issue. **Yan (Yan v Post Office Bank Ltd [1994] 1 NZLR 154)** made that plain, that the paying bank cannot back out of a bank cheque.

Elias CJ Well you have certainty, but you don't have delivery of value except on a, so it's still a conditional payment.

D It is conditional and the appellant's submission in this regard, and I said it before Your Honour, there are two points that I wish to make in this regard. The contract, the respondents submit, as His Honour justice chisholm held, can be taken to have a meaning of payment applicable in two ways. The first is that because there is a practice of making payments by pc and acceptance of that that as His Honour said he would have been prepared to imply a term to that effect at that stage. But he clearly distinguished between that circumstance and that of the payment of a deposit under notice. And in that regard he had extensive evidence from solicitors who made it plan that in that situation where lawyers are likely to be involved, both in giving the notice and making sure the contract's working properly, that they would not accept a personal cheque at all. So His Honour had, in my submission, a proper ground for distinguishing between what was called the initial deposition situation, even though the respondents didn't go with or didn't accept the idea of an implied term at that stage, the respondents' position has been there is one principle which flows throughout, legal tender unless waived, and His Honour saw a very clear distinction between the two situations because in the initial deposit under this contract there were no consequences of great moment other than that the vendor then gained the right to issue the notice under clause 2.2.

Whereas in respect of this situation under notice the contract had provided, the parties had agreed, that a step had to be taken, a process had to be undertaken, by which a payment was made within a certain time. And to try and analogise the situations where in the initial deposit the only consequence would be well let's, we may now suffer a notice. In the second situation where we're told expressly and the contract contemplates you will have a notice, this notice which is given by Berry and Co here made it plain that it's under pain of cancellation, then come 5 o'clock on D-day, the purchaser could have been under no doubt that the payment in law had to be made. And Your Honour I'd like to come in a moment to the question of whether a cheque is a condnl payment or whether as Professor Galbraithoode would have it, it is not a payment at all, supported by Brindle & Cox (*"The Law of Bank Payments"* Brindle and Cox (1966), 11-12 and 376 et seq), another authority.

- Blanchard J Does it matter? Either way, it's not an unconditional payment.
- D Well I suppose Sir. In that sense no it does not matter. It does not matter.
- Tipping J One of the key features of this case that I would think was important Mr D is how can it be said that to require payment allows conditional payment.
- D Exactly Sir.
- Tipping J A very simple way of looking at it.
- D Yes. Well that's because payment means, has meaning in law which has held for hundreds of years.
- Keith J You're just saying that the Galbraithoode position takes it even further. It's nothing. It's not even condnl.
- D Correct. And the cases that deal with the condnl nature of the payment, and we have looked at that in the submissions for the respondents, in my submission really do deal with often matters of insolvency. And the effect that the remedy available to a creditor is suspended having accepted a cheque. But even there, and as here in my submission, the key point, and **Galbraithoorge v Cluning** (1979) 28 ALR 57 (HCA) recognises this and the other cases to which I'd like to return in a moment, that it's always up to the person receiving the cheque to accept it or not. There is that choice. That risk of, accepting the risk is for the person receiving the cheque. And Galbraithoorge v Cluning and the other cases which are associated with it are all based on it. There are two authorities, Canadian authorities, **Wexelman v Dale** (1917) 35 DLR 557 is one which I'll come to. But another case of **Rehill (Laidlaw v Rehill)** (1943) 4 DLR 429) which is cited in Galbraithoorge v Cluning and which go to that very point, up to the

person receiving the payment or the cheque, receiving the cheque as to whether it will be accepted or not.

Tipping J It was very much a part of Mr Galbraith's argument that he built on the proposition that the two steps or the two payments should involve the same mechanics so to speak.

D Yes.

Tipping J Now I have to signal Mr D that I for one am not entirely comfortable with the learned trial Judge's view that he could imply a term that the initial payment could be made by pc. Because I presume he meant, he obviously meant imply a term into this contract. But the context was that he was really saying that the practice was so universal that you could apply it across the board.

D Yes.

Tipping J Now I'm not at all convinced that the evidence justified that in relation to the proper test for implying terms as a result of custom.

D Sir we for the respondents, I for the respondents, I think I'm the only Counsel who's been throughout the whole trilogy of cases of hearings here, we never accepted that it was implied, that an implied term should be upheld here. Our position has been that the one, the symmetry is gained by the payment being tender in respect of all elements of the contract.

Tipping J At least provisionally I would have thought that the better analysis was that the strictness of the law in relation to initial payments was customarily waived.

D Yes. And that is how the Court of Appeal put it. In exactly that form Your Honour. That appears at page 51 of vol 1 of the Case. Which is at paragraph [44], there is a practice that objection is not usually taken to payments of deposits being made by personal cheque. Presumably because it's held for 10 days anyway. Plenty of time to clear, if it bounces can invoke 2.2 etc. But the existence of this practice does not change the underlying legal obligation to pay the deposit and the vendor's right to stipulate an advance will not be accepted or object to the tender at the time of receipt. Sir that seems to me to comply exactly with what Your Honour's just said.

Tipping J Well they talked about waiver in the immediately preceding para.

D Yes they hv.

Tipping J So presumably they're carrying that concept forward into the paragraph you've just read.



D Yes. Sir I want to, while one can see the attractions of symmetry in the word payment having application throughout, payment does hv, comes up in a number of respects in the contract of course. And one of the anomalies in this contract, if the appellant is right and Your Honour Justice Blanchard I think was really addressing this point, is that the cure for following a notice of default, if we go to page 142 of the case in the red volume, is to be seen at 2.2. One can cancel and my learned friend's right the vendor should not be entitled to cancel this agreement for non-payment unless the notice has been given three working days and the failure within that time, has failed within that time, to remedy the default. No notice shall be effective of cancellation if the deposit has been paid before the notice of cancellation is served. This leads to what in my submission makes an uncertainty on an uncertainty. If paid is to have a consistent meaning of personal cheque throughout as I understand the appellant's case to be, then it must apply here.

Blanchard J I think that's a very good point.

D And one of the.

Blanchard J In other words, just let me clarify this so I'm sure I'm on the same wavelength. If they don't give a notice of cancellation immediately the three days are up, and perhaps they don't give it because on my g's argument they can't, another cheque could be tendered in so-called payment and because it arrived before the notice of cancellation you have an almost indefinite series of extensions.

D Precisely Sir, exactly the point. And in real terms of course the purchaser playing fast and loose or the purchaser who is genuinely without funds, could play that to the wire because giving a cheque on the last day which is personal, this came at 4.37 pm the fax was received, 22 minutes before, 23 minutes before 5 o'clock and Mr Eades has given evidence in his principle brief, what can you do. Two contracts made payment. Instructions from all these parties. You can't do anything about it. You can't take objection within that time. You'd have to have instructions to do so. But then time has to pass. And we know on the evidence that's before the court, the evidence was that it could take five or six days for the cheque to clear. The purchaser who knows their cheque is bad could be ready for the situation where it knows that the bank is to advise of dishonour but immediately remedy that because all they have to do is make payment, is to pay nor personal cheque which may be no good and do it again.

Tipping J You mean theoretically ad infinitum.

D Correct.

Tipping J If their timing is sufficiently astute.

D Theoretically yes. And they could do it before the dishonour comes out. They could actually say to the vendor's solicitor, look sorry that cheque was no good, you're about to be told that by the bank, here's another one. In other words the vendor wouldn't actually get the opportunity to jump in with the cancellation. Because it's been paid. All they have to do is pay and a pc will do. And there's the problem of the symmetry argument. Well, the problem actually lies the other way.

Tipping J Yes, yes.

D The problem is to maintain the symmetry by having one ... throughout.

Tipping J Yes, with a different meaning yes.

Keith J You're at one with Mr Galbraith in saying they should have the same meaning, the word paid and the other expressions in clause 2.

Blanchard J He's working forward, you're working backwards.

D Yes, that's right. But working backwards is only going back to what the law requires and what the plaintiffs

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D Yes, that's right. But working backwards is only going back to what the law requires and what the plaintiff's, appellant's seeking to do here is to actually have the law recognised in a different way in this contract. So there's a fundamental anomaly.

But what I was concerned to do was that if the Court, this Court were ... accept the respondents' case, what I did not want to see happen was us to fall on the argument of symmetry being absolutely inviolable. Because the concern would then be an extension of an implied term in payment of the initial deposit into a situation which as His Honour justice chisholm said is very diffnt. And it's my submission it is very diffnt. So different that it speaks against the implicatn of a term for much the reasons that His Honour said. And this appeared at page 37 of the Case in the grey volume. And he began at paragraph [26] by talking of certainty of payment as important. And in my submission this is fundamental. It's the corollary of the point that I've just addressed to Your Honours with regard to the meaning of paymt in the remediation situation. Clause 2.2 has been structured so the vendor can immediately cancel if payment's not been made by the time it expires. Any suggn of having to wait and see is incompatible with the plain wording and intend of clause 2.2. Two lines on, there is no halfway house, you either rmedy it within the time stipulated. And these parties

said it had to be done by a certain time else contractual sanction is available. A vendor is entitled to make decns based on what clause 2.2 actually says. And His Honour saw significance in this. And in my submission although one immediately moves into speculation as to circumstance, it could be of enormous significance. Particly in a contract that's run on for a period of time. A vendor too has to make his/her/its commercial decns. It could be that the vendor is after another property. Not a backup contract on this property but a vendor wants to buy another property. And they can only do so with the certainty that this contract is going to proceed. So, and they may be under a time constraint to confirm another contract, particly where one's run on here. Many contracts are interlinked. A vendor needs to know what the contractual position will be come 5 o'clock on that day. And they could have drawn other contracts that affect. The law or the practice of the law is familiar with many interlinking contracts. And they don't interlink just because there's a backup contract on this particular property. Someone else may well have said we will buy this property but our offer is only open until a certain time and the vendor will say well I can't do anything until a certain time has passed and I know whether this other person will complete the purchase or indicates by payment of deposit that they wl.

So there are many bases upon which the certainty is extremely important and the solicitors who gave evidence for the respondents alluded to those certainties or the need for it. All solicitors, Mr Cooney, Mr North and Mr Eades who gave evidence for the respondents talked about the importance of knowing the position by a certain time.

Tipping J Am I right in recalling that the evidence given for the appellant was simply directed to the first or what we're callg the initial and didn't touch on the default situation at all.

D Virtually no experience was held Sir in that regard at all. But in the respondents' solicitors witnesses, did have, two of them had some limited experience. And that is one of the reasons that I submit that it simply could not be the case that a practice as to the way in which a payment is made for initial deposits could carry into such a different setting. There is no practice. There is no custom. It could only get there by the symmetry argument in my submission that pay means pay for all purposes.

Elias CJ Could your argument be perhaps oversimplified, but could it be put that payment within the meaning of this contract is not condnl payment except in the case of a bank cheque for reasons of policy adopted by the Court, if a vendor's driven to 2.2 then you can't rely on a personal cheque because it won't be payment within the time specified.

D Yes.

Elias CJ And in the case of non-default, if the cheque is honoured it will be payment before you can cancel.

D Well my submission is that you don't have to look at it that way. It doesn't carry back. You have accepted the payment if you've taken any step you have done what the law recognises. It doesn't take very much the cases emphasise to demonstrate you've accepted the form of the payment. If you don't take objection to the form of the payment and there may be other bases for objection that's it.

Elias CJ Mm.

D You're stuck with it. So there's no relation back principle necry in relation to the cheque. You have waived your right to payment by a certain time.

Elias CJ Yes.

D Or performance in terms of ... End of story.

Elias CJ Yes.

Tipping J On an interpretation point Mr D, would there be any force in the view that if the contract is drawn as it is to require three working days, and the evidence is that it takes five to six working days to clear a payment, those two are irreconcilable and therefore personal cheques could not have been contemplated as within the compass of the word payment. Because you're not, the length of time it takes is immediately going to defeat the ppse of the three days.

D Yes Sir.

Keith J And even if you paid right at the beginning.

Tipping J Well even if you paid right at the beginning of the three days you're never going to know within the three days.

D You won't Sir. The logical extension of that argument is in my submission the proposition.

Tipping J Could you refer us, where was this evidence? I didn't actually pick it up in the evidence.

D The five to six days Sir?

Tipping J The five to six days.

D Yes Sir I can take you to that.

Tipping J Yes frankly I think that's significant. Obviously my bank isn't sort of hugely out of line with the general ...

D No, no, you're not being singled out Sir at all.

Elias CJ The Chief Justice is still convinced there must be some other lurking reason for my problems.

D There is special mention in the Judgment. At page 102 of the red Volume, and this is the evidence of Mr Ayers who gave evidence for the Appellant, the purchaser, at line 9 and 10. The personal cheque is received, goes back to line 4. The need to wait for it to be cleared before it can be paid out etc. Takes four or five days. So that's the direct evidence from the appellant. There was no, I think that was much the common view of the others. A few lines His Honour at line 16 said, can you get a special answer to avoid that. Yes Sir you can, some delay.

Tipping J It's four to five, not five to six. It doesn't make any difference to the point but I just want to get this accurate.

D Yes well in terms of the proposition you've just put to me Sir, yes it doesn't make any difference because you couldn't get it in within the three days. Which is another way of putting in my submission that it can't be a payment because it can't have any effect in terms of the deadline.

Elias CJ That was the proposition that I was putting to you.

D Yes.

Elias CJ But you also came back and said on the facts you could waive the requirement.

D Yes, yes you can. And usually it is.

Elias CJ Yes. But that would depend on the facts of acceptance.

D Yes.

Elias CJ Yes.

D Yes and it is quite important for the appellant, respondents' position that I acknowledge that the Courts really haven't looked far to see an act of acceptance. And Galbraith v Cluning is a case which touches on that and I'd like to come to that shortly.

Tipping J Well there's no suggestion against you that you have actually waived here is there?

- D On the contrary, no, we acted promptly to get it back. We didn't receipt it into the trust account, Mr Berry's firm was threatened.
- Blanchard J You sent back a bank cheque.
- D Yes I did. Was covering every base Your Honour. (Laughter) There was a certain sensitivity about the issue by then and we were trying to get it right by the book which is all the appellant had to do in the first place. But there is a piece on special answer there at 102 line 22. Delay was in the vicinity of two to three days on a special answer.
- Tipping J Two to three days.
- D Yes. So just addressing these matters of principle, the case for the appellant is run on a commercial reality type of argument which I've sought to distinguish from the **Williams v Gibbons** situation. And particularly because what they're asking is that there be an assumptn of risk now accepted in this type of contract by the vendor. By the payee. And it's a real risk for the reasons I have mentioned. It could be anyone's cheque. There's no means of knowing what that cheque is, how good it is, who the person is behind it. These contracts at auction will generally be made between people who have had no contact whatsoever between themselves.
- Tipping J Wd it mean in effect Mr Davidson that you could hand over your personal cheque at half past four on Friday and not actually fill it up in relation to funds until middle of next week.
- D Yes you could be safe, yes, until the bank addressed the question of the honour.
- Tipping J You'd be dicing with danger.
- D Perhaps not when you can just issue another cheque Sir, then it goes sour.
- Tipping J That's the other point yes.
- D And of course we're talking about cheques but we're talking about negotiable instruments here. Could be another form of cheque and not in a standard, it could be a building society cheque, it could be a cheque drawn on a company which allowed negotiable instruments to be drawn on it. Pandora's box is opened by the appellant's proposition. We immediately think of a cheque drawn on Westpac or whatever it may be. It needn't be. And by whom. If the appellant's right it could be what none of us would regard as a particularly commercial form of negotiable instrument by someone we've never seen or heard of before.
- Tipping J I suppose theoretically it could be a promissory note.

- D It could be a promissory note in the C P Herbert sense.
- Tipping J Written on the side of the cow (laughter).
- D That's where this argument goes.
- Tipping J Might appeal to your clients Mr D. (Laughter)
- Elias CJ Well more optimistically banking practice, particularly with electronic capacity may improve to the extent that there isn't going to be a practice problem with personal cheques.
- D Yes. And it's been referred to in this Court this morning that this can be done in the weekend. But not every purchaser will have the means to effect that turning up to buy a house property at auction on Saturday morning to do so. But in many cases we are, and I don't think there's any gainsaying it that so much of commercial transaction now is electronic, it's just the way we have gone.
- Tipping J Well one thing that influences me is it's not as if it's terribly difficult to get a bank cheque.
- D It's not at all difficult Sir. And on that point, there's been something, I'm not sure how far the argument's supposed to carry, but there has been something said about the practice. And in the lower Courts there has been a good deal said about this, is that there is a practice of saying what you want and that is to become the law as it were. You have to say what you want in order to get what the law requires that you should have which is quite a curious way of putting it. That you have to do something in order to take the benefit of an entitlement that you hv, you've got to give some form of notice. This is where the argument's carried certainly in the lower Courts. The answer to that I think, in my submission, is reasonably simple, that, and in terms of Your Honour's observation, getting back cheques is not that difficult. But it's a practice amongst some solicitors, Mr Cooney is one in the red Volume at page 95. This is just the form that his Nicoll Cooney practice in Ashburton uses. That's a direct credit, the facsimile confirmation, use the Nicoll Cooney bank deposit slip. As soon as direct credit's been completed, this is paragraph 2, send us by facsimile copies of the following, the bank cheque. Now in a way what was going on here was something akin to this the way Mr Cooney has set it out for the purchaser there. Sending a copy of what's been sent through. The trouble was it wasn't a bank cheque. That was the problem. But it doesn't take, in my submission, what is good practice on behalf of a solicitor to get it absolutely right in the settlement process by way of notice. You don't have to have that in order for a purchaser to know they have to simply make the payment as the law requires. Otherwise what is the form of the notice to be. What is required. How much time must be given. That you want a bank cheque. The whole notion of

importing an implied term that the person seeking the bank cheque has to say they want one and then say how long in advance it's to be obtained and so forth does turn the law completely on its head.

My submission for the respondents is that the practice such as it is, is people do proffer these personal cheques. The practice is not to object. But it's not an absolute practice in all circumstances. It hasn't moved to **Williams v Gibbons** to the point of becoming an obligation to accept.

If the Court will allow me to do so, I'd simply like to refer to one or two parts of the prepared submissions in very brief form. There's only a few pages here. I'd like to refer to what Mr Eades has said which is at page 15 of the prepared submission at paragraph 35. Because it captures, in his words as a very experienced commercial solicitor, the notion of a positive obligation to signal the requirement of what the law prescribes comes as a surprise to him and would turn commercial and conveyancing practice on its head.

Tipping J To be fair to Mr Galbraith's argument, he's asking that the law be changed.

D Yes, yes, yes.

Tipping J So it's not quite right to say that it would be turned.

D He's asking that the law be changed but he eschewed that Sir when you put it to him directly in saying that in the context of this contract, in the application of this contract. And Mr Eades is referring to that, the application of this contract.

Tipping J Mm.

D And he talks about the sheer impossibility of deal with the situation of if there is an affirmative obligation to make ... This is the point I haven't perhaps touched on properly yet. If you've got an affirmation obligation to say no I will not accept that cheque, then it's up to the purchaser to make the payment at a time that gives the purchaser time to fix the problem. If you leave it here, and the vendors here were accused of ambush. In my submission, this is self-ambush. Because if you take a step, you only advise the form of payment at 23 minutes before the clock ticks, there's no way that there can be a proper response by way of objection. And you can avoid all that. There's no way there can be a proper response because here you've got two contracts. You've got three named vendors. You'd have to get instructions, discuss the implications of the personal cheque. Where's it from, who are they and so forth. And of course this is a nominee.



Tipping J I think with respect Mr D you may be slightly at odds with the submission. The submission as I understood it was that you should give, the onus should be on you to give notice in advance.

D Yes.

Tipping J Not if you like at a time, not that you've got to object, you've got to actually inform them in advance that the ordinary rule which Mr Galbraith would wish us to affirm is not to apply here. In other words we want a bank cheque but then the question as you say would be how far in advance.

D Yes.

Tipping J I think that was his essential submission as I understood it.

D Yes Sir I think that's so. I've slipped off the point here. I was really talking about the application of the law as it stands in the context of this performance.

Tipping J Yes, right.

D The purchaser only had to say, I'll get it right, there's the bank cheque, end of story.

Tipping J Mm.

D If it had come on the first hour of the first day, that they had tendered this and the vendor had accepted it, end of story. If the vendor had said no, I don't have to accept this personal cheque. There's the notice, three days. There's three days to fix it. What the purchaser did here was by making the payment when it did, so close to five o'clock was there was no prospect, even if the vendor had wanted to make objection formally at that stage, the solicitor couldn't have actually got there. And there was no contest about that proposition in the lower Courts when it was made.

Mr Cooney at paragraph 40 discussed the complications of a personal cheque. He talked about the matters I've touched on, backup offers and so forth. And emphasising the importance. And Mr North at paragraph 41. Then dealt with the question of legal tender and payment. And I've mentioned in the first two lines of paragraph 43 a form of offer the law required a payee could not refuse. So the tender was as good as payment. Cheque wasn't a legal tender. A matter that was raised by Your Honour.

Then we say for the respondents and my submission is that the law is that it's always been the case, it becomes valid tender if a personal cheque is accepted or indeed any other payment outside the definition of legal tender. And not much has to be put up to achieve that. And

His Honour justice Mason in *Galbraithorge v Cluning* refers to that general expectn on the part of persons making payments.

Tipping J In actual the irony of *Galbraithorge v Cluning* is, according to Justice Mason, this payment wouldn't have actually satisfied that because he says was a sufficient payment if not objected to.

D Correct, if nt objected to. That's the fundamental tenet of the respondents' case.

Tipping J So it wouldn't actually fulfil the *Galbraithorge v Cluning* test it appears to me.

D No it doesn't. My submission Sir is that we are on all fours the *Galbraithorge v Cluning*. Rather than opening the door to some change in the law bec, as the appellant puts it, there's a recognitn of expectns, its qualified that the expectn can be met, still be met by an objectn taken by the payee or person receiving the cheque.

And then we've lked at the other jurisaidns in the following paragraphs in Canada and the United States. Obviously United Kingdom and in New Zealand, ***Stembridge v Morrison*** ((1913) 33 NZLR 621 at 640), they are all precisely on point. To move to the appellant's position here in my submission, and all those matters are in the bundle of authorities put forward by the respondents, all those references, is to give New Zealand a unique take on this fundamental principle. But underlying all this, and the reason there should be no unique take on it, amongst other things, is that the principle is that the risk assessmt is for the person receiving or being offered the tender.

We've dealt with the question of a conditnal payment. I've alerted myself to the response of the Bench to this issue. The authorities which are referred to at paragraph 50 are all in my submission cases which go to whether a cheque subsequently dishonoured is payment or ceases to be payment, and if it's honoured it dates back to the time of tender. They're all cases in my submission which have a real import regarding the significance of the timing in relation to remedy being taken. And I've mentioned the relation back principle in here.

The other view, which is set out eight lines from the bottom of paragraph 50 is that any analysis of condnl payment is artificial. A cheque isn't a payment 'til it's clear because it cannot operate as an assignment of funds until that time. That, in my submission, is the core point. Until that time, a payee's remedy may be suspended if it's accepted, if the cheque is accepted. But there is no assignment of funds.

Tipping J Well it's not an assignment at all, even at that time. It is simply a mandate to the holder of the money to make a payment to the payee isn't it?

- D Yes, it's a direction to pay and a promise to pay. Whereas legal tender is something in which you have property and can treat as your property from the moment that you receive it. And that's what Professor Galbraithoode was saying at the top of page 20 of these submissions. That he's challenge the statement that the instrument is acceptable as condtnl payment. He says in truth it's the suspension of the right of action pending maturity but does not operate as an assignment of funds and is therefore not payment in any real sense. And I submit for the respondents, that is the true position in law. What was required by 5 pm on this occasion was payment as the law knows it.
- Gault J Wd professor goode not accept the backdating, deemed backdating of the payment once the cheque is honoured?
- D Well he would accept that the law has held that that ademtion (?) has effect.
- Gault J In principle he would not accept that.
- D No in principle he wouldn't accept it.
- Tipping J Well that relates to the value date doesn't it in relation to international transactions. A cheque doesn't have a value date strictly on an ordinary personal cheque until the date it's cleared.
- D Exactly. Whereas a legal tender and bank cheque wl.
- Tipping J An immediate value basis.
- D You can act on the receipt of the bank cheque in reliance on the fact that they are funds that are available to you. And there's a section in Brindle & Cox in "*The Law of Bank Payments*" which is in the respondents' bundle. Brindle & Cox has quite a lot to say about this issue. It's behind tab 16. In various ways.
- Blanchard J Is this the latest edition?
- D Well I understood it was Sir.
- Blanchard J I'm not querying it. It's just a fair while ago and I wondered whether there was something more current.
- D I think this is right up to date Sir, I'll certainly tell the Court if it's not. At page 11 which is the first page behind the frontispiece. And the last paragraph. It begins, the provision of a negotiable instrument or the procuring of the opening of a letter of credit is thus not in truth effective as a payment at all. So if a debtor pays a cheque in discharge of his debt and before it's honoured the debtor is adjudicated bankrupt the creditor cannot argue that he has been paid. But he's not paid until

the cheque is honoured. So if you've got a time bar as in this case to pay by a certain time, it's not paid until the cheque is honoured. And that could be days down the track. In **Re Hone (Re Hone A Bankrupt; ex p The Trustee v Kensington Borough Council** [1951] Ch 85) the cheque was honoured but only after adjudication and it was too late then for the creditor to be entitled to retain the proceeds of the cheque. And the true legal position is stated at the top of page 12, the payment of the debt made by a bill of exchange or letter of credit, no payment, even condnl payment until the bill or credit is honoured. It's a fiction to say it's backdated in effect in my submission.

Blanchard J We seem to be surrounded by fictions.

D We do and the good thing is to get rid of them Sir by sticking to one principle.

And halfway down the same page, page 12, there is a line beginning, "not be fulfilled" about 60% of the way down the page. In truth the position is that no payment, condnl or otherwise, has been made pending clearing of the cheque. The ability to enforce payment by the creditor is suspended during clearance.

Then at page 376 of the same text, another page on, paragraph 4.152 refers to cheques. A very common method of payment. A debtor not necly entitled to make payment by cheque rather than by cash. Subject to the terms of the contract the creditor may insist on payment in legal currency. And top of the page, the contract may expressly or impliedly permit payment by cheque, and even if it does not, a tender if accepted will suspend the payment obligation. And that simply accords with the law.

And at page 379 there is a refnce to submission of the cheque. And at paragraph 4.156. Payment in the legal sense denotes discharge of an obligation to pay money. The dictinction between the cases the debtor is entitled to tender a cheque in payment with the result that the creditor cannot refuse to accept payment by cheque in cases where the creditor has not previously agreed to accept payment but may chose to do so when presented with the cheque. Which is the situation in law here. May chose to do so.

And it's probly starting to law it on a bit but I just refer Your Honours to page 381 of the same text in the second paragraph. There is a discussion about the word condnl. It comments in the fourth line of that second paragraph there's the usual shorthand with regard to condnl and absolute payments but in the former case the cheque condnl payment, there is no payment, condnl or otherwise in the sense of a discharge of obligation. Again, it's a question of suspension.

And over the page there's a reference to **Cohen v Hale** ((1878) 3 QBD 371, 373) and the Judgment of Chief Justice Cockburn with regard to an estoppel when a man takes a cheque.

Finally at page 385 in the citation from the Judgment of Lord Justice Lloyd, presentment by cheque of the cheque by the payee always strong evidence of acceptance, especially if not accompanied by immediate rejection of the offer. Well on the facts of course there was such, but there was not a scintilla of evidence that this cheque here was accepted.

At paras 54 onwards, and I don't wish to take the ct's time unless invited to do so, the respondents have looked at the question of implication of the term. Have referred to Your Honour Justice Tipping's Judgment in **Everist v McEvedy** ([1996] 3 NZLR 348) at paragraph 58 and has gone through the five requirements for implication.

Tipping J Is there a typing error in the second line of that citation where the word "that" should be "of it"?

D Sorry Sir, should be known that?

Tipping J Should be taken to have known that and have intended. I think it should read known of it shouldn't it?

D Of it, Sir it could be.

Tipping J I think. It doesn't look quite right but anyway.

D Known of that perhaps.

Tipping J I'm a bit sensitive because it was from me. It didn't seem to make a great deal of sense the way it's.

D Well that can't be said for your Judgments Sir so I think that I've got it down wrongly.

Tipping J I'll have a look.

D Because the case has been argued on the basis of implied term, we've set out some points there. I have knowledge of the custom and we've accepted the first point, paragraph 59. It may real estate agents and solicitors do know of a practice but it's not invariable on the evidence. It doesn't follow that all contracting parties do. Deposit payments may be made by lay people not acquainted with any practice at all. Then certainty. What are the details of the term supposed to be. And there's a difference. I mean it's certainty with regard to the position where the High Court has taken one view and the Court of Appeal another is hard to take or hard to accept. The High Court has taken the view there's a

certainty attaching to the implication of the term in the first stage, and the Court of Appeal has not. The Court of Appeal gets to certainty by virtue of sticking with the law as it has always been.

Elias CJ Mr D will you be a little while longer because it is.

D I'm sorry Your Honour, I missed the time.

Elias CJ I don't want to hurry you but perhaps we should take the lunch adjournment if you are, because we will want to hear from Mr Galbraith in reply.

D Could I just indicate that I'm really just covering the bases now.

Elias CJ Yes.

D And unless the Court really wishes me to go to some parts, I'll finish very shortly after lunch.

Elias CJ Yes, thank you. Thank you Mr Davidson. We'll take the adjournment.

Court adjourns 1.03 pm

Court resumes 1.15 pm

Elias CJ Yes Mr D.

D Yh. If I can just deal with two matters immediately. The passage at paragraph 58 of the respondents' submissions Your Honour Justice Tipping, you were correct, it is not properly cited. It should read in the second line, "should be taken to have known of it and intended". I apologise.

The second matter Sir, Your Honour Justice Blanchard asked about Brindle & Cox. This is a text which we obtained from the University of Canterbury Law Library. It's not held by anyone except the Law Libraries in New Zealand. And we've made a check at the break and found that there is in fact received recently a 2004 edition of Brindle & Cox. And we're having that sent to us by email to see if the passages remain the same and to advise the Court.

Blanchard J Well it would be helpful if we could be supplied a copy of the comparable passages.

D That's what we're doing Sir.

Blanchard J In any event.

D We'll do that Sir.

Blanchard J Since if we decide to cite from it, we want to have the page references and things correct.

D Sir, that will be with you this afternoon.

Blanchard J Thank you.

D It comes to this then for the Respondents. That there are one or two matters that I simply want to touch on to conclude having review the balance of these written submissions, everything has now been addressed in one way or another this morning. And I was just dealing with the question of implied term at paragraphs 54 onwards. And trying to fix what in fact the appellant is saying with regard to the implied term. And allowing the fact that the case in a sense moved on this morning. The written submission was, at paragraph 66 for the appellant by my learned friend was the issue was whether the Court should move on from recognition of bank cheques as implied satisfaction of payment obligations at least insofar as deposits paid on the originally specified date are concerned and recognise the reality of commercial practice in accepting payment by personal cheque. In essence that is a submission that based on that practice as described there is to be a implication that the cheque will be accepted. And as I understand the argument as addressed this morning, it's my learned friend's case that if you want your legal tender in the context of that practice, you've got to say so. And to avoid a wrestle as to when you should say so, you'd have to do so in the contract. Otherwise one immediately gets into absolute speculation of what is an appropriate date to give notice that you require the legal tender. And in my submission that's where logically the argument would have to go. It would have to go right back to requiring this effectively in the contract. So there would be a constant and certain way of dealing with the implied term for which it's contended.

And it's an observation only but this 7<sup>th</sup> Edition as page 141 of the red bundle of the Case demonstrates, is of July 1999, 7<sup>th</sup> Edition in respect of a contract of November 2000. And it's my submission that if the position was as contended for by the appellant then one would expect to have seen that reflected in the standard form of agreement. The very matter which arises from the implication if it's to be fixed at the time of contracting it would be fixed in this commonly used document at the time.

I had been addressing from the written submission the five criteria referred to in *Everist v McEvedy* and earlier at the other authorities. And the third criteria in paragraph 61 is that of reasonableness. And it's the respondents' submission that it cannot be reasonable to imply a custom which requires acceptance of a personal cheque given the degree of risk. We know that shops and businesses don't accept them in many cases. And it's hard to see why the custom should have developed that you have to accept it. Personal cheques are not better now than they

were before. And effectively the submission is developed saying that this submission is really no more than saying that people are being less careful than once they were. That does not sound reasonable.

The fourth criterion relates to the clear and convincing evidence. It's one thing to say a pc is normally accepted by custom. It's quite another to say that they have to be accepted. And it is quite striking that to say clear and convincing evidence as to this effect when we have a then current text in McMorland "*Sale of Land*" that cheques are not legal tender unless accepted. So the custom flies directly in the face of texts along with Your Honour Justice Blanchard's text to the contrary. And the submission is made that that bk is so widely used that its pronouncements are common currency and the custom otherwise would be in direct contradiction to the authority.

The fifth and final criterion is that the custom must be consistent with the express contract. The contract says that the deposit be paid within a certain time, time being of the essence. We come back to the debate which may be on the discn this morning of no great moment but I'm hesitant to leave the point with regard to the nature of a payment. A pc in my submission is not a true payment. The highest it is is a condnl payment and it may not even be that. And I've referred to already Professor Galbraithoode.

And in the Supplementary Bundle of Authorities which I think is before Your Honours, the second of those, behind the coloured intelver is the case in the Privy Council of **Allen v Royal Bank of Canada** ([1926] PCC 17) and it's concerned with a circumstance of a bill or note given by a debtor to his creditor on account. And there is a passage which looks at the basis of the law or the correct legal analysis at page 20 in the last paragraph. Which refers to "*Byles on Bills of Exchange*", that 1928 or 3 Edition, that if a bill or note be taken on account of a debt and nothing be said at the time, the legal effect is this, that the original debt still remains but the remedy is suspended until maturity of the instrucion in the hands of the creditor. And that remedy's suspended even if the bill or note comes not from the debtor but by a stranger. It then refers to a view in the cases that are cited that when a negotiable instrument is given to the creditor the presumption is that it is given and accepted by way of payment. But the more recent authorities are in conflict with this proposition and support the statement of the law given at the abovementioned page of "*Byles on Bills*". In my submission that is all in support of the proposition the respondents advance to this Court that there is no payment as a matter of law by the negotiable instrument consistent with Professor Galbraithoode.

And at paragraph 64, to wrap the argument of implied term, comes to this but I've said it in different ways so I just conclude in this form. If the appellant's right then we have the unpalatable result the vendor has no option but to accept a personal cheque. And where does it go?



Where does it extend? We're going to have a different law and different contractual settings as the cases develop.

I've dealt with then the question of payment having one meaning. And at paragraph 67 is what's been described as the anomaly if the word pay runs on. It means you can remedy a default with a bad cheque, with a personal cheque which may be bad.

Your Honours I didn't intend to address you on estoppel havg regard to the fact it wsn't developed by my learned friend unless you wish me to do so.

And then I've come to in conclusn at page 25, the challenge to the concept of certainty. Really at paragraph 72, this addresses the invitation expressed at paragraph 66 in my learned friend's submission the Court move on to the reality of commercial practice. And that the Courts have refused to acknowledge that reality based on the apprehended need for certainty. And that people don't require certainty for initial deposits and the expectations of parties must be determined in practice. This paragraph 73. But it is clear that the solicitors do see the need for certainty in the setting with which the Court's primarily concerned. And they may see it in the context of an initial deposit. And that's evidence before the Court from witnesses, all witnesses for the respondents have said this. All experts have said certainty in terms of the notice situation strikes them as being critical to effect the payment, to leave no uncertainty beyond the date specified. The parties meant something when they made a contract which fixed a time by which a default may be remedied, must be remedied, failing which cancellation can follow. Not to leave it open ended as to some time in the future when a vendor might be in a position to cancel depending on the fate of the cheque and remedial steps taken by a recalcitrant purchaser.

It comes then to this at page 26 with regard to certainty. And in preparing for this hearing today not just the matters that are referred to but I noted Your Honour Justice Tipping in the case of **Galbraitharratt v Ikeda** ([2002] 1 NZLR 577) with regard to deposits and referred to this fundamental tenet of certainty in commercial law being desirable.

And these paragraphs from 77 onwards go to that effect. Behind tab 6 of the respondents' bundle of authorities is Galbraitharratt v Ikeda. And at page 591 with regard to deposits, with regard to the circumstances of default and forfeiture or recovery Your Honour said at paragraph [40], This is an aspect of the law where it is of the highest importance to have as much certainty as possible. Referred then to the primary nature of the deposit. The parties must be taken as knowing and intending that on default would be forfeiture or recovery. It's just an example of the ct's recognition of this. And these paragraphs at 77 to the conclusion really are to this effect. And because they're so clear,

I don't wish to make any observation further about them except that at paragraph 77 in the case of the **Deputy Commissioner of Taxation v Barroleg Pty Ltd** ((1997) 25 ACSR 167), waiting 'til the last day is always a dangerous course to plot and if one makes a mistake the Court will not always overlook non-compliance and sometimes it cannot do so. You've got to be 100% sure you've got it right if you wait 'til the last day. And the cases which follow all go to the importance of certainty.

And at paragraph 80 from the COA's Judgment of **Wilmott v Johnson** ([2003] 1 NZLR 649) developing presumptions to consider policy factors. The public interest in encouraging a practice that makes for certainty and simplicity is apparent. What we have here as arose in the discn this morning is a situation where the law is known. It is flexible. In practice it proves to be extremely flexible in the case of initial deposits. A party here, the appellant, simply failed to do what the law requires. It is as simple as that. It's of its own making that it finds itself in this situation. And all the respondents have done is asked through these Courts and at the time of the transaction that the appellant should have observed its obligations and that they as vendors should have been entitled to exercise their ordinary legal rights.

I have nothing further to add unless there are any other questions Your Honours.

Elias CJ Thank you Mr D.

D May it please Your Honours.

Elias CJ Yes Mr Galbraith.

Galbraith Just very briefly. It's not as the respondents' submissions suggest at paragraph 57 a question of what's legal tender in respect of the normal run of commercial contracts. Nobody's arguing, sorry, the appellant's not arguing that the law as to legal tender has to be changed. It's simply a question about how should the obligation to pay the deposit in this standard form contract be interpreted. And related to that is this question of payment, condnl payment. Can I just note for Your Honours, I haven't got the page reference I'm afraid. But in "*Laws of New Zealand*" under cheques at paragraph 11, you'll find the proposition that I have submitted that it's a condnl payment on the cheque or bill being honoured. And if it's not honoured the liability of the debtor to pay the price remains. I think most of those cases which my learned friend has cited really are saying that same thing. It's just this, as I say, the gloss which Professor Galbraithoode adds that it isn't anything at all until it's been honoured. And **Allen v Royal Bank of Canada** which is that case which my learned friend just recently cited to Your Honours is in fact the first case cited in support of the condnl payment proposition in "*Laws of New Zealand*" so. But a bank cheque's no different from an ordinary cheque or a personal cheque. It

again is in my respectful submission a conditional payment and regarded by that commercially until it has been honoured.

The second point I'd just like to make is my friend has suggested that the proposition which we contend for which I think you fairly summarised a moment or two ago would open a Pandora's box. But with respect it's what actually happens in practice at the moment. So one has to take that into account. The obligation under the contract to pay the deposit has to be met by the contracting party and in my submission it could not be met by a third party undertaking the liability. It's a liability, an obligation. You can't assign that to a third party without the vendor's consent of course when you get an option. So it would have to be discharged by the contracting party. And the issue becomes one of course between us, really quite a narrow one, whether it's a situation where the purchaser is entitled to meet that obligation by way of a personal cheque or whether the situation is whether the purchaser can try and meet that obligation by way of a pc and then has to wait and wonder whether the vendor's going to accept that or reject it. So under the law as it is at the moment there's an uncertainty because nobody knows. My friend made much of the certainty. The only certainty at the moment is the vendor's got an option and the purchaser doesn't know which way the vendor's going to jump. And so what we're contending for is something which would be certain, which is given that practice is with deposits to accept pcs and if one wants to remove the uncertainty that under the *Galbraith v Cluning* sort of situation arises where the vendor can, post the handing over of the cheque, say no I don't want that, I want a bank cheque for a legal tender, then the obvious way to do that is to specify it. And as my friend said, you won't find that specification in the standard form contract and the reason as I said before is because it would be totally impractical. And so it would only be specified in a particular circumstances where there was a concern about the financial status of the purchaser or the purchaser was unknown to the vendor, that the vendor would then stipulate for it. And as I said before, this is all happening right at the front end of the contract, so that's the time for it to be stipulated.

Now it would mean, it would mean a change in the assumptions upon which vendors and purchasers are contracting in terms of what the law has been declared to be at the moment as a general issue of interpretation.

My friend said that the obligation to pay by bank cheque, or one doesn't say the obligation, at least the legal entitlement to have the obligation satisfied, only existing by way of payment by bank cheque or legal tender, is customarily waived. But as I said before, that's a purely legal fiction because waiver in law requires knowledge. The principal would have to waive and the principal would have to have knowledge that there was a personal cheque being tendered and that generally is not what happens so we are in the situation of legal fiction

in respect of a practice which exists. And so the submission is that this Court should interpret this standard form contract in the context of the practice and the practice is different quite clearly with deposits and settlement because the evidence before the Court of Appeal in **Williams v Gibbons** was that for settlements bank cheques are almost invariably used whereas the evidence before the Court in relation to deposits is that pcs are almost invariably used. So you have two completely different practices. And if one interprets one contractual obligation in the light of that practice, then my respectful submission is one should interpret a different contractual obligation in the light of the different practice. They are not the same.

And indeed the point that my learned friend made which is that what if you have such a contract which doesn't have this three day notice provision in, then what. Well of course in that situation there would be even greater justification for interpreting the contract as permitting satisfaction by a personal cheque. Because otherwise, if it's on the Friday night you're immediately in default. And can be cancelled immediately because time's of the essence. So if you don't have the three day notice period, and I accept what His Honour Justice Blanchard said, it's an ameliorating provision, if you don't have that, then even more clearly the commercial implication has to be that you can pay by a personal cheque. Because otherwise in a lot of situations you'd be in immediate default.

- Elias CJ Well you'd then. Yes alright.
- Galbraith Yes, because you wouldn't have satisfied the terms unless of course they waived it.
- Elias CJ But that's true isn't it under the three day notice provision anyway.
- Galbraith Yes, if you haven't paid that's certainly right.
- Elias CJ You just can't cancel.
- Galbraith Or if they don't accept the pc Your Honour's quite right. Just in relation to consistent payment, and I understand that's one way that the Court might chose to not accept the appellant's submissions. Just perhaps worth noticing that there are other payment obligations under the standard form of contract. And it includes a payment obligation which arises if you pay late in the date, if you turn up to settle late in the day. And you will notice under clause 3.8, if due to the delay of the purchaser settlement takes place between 4pm and 5pm on the settlement date (last minute settlement) the purchaser shall pay the vendor: (1) one day's interest at the interest rate for late settlement on the portion of purchase price paid in the last minute settlement. Now if payment's going to be interpreted consistently it means that they could refuse to settle unless you turned up with a bank cheque for the one day's interest. By definition, because you're running late to settle

you're not going to have a bank cheque. So I do with respect suggest that context is everything in interpreting what the legal obligation is or what the requirement is to satisfy an obligation to pay.

Just two more short points. There was a discn about the possibility of endlessly bouncing cheques, a sort of kangaroos hopping all over the paddock type of idea. With the greatest respect, that in my respectful submission is entirely theoretical. That situation where you had an initially bounced cheque, a three day notice, another cheque given and then tender of another cheque before the, because it would have to be tendered before the three days ran out or they'd still be in default or they could be cancelled would be a repudiation. I don't think a Court would find it very hard to interpret.

Blanchard J It wouldn't have to be tendered before the three days.

Tipping J No.

Blanchard J Well that's the point of that sentence.

Galbraith Well Your Honour it seems to me that if it's not tendered within the three days and not met, then of course it, sorry, the first cheque's tendered. The three days runs out, hasn't been met so you don't know where you are. If that first cheque is not then met, the payment doesn't relate back so there hasn't been payment within that period so you could cancel. Now if, when that cheque is not met and you're the vendor, you're the first person to know that, you can then cancel. If the other party tries to give another cheque before you know it's not met, because that seems to me the only way that it would continue to operate and you would then argue that that's a payment, in itself there seems to be nothing to stop the vendor giving a notice of cancellation qualified or conditioned on the basis of the first cheque.

Tipping J Not being met.

Galbraith Not being met, yes that's right.

Keith J Except it's been paid on your.

Galbraith Well it's only conditionally paid. The conditional payment is not a payment in the sense of, it doesn't discharge the debt. All it does is suspend the obligation.

Keith J You're saying it is paid in terms of the literal wording of 2.2

Galbraith Um well all that 2.2 says is that you've got to have remedied the default I think.

Keith J Mm. But that means doesn't it, payment.

Galbraith Which I suppose goes back to 2.1. Yes Your Honour's quite right. But if I'm right, and I know Your Honours aren't persuaded I'm right. But if I'm right in terms of you can, there's an implied term that you can pay by pc then it's paid in terms of that definition if I can put it that way of payment. But it's not paid in terms of a legal tender definition.

Keith J Mm.

Galbraith I accept that. And so if Your Honours decide that payment throughout means legal tender, and/or bank cheque, well it's not paid. I mean I have to accept that.

Keith J Mm.

Galbraith So it's only if I could persuade Your Honours on the first point. And just the last point is just to say if certainty really is the driving issue in all of this then it would be more certain if it's actually spelt out in the contract that if you're in default you've got to pay by bank cheque. And one suspects if Your Honours held that pcs could discharge the 2.1 obligation, then the District Law Society or Real Estate Institute would quickly modify clause 2.2 so I don't think that we're going to be in for the world standing on its head sort of thing.

Blanchard J Right, right.

Galbraith So I think it would all change very quickly. That's perhaps all I can sensibly say I think.

Elias CJ Thank you Mr Galbraith. Thank you Counsel, we'll take time to consider our decn.

Court adjourns 2.42 pm