IN THE COURT OF APPEAL OF NEW ZEALAND

CA158/03

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

Hearing: 30 March 2004

Coram: Glazebrook J
Chambers J
O'Regan J

Appearances: I R Millard QC and F B Barton for Appellant
N R W Davidson QC for Respondents

Judgment: 10 June 2004

JUDGMENT OF THE COURT DELIVERED BY O'REGAN J

Introduction

[1] This case arises from a dispute about the method of payment of a deposit in a conveyancing transaction, in circumstances where the vendor has given a formal notice of intention to cancel for non-payment of the deposit. In this case the purchaser sought to remedy the default in payment of the deposit by tendering a personal cheque for the amount of a deposit and outstanding interest. The vendors refused to accept the personal cheque and cancelled the contract. The question we have to determine is whether the tendering of a personal cheque was sufficient to

remedy the default in the circumstances of this case. In the High Court, Chisholm J found it was not. The appellant appeals to this Court against that finding.

Facts

[2] The dispute relates to two separate conveyancing contracts which are inter-linked. Both were entered into on 22 November 2000. The first was a contract between Livingstone Properties Ltd as purchaser and the first respondent, John Parker as vendor. It related to a 70 ha block at Otekaieke, Otago. The purchase price was $600,000 and the deposit, which was payable on confirmation of the agreement, was $60,000.

[3] The second agreement was between Willowbank Holdings Limited as purchaser and the second respondents, David and Lorraine Parker, as vendors. It related to another property at Otekaieke comprising 385.1958 ha. The purchase price was $2,950,000 and the deposit was $295,000, payable on confirmation of the agreement.

[4] There were a number of quite complex special terms which applied to these transactions but the only relevant one for present purposes is the provision in both agreements that said that each was interdependent upon the other.

[5] Both Livingstone and Willowbank nominated the appellant, Otago Station Estates Ltd as purchaser, as they were entitled to do under the terms of the agreements. The agreements were prepared on the standard form Agreement for Sale and Purchase of Real Estate approved by the Real Estate Institute of New Zealand and the Auckland District Law Society, 7th ed (2), July 1999 with the special conditions being added on separate sheets. The relevant terms of both agreements for the purposes of this case were identical. For the purposes of simplicity we will refer to the appellant as the purchaser and to the Parkers collectively as the vendors.

[6] The appellant was not, strictly speaking, the purchaser in relation to either agreement – it was only the nominee of Willowbank and Livingstone. The vendors

made no argument based on that distinction and there was no objection to the fact that neither Livingstone nor Willowbank was a party to the proceedings. We have not therefore considered whether there is any significance in the fact that the personal cheque tendered in this case was from the appellant, not Willowbank and Livingstone, and our conclusions on the issues before us mean there is no need for us to do so.

[7] The provision of the agreements which is relevant to the present dispute is cl 2, which deals with deposits. It says:

> 2.0 Deposits
>
> 2.1 The purchaser shall pay the deposit to the vendor or the vendors' agent immediately upon execution of this agreement by both parties and/or at such other time as is specified in this agreement time being of the essence as to each such time.
>
> 2.2 The vendor shall not be entitled to cancel this agreement for non-payment of the deposit unless the vendor has first given to the purchaser three working days' notice of intention to cancel and the purchaser has failed within that time to remedy the default. No notice of cancellation shall be effective if the deposit has been paid before the notice of cancellation is served.
>
> 2.3 The deposit shall be in part payment of the purchase price.
>
> 2.4 Where this agreement is entered into subject to a condition expressed in this agreement, the person to whom the deposit is paid shall hold it as a stakeholder until this agreement becomes unconditional or is avoided for non fulfilment of any condition….

[8] The agreements became unconditional on 6 May 2001, but the parties agreed to defer the payment of the deposits which were then payable under the terms of the agreements for reasons which were not explained to us. There then followed a long period during which nothing happened in relation to the agreements. Nearly a year later, in February 2002, the purchaser gave notice to the vendors that the purchaser was ready, willing and able to settle. Subsequently the purchaser sent a resource consent application to John Parker for signature, but despite a follow-up request it was not returned.

[9] A further period of inactivity followed. Then, on 10 October 2002, the purchaser issued specific performance proceedings against the vendors. It is not clear from the evidence why the purchaser had not paid the deposits at that point, but counsel for the purchaser, Mr Millard QC, accepted that we should proceed on the basis that the purchaser was in default in that respect. Mr Millard did not question the vendors' right to give a notice under cl 2.2 requiring payment of the deposit, nor did he question the vendors' entitlement to require strict compliance within the three working day period specified in cl 2.2.

[10] On 13 November 2002, the solicitors for the vendors sent notices under cl 2.2 to Willowbank, Livingstone and the purchaser requiring payment of the deposit. The relevant parts of each notice read as follows:

> **NOTICE IS HEREBY GIVEN** of the intention of [the vendor] as Vendor under Agreement for Sale and Purchase dated the 22 November 2000 in relation to Gards Road, Otekaieke property to **cancel the agreement for non payment of the deposit** unless [the purchaser] as Purchaser pays the deposit within three (3) working days of the service of this notice
>
> …
>
> Payment is required to be made to the offices of Berry & Co, Solicitors, 20 Eden Street, Oamaru – National Bank account number [number] to be made for credit of the vendor.
>
> This notice is given as required by clauses 1.2 and 2.2 of the General Terms of Sale under the Agreement for Sale and Purchase.

[11] Each notice was served by fax at about 4pm and within an hour the solicitors for the purchaser responded by fax. In that fax they indicated that the purchaser would pay the deposit in respect of both agreements by 5pm Monday 18 November 2002 (the deadline provided for in the notice), such deposits to be held by the vendors' solicitors as stakeholder.

[12] On Friday 15 November 2002 the purchaser's solicitor asked the vendors' solicitor for a pre-printed lodgement slip for the vendors' solicitors trust account to be sent to the purchaser's solicitors.

[13] On Monday 18 November 2002, a cheque drawn on the purchaser's account at the National Bank, Octagon Branch, Dunedin, was deposited to the credit of the

vendors' solicitors' account at the National Bank. This deposit was also made at the Octagon branch of the bank. The deposit slip and cheque was accepted by the bank and the processing of the cheque commenced in accordance with the bank's normal practice. Later in the afternoon, at 4.32pm, the purchaser's solicitor sent a fax to the vendors' solicitor saying that an amount of $433,892.78 had been deposited to the trust account of the vendors' solicitor that afternoon. That amount represented the deposits on both transactions plus interest, and was said to be made without prejudice to an argument about whether interest was payable. Attached to the facsimile message itself were photocopies of the deposit slip and of the cheque. It was apparent from this facsimile that the cheque which had been deposited was a personal cheque of the purchaser rather than a bank cheque.

[14] On Tuesday 19 November 2002 at 4.01pm the vendors' solicitors sent a fax to the purchaser's solicitors in which it was stated:

> We must advise you that payment of the deposit by the cheque of Otago Station Estates Ltd is not legal tender and is not in compliance with clause 2.2 of the agreement.
>
> In these circumstances Otago Station Estates Ltd, as purchaser, has, within three working days of the receipt of our client's notice of intention to cancel, failed to remedy the default as to non-payment of the deposits.
>
> We record the cancellation of the contracts accordingly and note that it will be appropriate for you to stop payment on the Otago Station Estates Ltd cheque that you have direct credited to our trust account. This has not been receipted as, of course, this payment is not cleared in available funds.

[15] The purchaser's solicitors responded to this on Friday 22 November 2002, rejecting the purported cancellation of the agreements. They said:

> There is no requirement at contract, in the Notices Requiring Payment of Deposit, or as a matter of commercial practice, that deposits be paid by way of bank cheque.

[16] The purchaser's solicitors asked for trust account receipts for the deposits and threatened to complain to the local Law Society if receipts were not forthcoming.

[17] The vendors' solicitors wrote back reiterating their clients' position that the contracts were cancelled and refusing to issue receipts.

[18] On 26 November, the vendors' solicitors refunded the deposited amount to the trust account of the purchaser's solicitors by depositing a bank cheque for the relevant amount to their trust account. They also issued receipts from their trust account referring to the payments as "rejected deposit payments for refund to Otago Station Estates Ltd". The personal cheque tendered by the purchaser in response to the notice requiring payment of the deposit had been met by the National Bank in the ordinary course of bank business.

The High Court judgment

[19] In the High Court, Chisholm J heard from a number of expert witnesses as to normal conveyancing practice in relation to the payment of deposits. He found on the basis of the evidence from all of these witnesses that personal cheques represented the most common mode of payment of deposits in conveyancing contracts. He found that if some other mode of payment were to be required, it would be customary for the vendor's solicitor or agent to specify the required mode of payment. He said that, if it had been necessary to imply a term in the agreements in this case to the effect that a personal cheque represented a valid form of tender for the initial deposit, he would have been prepared to oblige.

[20] However, the Judge drew a distinction between payment of an initial deposit under the terms of cl 2.1 and the payment made to remedy a default in response to a notice under cl 2.2. He noted the need for much greater certainty in the latter situation, because of the fact that a failure to remedy the default gave rise to an immediate right of cancellation. He contrasted that with a situation under cl 2.1. Clause 2.1 provides that payment of the deposit must be made immediately on execution of the agreement. Time is of the essence. But, crucially, a failure to make the payment does not give rise to any immediate right to cancel. The vendors' right to cancel arises only after a notice has been given under cl 2.2 and has remained unremedied after the three working day period referred to in that clause.

[21] The Judge also noted that the custom that payments for deposits be made by cheque did not apply in relation to payments required to remedy a default under cl 2.2. He found that there was no custom or commercial practice relating to

payments required under clauses equivalent to cl 2.2. And he also decided that it was not appropriate to imply a term to the effect that a personal cheque would satisfy the requirements of cl 2.2 under the test laid down in *B P Refinery (Westernport) Pty Ltd v Shire of Hastings* (1977) 16 ALR 363.

[22] Chisholm J concluded that a different regime had to be applied to cl 2.2 from that which applied to cl 2.1. He found that, in order to remedy a default under cl 2.2 it was necessary to make payment by a bank cheque, which he found to be effectively equivalent to the tendering of cash, following in that respect the decision of this court in *Williams v Gibbons* [1994] 1 NZLR 273. *Williams v Gibbons* related to a settlement payment, but the Judge found, and we agree, that it applied more generally, and, in the circumstances of this case, covered payments made to remedy a default in the payment of a deposit. He said that, if the purchaser wished to modify the requirement for payment by bank cheque, it needed to obtain a concession from the vendors i.e it was up to the purchaser to take the initiative. Chisholm J concluded that the purchaser had not remedied the default in the payment of the deposit within the required time because the personal cheque which it tendered did not represent good tender. Accordingly he entered judgment for the respondents.

Submissions by the purchaser

[23] On behalf of the purchaser, Mr Millard raised three separate arguments in support of his submission that the decision of Chisholm J was wrong. These were:

(a) Payment by a personal cheque is in accord with the agreement and with usual custom unless the vendor stipulates to the contrary in advance. In the absence of such a stipulation in this case the tendering of a personal cheque was sufficient to remedy the default;

(b) On the particular facts of the case it was wrong to infer a need for certainty so as to require a departure from custom as to personal cheques being acceptable for the payment of a deposit simply because the payment was after a notice had been given under cl 2.2;

(c) In the events that happened, the vendors had forgone their right to reject the personal cheque.

Vendors' submissions

[24] On behalf of the vendors, Mr Davidson QC argued that the starting point was that payment in law requires legal tender (or bank cheque) unless there is an express or implied term that a personal cheque or trust account cheque will be accepted. There was no practice to dictate such an implication in the circumstances of this case. He said that if the vendors had a right or obligation to object to the tendering of a personal cheque then they must have an opportunity to do so. It would be odd if this principle applied in respect of the payment which could be made at 4.59 pm in terms of the notice (i.e. one minute before the deadline). Mr Davidson said there is no obligation in law to reject the personal cheque upon or before receipt and that there was no opportunity either. He argued it would have been easy for the purchaser to meet the certainty requirements of the situation by payment either by a bank cheque or a transfer of cleared funds. As the purchaser failed to do this, it took the risk of rejection of its cheque and cancellation of the contract.

Discussion of the purchaser's arguments

[25] We now turn to the arguments raised by the purchaser and deal with them one by one.

First argument: Personal cheque must be accepted unless the vendor stipulates to the contrary in advance

[26] Mr Millard referred us to a number of Australian cases which upheld payments by cheque in the context of commercial transactions. He placed particular reliance on *George v Cluning* (1979) 28 ALR 57, a case which was cited with approval in this court in *Williams v Gibbons*, and *Stirling Properties Ltd v Yerba Pty Ltd* (1987) 74 ACTR 1. In *Stirling*, Miles CJ summarised the law as follows (at p7):

> *George v Cluning* (1979) 28 ALR 57 illustrates that, in modern conditions and without specific provision in the contract, parties to a commercial transaction may expect to pay and to be paid by cheque, but that the entitlement to pay by cheque and the obligation to receive payment by cheque is not absolute. The payee may waive the right to be paid in cash and if the payee accepts tender of a cheque without objection to its form the payee is deemed in the language of the old law to have "waived" the right to payment in cash. Similarly if the payee rejects the tender of the cheque for a reason other than the form of the tender the payee is deemed, in the terms of the modern law, to have declined to exercise his or her right to object to payment in that form and hence to have waived the right to payment in cash.

[27] Mr Millard said, applying that approach, payment by cheque in this case was sufficient for three reasons.

[28] The first was that deposits are normally paid by personal cheque. He said this was a general practice and could not be limited to deposits paid other than in response to a default notice. He noted that the acceptance of personal cheques for deposits applied in many situations where the contractual position was such that a non-payment of the deposit could give rise to an immediate right of cancellation. He therefore questioned the distinction that the Judge drew between a payment of a deposit under cl 2.1 in this case and the payment of a deposit in response to a default notice under cl 2.2.

[29] The second reason was that on the front page of the agreement there was a reference to the deposit being "payable upon confirmation of this agreement", and a subsequent reference to the balance of the purchase price being paid or satisfied "in cash, in full on date of possession". He drew a contrast between the lack of any stipulation as to how the deposit was to be paid and the requirement that the balance of the purchase price be paid in cash. He said that the reference to the payment of the deposit on the front page of the contract had a cross-reference to cl 2 which incorporates not only cl 2.1 but also cl 2.2. This supported the argument that no distinction was drawn between a payment of deposit in accordance with cl 2.1 and the making of a payment to remedy a default under cl 2.2.

[30] The third reason was that there was a custom that it was for the vendors' solicitor to specify how payment on settlement is to be made. He referred to the expert evidence in the High Court which indicated that vendors' solicitors especially

in Otago usually specified the method of payment of settlement money for conveyancing transactions.

[31] Mr Millard said that the practice relating to settlements also applied where deposit payments were to be made other than by personal cheque and pointed to the expert evidence to the effect that where a bank cheque is required for a deposit the vendors' solicitor notifies the purchaser's solicitor to that effect in advance of the payment being made.

[32] Mr Millard therefore suggested that, as the contract impliedly permitted payment of deposits by personal cheque and that this was the custom as demonstrated by the expert evidence, the purchasers could reasonably expect that a personal cheque would be accepted in the circumstances of this case. He said that the custom was that, if a particular form of payment was required, the vendors should have specified it and, because they did not, they were not entitled to reject the purchaser's personal cheque in this case.

[33] The vendors disputed all three reasons. As to the first, they argued that there was no custom in relation to payments to remedy defaults in payment of deposits. As to the second reason, the vendors argued that the reference to the payment methods on the front page of the contract had no relevance to the remedying of a default under cl 2.2, for essentially the same reasons as advanced in relation to the purchaser's first reason. As to the third, the vendors said the practice adopted in relation to settlement payments does not provide guidance as to the practice for deposit payments.

[34] We accept the vendors' argument on the first reason. The High Court Judge found there was no custom in relation to payments to remedy defaults in payment of deposits, and we accept there is no reason to disturb that finding.

[35] As to the second reason, we accept Mr Millard's contention that the reference to the payment of a deposit on the front page of the agreement refers to cl 2 generally rather than to the circumstances in which the deposit is paid. But, in our view, the fact that the agreement required payment of the balance of the purchase price "in

cash" does not create an inference that a different form of payment is mandated for payments under cl 2. Rather, the reference to "in cash" is, in our view, primarily intended to indicate that the transaction does not involve a swapping of one property for the other or a partial settlement by the transfer of another property – in other words it is a strictly monetary transaction.

[36] Clause 3.7(1) of the agreement requires the purchaser "to pay or satisfy" the balance of the purchase price on settlement. By saying on the front page of the agreement that the balance of the purchase price must be paid in cash in full on settlement, the vendor is making it clear that "satisfaction" by non-monetary consideration is not permitted: the balance must be "paid". What is required for "payment" under cl 3.7(1) is the same, in our view, as what is required under cl 2.1 or cl 2.2. It may be that the reference to a requirement for the settlement payment to be made in cash indicates that the vendor will not waive the requirement for a bank cheque for the settlement payment. But the omission of the words "in cash" from the provision relating to deposits does not mean the vendor commits to accept a personal cheque. At best, it leaves open the possibility that the vendor will accept a personal cheque without objection.

[37] The expert witnesses agreed that legal tender or a bank cheque was required for settlement payments, in the absence of agreement to the contrary. Sometimes there may be a waiver of this requirement, and a solicitor's trust account cheque (but not a personal cheque) may be accepted. In our view, payment by personal cheque would also be permitted if the vendor did not object in circumstances where that amounted to a waiver of the requirement for a bank cheque. There is no difference between deposit payments under cl 2.1 or cl 2.2 and settlement payments in legal terms. But there is a big difference in practice: personal cheques are usually (but not universally) accepted for deposits without objection. On the other hand, personal cheques are almost never accepted for settlement payments (though we were told that, in the south of the country, settlement payments are still sometimes made by solicitor's trust account cheque without objection).

[38] As to the third reason, the vendors' argument was that the practice which has been adopted in relation to settlement payments does not provide guidance as to the

practice for deposit payments. We do not think that answers the purchaser's argument. But we reject the purchaser's argument because, even if it is normal practice for vendors' solicitors to specify the mode of payment (whether for deposits or settlement payments), failure to do so cannot be construed as a waiver of the requirement to pay in cash (or, in modern times, bank cheque or other cleared funds).

[39] We therefore find that the first argument put forward by the purchaser fails.

Second argument: no inference of a need for certainty

[40] Mr Millard argued that Chisholm J was wrong to differentiate payments under cl 2.2 from payments under cl 2.1. He said that, where default has been made in the payment of a deposit under cl 2.1, the notice under cl 2.2 requires that the default be remedied. He said that this meant, by definition, that what the purchaser was required to do was to pay the deposit, because that is what the purchaser had defaulted in doing up to that point. Thus, he said cl 2.2 does not change the obligation in cl 2.1.

[41] We accept Mr Millard's submission that cl 2.2 required the purchaser to do what it should have done under cl 2.1 i.e. pay the deposit. The obligation under cl 2.2 is the same as the obligation under cl 2.1, though the circumstances of a payment under cl 2.2 are such that the parties are much more likely to insist on strict compliance with the contract.

[42] Chisholm J said he would have been prepared to imply a term in the agreements that a personal cheque represented valid tender for a deposit paid under cl 2.1. However, his decision did not require him to do so.

[43] In our view the evidence of the custom followed in relation to payment of deposits does not justify implication of a term in the agreement to that effect. We accept that vendors (or, more accurately, real estate agents acting for vendors) almost always accept personal cheques for deposits. But in our view that is simply the operation of the principle referred to in *George v Cluning* and *Stirling Properties Ltd v Yerba Pty. Ltd* that, if a payee accepts tender of a cheque without objection to its

form, the payee is deemed to have waived the right to payment in cash (or, in today's environment, a bank cheque or other form of cleared funds).

[44] There is a practice that objection is not usually taken to payments of deposits being made by personal cheque – presumably because the deposit is usually held by the real estate agent for ten days anyway. That gives plenty of time for the cheque to clear, and if the cheque bounces, the vendor can invoke cl 2.2 but cannot immediately cancel the contract. But the existence of this practice does not change the underlying legal obligation to "pay" the deposit, and the vendor's right to stipulate in advance that a personal cheque will not be accepted or object to the tender of the personal cheque at the time of receipt.

[45] Chisholm J adopted the statement from *Tyree's Banking Law in New Zealand* (2nd ed) at 6.10 that payment by cheque is not, strictly speaking, payment at all in that it does not unconditionally discharge the debt which gave rise to the drawing of the cheque. We too agree with that statement. Unless the payee expressly agrees to payment by personal cheque or does not object when one is tendered, "payment" under cl 2.2 requires payment in legal tender or, more realistically in the modern world, by bank cheque or bank transfer in cleared funds. And we would say the same applies to a payment under cl 2.1, though we acknowledge that personal cheques are usually accepted without objection in practice for payments under cl 2.1.

[46] We therefore accept the second argument made on the part of the purchaser: there is no distinction to be drawn in the nature of the payment required under cls 2.1 and 2.2. But this finding does not avail the purchaser because of our view that the vendors were entitled, whether under cl 2.1 or cl 2.2, to reject a personal cheque by way of deposit.

Third argument: right to reject a personal cheque forgone

[47] The third argument raised on behalf of the purchaser was that the vendors (through their solicitors) had forgone the opportunity to reject payment by a personal cheque because they instructed the purchaser's solicitors to make payment directly to their trust account, through their banker, the National Bank.

[48] The basis of this argument is the rule that, where a personal cheque is tendered in payment of a debt and the cheque is accepted by the creditor, that acceptance constitutes payment subject to a condition subsequent that the cheque is honoured.

[49] Mr Millard relied on *George v Cluning*, to which we have already referred, as authority for the proposition that the tendering of a personal cheque in payment of a debt will constitute a valid payment unless the payee objects before or at the time of receipt that the cheque does not constitute legal tender, because the failure to object is an effective waiver by the payee of the requirement for legal tender (or bank cheque). We agree with the proposition, but the question which must then be confronted is whether the vendors waived the requirement for legal tender in this case.

[50] We do not believe that the present circumstances involved any waiver on the part of the vendor. We accept that the instructions given by the vendors' solicitors can be fairly interpreted as an acceptance that the depositing of a cheque at any branch of the National Bank to the trust account of the vendors' solicitors was sufficient. But in the absence of waiver of the requirement for legal tender, the cheque to be deposited had to be a bank cheque. If a personal cheque had been presented to the vendors and the vendors had not objected, the matter would have been different.

[51] Mr Millard argued that the payment instructions from the vendors' solicitors effectively appointed the National Bank as the agent of the vendors' solicitors to accept the payment, and the depositing of the cheque at the National Bank involved an acceptance of payment because the bank commenced processing of the cheque. We do not accept that submission. All the bank did was accept a deposit to an account with the bank in the normal course of its banking business. That did not involve the exercise by the bank of any choice on behalf of the vendors' solicitors (or the vendors) to accept one form of payment over another. And the vendors' solicitors themselves had no opportunity to, and did not, accept the personal cheque themselves.

[52] The method of payment adopted by the purchaser did not comply with the agreement. The conditional crediting of the trust account of the vendors' solicitors with the face value of the cheque, conditional upon subsequent clearance, is not equivalent to the receipt of cleared funds in the trust account. Tender of a personal cheque would have satisfied the requirements of the notice given under cl 2.2 only if there had been prior agreement that a personal cheque would be accepted or if the vendors had accepted the personal cheque without objection before the notice expired.

[53] Mr Millard placed some weight on the fact that the vendors' solicitors could have earned interest on the amount conditionally deposited to their trust account from the date of the deposit, subject to the cheque later clearing, to support his argument that the crediting of the account of the vendors' solicitors on a conditional basis pending clearance of the cheque amounted to acceptance of the cheque by the vendors' solicitors. Again, we reject that submission: in our view there was no action taken on the part of the vendors' solicitors or the National Bank which would constitute acceptance or waiver in the circumstances of this case.

[54] Accordingly, we reject the third argument made on behalf of the appellants.

Casenote comment

[55] In his casenote on the High Court decision in this case ([2004] *New Zealand Law Review* 156), Andrew Beck observed that the High Court could have, and should have, concluded that the payment of deposits by personal cheque had become the norm in practice and should not have distinguished between deposits paid in the ordinary course and those paid in response to a default notice. We agree. But the crucial point is that the legal obligation remains an obligation to pay by legal tender or bank cheque in both cases. A vendor cannot be obliged to accept a personal cheque. The practice of vendors of not requiring deposits to be paid by bank cheque is just that: a practice. The existence of the practice among solicitors and real estate agents does not change the law. If it is considered desirable to give legal force to the practice, and oblige vendors to accept deposit payments by personal cheque, the standard form contract could say so, but it does not. In a situation like the present

case, where objection by the vendor to a personal cheque will have serious legal consequences, a prudent purchaser needs to ascertain beforehand that no objection will be taken to the tender of a personal cheque or pay by bank cheque.

[56] Mr Beck also said that the overall impression is one of a vendor exploiting a technicality, and questioned why the High Court went along with this. In our view, the Courts are required to enforce contracts in accordance with their terms. The purchaser did not pay the deposit as it was contractually bound to do. It was served with a default notice and given three days to remedy the default. It did not comply with that notice. The default notice required strict (or technical, if that term is preferred) compliance, failing which the vendors were entitled to cancel the contract. We can see no reason to read down the vendors' right to cancel because the purchaser "almost" complied. The same would apply if the purchaser had tendered a bank cheque just after the notice period expired.

Conclusion

[57] We conclude that Chisholm J was correct in his finding that the method of payment adopted by the purchaser in this case did not meet the requirements of the agreement. Accordingly, we dismiss the appeal. The vendors are entitled to costs in this court of $6,000 plus disbursements (including the reasonable travel and accommodation costs of Mr Davidson) which, in the absence of agreement, can be set by the Registrar.

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