

HIGH COURT OF AUSTRALIA

Brien

Vs.

Dwyer

(Barwick C.J., Gibbs, Stephen, Jacobs and Aickin JJ.)

14 December 1978

BARWICK C.J.

1. On 27th February 1973, the parties, the appellant as purchaser purchase of land at Byron Bay in the State of New South Wales. The purchase price was the sum of \$16,000. The parties had signed a printed form of contract as approved by the Law Society and the Real Estate Institute of New South Wales. It does not appear who first signed the form. Clause 1 of this form of contract was as follows:

"The Purchaser shall upon the signing of this agreement pay as a deposit to the Vendor's Agent herein named as Stakeholder the sum of: ONE THOUSAND SIX HUNDRED DOLLARS (\$1,600.00) which shall vest in the Vendor upon and by virtue of completion and which shall be accounted for to the Vendor upon receipt of an order from the Purchaser or his Solicitor authorizing such payment. The deposit may be paid by cheque but if the cheque is not honoured on presentation the Purchaser shall immediately and without notice be in default under the agreement. The balance of the purchase price shall be paid as stipulated in the First Schedule hereto. Any moneys payable to the Vendor hereunder by the Purchaser or the Agent will be paid to the Vendor's Solicitor or as he may direct in writing." (at p382)

2. The deposit was not made at the time the contract was signed by the purchaser. The vendors apparently did not know that fact when they signed the document, if they did sign it later than the purchaser. But some time in March 1973 the appellant's husband, who is a solicitor, gave to an employee of the estate agents named in the contract as vendor's agent to be stakeholder of the deposit, his "cheque" drawn on the Commercial Bank, Ballina, post-dated to 1st April 1973, for the sum of \$1,600. Though this document was post-dated, there were in fact adequate funds in the drawer's account in the bank at Ballina to have met a cheque

for that amount presented to the bank at the date the document was handed to the estate agents. (at p382)

3. No receipt was issued upon the handing over of this document, nor any entry made in the books of account of the estate agents. No advice of the receipt of the document was given to the respondents. (at p382)

4. The estate agents held the document until 2nd April, on which date the drawer had a telephone conversation with an employee of the estate agents about his intention to substitute for the document drawn on the Ballina bank a cheque drawn on the A.N.Z. Bank, Byron Bay, for the same amount. However, no such cheque was sent to the estate agents, who continued to hold the March document. On 13th April the drawer left for overseas, not returning till 14th May. He left a solicitor in charge of his Byron Bay practice and of the further conduct of the purchase by the appellant. (at p382)

5. On 10th May, this solicitor told an employee of the estate agents to bank the March document. That day the estate agents signed a receipt for the amount of \$1,600 and credited that sum to the trust account ledger of the estate agents. On 11th May, the March document was banked and it was cleared by the Ballina bank that day. No advice had been furnished to the respondents of any of these events, nor had any authority been sought in respect of them. They were not at any time before 11th May aware that the deposit had not been duly made according to the requirements of cl. 1. (at p382)

6. On 11th May, the respondents' solicitors signed and that day served on the appellant's solicitor a notice in the following terms:

"We are instructed to advise you that as no deposit has at this stage been paid by you, the Vendor pursuant to Conditions one (1) and sixteen (16) of the Contract hereby terminates the said Contract." (at p382)

7. Clause 16 of the contract document is in the following terms:

"If the Purchaser defaults in the observance or performance of any obligation imposed on him under or by virtue of this agreement the deposit paid by him hereunder, except so much of it as exceeds 10&percent; of the purchase price shall be forfeited to the Vendor who shall be entitled to terminate this agreement and thereafter either to sue the Purchaser for breach of contract or to resell the property as owner and the deficiency (if any) arising on such re-sale and all expenses of and incidental to such re-sale or

attempted re-sale and the Purchaser's default shall be recoverable by the Vendor from the Purchaser as liquidated damages provided that proceedings for the recovery thereof be commenced within 12 months of the termination of this agreement. The Vendor may retain any money paid by the Purchaser on account of the purchase other than the deposit money forfeited under this clause as security for any deficiency arising on a re-sale or for any damages or compensation (including any allowance by way of occupation fee or for rents or profits from a Purchaser who has been in possession of the property or in receipt of the rents or profits thereof) awarded to him for the Purchaser's default provided that proceedings for the recovery of such damages or compensation be commenced within 12 months of the termination of this agreement." (at p383)

8. Thereafter the appellant, by statement of claim in the Equity Division of the Supreme Court of New South Wales, sued the respondents for the specific performance of the contract of sale and purchase. (at p383)

9. The Supreme Court (Holland J.) decreed specific performance. His Honour held that the payment of the deposit in terms of cl. 1 of the contract was not a condition precedent to the creation of the vendor's obligations under the contract; that the removal on 10th May of the restrictive conditions on which the March document was originally lodged with the estate agents rendered that document a performance on that date of that clause, particularly as the document was met on 11th May; and that the deposit being paid on 10th May, the respondents had then no right of rescission. (at p383)

10. The respondents appealed to the Court of Appeal Division (Moffitt P., Hutley and Samuels JJ.A.), which unanimously allowed the appeal, set aside the decree for specific performance and dismissed the appellant's suit [\(1976\) 2 NSWLR 420](#) . (at p383)

11. Before the Court of Appeal, the appellant did not support the primary judge's reasons for judgment. The appellant submitted to the Court of Appeal that cl. 1 only required the deposit to be paid within a reasonable time of the signing of the contract and that no fundamental breach of the contract would take place by non-payment of the deposit except after a notice duly making time in that respect of the essence of the contract. (at p384)

12. The Court of Appeal saw no reason to depart from the literal meaning of cl. 1. It held, as I read the published reasons for judgment, that the provision for payment

of a deposit is wholly for the benefit of the vendor and that the obligation of the purchaser, unless its performance is waived by the vendor, is to pay the deposit either before or immediately upon the signature of the contract. Failure to do so is a fundamental breach which entitles the vendor to rescind forthwith and without prior notice. The Court was also prepared to hold that the acts of the purchaser in this case justified the conclusion that she was repudiating the contract and unwilling to be bound by its terms. Accordingly, the Court of Appeal allowed the appeal and made the orders I have already mentioned. (at p384)

13. In my opinion, although cl. 1 speaks of "the" signing of the agreement, it clearly means, in my opinion, that the deposit is to be made by the purchaser on the signing of the document by the purchaser. In using the word "agreement", the clause, in my opinion, does not refer to the time when the parties have already become contractually bound to each other but to some anterior point of time. The form of agreement contemplating a vendor's agent being instrumental in effecting a sale, it is reasonable, in my opinion, to conclude that signature by the purchaser will precede signature by the vendor. In my opinion, the clause in speaking of the signing of the agreement refers at the latest to the time the signature of the purchaser is available to be matched by the signature of the vendor. That, in the ordinary course, will be when the purchaser signs the form of agreement for transmission to the vendor, whether that is to take place through an estate agent or through a solicitor. Of course, if each signs contemporaneously the clause will embrace that time. But this in my experience does not usually happen. I think I see practical difficulties in reading the clause as not requiring the payment of a deposit until the vendor has signed. Thus, on the whole, I prefer a construction of the clause which requires the purchaser to pay the deposit to the agent when the form of agreement is signed by the purchaser for transmission to the vendor. The clause, in my opinion, does not mean on the signature of the document by both parties or on the exchange of the counterparts signed by the respective party. But such a construction would produce in this case the same result as the construction I prefer. (at p384)

14. If the form of contract is read as in my opinion it should be, the payment of the deposit at the time the purchaser signs the form of contract for transmission to the vendor performs the function of a deposit in the negotiation of an executory transaction of sale and purchase. It does provide an earnest of performance by the purchaser if the vendor is willing to be bound: it also affords some proof that the estate agent has procured for the vendor a willing purchaser and an agreement enforceable upon the vendor's adherence to the terms of the document signed by the purchaser. It seems to me that, not only must the purchaser so pay to the estate

agents the stipulated deposit, which until the vendor becomes bound will be held for the purchaser (see *Sorrell v. Finch* (1976) AC 728), but that it is part of the estate agent's duty, if he is to earn his commission, to obtain payment of the deposit by the purchaser at the time he signs the form of contract for transmission or presentation. Such an obligation on the part of the estate agent is scarcely burdensome: self-interest if nothing else should ensure its performance. (at p385)

15. Thus, in my opinion, in the context of cl. 1, and being mindful of the function of a deposit in a transaction of the present kind, the word "upon" means, in my opinion, "at the time of", and relates to the time of the signature by the purchaser of the form of agreement for transmission or presentation to the vendor for his signature. (at p385)

16. There is no room, in my opinion, for construing the clause as meaning within a reasonable time after signature, whether it be a signature by the purchaser or by both parties. Such a construction denies to the payment of a deposit, the character of an earnest of performance and raises almost an insoluble question as to what is a reasonable time: for there can be no norm by reference to which a judgment as to what is a reasonable time can be made. It is important, it seems to me, not to apply doctrines equitably devised in relief of purchasers in the performance of a contract to the formation of the contract itself. (at p385)

17. No doubt an intending vendor who knows that the purchaser has not paid his deposit will be justified in not making a contract with him. If, having signed the contract in ignorance of the purchaser's failure to pay the deposit, the vendor becomes aware of that failure, he can immediately, in my opinion, and without prior notice, out of hand rescind the contract. Quite clearly, in my opinion, he is not bound to wait any time to allow the purchaser to pay the deposit. Nor is he bound to give any notice to make the time for payment of the deposit of the essence of the contract. In my opinion, if it matters, cl. 1 itself effectively does that. Nor is he required to notify his intention to rescind. No other conclusion, in my opinion, as to the meaning of cl. 1 would give effect to the undoubted function of the deposit as an earnest of performance. I do not see any undue rigidity or unfairness in such a construction of such clear words, bearing in mind the avowed purpose of stipulating for a deposit. (at p386)

18. Of course, if a vendor is aware of the failure to pay the amount of the stipulated deposit, he cannot delay in exercising what, in my opinion, is his undoubted right of rescission of the contract. If he takes steps in performance of the contract without knowing whether or not the deposit has been paid, the ability validly to

rescind the agreement might have to be decided upon general grounds in the particular circumstances. If, without taking any such steps, a vendor fails to pursue his right to rescind, a court of equity might possibly be prepared to treat his inactivity as inordinate and as having itself led the purchaser into some position of disadvantage, in the particular circumstances of a case. But, in my opinion, the right to rescind, arising at the very moment of the execution of the contract is not lost otherwise than by the conduct (including, perhaps, in an appropriate case, the inaction) of the vendor. (at p386)

19. As the right to rescind arises at the very moment that the vendor, in ignorance of the fact that, though the purchaser has signed, no deposit has been paid, signs the contract, there is much to be said for the view that the payment of the deposit at the time the purchaser signs the agreement is a condition precedent to the assumption by the vendor of the obligation of the contract. Again, on that view of the operation of a clause such as cl. 1, the vendor will only subsequently become bound because of some act, or perhaps some particular inactivity, of his own. I have no need in this case, however, to make a firm decision on that point, though there is some force in the reasons of Goulding J. in *Myton Ltd. v. Schwab-Morris* ([1974](#)) [1 WLR 331](#); ([1974](#)) [1 All ER 326](#) . It is sufficient for the purposes of this case to hold that non-payment of the deposit at the time the purchaser signs the form entitles the vendor to rescind out of hand. (at p386)

20. Thus I agree with what is said by Hutley J.A. in his reasons for judgment in this case ([1976](#)) [2 NSWLR](#), at pp 424-425 :

"The deposit is an 'earnest to bind the bargain' (*Howe v. Smith* ([1884](#)) [27 Ch D 89](#), at p 101), or, as Lord Macnaghten said in *Soper v. Arnold* ([1889](#)) [14 App Cas 429](#), at p 435 , 'a guarantee that the purchaser means business'. It cannot so function if payment can be made within a reasonable time after the signing of the contract. No rational vendor would subject himself to the trouble of giving a notice to pay the deposit and the risk of court determination of what is a reasonable time at the very inception of the contract. It must be remembered that on the exchange of contracts the purchaser acquires an equitable interest in the land, and this of itself has a constraining effect upon the vendor. What he can do with his land is materially limited from the moment of exchange." (at p387)

21. I also agree with his Honour that the provisions of cl. 1 as to the payment of the

deposit by cheque strongly support the construction which I would place on the plain words of the clause. (at p387)

22. In this case, no money and no cheque was paid at the time the purchaser signed the form of contract. But her agent deposited the post-dated "cheque" some time later. Clearly, the estate agents had no authority to accept that document as under the contract. The cheque spoken of in cl. 1 is a cheque proper. i.e., an order on a bank for immediate payment. A post-dated cheque is a bill of exchange of a different order and does not, in my opinion, satisfy the description of a cheque in cl. 1. Nor had the estate agents any authority to negotiate that bill of exchange on behalf of the vendor. All the acts of the estate agents to which I have referred were done in the interests of the purchaser. None was for the benefit of the vendors; none was within the vendor's authority to the estate agents. None of these acts, including the receipt of the proceeds of the March document, can be accounted as acts of the vendors, nor, in my opinion, as relevant to their rights or the exercise of their rights. (at p387)

23. But it is said that, when on 10th May the estate agents were told that the post-dated cheque could now be banked and cleared, there was then a payment which affected the rights of the vendors. I am at a complete loss to understand how the unauthorized acts of the estate agents can, without any knowledge or act of the vendors, affect the vendors' rights. In my opinion, upon any proper view of the law of contract, or of equity, they cannot. The more so, if anything further were needed, when the estate agents have been acting not in the interests of the vendor but in the interests of the purchaser and in complicity with her agent. The removal on 10th May of the condition on which the March document had been held did not turn that document into a cheque within the meaning of cl. 1: nor the clearance of the March document on 11th May as a payment on 10th May, as might have been the case had the March document been such a cheque. The basic reason that, upon a cheque being met, payment is deemed to have been made at the time the cheque was given is that, being a negotiable demand on a bank for immediate payment, it is susceptible of immediate negotiation. This could not have been said of the March document. In this connection, I do not place anything on what might be thought a justifiable suspicion that the communication between agent and the drawer's agent on 10th May was inspired by some apprehension on the part of one or both of them that the vendors were about to act. (at p388)

24. In my opinion, the primary judge was in error in his conclusions. The vendor was entitled, in my opinion, on 11th May to rescind the contract. The deposit as required by the contract had not then been paid. The activities of the estate agents

and the agent for the drawer of the March document were irrelevant to the vendors' rights and did not affect them. The proceeds of the March document were not authoritatively received on his account, unless of course by some act he ratified the estate agents' acts: which quite clearly he did not; and, in any case, for the reasons I have given, there was no payment on 10th May. (at p388)

25. I might observe, having regard to some remarks made by the primary judge, that it is, in my opinion, erroneous to discuss the position of a vendor on non-payment of a deposit in terms of damage or disadvantage thereby suffered by the vendor. To do so misconceives the function of a deposit and fails to give proper significance to the fact of its non-payment at the time the purchaser signs the form of contract. (at p388)

26. Having regard to the view I have formed, I should say something as to certain decisions of the Supreme Court. (at p388)

27. Holland J. in *Payne v. City Syndicate Management Pty. Ltd.* (Supreme Court of N.S.W.; 3rd May 1973), so far as presently relevant, held that the obligation of clauses such as cl. 1 was to pay the deposit within a reasonable time of the contract coming into existence and that that time was not of the essence. (at p388)

28. In *Babic v. Williams* (Supreme Court of N.S.W.; 13th June 1974), his Honour affirmed his earlier decision, preferring it to the decision of Goulding J. in *Myton Ltd. v. Schwab-Morris* ([1974](#) [1 WLR 331](#); [1974](#) [1 All ER 326](#) . (at p388)

29. In *Lydia Court Pty. Ltd. v. Panousis* (Supreme Court of N.S.W.; 7th September 1973), Street C.J., when Chief Judge in Equity, associated himself with the decision in *Payne's Case*. (at p388)

30. In *Alarm Facilities Pty. Ltd. v. Jackson Constructions Pty. Ltd.* ([1975](#) [2 NSWLR 22](#) , Wootten J., according to the headnote, held:

"(1) Whether or not payment of a deposit is a condition precedent to the coming into operation of a contract for the sale of land depends upon the terms of the contract. In the present case, such payment was not a condition precedent, that is to say that failure to pay the deposit constituted default under the contract, rather than failure to bring it into existence. (2) *Semle*, time is not of the essence so far as payment of a deposit is concerned. In the present case, the implication to be drawn from the terms of the contract was that the deposit should be paid within a reasonable time after the contract had commenced to operate. Therefore, it was necessary for

the vendor to give a notice of intention to rescind specifying a reasonable time for payment of the deposit, and this the vendor had done." (at p389)

31. In my opinion, these decisions, in so far as they decide that under a clause in terms of cl. 1 a deposit is not payable at the time the purchaser signs the form of contract but at a reasonable time thereafter, that time is not of the essence in that respect and that a vendor may not rescind out of hand for failure to pay the deposit as and when stipulated by cl. 1, are insupportable and ought to be overruled. (at p389)

32. In my opinion, the Court of Appeal was correct in its conclusions. I agree with Hutley J.A. that the acts of the purchaser in this case were capable of establishing that the purchaser had evinced an intention not to be bound by the contract. (at p389)

33. In my opinion, the appeal should be dismissed. (at p389)

GIBBS J. This appeal raises for decision a number of questions of considerable importance to persons buying and selling land in New South Wales, at least to those who use the form of contract for sale of land approved by the Law Society of New South Wales and the Real Estate Institute of New South Wales in 1972. In particular, the following questions arise: (at p389)

2. 1. Within what time is the deposit required to be paid? (at p389)

3. 2. When there has been a default in the payment of a deposit, is the vendor entitled to terminate the contract without first giving a notice requiring payment of the deposit within a specified reasonable time? (at p389)

4. 3. When a purchaser has made default in payment of the deposit, does the vendor lose the right to terminate the contract if, before the right is exercised, the purchaser makes a belated payment to the vendor's estate agent but the vendor is unaware that the belated payment has been made? The word "terminate", which is used in the second and third of these questions, is the expression employed in cl. 16 of the contract for sale. (at p389)

5. The form of contract in question is intended for use whether the sale is by private treaty or by public auction. In the latter case the introductory provisions of the contract require the purchaser to sign the agreement "upon the fall of the hammer". In the present case the sale was by private treaty. The purchase price specified was \$16,000. Clause 1 of the contract provided as follows:

"The Purchaser shall upon the signing of this agreement pay as a deposit to the Vendor's Agent herein named as Stakeholder the sum of: ONE THOUSAND SIX HUNDRED DOLLARS (\$1,6000) which shall vest in the Vendor upon and by virtue of completion and which shall be accounted for to the Vendor upon receipt of an order from the Purchaser or his Solicitor authorizing such payment. The deposit may be paid by cheque but if the cheque is not honoured on presentation the Purchaser shall immediately and without notice be in default under this agreement. The balance of the purchase price shall be paid as stipulated in the First Schedule hereto. Any moneys payable to the Vendor hereunder by the Purchaser or the Agent will be paid to the Vendor's Solicitor or as he may direct in writing."

The First Schedule required the balance of the purchase money to be paid in cash on completion which shall be completed within 90 days of the date hereof. However, the contract was not dated. Clause 16 provided, inter alia, as follows:

"If the Purchaser defaults in the observance or performance of any obligation imposed on him under or by virtue of this agreement the deposit paid by him hereunder, except so much of it as exceeds 10&percent; of the purchase price shall be forfeited to the Vendor who shall be entitled to terminate this agreement and thereafter either to sue the Purchaser for breach of contract or to resell the property as owner and the deficiency (if any) arising on such re-sale and all expenses of and incidental to such re-sale or attempted re-sale and the Purchaser's default shall be recoverable by the Vendor from the Purchaser as liquidated damages provided that proceedings for the recovery thereof be commenced within 12 months of the termination of this agreement . . ." (at p390)

6. It is no doubt true, as Hutley J.A. said in the Court of Appeal, that this form of contract has been "refined and polished by the courts and leading conveyancers", but this process has, unfortunately, not meant that the resulting product has been altogether freed of its obscurities. The phrase "upon the signing of this agreement" contains two possible sources of ambiguity. It is a question whether "the signing" referred to is the signing by the purchaser, or whether what is meant is that the deposit is not payable until both parties to the contract have signed it. If it were intended that both parties should sign the contract at the one time the difficulty would not arise. However the usual practice in New South Wales is for parties intending to enter into a contract for the sale of land to exchange counterparts, and this was done in the present case. The word "upon" is also ambiguous. In its

ordinary sense, according to the Shorter Oxford Dictionary, it means "immediately after; following upon". However the word "in different cases, may undoubtedly either mean before the act done to which it relates, or simultaneously with the act done, or after the act done, according as reason and good sense require the interpretation, with reference to the context, and the subject matter of the enactment": Reg. v. Humphery (1839) 10 A & E 335, at p 370 [\[1839\] EngR 314](#); [\(113 ER 128](#), at p 142) ; see also Ex parte Lesiputty; Re Murphy [\(1947\) 47 SR \(NSW\) 433](#), at p 436 , and Bowman v. Durham Holdings Pty. Ltd. [\[1973\] HCA 55](#); [\(1973\) 131 CLR 8](#), at p 16 . If the word means "after" rather than "immediately after", it must be taken to mean within a reasonable time after the event specified: Koon Wing Lau v. Calwell [\[1949\] HCA 65](#); [\(1949\) 80 CLR 533](#), at p 573 . The purchaser contends that this is its meaning in the present case. (at p391)

7. When parties propose to enter into a contract for the sale of land, and to follow the customary procedure of exchange, they do not contemplate the coming into existence of a binding agreement before the exchange has taken place; the exchange "is the crucial and vital fact which brings the contract into existence": Eccles v. Bryant and Pollock [\(1948\) Ch 93](#), at p 99 and see Allen v. Carbone [\[1975\] HCA 14](#); [\(1975\) 132 CLR 528](#), at pp 532-533 . It is clear that if, before the counterparts had been exchanged, a cheque given as deposit was dishonoured, the purchaser would not at that time have committed a breach of the contract, because no binding agreement would have come into existence. It is also clear that whatever the proper construction of the contract, the vendor can insist that the deposit be paid before he signs the contract or exchanges counterparts, because until those things have been done the matter remains in the realm of negotiation. For these reasons it may not matter, from a practical point of view, whether the deposit is intended to be paid upon the signing by the purchaser, or upon the signing by both parties. The crucial question is whether the use of the word "upon" has the effect that the obligation to pay the deposit is postponed until a reasonable time after both parties have signed. Since the word is used in a clause which provides for payment of the deposit, in deciding which of its possible meanings it is intended to bear it is necessary to keep in mind the functions which a deposit performs. The nature of a deposit is well understood. In Soper v. Arnold (1889) 14 App Cas, at p 435 , Lord Macnaghten said: "The deposit serves two purposes - if the purchase is carried out it goes against the purchase-money - but its primary purpose is this, it is a guarantee that the purchaser means business . . ." In the same case Lord Herschell said (1889) 14 App Cas, at p 433 : "The deposit is given as a security for the performance of the contract." (at p392)

8. The primary purpose of the deposit would not be served unless the deposit were paid at the very time when the purchaser assumed his obligations under the contract. A vendor is entitled to expect that the purchaser will be ready to show that he means business by paying the deposit no later than the time when the contract is entered into, and a security for due performance is likely to be ineffective if not available at the time when the binding obligations attach. If the vendor were compelled to wait an indefinite time after contracts had been exchanged before becoming entitled to receive the deposit, the purposes of the deposit would be frustrated. These considerations strongly support the view that "upon" in cl. 1 does not mean "after", but "immediately after", or, to use the language of *Reg. v. Humphery* (1839) 10 A & E, at p 369 (113 ER, at p 141) , "upon the occasion of, or at the time of". This is consistent with the use of the word in the auction conditions, where the expression "upon the fall of the hammer" indicates the occasion on which the purchaser is to sign. It is also consistent with the use of the word "upon", and its synonym "on", in a number of other places in cl. 1. The deposit is to vest in the vendor "upon" completion; it is to be accounted for to the vendor "upon" receipt of an order from the purchaser and if the cheque is not honoured "on" presentation the purchaser is to be immediately in default. In these parts of cl. 1 the word indicates the occasion when the right or duty arises or the default occurs, and does not have the effect that a reasonable time is to elapse before those things happen. (at p392)

9. It is not, of course, intended that the payment of the deposit and the signing of the agreement should be strictly simultaneous, because that would be absurd. What is meant is that the deposit shall be paid on the occasion when the contract is signed. This conclusion throws some light on the question whether it is intended that it shall be paid only when both parties have signed. In the ordinary course of events it is unlikely that the purchaser will be present either when the vendor signs his part of the contract, or when the parts are exchanged, and it is unlikely that the agent will be present on the latter occasion. The contract should be construed in the light of what is likely to be the practice usually followed, so as to render its operation practicable and convenient. I therefore think that what is meant is that the deposit should be paid by the purchaser when he signs the contract, although it will no doubt be sufficient from a practical point of view if the deposit has been paid before contracts are exchanged. (at p393)

10. It was not necessary for the vendor, before he terminated the contract, to give notice requiring payment of the deposit within a reasonable specified time. The time for payment of the deposit was, as I have held, fixed by the contract, and the condition that the deposit be paid upon the signing of the agreement was an

essential term going to the very root of the contract, the breach of which would immediately entitle the vendor to terminate the contract. In *Myton Ltd. v. Schwab-Morris* ([1974](#)) [1 WLR 331](#); ([1974](#)) [1 All ER 326](#), Goulding J. held that a clause requiring that a deposit be paid on the signing of the contract stated a condition precedent to the contract taking effect. Alternatively, he held that if payment of a deposit was not a condition precedent it was a term of so radical a nature that a failure to comply with it would entitle the other party to renounce further performance. In *Alarm Facilities Pty. Ltd. v. Jackson Constructions Pty. Ltd.* ([1975](#)) [2 NSWLR 22](#), Wootten J. held in the case of a contract in similar terms to that in the present case that the payment of a deposit was not a condition precedent to the coming into operation of the contract, but that failure to pay the deposit constituted default under the contract. With respect I agree with Wootten J. that cl. 1 does not state a condition precedent. There is nothing in the words of the contract that suggests that payment of a deposit is a condition precedent to the coming into existence of the contract; on the contrary, a failure to pay the deposit is a breach of a term of the contract, namely the term contained in cl. 1. However, I respectfully agree with the alternative view of Goulding J. that the character and importance of a deposit indicate that the clause requiring payment of a deposit is a fundamental term the failure to perform which goes to the root of the contract and entitles the vendor to renounce further performance. A similar view was expressed by Woodhouse J. in *Watson v. Healy Lands Ltd.* ([1965](#)) [NZLR 511](#), at p 516. This conclusion is supported by the final words of cl. 1, read in conjunction with cl. 16. If the vendor is entitled to terminate the agreement immediately and without notice when a cheque given in payment of a deposit is dishonoured it would be strange if he were not entitled similarly to terminate the agreement if no payment was made at all. (at p394)

11. For these reasons the learned trial judge was incorrect in holding that the contract provided for payment of the deposit within a reasonable time, and that in order to gain the right to rescind for non-payment of the deposit the vendor must first give to the purchaser a notice specifying a reasonable time for payment. If the headnote to *Alarm Facilities Pty. Ltd. v. Jackson Constructions Pty. Ltd.* is correct in indicating that Wootten J. favoured that view, he was, in that respect, in error. (at p394)

12. In the present case there was a clear default in the observance of the obligation imposed on the purchaser by cl. 1 of the contract. Although undated contracts were exchanged on 27th February 1973 no cheque was given to the agent until some time in March - according to the evidence of the purchaser's husband, about a fortnight after the exchange had been effected. The cheque then given was post-

dated to 1st April 1973. Payment by a post-dated cheque is not payment by cheque within the meaning of cl. 1, for that clause contemplates payment of a cheque which is capable of being honoured immediately on presentation. A post-dated cheque does not answer that description. In my opinion a bank is not entitled to pay a post-dated cheque before the date which it bears and to charge the amount to the customer's account. In my respectful opinion the view expressed in *Pollock v. Bank of New Zealand* (1901) 20 NZLR 174 and *Keyes v. Royal Bank of Canada* (1947) SCR 377, at pp 382-383, 386-387 is to be preferred to that taken by the Full Court of Queensland in *Magill v. Bank of North Queensland* (1895) 6 QLJ 262 . (at p394)

13. The final question is whether the vendor had lost his right to terminate the contract. The learned trial judge held that the right to terminate the contract could no longer be exercised once the deposit had been paid, and that the obligation to pay the deposit was performed on 10th May 1973. On that day a solicitor purporting to act on behalf of the purchaser's husband, the drawer of the cheque, told the agent to bank the cheque, which the agent had continued to hold notwithstanding that the date for its payment had arrived on 1st April. The agent thereupon signed a receipt for the deposit, and credited the vendors' trust account ledger card with the amount of the cheque. On the following day, 11th May 1973, he presented the cheque for payment, and it was paid. On the same day the vendors gave the notice of termination. (at p395)

14. It does not seem to me material to consider whether the solicitor who instructed the agent to bank the cheque had authority to do so or whether the cheque was banked before or after the notice of termination was given. Nor is it necessary to consider the circumstances in which the agent withheld the cheque from presentation after 1st April 1973. The vendors were not aware until some time in May that the post-dated cheque had been accepted and held. They did not expressly authorize the agent to accept payment either on 1st April or on 10th May. In my opinion the agent had no actual or ostensible authority on either of those dates to receive payment of the deposit. The expression "agent", when used in relation to an estate agent acting for a vendor, is misleading, as has been pointed out by this Court in *Petersen v. Moloney* [1951] HCA 51; (1951) 84 CLR 91, at pp 94-95 , and by the House of Lords in *Sorrell v. Finch* (1977) AC 728, at pp 750, 753 . Such so-called agents do not have a general authority to act on behalf of the vendor in relation to the contract. They have no general authority either to accept a deposit before a contract is made (*Sorrell v. Finch* (1977) AC 728) or to receive the purchase money (*Petersen v. Moloney* [1951] HCA 51; (1951) 84 CLR 91), although such authority may of course be conferred on an agent in a particular

case. Conflicting opinions have been expressed as to whether an agent has a general authority to receive a deposit when a contract is made, but in the present case, as in most cases in practice, authority to do so is expressly conferred by the contract of sale. It is however clear in principle that where the contract of sale expressly provides for the payment of the deposit to the agent, the authority of the agent to receive the deposit is limited by the provisions of the contract. In the present case the authority of the agent was to receive a deposit paid in accordance with cl. 1. As I have said, the agent was authorized to accept a cheque, but not a post-dated cheque. He was authorized to accept payment of the deposit "upon the signing of this agreement", but not later. Of course, the vendor might have ratified the acceptance of a belated payment, but there was no ratification in the present case. The agent therefore had no actual or ostensible authority to accept payment on 10th May, or if it matters on 1st April, because by those dates the time specified in the contract for payment of the deposit was long past. In other words, the deposit was never paid in accordance with the contract. I do not find it possible to regard the case as one in which the default had been remedied, and the conditions of the contract fulfilled, before the notice of termination was given. At best the purchaser had offered to remedy the breach and this offer was accepted by the agent, who acted however without the authority or knowledge of the vendors. The vendors did not waive their right to terminate the agreement and in the circumstances they were not estopped from exercising that right. In my opinion the right was effectively exercised, and the Court of Appeal was right in dismissing the action for specific performance. (at p396)

15. I would dismiss the appeal. (at p396)

STEPHEN J. When Mrs. Brien agreed in February 1973 to buy from the Dwyers their house at Byron Bay she promised, by cl. 1 of the contract of sale, that she would "upon the signing of this agreement pay as a deposit to the Vendors' agent herein named as stakeholder the sum of \$1,600". She signally failed to keep her promise. Nothing was paid in February and when in early March her husband, a local solicitor who acted for her in the transaction, sought to take advantage of a provision of cl. 1 which permitted payment by cheque, the cheque for \$1,600 which he gave to the vendors' agent he post-dated to 1st April. The 1st April came and went and, for the reasons described in the several judgments of my brothers, it was not until 10th May that the sum of \$1,600 was first credited in the agent's trust account ledger card and a receipt issued for it. Only on 11th May did the agent bank the cheque, which was on the same day cleared by the bank on which it was drawn. (at p396)

2. Until about 11th May the Dwyers knew nothing of all this. When they learned that the deposit had not been paid, their solicitors on 11th May notified Mr. Brien of their clients' termination of the contract pursuant to cl. 16, a clause which entitled the vendor to terminate upon the purchaser defaulting in performance of any contractual obligation. (at p396)

3. The question for the Court is whether the Dwyers were entitled to thus terminate the contract. That Mrs. Brien was some two and a half months late in payment of the deposit is undisputed. Her default began when she failed to pay the stipulated deposit "upon the signing of this agreement". The different shades of meaning which have been assigned to this expression by those before whom this case has come demonstrate how uncertain is the language. Joining, as I must, the ranks of those who essay its interpretation, I would adopt the meaning attributed to it in the reasons for judgment of Jacobs J. and I do so for the reasons there expressed. It is to be hoped that some change can be made to the present standard form of contract of sale so as clearly to express whatever was in fact the precise intention of its authors. As Jacobs J. makes clear, his view does not contemplate the giving of any notice so as to fix a reasonable time for payment of the deposit and in the present case it is quite clear that the deposit was not paid within the time required by cl. 1 of the contract. The handing over, days later, of a postdated cheque did not come near to being compliance with cl. 1; even the advent of 1st April did not improve the position since the estate agent appears to have held the cheque even after that date on terms that it should not be presented for payment. Only on 10th May was the agent told that he might bank it, which he did the following day. (at p397)

4. The evidence leaves quite uncertain the sequence of events on 11th May, whether the notice of termination did or did not precede the banking of the cheque, but I do not think it matters: if a post-dated cheque, given subject to an additional suspensory condition, could ever involve payment by cheque within cl. 1, it would have been the purchaser's instruction, given to the agent on 10th May, that the cheque might now be banked, and not anything occurring the next day, that would be significant. However, in the present circumstances I need not decide whether such an instrument can ever become a payment by cheque within cl. 1 because I have concluded that once the purchaser defaulted in payment of the deposit that default was decisive. The vendors thereupon became entitled to terminate the contract and might only lose that entitlement by waiver or, perhaps, by the operation of some form of estoppel, neither of which finds any support from the facts of this case. It cannot, I think, avail Mrs. Brien that on 10th May, a day before notice of termination, the agent had in his possession a cheque which he was then authorized to present for payment, or that by the following day the cheque had

been banked and the agent's trust account credited with the full amount of the deposit. Once the breach of contract occurred, as it had months earlier, only some act or omission on the vendors' part could deprive them of their entitlement to terminate: there was no such act or omission, there scarcely could be in view of their ignorance of the breach, and accordingly the purchaser's breach subsisted as one which the vendors could rely upon to terminate the contract despite the purchaser's later payment of the deposit. (at p397)

5. This inexorable effect of the purchaser's default in timely payment of the deposit is due to the quite special character of a purchaser's promise to pay a deposit. Expressed as a promise, as it is in the present contract, it should not, I think, be regarded as a condition precedent to the formation of contractual relations between the parties - compare *Myton Ltd. v. Schwab-Morris* (1974) 1 WLR 331, at p 336; (1974) 1 All ER 326, at p 330 per Goulding J. - but rather as a condition subsequent, as Wootten J. treated it in his examination of the authorities in *Alarm Facilities Pty. Ltd. v. Jackson Constructions Pty. Ltd.* (1975) 2 NSWLR 22. However it is a condition subsequent of a quite special character. As is made clear in the authorities to which Hutley J.A. referred in his reasons for judgment in this case, a deposit is indeed "an earnest to bind the bargain", a "guarantee that the purchaser means business". In *Watson v. Healy Lands Ltd.* (1965) NZLR 511, at p 516 Woodhouse J. described a deposit as having "the character of a security arranged to ensure the due performance of the contract . . . payment of the deposit is regarded as fundamental to the contract proceeding . . . failing to meet this initial obligation . . . is not merely a failure to meet the first requirement of the contract, but it is a failure to provide the agreed security for the further performance of other obligations". It is this special character of a deposit which requires that a purchaser's failure to pay a deposit at the time and in the manner stipulated in the contract entitles the purchaser then and there to terminate the contract - and see *Frampton v. McCully* (1976) 1 NZLR 270, at p 277. (at p398)

6. It is also because of this character which a deposit bears that a purchaser's tardy payment of deposit, unaccompanied by waiver of the breach by the vendor, will not avoid the consequence of the breach involved in that tardiness, namely the vendor's entitlement to terminate the contract. The vendor acquired this entitlement as soon as the breach occurred and no unilateral act on the part of the purchaser can deprive him of it. The position is no different from that of an unfulfilled contingency, precedent or subsequent, upon the timeous fulfilment of which is made to depend the coming into effect, or continuance in being, of the contractual relationship. In relation to such contingencies Needham J., held, in *Gilbert v. Healey Investment Pty. Ltd.* (1975) 1 NSWLR 650, that performance of the

contingency out of time did not, in the absence of waiver, prevent the other party from thereafter avoiding the contract. His Honour relied upon what their Lordships had said in *Aberfoyle Plantations Ltd. v. Cheng* (1960) AC 115, at pp 124-125 . There is, I think, no occasion for the drawing of any distinction between such cases and the instant case. (at p398)

7. Although, in my view, the purchaser's obligation to pay the deposit at the stipulated time was not an act upon which formation of contractual relationships between the parties was made contingent, its exact performance was essential. Once the obligation was breached, the vendors were free to bring the contract to an end. Because of its requirement of exact performance, there was no way in which a breach of the obligation could subsequently be made good. To regard some tardy doing of the promised act of payment of a deposit as equivalent to its punctual performance is to ignore the element of time. This element cannot be ignored, since without it a deposit will no longer possess those qualities which give to it its special character and importance in contracts for the sale of land. (at p399)

8. I would dismiss this appeal. (at p399)

JACOBS J. An agreement for the sale by private treaty of certain land from the respondents to the appellant was made on 27th February 1973. The agreement was made by exchange of contracts in the printed Law Society and Real Estate Institute form. The price was \$16,000. Clause 1 provided:

"The Purchaser shall upon the signing of this agreement pay as a deposit to the Vendor's Agent herein named as Stakeholder the sum of: ONE THOUSAND SIX HUNDRED DOLLARS (\$1,600.00) which shall vest in the Vendor upon and by virtue of completion and which shall be accounted for to the Vendor upon receipt of an order from the Purchaser or his Solicitor authorizing such payment. The deposit may be paid by cheque but if the cheque is not honoured on presentation the Purchaser shall immediately and without notice be in default under this agreement. The balance of the purchase price shall be paid as stipulated in the First Schedule hereto. Any moneys payable to the Vendor hereunder by the Purchaser or the Agent will be paid to the Vendor's Solicitor or as he may direct in writing." (at p399)

2. On some date in March 1973 the appellant's husband, who was acting as her solicitor, handed a cheque for the amount of the deposit to an employee of the agents named in the contract, Messrs. Patch & Taylor of Byron Bay. The cheque

was post-dated to 1st April 1973. The agents did not bank the cheque on or immediately after 1st April, nor did they issue a receipt for it or credit it in the firm's trust account ledger. (at p399)

3. On or about 2nd April 1973 the appellant's husband had a telephone conversation with the employee of the agents, Mrs. Charters. According to Mrs. Charters, Mr. Brien told her that he would take down to the agents a cheque on the Byron Bay Bank which could be banked but Mr. Brien's version was that he told Mrs. Charters or another person at the agents that the cheque already held would be met but would the agents call up and get another cheque on the A.N.Z. account. No substituted cheque was sent, but still the agents did not bank the cheque in their possession. If they had done so it would at all material times have been met on presentation. (at p400)

4. On 13th April 1973 the appellant's husband left Byron Bay for overseas and returned on 14th May 1973. Whilst away Mr. Watson, solicitor, was in charge of his office at Byron Bay and of this transaction. On 10th May 1973 Mr. Watson told the agent's employee to bank the cheque held by that firm. On the same day a member of the agent's firm signed a receipt dated 10th May 1978, and the agent's employee credited the trust account ledger card with the amount of the cheque as being a deposit in the matter of Brien from Dwyer, Lot 2, Lawson Street, Byron Bay. (at p400)

5. On 11th May 1973 the agent's employee banked the cheque, which was cleared through the bank on which it was drawn on that day. On the same day the respondent's solicitor delivered to the appellant's solicitor a notice of termination of the contract "as no deposit has at this stage been paid by you". There was no proof whether this notice was received before or after the cheque was banked. (at p400)

6. The respondents first became aware of the form in which the deposit had purportedly been paid when they with their solicitor went to the agent's office. The date of this visit is put by Mr. Dwyer at 14th May but he was not clear in his recollection. Thus it is not made clear how or when the respondents or their solicitors obtained information which led to the letter of termination on the ground therein stated. (at p400)

7. Holland J. ordered specific performance of the contract. He took the view that, whether or not the provision for payment of the deposit was a fundamental term of the contract, on its true construction cl. 1 required that the deposit be paid within a reasonable time. He then held that a provision so construed required that before

notice of termination could be given there be a notice fixing a time certain for payment and failure to pay at or before that time. (at p400)

8. The New South Wales Court of Appeal reversed the decision of Holland J. It held that the provision for payment of the deposit was a fundamental term, that it required payment of the deposit simultaneously with the making of the contract and that the respondents, on learning of the breach, were entitled to rescind even if the deposit had in the meantime been paid ([1976\) 2 NSWLR 420](#) (at p400)

9. In my opinion there can be no doubt but that the payment of the deposit strictly in accordance with the terms of the contract was an essential condition or fundamental term of the contract. It seems to me that the very nature of a deposit on the sale and purchase of land leads to that conclusion. A deposit fulfils a very important function which would be destroyed if payment of the deposit is not regarded as an essential term. It is an earnest to bind the bargain, as was said in *Howe v. Smith* ([1884\) 27 Ch D 89](#), at p 101 . It is an assurance to the vendor, a security to him pending completion. He can take his property off the market and not concern himself with other offers in case the sale should go off, with the comfort at least that the deposit is there for his security. (at p401)

10. Moreover, the terms of the present contract make it clear that payment of the deposit in accordance with cl. 1 was intended to be an essential condition. This appears from cl. 1 itself. If payment is by cheque and the cheque is not honoured on presentation the purchaser is immediately in default and the vendor may terminate under cl. 16. (at p401)

11. Next there is the question what is meant by "on the signing of the contract". I cannot agree that it means "within a reasonable time" if those words introduce any substantial interval of time between signing and payment and particularly if they introduce a requirement that notice be given fixing a time. It should be observed that the requirement that an act be done within a reasonable time does not necessarily mean that notice must be given fixing a time. It is true that the general principle which has been applied in actions for specific performance of contracts for the sale of land has been that where it is implied that a step is to be taken within a reasonable time, then before termination for breach notice must be given fixing a time. But the reason for that approach has been that equity has not regarded provisions as to time as essential conditions, and it would not ordinarily regard a provision that a step be taken within a reasonable time as an essential condition. If, however, it would in some circumstances regard a provision for taking a step within a reasonable time as embodying an essential condition, I am not satisfied

that it would regard notice fixing a time as a necessary condition precedent to termination of the contract. (at p401)

12. On the other hand I cannot agree with the view expressed in the Court of Appeal that the word "on" means "simultaneously with". It cannot be said that the word "on" has this meaning as a literal or even prima facie meaning. It may as well mean "after". It all depends on the context. If simultaneous payment is a practical impossibility, that tends to the adoption of some different construction of the phrase in which the word "on" appears. The purchaser is not by the contract required to pay the deposit to the agent before signing, which I take to mean exchange of contracts. A construction should not lightly be adopted which would in effect require him to do so. (at p402)

13. In my opinion the words "on the signing" mean "at the earliest practicable time after the signing". This gives the word "on" the same meaning as the word "upon" has in the condition of the contract form (inapplicable in the present case) dealing with sales by auction. That condition provides that "upon the fall of the hammer the Purchaser shall sign". That must mean "at the earliest practicable time after". The reason is obvious and does not need elaboration. And the same is true of the deposit clause. Some time must be allowed but it is only that short time which circumstances of time and place dictate. It may be that some element of reasonableness comes into the matter. A man does not have to run rather than walk to the agent's office. If the agent cannot be found, if his office is closed, some time must be allowed. In many circumstances the use of the post may be permissible. It may be that the length of time taken by a letter in the course of post gives a good general indication of the limit of the time after signing which is permissible. However it is clear that nothing done by the appellant in the present case could fall within the words "on the signing" when they are construed as I have suggested. (at p402)

14. Then there is the fact that the cheque was post-dated Payment by cheque was permissible under the express provision in cl. 1 but the word "cheque" must there mean "a cheque which is capable of being presented for honouring", and the words "on presentation" must mean "on presentation by the agent at any time while it is not stale". Otherwise the provision as to the consequences of the cheque not being honoured on presentation could not sensibly operate. (at p402)

15. So, the appellant was in breach of an essential or fundamental condition. Strict performance of the condition was not waived by the respondents at any time because at no material time before termination did they know of the breach. The

consequence, it was held in the Court of Appeal, was that the respondents were entitled to rescind the contract for breach. This conclusion would follow from the application of the broad principle that a party to a contract may rescind for breach of a term or condition performance of which has not been waived. But the real question is whether the general rule is an all-embracing one, necessarily applicable to the facts of the present case. The general rule was designed by the courts to meet the situation where the innocent party had suffered an injury in the performance of the contract which he was not bound to tolerate even if he could not show that the injury had caused pecuniary loss to him; he would nevertheless not be getting in the long run precisely what he had bargained for. It is seldom that a breach of an essential condition can be so wholly cured that when it is cured without the innocent party being aware of the breach he is in no worse position than if there had been no breach at all. In this respect the late payment of a deposit to a stakeholder may possibly stand alone among real, rather than fanciful, situations. So long as the deposit is not paid the vendor is undoubtedly gravely prejudiced and he can certainly rescind the contract. Further, if he learns of the non-payment before the deposit is paid, he would be prejudiced if he could not immediately resell without having first to give notice rescinding the earlier contract. But if the deposit is paid and is safely in the hands of the stakeholder before the vendor has taken any step to inquire whether or not it has been paid the vendor, once it has been paid, is in the same position as if the deposit had been paid on time. He suffers no continuing prejudice under and in the performance of the contract. It is true that he might say "If I had known, I could have rescinded and therefore I was prejudiced". But that, it seems to me, is not prejudice under and in performance of the contract. At the most he is deprived of a justification for non-performance of the contract on his part and that is not a relevant prejudice. It should be noted that failure to pay a deposit which is payable to a vendor or agent of a vendor raises different considerations. On the one hand the vendor is inevitably out of his money while the deposit is unpaid, and on the other hand he has immediate notice of the breach and is both entitled (and depending on the circumstances bound) to act in the light of that knowledge. (at p403)

16. The question whether a party can rescind a contract for a breach of an essential condition which has been wholly cured before he is aware of the breach has never, so far as I have been able to discover, been the subject of judicial decision. However, a hint of the correct approach to the question appears, perhaps, in the decision of the English Court of Appeal in *Panchaud Freres S.A. v. Etablissements General Grain Co.* (1970) 1 Lloyd's Rep 53. There a buyer of goods c.i.f. rejected the goods on the ground of defect in quantity. Much later during the currency of arbitration proceedings the party claimed to be entitled to

reject the goods because they were not shipped during the contractual shipping period. The shipping documents bore an incorrect date and as a result the buyer did not become aware of the breach of contract until shortly before he sought to rely on it during the arbitration proceedings. It was held that the arbitrators were correct in their conclusion that the buyer could no longer reject on that ground. There was no waiver of the breach, and the Court of Appeal so held. Lord Denning M.R. based his decision on estoppel but Winn L.J., conscious of the difficulty in that approach, said (1970) 1 Lloyd's Rep, at p 59 :

"I respectfully agree with my Lord that what one has here is something perhaps in our law not yet wholly developed as a separate doctrine - which is more in the nature of a requirement of fair conduct - a criterion of what is fair conduct between the parties. There may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negating any liberty to blow hot and cold in commercial conduct." The decision shows that the statement of principle that a party who has not waived the breach of an essential condition of a contract can rescind does not state the whole law. There may be circumstances not amounting to waiver which deny him that right. (at p404)

17. The facts in the present case would be closer to the facts in the case to which I have referred if the vendor had sought to rescind on another ground, if the parties had been locked in dispute, and if then the vendor had discovered that the deposit had been paid late. The rule which in ordinary circumstances operates quite fairly would seem to me to operate unfairly if he should then be able to rescind when at the time of his discovery of the breach he can still get everything under his bargain which he was entitled to have. (at p404)

18. The deposit was in my opinion effectively paid in the present case when the cheque became immediately presentable for payment, that is to say, on 1st April 1973. The request by the appellant's solicitor, her husband, to the agent to withhold presentation had no legal effect. The agent was under a duty both to the vendors and the purchaser to present the cheque and if he failed in that duty that was his concern. He had received the deposit once the cheque became immediately presentable. Thus by 1st April the initial breach of contract had been cured. Nevertheless there had unknown to the respondents been a breach of an essential condition of the contract. (at p405)

19. I would note that, even if the cheque was not immediately presentable at the beginning of April because of a view that it was delivered subject to a condition

against presentation, a view which is not borne out by the evidence of the circumstances surrounding delivery of the post-dated cheque, nevertheless by 10th May the condition had been removed, and so far as appears from the evidence that was a time before the respondents knew of the late payment. (at p405)

20. It seems to me that it would be an unfair and unsatisfactory rule that a vendor in the circumstances of the present case should be entitled to go back to this breach in order to rescind the contract, relying on the fact that he had not previously known that the breach had occurred. The fact in the present case that the purchaser's solicitor had requested the agent to withhold presentation of the cheque even after 1st April, a request devoid of legal significance, must not be allowed to obscure the relevant facts from which the legal principle ought to be deduced. A rule entitling a vendor to rescind in case of late payment at any time so long as he had not waived the breach would apply in every case where there was any delay in payment of the deposit to the stakeholder and where the delay was not known to the vendor until after the deposit had been paid. Knowledge of the late payment might not be obtained until a late stage in the progress of a sale towards completion. A vendor who then sought to be relieved of the contract could go back to an event which by that stage was no more than a part of the history of the matter. (at p405)

21. It seems to me that a vendor who is so concerned to see that a deposit is paid right on time that he would rather rescind the contract than take any other course should stir himself promptly after the exchange of contracts to ascertain for himself that it has not been paid. If he does nothing, and thereafter the deposit is paid, he cannot in my opinion be heard to complain. Whether it be called an estoppel or a doctrine of the kind which Winn L.J. sought to formulate does not matter. The particular rule which I have described will operate more fairly and more in accordance with the business expectations of ordinary men and women than an application of the general rule governing termination of contracts for breach of an essential term. (at p405)

22. For these reasons I am of the opinion that the appellant was entitled to specific performance of the contract. I would allow the appeal with costs, set aside the orders of the Court of Appeal and in lieu thereof order that the appeal to that Court be dismissed with costs. (at p405)

AICKIN J. I have had the advantage of reading the reasons for judgment prepared by the Chief Justice and I agree with his conclusion that the appeal should be dismissed. I am in general agreement with his reasons for that conclusion, but there

is one point on which I prefer to state my own reasons separately, and another on which I add some further comments. (at p406)

2. I agree that there is no warrant for qualifying the words in cl. 1 by such expressions as "or within a reasonable time thereafter" or for reading "upon" as meaning "on or after". The words are "upon the signing of this agreement", but the obligation which they impose may be effectively discharged by the purchaser making payment to the estate agent before the counterparts are exchanged, or when both parties sign the one document contemporaneously. It is not until the standard form document is signed by both parties, or signed copies exchanged, that there is anything which answers the description "this agreement" in cl. 1, and it is not until then that any obligation on either party arises. No doubt it would be unusual for both parties to sign the contract, or exchange signed parts, in the presence of the estate agent, but if that occurred payment of the deposit then and there would constitute compliance with the terms of cl. 1 of what would at that moment become a contract. (at p406)

3. It appears clear in principle that if payment were made in advance of the formation of the written contract, it would be held by the estate agent for the purchaser until the contract was signed by both parties or separate parts exchanged: *Sorrell v. Finch* ([1977](#)) [AC 728](#). Upon exchange of parts or contemporaneous signatures it would become "the deposit" and as such would be held by the estate agents in accordance with the terms of the contract. No doubt prudent solicitors for vendors and for purchasers are concerned to ensure that the deposit is paid before exchange of parts so as to protect the interests of their respective clients. (at p406)

4. This view accords with the nature of a deposit under a contract for the sale of land as an earnest given by the purchaser to bind the bargain and as security for its performance. It is thus the basis on which the purchaser obtains then and there an equitable interest in the land. See *Howe v. Smith* ([1884](#)) [27 Ch D 89](#), esp at p 101 and *Soper v. Arnold* ([1889](#)) [14 App Cas 429](#), esp at p 435, per Lord Macnaghten. (at p406)

5. It follows that, if the deposit is not paid "upon the signing of this agreement" in the sense which I have described above, the purchaser is in breach of the contract the moment it comes into existence, and that the vendor may thereupon rescind. There is, in my opinion, no basis upon which it can be said that the vendor must give notice before doing so. The breach is a fundamental one, going to that which is required at the very moment of formation of the contract. There is here no room for the application of the general equitable rule that time is not of the essence

except where expressly made so. Here the payment of the deposit is part of the mode of formation of the contract and as a result the time for payment of the deposit is by necessary implication of the essence of this form of contract. (at p407)

6. In construing a standard form of contract in common use, matters of convenience to both parties are a legitimate matter for consideration if more than one construction is open. In a transaction of this kind it is a matter of convenience, and indeed of practical necessity, that the parties should know at the moment of formation of the contract exactly what these obligations are and when they are to be performed. That need is not met by the implication of an imprecise standard such as a "reasonable time" for there is in this context no standard by which to measure what is reasonable. Moreover such a view would not give to the vendor the protection of the deposit as a convenient security for performance. Forfeiture of the deposit for failure by the purchaser to complete has long been an integral part of contracts for the sale of land and is provided for in this contract. If the obligation to pay the deposit does not arise until the expiration of a reasonable time and can then be enforced only on the giving of reasonable notice, one of its principal purposes is defeated and the vendor left to the expensive and inconvenient remedy of an action for damages. (at p407)

7. The view which I have expressed above leads in this case to the same conclusion as the view of the Chief Justice and it is hard to visualize circumstances in which the two views would produce different results under this form of contract. (at p407)

8. The other aspect of this case on which I wish to add to what the Chief Justice has said is the post-dated cheque. In my opinion, the giving of a post-dated cheque with express instructions not to present it for payment did not constitute compliance with the contract requiring payment and permitting it to be made by cheque, quite part from the time at which it was given to the estate agents. No doubt a post-dated cheque is a valid instrument - see Bills of Exchange Act 1909-1973 (Cth), s. 18 (2) (Bills of Exchange Act, 1882 (U.K.), s. 13 (2)) and this was so before the passing of the latter Act. However, it is not a "cheque" within the meaning of the Bills of Exchange Act which by s. 78 (1) defines a cheque as a "bill of exchange drawn on a banker payable on demand". I take that to be the ordinary meaning of the term; hence the need for the adjective "post-dated". It is, I think, clear that a post-dated cheque is a bill of exchange payable at a future date. There is no authority for the proposition that it becomes a cheque properly so-called when the date which it bears arrives. It is established that for stamp duty purposes

it may then be received in evidence when stamped only as a cheque and not as a bill of exchange, but that is not because it has become a cheque, but because the view has been taken that if an instrument appears on its face to be correctly stamped when tendered that is sufficient to make it admissible - see *Royal Bank of Scotland v. Tottenham* ([1894](#)) [2 QB 715](#) and the case there cited. In so far as the view of Griffith C.J. (when Chief Justice of Queensland) in *Magill v. Bank of North Queensland* (1895) 6 QLJ 262 might suggest a contrary view of the nature of a post-dated cheque, I am respectfully of opinion that the decision of the Court of Appeal of New Zealand in *Pollock v. Bank of New Zealand* ([1901](#)) [20 NZLR 174](#) is to be preferred. (at p408)

9. What was done with the post-dated cheque was not done with the knowledge of, nor on behalf of, the vendor. It was done at the behest of the purchaser and did not fall within the authority of the estate agents under the contract of sale which they had arranged. I can see no warrant for regarding it as affecting the position of the vendor. The vendor had not in any way acquiesced in what was done, nor did his delay in checking whether the deposit had in fact been paid in accordance with the contract operate as a waiver or in any way to the prejudice of the purchaser. (at p408)

ORDER

Appeal dismissed with costs.