

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

CIV 2006-404-003221

BETWEEN CLUB SECURITIES LTD
Appellant

AND MURRAY CRAIG HURLEY
Respondent

Hearing: 24 August 2007

Appearances: David Chisholm for Appellant
James Guest for Respondent

Judgment: 31 October 2007

JUDGMENT OF HARRISON J

*In accordance with R540(4) I direct that the Registrar
endorse this judgment with the delivery time of
5.00 pm on 31 October 2007*

SOLICITORS

Kevin McDonald (Auckland) for Appellant
Downie Stewart (Dunedin) for Respondent

COUNSEL

DJ Chisholm

Introduction

[1] Club Securities Ltd (Club) appeals against a decision in the District Court at Manukau, refusing to grant its application for summary judgment on a document signed by Mr Hurley agreeing to pay Club \$120,000 by a fixed date.

[2] At principal issue are, first, whether or not the instrument is a promissory note, giving rise to a strict liability for payment, and, second, if so, what is the status of a number of affirmative defences raised by Mr Hurley.

Background Facts

[3] Club is an investment company. Among other things, it acts as agent for Roof Doctors Ltd (RDL) which franchises the rights to distribute and apply a roof resurfacing product known as 'RB80'. Sales are effected by Club arranging for a shelf company to purchase the rights from RDL and then assigning the shares to a purchaser wishing to become a franchisee.

[4] Mr Hurley, who lives in Southland, responded to a newspaper advertisement placed by Mr John Lehmann on Club's behalf in June 2002. He is a shareholder in the company. The advertisement invited the public to purchase a 'great husband and wife business', offering 'cashflow, immediate start, guaranteed income over 20 years'. Messrs Hurley and Lehmann had a number of telephone conversations, culminating in a meeting at the Centra Hotel at Auckland Airport.

[5] The parties entered into an unconditional written agreement on 24 June 2002 whereby Club agreed to sell and Mr Hurley agreed to buy the shares in a company that had obtained or would obtain a distribution and marketing agreement with RDL for the Southland area. Consideration for the transfer of shares was fixed at \$120,000. Settlement was to be on 1 July 2002. Club gave various undertakings. The agreement expressly provided that any cheque or bill of exchange will be considered by both parties as cash: clause 8. Both parties acknowledged that there had been no representations other than those expressly set out: clause 10(iii).

[6] Contemporaneously Mr Hurley signed this document:

To: Club Securities Ltd, Auckland

I/we Murray Craig Hurley, hereby acknowledge that I am indebted to you for the sum of \$120,000 and I covenant to repay the above-mentioned sum to you by the 1st of July 2002 to Club Securities.

[7] Mr Hurley failed to settle the agreement or pay the sum of \$120,000 to Club on 1 July 2002. Correspondence and telephone discussions followed. Mr Hurley purported to cancel the agreement on 26 July 2002.

[8] Club issued proceedings in the District Court at Papakura on 31 March 2005. Its application for summary judgment for \$120,000 was filed contemporaneously. Mr Hurley's statement of defence raised affirmative defences and also counterclaimed for declaratory and assignment relief.

District Court

[9] Club's application for summary judgment was heard on 17 June 2005. Judge Singh did not deliver judgment until 16 May 2006, some 11 months later. He had in the interim, on 23 December 2005, sought further submissions on a legal issue.

[10] The Judge's primary ground for dismissing Club's application was his lack of satisfaction that Mr Lehmann was 'authorised and in a position to depose as to [Club's] belief that [Mr Hurley] has no defence to the claims': at [22]. The reasons for this conclusion, briefly expressed in the judgment, were that Mr Lehmann signed the sale and purchase agreement on Club's behalf but signed the deed of acknowledgement of debt as a 'broker'; that in his affidavit in opposition Mr Hurley raised the question of Mr Lehmann's status; that in a second affidavit Mr Lehmann denied claiming 'he had no interest other than as a broker' but said he was 'authorised to act as a director'; and that Mr Lehmann concedes a company search does not disclose him as a director which he will rectify: at [18]-[21].

[11] It is most regrettable that the Judge waited for nearly a year before dismissing Club's claim on this narrow and briefly articulated ground. It could have been

expressed at the end of argument or, at latest, a week or so later, even allowing for other work commitments. It was a simple point and, with respect, the delay frustrated the purpose of the summary judgment procedure.

[12] In any event, this ground is unsustainable. I agree with Mr David Chisholm, Club's counsel, that the Judge erred. The qualifying requirements for a supporting affidavit made for and on behalf of another party are that the deponent must, first, verify the allegations in the statement of claim to which it is alleged that the defendant has no defence; second, depose to his belief that a defendant has no defence; and, third, set out the grounds of that belief: R154(5) District Court Rules. A person who makes an affidavit 'on behalf of a corporation' only has to depose that he knows the relevant facts and is authorised to make the affidavit: R515 District Court Rules. The law does not require that the deponent be a director or officer of the company: *Hempseed v Durham Developments Ltd* [1998] 3 NZLR 265 (CA).

[13] Mr Lehmann swore an affidavit in support of Club's application for summary judgment on 31 March 2005. He deposed to his role as a director of Club, his full knowledge of the matters at issue, and his authority to swear the affidavit on Club's behalf. His affidavit then provided full grounds for his belief that Mr Hurley had no defence.

[14] Mr Hurley swore an affidavit in answer on 26 April 2005, setting out the grounds for his belief to the contrary. He did not question Mr Lehmann's authority to swear Club's supporting affidavit or, indeed, to enter into the negotiations on its behalf which led to the subject agreement. In an affidavit sworn in reply on 11 May 2005 Mr Lehmann confirmed that he was a shareholder and director or authorised representative of Club.

[15] I cannot follow the legal or factual basis for the Judge's finding. Contrary to the Judge's statement, Mr Hurley's affidavit did not raise any issue about Mr Lehmann's status. Nor did his notice of opposition. It does not matter whether or not a search of the Companies Office discloses that Mr Lehmann is registered as a director. His affidavits satisfied the statutory requirements for a deponent necessary to support an application by a company for summary judgment.

[16] The Judge also concluded that, upon reflection, summary judgment was inappropriate for three other reasons. The first was that: at [32]:

Oral evidence at a fully defended hearing is considered critical to the parties' intentions, that is whether the deed was no more than an acknowledgement of debt as a security for payment, or whether it was intended to be a promissory note.

[17] In support the Judge cited *Klinac v Lehmann* [2001] DCR 718, where the sale of a property was settled with \$115,000 of the purchase price still outstanding. The purchaser gave the vendor a document headed 'deed of acknowledgement of debt', which read:

I, John Christian Lehmann, hereby acknowledge that I am indebted to you in the sum of \$115,000 and I covenant to repay this sum to you on 14 June 1999.

[18] In *Klinac* Judge Tompkins held, correctly in my respectful view, that this instrument was a promissory note which in every respect met the statutory definition: s 84 Bill of Exchange Act 1908. Its heading did not and could not alter its essential legal effect. Judge Tompkins found that the deed 'was clear and unequivocal, signed in circumstances of some formality ...': at [33]. In reliance on this latter observation, Judge Singh concluded that the same could not be said in this case and that oral evidence was thus necessary.

[19] The document under consideration by Judge Tompkins in *Klinac* was in all material respects identical to this instrument, subject to one difference which is relevant in a different context (the substitution of the word 'on' for the word 'by'). Judge Tompkins simply referred to the formal circumstances of signature within the context of considering whether the document was in law a promissory note. Oral evidence has no bearing on the issue of whether or not an instrument is a promissory note. That decision is to be made by reference solely to the document itself in its contractual setting.

[20] Here the parties expressed their intentions unequivocally in the underlying agreement. They agreed that 'any cheque or bill of exchange will be considered by both parties as cash': clause 8. That is a summary but classically correct statement of the legal purpose and effect of a bill of exchange.

[21] Mr Lehmann initially asked for a cheque. When Mr Hurley replied that he did not have his cheque book, Mr Lehmann requested Mr Hurley to sign the deed. Mr Hurley complied. The parties' common intention is found within the four corners of the document; oral evidence could have no bearing on its meaning, especially where there is no suggestion of ambiguity. Mr Hurley's agreement to send a cheque within a week is irrelevant to the question of whether or not the document actually signed was a promissory note. This ground for refusing summary judgment cannot stand.

[22] The second alternative reason given by Judge Singh for refusing summary judgment was that the application gave rise to a difficult question of law which required development and was thus inappropriate for determination by summary judgment: at [43]. The difficulty arose from conflicting authority in the United Kingdom, Australia and Canada on the constituent elements of a promissory note sufficient to satisfy the statutory definition.

[23] However, other than citing passages from the authorities going both ways, the Judge did not undertake an analysis of the law or explain why the difference could not be resolved in this setting. It was the key issue falling for determination in the District Court and now on appeal and it is regrettable that I do not have the benefit of the Judge's reasoning.

[24] The third alternative reason for dismissing the application was that, even if he had entered summary judgment, Judge Singh would have ordered a stay of execution to allow determination of Mr Hurley's counterclaim or, more correctly, his affirmative statutory defences: at [45]-[52]. While accepting that breach of an underlying contract does not afford a defence on an action on a promissory note except in the case of a total or liquidated partial failure of consideration, the Judge said that the latter possibility could not be ruled out after a full hearing of the disputed facts and legal issues: at [53]-[54]. But he did not explain why.

Decision

[25] The primary question is whether or not the deed of acknowledgement of debt is a promissory note, defined as: s 84 Bill of Exchange Act 1908:

... an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand, **or at a fixed or determinable future time**, a sum certain in money to or to the order of a specified person or to a bearer.

[Emphasis added]

[26] This definition mirrors in all material respects the statutory definition of a bill of exchange: s 3. The only relevant difference is that a traditional bill, such as a cheque, is an order by the payer addressed to a third party to pay on a nominated date, whereas a promissory note is the payer's promise to pay directly. The provisions of the Bills of Exchange Act apply, with any necessary changes, to promissory notes: s 90.

[27] It is well settled that even between the immediate parties bills of exchange are to be treated as the equivalent of cash: *International Ore & Fertiliser Corporation v East Coast Fertiliser Co Ltd* [1987] 1 NZLR 9 (CA). Accordingly, except for a total failure of consideration, the breach of an underlying contract by the payee does not afford the payer a defence to an action on a promissory note.

[28] The dispute here arises from the parties' use of the words of obligation in the deed to pay \$120,000 '... by the 1st of July 2002'. In contrast, the promise in *Klinac* was to pay 'on' a fixed date. The issue is whether the promise to pay 'by' rather than on a date certain creates a contingency. It has arisen previously for determination in other jurisdictions but not in New Zealand.

[29] Both counsel fully traversed the leading authorities. On the one side, cited by Mr Chisholm, is the dissenting judgment of Ormerod LJ in *Williamson v Rider* [1963] 1 QB 89 (CA) supported by Canadian, Australian and Irish authorities and by textbook writers. On the other side, cited by Mr Guest, is the majority decision in

Williamson since followed in *Claydon v Bradley* [1987] 1 All ER 522 (CA) and an Australian authority.

[30] In *Williamson* the holders sued on a note which provided that in consideration of the loan the borrower ‘... agreed to repay ... the sum of £100 on or before December 31st 1956’. The majority in the Court of Appeal (Willmer and Danckwerts LJ) held that the option reserved by the document to pay at a date earlier than the fixed date (‘on or before’) created an uncertainty and contingency in the time for payment. Accordingly, the document could not be a promissory note within the English equivalent of s 84. Danckwerts LJ observed, however, at 97:

There is, in my view, considerable force in the contention that if a promise to pay is not enforceable against the maker by proceedings until December 31 1956 has arrived, that is the fixed date or time for payment; and a provision conferring on the maker an option of payment at an earlier date should not prevent the document being a promissory note ...

[31] Nevertheless, despite the appeal of this view, Danckwerts LJ followed *Crouch v Credit Foncier of England Ltd* (1873) LR 8 QB 374, which he understood was authority to the contrary. In *Crouch* three Judges of the Court of Queen’s Bench held that debentures issued under a company seal and repayable at a certain time, but subject to a condition permitting redemption by drawings by lot, were not negotiable instruments. Danckwerts LJ noted that, while the point was not discussed at any length, the Court in *Crouch* held that ‘debentures redeemable in this way obviously could not be promissory notes’: at 98.

[32] Willmer LJ, agreeing with Danckwerts LJ, decided the question as: at 100:

... largely one of first impression ... The introduction of the date December 31 limits the time within which payment must be made, but does not fix the date of payment, as I see it ...

Willmer LJ acknowledged that there was no authority directly on point but seemed to find some support in principle from *Crouch*.

[33] Ormerod LJ dissented in *Williamson*. He followed *Dagger v Shepherd* [1946] KB 215, where Evershed J for the Court of Appeal stated that the use of the phrase ‘on or before’ a fixed date in a notice to quit means: at 233:

... that the covenantor or debtor is under an obligation to pay the debt on (but not earlier than) the date fixed but has the option of discharging it at any earlier time selected by him ...

Applying that statement, Ormerod LJ held that the promisor was bound to pay on a fixed date but if he chose to pay earlier then the holder of the bill was under an obligation to accept: at 102.

[34] While noting that Danckwerts LJ was apparently swayed to the opposite view by *Crouch*, Ormerod LJ distinguished the decision: at 102-103. The debentures in *Crouch* promised repayment 'on the 1st May 1872 ... or upon any earlier day upon which this bond shall be entitled to be paid off according to the conditions', which were incorporated in a separate document. Ormerod LJ pointed out that there were to be periodical drawings in the nature of a lottery, and the holders of the drawn debentures were entitled to early repayment. As he noted: at 103:

It may be that in the present case the money which is payable on December 31 1956 may be paid at an earlier date if the promisor chooses to pay it; but he is under no obligation to pay it. He cannot be sued in respect of it; and, if he chooses to do nothing, nothing can happen until the date fixed for payment, which is December 31. That appears to me to be entirely different from the circumstances in the *Crouch* case, where there was a legal obligation on the part of the company to pay the money at an earlier date if the particular condition referred to was fulfilled...

[35] In *Claydon* the borrower of £7,600 signed a document acknowledging the loan which stated that it was '... to be paid back in full by 1st July 1983'. The Court of Appeal found the document was not a promissory note for two reasons. First, following *Williamson*, the option to pay at a date earlier than the fixed date created an uncertainty or contingency as to the time for payment; and, second, the document was primarily a receipt for money containing the terms in which it was to be repaid and was not intended to be negotiable or capable of being enforced by the holder in due course.

[36] Dillon LJ delivered the leading judgment in *Claydon*. He recited the preference of the Supreme Court of Canada in *John Burrows Ltd v Subsurface Surveys Ltd* [1968] SCR 607 and the High Court of Ireland in *Creative Press Ltd v Harman* [1973] IR 313 for Ormerod LJ's dissenting judgment in *Williamson*, and the concurring view of the authors of the then edition of *Byles on Bills of Exchange*, 25th

Ed. 1983 at p18 (the current edition, the 27th, is to the same effect at p363). Dillon LJ noted, in terms which seem to endorse Ormerod LJ's reasoning, that in *Williamson* the time for payment was bound to arrive; the money was payable on due date if it had not been repaid, at the option of the payer, beforehand.

[37] However, and without further discussion, Dillon LJ concluded that the Court of Appeal in *Claydon* was bound on this point by the precedent of the majority decision in *Williamson*. Stephen Brown LJ concurred without delivering a separate judgment. The third Judge, Neill LJ, also considered the Court was bound by *Williamson*, emphasising the payee's option to pay at a date earlier than the terminal date.

[38] Mr Guest urges me to follow *Williamson* and *Claydon*. However, the High Court of New Zealand is not bound by previous decisions of the English Court of Appeal: *Attorney-General for Hong Kong v Reid* [1994] 1 NZLR 1 (PC) per Lord Templeman at 9-10. Like Mr Chisholm, I find Ormerod LJ's reasoning in *Williamson* more compelling than that of the majority. Indeed, but for Danckwerts LJ's equivocality in *Williamson*, English authority would be the other way. Danckwerts LJ was plainly attracted to the same logic which found favour with Ormerod LJ but then, without explanation, followed an earlier authority which was plainly distinguishable; the debentures in *Crouch's* case were subject to conditions expressly binding the borrower to pay at an earlier date if his instrument was drawn.

[39] That feature is absent here. Mr Hurley covenanted to pay \$120,000 by 2 July 2002. The time for payment was bound to arrive. Unlike the borrowers in *Crouch*, Mr Hurley could not be sued upon the instrument until that date did arrive. There was no contingency or uncertainty on the face of the instrument signed by Mr Hurley.

[40] Mr Guest seeks alternative support from *Gore v Octahim Wise Ltd* (1995) 2 Qd.R 242. The instrument at issue in that case was an unconditional promise to pay a sum on 31 December 1989 with an option to repay 'in whole or part at any time without premium or penalty'. Williams J held in the Supreme Court of Queensland

that this right introduced such a degree of uncertainty as to make the negotiability of the instrument illusory. Accordingly, the document was not a promissory note within the statutory meaning.

[41] In *Gore* Williams J carefully surveyed the English, Canadian and Irish authorities. He concluded by preferring the majority view in *Williamson*, saying this: at 249:

... There is no doubt that the reasoning in *Dagger v Shepherd* is correct, and that a notice to quit (as in any contract) is not rendered void for uncertainty because something must be done 'on or before' a fixed date. There is in that situation certainty as to the date by which the obligation must be performed. But a promissory note (and any bill of exchange) creates rights and obligations which go well beyond mere contractual rights and obligations between parties. It cannot be overlooked that the critical feature of any bill of exchange is its negotiability, and rights may be acquired by a person, not a party to the original contract, namely a holder in due course, against the payer. The law also imposes obligations on the intending transferee of such a negotiable instrument, particularly with respect to what enquiries, if any, should be made before accepting the endorsement...

[42] Williams J said further: at 249-250:

... Where there is either a fixed day for payment, or the note is payable on demand, there will be presentment of the note in accordance with its terms for payment. If it is then dishonoured that would be noted, normally, on the face of the note and thereafter any indorsee would have knowledge thereof. Paragraph 4 of this note gives the payer the right to make payment other than upon presentation of the note in accordance with its tenor. That introduces, in my view, a degree of uncertainty with respect to payment which has, or may have, marked consequences so far as the negotiability of the note is concerned.

Here the law is not concerned with whether the terms of a contract are so uncertain as to render the agreement a nullity, but with whether or not there is such uncertainty because of the contingency as to the time for payment as to make illusory the negotiability of the instrument. In my view cl. 4 has the effect of rendering illusory the negotiability of this document as a promissory note. It may be there is good reason from the commercial point of view for the payer always to be in a position to redeem the bill. However, he may always purchase the instrument prior to maturity; that is a matter to which Danckwerts LJ referred in *Williamson* at 97 relying on a passage from *Chalmers' Bills of Exchange*. The payer of a promissory note always has the right to purchase it thus putting an end to his obligations thereunder; but that is a vastly different thing from creating a negotiable note containing a provision that it may be paid out at the option of the payer prior to maturity date.

[43] A different view was later taken in *Australian Securities & Investments Commission v Emu Brewery Mezzanine Ltd* [2004] WASC 241. In the Supreme Court of Western Australia, Simmonds J also reviewed the leading Commonwealth authorities in this area but expressly disagreed with Williams J in *Gore*. Simmonds J addressed the issue, which was decisive for Williams J, of whether the possibility of payment on a date prior to that nominated in the instrument would destroy its status as a promissory note: at paras 56-74. The Judge explained that the issue of whether an option of prepayment strikes at the negotiability of a note arises in this way: at para 59:

... A holder may not qualify as a holder in due course if that person at the time of the dealing was put upon inquiry as to a possible defect (such as the fact that the note had already been paid) in the transaction. A note without an option for prepayment might always be paid early with the consent of the previous holder. Under those circumstances, the promisor/payer is at risk, if the note does not contain an endorsement of payment, or is not otherwise removed from circulation, that the payee might fraudulently negotiate the discharged note to a third party. That person would be capable of being a holder in due course and demanding payment in accordance with the terms of the note...

[44] Simmonds J concluded: at paras 63-64:

... it seems to me that it is not clear a duty of inquiry would arise simply from the presence on a negotiable note of a qualification represented by an option of prepayment of the sort here. The holder in due course could treat the fact the note had not been endorsed as paid or otherwise cancelled as indicating that there was no qualification by prior payment. This would be in the absence of any other circumstances which might give rise to a duty to inquire.

Of course, the holder in due course of a note bearing the qualification on its face would have to accept the possibility of subsequent prepayment, in whole or in part... This would not, however, strike at the note's negotiability. Rather, it would expose the holder to the risk of being paid out, if market interest rates began to fall, by a refinancing promisor.

[45] Mr Guest seeks to distinguish *Emu Brewery*. He says Simmonds J did not adequately address Williams J's concern in *Gore* as to a partly prepaid note's negotiability. He says that the fact of an option for prepayment might, if coupled with other circumstances, giving rise to a duty of inquiry by the person to whom the note is negotiated, substantially restricts its negotiability.

[46] In principle, I prefer Simmonds J's reasoning in *Emu Brewery*, for the same reasons that I am attracted to Ormerod LJ's judgment in *Williamson*. With respect, I think that in *Gore Williams* J introduced a degree of artificial refinement to the question.

[47] In terms of s 84, Mr Hurley unconditionally promised to pay the sum of \$120,000 'at a fixed or determinable future time'. That time was 1 July 2002. He could not be sued until then. I repeat that he was not obliged to pay at an earlier date.

[48] To the extent that the word 'by' provides Mr Hurley with an option to pay at an earlier date (payment was due within one week of the note being signed), it does not introduce a contingency of the type which might destroy the instrument's negotiability. There is always the possibility of a payee discharging his obligations before due date irrespective of whether the instrument uses the word 'on' or 'by'. In my judgment the substitution of the latter word for the former in Mr Hurley's document does not constitute a disqualifying contingency. The right to pay earlier than 1 July 2002 does not alter the unconditional nature of Mr Hurley's promise: *John Burrows* at 358-359; *Creative Press* at 317.

[49] Mr Guest submits, however, that Judge Singh correctly held that the possibility of a total or partial failure of consideration for the note could not be ruled out after a full hearing of the disputed facts and legal issues. The Judge did not give any reasons for this conclusion. I assume, though, that he was referring to the two affirmative defences raised by Mr Hurley. The statement of defence pleads that by virtue of them, and his counterclaim, 'there was a total lack of consideration for the deed of acknowledgement of debt'. Otherwise, he does not point to a linkage between the two.

[50] Mr Hurley's two affirmative defences are as follows:

- (1) A breach of the Securities Act 1978. Mr Hurley says the sale of shares provided for in the transaction was the sale of a security interest in terms of the statute. He says that Club's offer was in

breach and that the contract was thus illegal. He originally pleaded that the Court has no jurisdiction to grant relief;

- (2) Alternatively, Mr Hurley says that Mr Lehmann on Club's behalf misled him in a number of ways including representations that Roof Doctors was a thriving business when it was not; that there were other parties ready to make the same purchase when there were not; and that there was no goodwill included in the purchase price. As a result, he says, the actual value of what he purchased was substantially less than the represented value. He is entitled to cancel: s 7 Contractual Remedies Act 1979, and has done so.

[51] By way of counterclaim Mr Hurley says that Club was 'in trade' within the meaning of the Fair Trading Act and that by its agent it engaged in misleading and deceptive conduct by making the representations set out above. He counterclaims for an order declaring the documents which he signed are void. He also counterclaims for relief under s 9 Contractual Remedies Act.

[52] Mr Guest submits that the Fair Trading Act counterclaim might constitute a defence of invalidity to a claim on the note. He suggests that the Securities Act defence might separately found a defence of illegality. Thus he seeks to bring Mr Hurley's defence within Cooke P's brief statement in *International Ore* at 16 that:

There being no question of illegality or invalidity the only possible defences requiring attention in this case are total failure of consideration and fraud.

[53] By way of elaboration, Mr Guest says that it is possible on the papers to find illegality of the overall transaction under the Securities Act and a failure of consideration accordingly. He says it is also open to the Court to find, even short of that conclusion, that it is not an appropriate question to determine on an application for summary judgment. Alternatively, he submits, it is not possible to determine on the papers the question of invalidity under the Fair Trading Act; clearly a conventional hearing is required because it is possible, by considering the relevant

statutory provisions, that the whole transaction could be struck down as void ab initio.

[54] In my judgment Mr Guest's argument conflates the distinct concepts of invalidity or illegality, on the one hand, and a total failure of consideration, on the other. I am in no doubt that Cooke P's reference in *International Ore* at 16 was to invalidity or illegality in the note itself. He was not suggesting an exception to his earlier statement of principle in the same judgment at 14, expressly excluding from the range of available defences on a bill of exchange either allegations of breach of the background or underlying contract or a counterclaim for unliquidated damages by way of set-off.

[55] This much seems obvious from Cooke P's approval in *International Ore* at 14-15 of this passage from the speech of Lord Russell in *Nova Knit Ltd v Kammgarn* [1977] 2 All ER 463 at 479-480:

It is in my opinion well established that a claim for unliquidated damages under a contract of sale is no defence to a claim under a bill of exchange accepted by the purchaser; nor is it available as set-off or counterclaim. This is a deep rooted concept of English commercial law. A vendor and purchaser who agree on payment by acceptance of bills of exchange do so not simply on the basis that credit is given to the purchaser so that the vendor must in due course sue for the price under the contract of sale. **The bill is itself a contract separate from the contract of sale. Its purpose is not merely to serve as a negotiable instrument; it is also to avoid postponement of the purchaser's liability to the vendor himself,** a postponement grounded on some allegation of failure in some respect by the vendor under the underlying contract, unless it be total or quantified partial failure of consideration.

[Emphasis added]

[56] The rationale for this rule is explained in Lord Wilberforce's speech in the same case at 470. Bills of exchange payable at a future date are taken as the equivalent of deferred instalments of cash; if they are not so treated, the seller might as well give credit. For that reason, rights of defence are strictly limited to those arising on the bill itself such as fraud, invalidity or failure of consideration. In my judgment, defences or counterclaims by way of set-off, based primarily on what Mr Chisholm calls generalised allegations of misrepresentation – in the statutory setting of either the Fair Trading Act or the Contractual Remedies Act – relate to the

contract to purchase shares, and could not possibly operate as defences to a claim on the note itself.

[57] The decision in *International Ore* illustrates the applicability of these principles. The Court of Appeal allowed the payer of a bill of exchange drawn in New York for payment of a cargo of fertiliser leave to defend under the now repealed bill writ procedure, the predecessor of the summary judgment regime. Leave was granted on the basis that, if the payer was entitled to reject the cargo for contamination where it relied on certificates of cleanliness given by surveyors, it may be able to establish a breach going to the root of the contract constituting a total failure of consideration by the bill holder.

[58] By contrast, Mr Hurley agreed to pay \$120,000 to Club on or before a date certain for the shares in a company. Its principal asset was in the nature of a distribution and marketing agreement with Roof Doctors Ltd. Mr Hurley has not raised any defence to the effect that the company did not own this asset or that it did not exist. He simply says that he later worked out that it was ‘worth a good deal less than \$120,000’. This assertion is no more than a counterclaim by way of set-off for unliquidated damages.

[59] I should add that Mr Guest placed most weight on the Securities Act defence of illegality. He devoted a considerable part of his written synopsis to an argument that the Court had no power to validate a contract which was illegal by virtue of a breach of the Securities Act. However, in a supplementary memorandum filed since the hearing Mr Guest has conceded that Mr Chisholm is correct that the District Court has jurisdiction to grant relief, by virtue of s 37AH(1), which provides:

The Court may in the course of any proceedings, or on the application of the issuer under this section, make a relief order in respect of the application of s 37 to the allotment of a security if the Court considers that it is just and equitable to do so.

Result

[60] Accordingly, I am satisfied that the instrument signed by Mr Hurley on 24 June 2002 is a promissory note on which he was unconditionally liable to pay

Club the sum of \$120,000 on 1 July 2002. The appeal is allowed and judgment is entered accordingly for Club for \$120,000, together with interest at 7.5% from 1 July 2002.

[61] The only issue is whether or not I should stay judgment to allow trial of Mr Hurley's affirmative defences and counterclaim. Mr Chisholm opposes this proposal. He cites compelling authority to the contrary: *Montecchi v Shimco (UK) Ltd* [1979] 1 WLR 1180 (CA) where Bridge LJ said at 1183:

... the fact that the defendant may have a counterclaim for unliquidated damages arising out of the same transaction forms no sort of defence to an action on a bill of exchange and no ground on which he should be granted a stay of execution of the judgment in the action for the proceeds of the bill of exchange.

[62] That statement of principle must, with respect, be correct. However, a qualified exception should be made in this case. I am unaware of Club's financial circumstances and in particular its ability to repay some or all of the \$120,000 if Mr Hurley succeeds on his defences to the underlying contract or on his counterclaim by way of set-off.

[63] In the circumstances I make an order staying execution of the judgment until further order of the District Court on the conditions that Mr Hurley, first, pays the sum of \$120,000 together with interest calculated at the rate of 7.5% from 1 July 2002 to the Registrar of the District Court at Papakura to be held on trust pending a final decision on the claim and counterclaim in that Court and, second, takes all possible steps to obtain a priority fixture for trial in that Court.

[64] Club is entitled to costs in the District Court and in this Court which I fix according to category 2B. I wish to express my appreciation for the quality of the submissions made by both counsel in argument on this appeal.

Rhys Harrison J