

**JUDGMENT : The Hon. Mr. Justice Ramsey:** TCC. 15<sup>th</sup> February 2007

**Introduction**

1. These proceedings concern an arbitration claim made by Chattan Developments Limited ("Chattan") in relation to an Award dated 18 August 2006 ("the Award") made in arbitration proceedings between Chattan and Reigill Civil Engineering Limited ("Reigill").
2. On 15 January 2007 I heard an application by Chattan under section 80(5) of the Arbitration Act 1996 for an extension of the time for making an arbitration claim to appeal a question of law in the Award under section 69 of that Act. The arbitration claim should have been issued by 15 September 2006 but was only issued on 28 September 2006.
3. I gave judgment on 15 January 2007 and extended time by 13 days. However I did so on conditions, one of which related to the payment of Reigill's costs on an indemnity basis which, I assessed in the sum of £16,000.
4. My Order dated 15 January 2007 was in terms that Chattan should pay Reigill the sum of £16,000 by 4pm on Monday 29 January 2007.

**Factual background**

5. On the evidence before me it seems that Mr Cattanach, the managing director of Chattan, sought to comply with that Order by attending a branch of the Royal Bank of Scotland ("the RBS") in Burnley (sort code 16-14-22) and by paying in a cheque for £16,000 drawn on the Chattan account at a Bank of Scotland branch in Manchester. The cheque was made payable to Reigill's solicitors and was paid into their client account held at an RBS branch (sort code 16-00-01) elsewhere.
6. The "counter deposit" form shows that the cheque was paid in at the Burnley Branch of the RBS at 15:07:18 on 29 January 2007.
7. So far as Reigill's solicitors' are concerned, their client account showed the credit appearing on 30 January 2007.
8. By the time of the hearing the client account still stood in credit to the sum of £16,000 in respect of the cheque and this position has not subsequently altered.
9. So far as Chattan's account is concerned, on 29 January 2007 there was a credit and then a transfer from another account which I understand Chattan holds. On the face of the bank statements there are, prime facie, sufficient funds to meet the sum of £16,000 provided that the credit and transfer are not subsequently withdrawn for any reason.

**Reigill's Submissions**

10. Reigill submits that this payment was not sufficient to fulfil the condition in the Order of 15 January 2007 and therefore the extension of time granted falls and the appeal must necessarily be dismissed as being made out of time.
11. Mr Neil Berragan submits on behalf of Reigill that payment by cheque was not an agreed method and that this method did not amount to payment as ordered by the Order.

**Chattan's Submissions**

12. Chattan submits that the payment made on 29 January 2007 was sufficient to fulfil the condition and that the appeal should proceed. In the alternative they made an oral application to extend time for the payment to the date on which the payment was made, if it is held that it was made later than 4pm on 29 January 2007.
13. Mr Anthony Edwards submits on behalf of Chattan that payment by cheque can satisfy an obligation to make payment and when it does do so then on established principles, payment is made when the cheque is paid in.

**Position at the Hearing on 8 February 2007**

14. Despite Chattan originally seeking leave to appeal, it transpired that the appeal did not require leave because, as was common ground, consent had been given to such an appeal under a term of the JCT Standard Form incorporated into the agreement between the parties.
15. As a result, when the hearing of the appeal was to take place on 8 February 2007, this matter had to be determined at the outset. Having heard arguments I ruled that the payment made on 29 January 2007 was sufficient to fulfil the conditions but, if I was wrong about that I would grant an extension to the date when such payment became effective. I reserved my reasons and I now set out reasons for that decision.

**Reasons for Decision**

16. The issue is whether by paying in the cheque at 3:07pm on 29 January 2007 Chattan complied with the Order that it should pay the sum by 4pm on that day.
17. There was no prescribed means of payment and I accept that, as set out in Chitty on Contracts (29<sup>th</sup> Edition) at para 21-055:

**"Mode of Payment.** Except where he has expressly or impliedly agreed to do so, the creditor is under no obligation to accept a negotiable instrument (such as a bill, note or cheque) in payment of a debt. If the creditor does accept payment in this way, the effect on the existence of the debt depends on the circumstances, and is discussed in detail in a separate section."

18. Also as set out in Chitty at para 21-073:
- "Payment by negotiable instrument.** *Apart from express agreement creditor is not bound to accept payment in any way except cash, i.e legal tender. If, however he accepts a negotiable instrument, such as a bill of exchange, promissory note or cheque, it is a question of fact depending on the intention of the parties, whether it is taken in absolute satisfaction of the debt, or only in conditional satisfaction. In either event, the acceptance of the instrument gives the debtor a good defence to an action for the debt, at least until the instrument matures.*"
19. The position in respect of payment by cheque was recently considered by the Court of Appeal in **Coltrane v Day** [2003] EWCA Civ 342, a case concerning payment of rent. At para 12 Tuckey LJ set out the general points as follows:
- "In the absence of express or implied agreement the landlord is not bound to accept a last minute cheque. If he is sent a cheque shortly before the hearing which it is not possible to have cleared through the normal clearing system in time for the hearing, he can refuse to accept it. He should obviously do so promptly and return the cheque, otherwise he may be taken to have accepted it. The same obviously applies if the tenant produces a cheque at the hearing."*
20. At para 17 Wall LJ referred to
- "the long established principle, succinctly set out by Byrne J in **Felix Hadley & Co v Hadley** [1898] 2 CH 680 and recently reiterated by Lord Woolf in **Homes v Smith** (2000) Lloyds Law Reports (Banking) 139, that a cheque for a sum due which (a) is delivered to a creditor (b) is not returned by the creditor and (c) is met on first presentation discharges the debt as at the date the cheque is delivered."*
21. On the facts of this case, it seems to me that Reigill was not bound to accept the cheque which was paid in by Mr Cattanach. In her Witness Statement Ms Kershaw says that she spoke to her bank shortly after 4pm on 29 January 2007 and they confirmed that no monies had been paid into the client account.
22. Mr Loveridge, Chattan's Solicitor, wrote to Ms. Kershaw at 7:24pm on 29 January 2007 to say that his client, I assume Mr Cattanach, had informed him that "the £16,000 was paid into your account this morning." This information appears to be erroneous as the cheque is recorded as being paid in at 3:07pm and I have no evidence to the contrary.
23. I understand that the cheque for the sum of £16,000 was shown as credited to the client account on 30 January 2007. At 4:59 pm on 30 January 2007 Ms Kershaw says that she received faxed documents from RBS showing that a payment was made at 4:07pm The fax copy is not clear but the time on other documents is shown more clearly 15:07:18, ie 3:07 pm.
24. After being aware of the position Ms Kershaw did not take any steps to prevent the banks clearing system continuing in respect of the cheque. Whilst as she says, if the cheque had been brought to her office she could have made arrangements to have it specially cleared, she was unable to do so. I understand that special clearance could not be carried out now in respect of the cheque.
25. However the fact remains that Mr Cattanach paid the cheque into the client account before the deadline on 29 January 2007 and no steps have been taken to refuse that payment. In these circumstances, I consider that there was an implied acceptance of the cheque and therefore Reigill cannot now contend that payment by cheque was an invalid method of payment. I consider that this is equivalent to a case where the cheque is delivered to and not returned by the creditor.
26. On that basis, as set out above, the established principle is that a cheque which is met on first presentation discharges the debt as at the date the cheque is delivered. In this case the funds still stand credited to the client account as more recently confirmed by Ms Kershaw.
27. In those circumstances it seems to me that the sum of £16,000. is to be treated as being paid at 3:07pm when it was credited to the client account of Kershaw-Abbot.
28. While I have every sympathy for the position of Reigill and its Solicitors, on the facts of this case I find that Chattan did comply with para 4 of my Order and the extension of time granted by that order stands.
29. If I had come to a different decision then, as I indicated at the hearing, I consider that taking into account the overriding objective in rule 1.1 of the CPR and my powers under rule 3.1(2)(a) of the CPR this a case where to deal justly would require me to extend time until payment as found to have been made, subject to any terms which might have been appropriate as to payment of costs and interest.

Mr. Anthony Edwards (instructed by Michael Loveridge, Clitheroe, LANCS) for the Claimant  
Mr Neil Berragan (instructed by Kershaw-Abbott) for the Defendants