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DEPOSITS

NATURE AND FUNCTION OF THE DEPOSIT

PRINCIPLES

- Deposit serves two purposes:
 - if the purchase is carried out it goes against the purchase money;
 - it is a guarantee that the purchaser means business: *Soper v Arnold* (1889) per Lord Macnaghten
- Deposit is also viewed as serving the third function of being a specified sum of money which the parties have agreed should be payable to the vendor as compensation or damages for losses incurred upon termination for the purchaser's breach (liquidated damages): TEXT p 107.

DEPOSIT HOLDER

CAPACITY OF DEPOSIT HOLDER

- If the deposit is payable to a third party, in the absence of an agreement to the contrary, the deposit holder holds the deposit as agent for the vendor: *Edgell v Day* [1865]
- It is more common for the contract to provide that the purchaser will pay a deposit to a third party, such as an estate agent or solicitor for the vendor, as stakeholder
- In the event that the contract stipulates that a deposit is to be paid but is silent as to whom it is payable, it is considered that the parties impliedly intended that the payment should be to the vendor.

RECOVERY OF PAID DEPOSIT BY PURCHASER

- In the event that the purchaser becomes entitled to recover the paid deposit, it is important to determine whether the deposit holder holds the deposit as agent for the vendor or as stakeholder.

If deposit held as agent

- Deposit is held to the account of the vendor and it is the vendor and the vendor alone that the purchaser must direct an action for recovery of the deposit, whether or not the agent has accounted to the vendor: *Christie v Robinson* (1907); *Smith v Woodcock* [1950]

If deposit held as stakeholder

- The stakeholder holds the deposit or 'stake' as trustee for both the vendor and purchaser until the sale is completed or terminated: *Maloney v Hardy* (1970)
- It is the stakeholder against whom the purchaser's claim should be brought, since neither the vendor nor their agent ever received the deposit.
 - Therefore, in the event the sale is completed the stakeholder releases the deposit to the vendor as part payment of the price payable on completion
 - Therefore, if the contract is terminated, the stakeholder pays the deposit to whichever party is entitled to it under the terms of the contract and the general law in the particular circumstances.
- If the stakeholder mistakenly pays the deposit to a payee who was not legally entitled to receive the sum, the stakeholder will incur personal liability to the party who was entitled: *Maloney v Hardy* (1970)
- If the stakeholder is unable to account for the deposit (eg, misappropriation, insolvency) the loss is borne by the party who would have normally received it.
 - The loss will be borne by the vendor if:
 - the purchaser had become entitled to have the K completed; or
 - the deposit had become forfeitable by the vendor by reason of termination for the purchaser's breach.
 - The loss will be borne by the purchaser if:
 - the contract has been rescinded ab initio;
 - justifiably terminated by the purchaser; or
 - terminated by the vendor in circumstances where deposit refundable to purchaser (eg failure of condition precedent to further performance).
- Special situations where purchaser can recover deposit from vendor rather than stakeholder:
 - where the terms of the contract expressly provide that either party may rescind the K, and that the deposit will be refunded, if specified contingencies occur (vendor regarded as warranting that deposit will be refunded): *Minahan v Sahib Dad* (1925)

- where the purchaser has rescinded the contract for fraudulent misrepresentations by the vendor (or agent), the vendor must pay the purchaser such amounts as are required to return the latter to the position before entry into the K: Swindle v Knibb (1929)
- where the deposit has been paid to a stakeholder whom the vendor insisted to be appointed despite the purchaser's unequivocal request for a different stakeholder: Laybutt v Amoco Australia Pty Ltd (1974)
- where, in a sale of land by auction, a deposit is paid to a stakeholder auctioneer, who then defaults: Barrington v Lee [1972]

PAYMENT OF DEPOSIT IS PROTECTED BY AN EQUITABLE LIEN

- A purchaser obtains an equitable lien over the subject matter of a sale, where, pursuant to a valid K, the purchaser pays a deposit or price installment to the vendor (or agent) or at the direction of the vendor: Rose v Watson (1864)
 - Lien does not arise where a deposit is paid to a stakeholder rather than the vendor
- Where such a lien arises, the purchaser is, in equity, a secured creditor of the vendor for the amount paid under the K.
 - Accordingly, if the K is rescinded *ab initio*, or terminated for a reason other than serious breach by the purchaser but the vendor fails to return the deposit and any price installments already paid, the purchaser will become entitled to enforce the security.
 - This is done by obtaining a court order of sale of the property in question.
 - A purchaser's lien arises whether or not the contract for sale was specifically performable: Hewitt v Court (1983)

NON-PAYMENT OR LATE PAYMENT OF DEPOSIT

NON-PAYMENT OR LATE PAYMENT OF THE DEPOSIT

- Non-payment or late payment of the deposit is a breach of an essential term of the K by the purchaser, entitling the vendor to sue to either terminate the contract and sue the purchaser for the deposit and any other damages, or to affirm the contract and seek specific performance of the contract: Brien v Dwyer (1978)

TIMING OF THE PAYMENT

- Standard form contracts for the sale of land require that the deposit be paid 'on or before the making of the K'
- In practice, where parties are following standard conveyancing practices, payment of the deposit will not occur until a day or so after K formation
- Thus, an express term was introduced into the standard form K stating that the purchaser would be deemed to have paid the deposit to the designated deposit holder where the sum had been paid to the vendor, the vendor's agent or the vendor's solicitor for forwarding to the contractually specified deposit holder

LOSS OF THE RIGHT TO TERMINATE FOR FAILURE TO PAY A DEPOSIT PUNCTUALLY

- A vendor's right to terminate a sale for the purchaser's failure to pay a deposit is only lost where there is some conduct by the vendor (or agent) satisfying the general law requirements for waiver of their legal right.
- A vendor may be precluded from terminating the contract if it would be wholly unfair or unconscionable.
- The express terms of the contract may preclude the vendor from terminating the K for the purchaser's lack of punctuality

Waiver of the right to terminate

- A right will be waived upon the operation of: Commonwealth v Verawayen (1990)
 - doctrine of election between alternative inconsistent rights (eg, where one party has the right to rescind *ab initio* or affirm);
 - where a person becomes fully informed of alternative legal rights and then exhibits conduct which unequivocally indicates a final decision (election) to pursue one of the rights and then completely abandon the other, this person will not subsequently be permitted to resile from the choice made and exercise the right elected to be abandoned

- doctrine of estoppel;
 - Vendor may be precluded from exercising a right to terminate for the purchaser's failure to pay the deposit punctually where the vendor exhibited conduct which encouraged the purchaser reasonably to assume that the right of termination would not be exercised; the purchaser was induced by this assumption to take some action that was reasonable in all the circumstances; and the purchaser would be disadvantaged for having taken this reliant action if the vendor were now permitted to exercise the right of termination which the vendor were now permitted to exercise the right of termination which the vendor had earlier indicated the vendor forego.
- doctrine of variation by a later contract.
- In the case of election and estoppel, it is important to remember that the conduct of or knowledge acquired by an agent is attributed to the vendor.

Acceptance of late payment as waiver

- Where the vendor (or agent) accepts late payment of a deposit, the vendor would normally be regarded as having elected to abandon the right to terminate the sale
 - This will usually require that the vendor or agent knew that the deposit had not been paid punctually, and such default generated alternative rights to terminate or affirm the sale.
 - The conduct of the vendor (or agent) in accepting the late payment with knowledge seems likely to be regarded as a manifestation of a clear decision to proceed with the contract instead of terminating it
- Note that there is a distinction between where an agent has the authority to receive a payment, and where the agent has authority to accept late payment in waiver of the right to terminate.

Contractual provision precluding termination after the deposit has been paid

- A term to the effect of the following was considered by Young J in *Josland v Mullaley Properties (1993)* *If any of the deposit is not paid on time or a cheque for the deposit is not honoured on presentation, the vendor can terminate. This right to terminate is lost as soon as the deposit is paid in full.*
- The following was held:
 - If late payment of the deposit is not made directly to the designated depositholder, the clause would nevertheless deem payment to have occurred at the time when the purchaser's tender of the deposit is accepted by the vendor, vendor's agent or vendor's solicitor for forwarding to the deposit holder.
 - When the clause operates to extinguish the right of termination following an estate agent's acceptance of a late payment of the deposit, the clause is permitting the acts of the estate agent to have a legal effect which they would not normally have had
 - There is no positive requirement that the deposit holder or other authorized persons accept receipt of payment

PRE-CONTRACT DEPOSITS

PRINCIPLES

- Sometimes a prospective purchase pays to a vendor, or the vendor's estate agent, a pre-contract (or 'holding') deposit as a demonstration of the purchaser's keen interest in buying the property.
- A pre-contractual deposit paid by a purchaser is held by the depositholder as trustee or agent for the **purchaser**: *Sorrell v Finch [1977]*
- If a pre-contractual deposit is made, it is held by the estate agent for the purchaser until exchange, and on exchange it would become 'the deposit' and as such would be held by the estate agent in accordance with the terms of the K: *Brien v Dwyer [1978]*
 - Purchaser can therefore recall the deposit up until exchange: *Sorrell v Finch [1977]*
- Note that vendor's engagement of an estate agent to find a purchaser for the vendor's property does not give the estate agent either implied actual authority or apparent authority to ask for, or receive, a pre-contractual deposit *on behalf of the vendor*: *Sorrell v Finch [1977]*

Estate agent's role in relation to receiving a pre-contract deposit: Sorrell v Finch [1977]

- An estate agent is not a mere instrument of the vendor, therefore, it is only in very limited circumstances that the acts of the estate agent are attributable to the vendor (eg where estate agent makes representations about condition of property)
- Vendor's engagement of the estate agent does not give the estate agent either implied actual authority or apparent authority to ask for or receive a pre-contractual deposit *on behalf of the vendor*
- When an estate agent receives a pre-contract deposit, then at all times until the contract is formed, the deposit remains the property of the purchaser who can recall it at will.
 - After the contract is made the contract is held by the estate agent according to the terms of contract or on behalf of the vendor if contract silent
- When an estate agent defaults in returning a pre-contract deposit the decision as to whether the agent or purchaser should bear the loss depends on circumstances

Vendor's liability following misappropriation of a pre-contractual deposit

- A vendor will not normally incur liability to indemnify a purchaser for the loss of a pre-contract deposit misappropriated by an estate agent: Sorrell v Finch (1977)
- Two distinct conditions must be satisfied before a vendor incurs liability to indemnify a purchaser for the loss of a pre-contract deposit misappropriated by an estate agent: Sorrell v Finch (1977)
 - Purchaser must have authorized the agent to hold the pre-contract deposit on behalf of the vendor; and
 - The vendor must have given the estate agent actual or apparent authority to receive such a sum on his or her behalf.
- An estate agent will not have received from a vendor either implied actual authority or apparent authority to receive a pre-contract deposit on his or her behalf merely because the agent was employed by the vendor to find a purchaser for the latter's property: Sorrell v Finch (1977)
- NB: One Australian decision where it was suggested that a vendor could be liable for an estate agent's misappropriation of a pre-contract deposit simply because the vendor had earlier given the agent actual authority to receive the sum on his or her behalf: Sorridimi v Cave [1964] Qd R 330

RECOVERY BY THE VENDOR OF AN UNPAID DEPOSIT (FORFEITURE)

RECOVERY WHILE THE CONTRACT IS STILL ON FOOT

- A purchaser's failure to pay the deposit punctually will normally be an essential breach entitling the vendor immediately to terminate the contract
- However, the vendor may elect to keep the contract on foot in the hope that the deposit will be paid
- If the terms of the K make the deposit payable directly to the vendor (rather than a stakeholder) the purchaser's failure to pay the sum punctually will entitle the vendor to sue immediately for the unpaid deposit as an overdue debt: Pacific Commerce Finance v Cleargate (1994)
- Where the terms of the deposit make the deposit payable to a stakeholder, recovery is more difficult. There is no decision on point, but we can draw on the following principles:
 - The only effective legal path to recovery of the deposit is the vendor's commencement of an action for specific performance of the purchaser's promise to make the agreed money payment to the stakeholder: Beswick v Beswick [1968]; Coulls v Bagot (1967)
- By commencing an action to recover the deposit, the vendor will have waived the right to terminate the sale for the purchaser's failure to pay the sum at the time originally promised.

RECOVERY AFTER THE CONTRACT IS TERMINATED

- After termination of the contract for the purchaser's repudiatory breach, the unpaid deposit remains recoverable: Bot v Ritevski [1981]

Actions available for post-termination recovery of a deposit

- There are three bases on which vendors who have terminated a K for the purchaser's breach might claim the amount of an unpaid deposit: Socratous v Koo (1993)
 - as a debt, the obligation to pay which accrued before, and survived, termination of the contract
 - as an element in a claim for damages for the purchaser's breach;

- where a cheque for the deposit has been given and dishonoured, there is an action on that debt.

RELIEF AGAINST FORFEITURE OF THE DEPOSIT

PRINCIPLES

- Under the general law and under the terms of the standard form contract, the vendor has the right to forfeit or appropriate the deposit to the vendor's use following an election to terminate the contract upon the purchaser's default.
- In a rising market, however, the vendor may not suffer any actual loss and in these circumstances the purchaser may seek relief against forfeiture.
- Relief against forfeiture of a deposit may be granted in equity to a purchaser where part of the deposit is not a true deposit but operates as a penalty, in the sense that the sum forfeited is out of all proportion to the damage: Saunders v Leonardi (1976)
 - In determining whether a sum is a penalty or liquidated damages, the circumstances must be taken as a whole and viewed at the time the bargain was made: Coates v Sarich [1964]

Statutory jurisdiction given to Court of Equity under s 55(2A) of *Conveyancing Act 1919*

- A vendor who forfeits a deposit in strict enforcement of his legal rights is not to be deprived of it under s 55(2A) unless it is unjust and inequitable to permit him to retain it: Lucass & Tall v Victoria Securities [1973]

DEPOSIT: CASES

Howe v Smith (1884)

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Brien v Dwyer (1979)

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Facts

- Plaintiff purchaser and defendant vendor exchanged contracts for the sale of land on 27 February 1973
- The document used was the 1972 version of the standard form contract in use in NSW
- The deposit clause relevantly provided that '...the purchaser shall upon the signing of his agreement pay as a deposit to the vendor's agent as stakeholder the sum of \$1600'
- No deposit was paid at the time of exchange of contracts but in March 1973, the estate agent received a cheque for the sum, which was postdated to 1 April 1973 and was the subject of a 'request' from the purchaser solicitor that it not be banked without further instructions
- On 10 May 1973, the estate agent was told that the cheque should not be banked and this was done the following day
- Later the same day, the vendor learned for the first time that the deposit had only just been paid and communicated a decision to terminate the K

Held COA/HC

- Vendor entitled to terminate the contract, although in HC their honours disagreed as to the precise time the deposit was to be paid
- Their Honours unanimously of the view that the promised time for payment of the deposit had been essential, and that the vendor's consequent right of termination for the purchaser's failure to pay the deposit punctually had not been waived by either the vendor's personal inaction for the two and a half months in which he was ignorant of such failure, or by the conduct of the estate agent in tolerating the delay, which could not be attributed to the vendor.
- Non-payment or late payment of the deposit is a breach of an essential term of the K by the purchaser, entitling the vendor to sue to either terminate the contract and sue the purchaser for the deposit and any other damages, or to affirm the contract and seek specific performance of the contract

Sorrell v Finch (1977)

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Facts

- Finch instructed an estate agent, L, to sell his house
- Unknown to Finch, L was an undischarged bankrupt
- Sorrell paid a 10% deposit of \$550 to L, who also received deposits from 5 other prospective purchasers
- L disappeared with the deposit and Sorrell sued Finch for its return

Held HOL

- Sorrell not entitled to sue Finch for the return of the deposit
- An estate agent is not a mere instrument of the vendor, an estate agent is an independent person who is engaged to find an introduce a willing purchaser and is usually to be remunerated on a commission basis. An estate agent's actions are not normally attributable to the vendor
- A vendor's engagement of an estate agent to find a purchaser for the vendor's property does not give the estate agent either implied actual authority or apparent authority to ask for, or receive, a pre-contractual deposit *on behalf of the vendor*
- When an estate agent receives a pre-contractual deposit, then the deposit remains the property of the purchaser who can recall it at will, until the contract is formed