



Article: Recovery of deposits paid in conveyancing transactions

Deposits are paid as a guarantee or security for performance of the contract and as part of the purchase price. It is very firmly established that unless the contract states otherwise, the purchaser forfeits the deposit if it fails to complete in accordance with the contract; no express forfeiture clause is required. Deposits of 10% of the purchase price have, by custom, become normal in most conveyancing transactions. But what happens if a deposit is provided for but not paid or is only partly paid? An I.O.U. given for the deposit is evidence that can be used by the vendor in a claim for payment. If part of a deposit is paid, however, it would appear that the vendor cannot sue for the balance (*Lowe v Hope*). Nonetheless, subsequent cases (*Buckland v Farmar* and *Johnson v Agnew*), albeit not quite on point, suggest that this is wrong and that any unpaid deposit can be recovered as damages.

The Court has a wide and general discretion under Section 49 Law of Property Act 1925 to order the return of a deposit, and should look to achieve the fairest course between the parties. Matters to be taken into consideration include the conduct of the parties (especially that of the purchaser), the size of the deposit and the seriousness of the matters in question; there is no need to show the vendor has misconducted itself. For example:

- *Schindler v Pigault*: held that a vendor that had not given access to a sub-purchaser could not rely upon the purchaser's failure to complete by the agreed date as a defence to the purchaser's rescission claim. Consequently the return of the deposit was just and equitable.
- *Universal Corp v Five Ways Properties Ltd*: held that the intervention of circumstances beyond the purchaser's control (i.e. a change in Nigerian exchange control law) meant that the matter should be allowed to go to trial.
- *Maktoum v South Lodge Flats Ltd*: the deposit was ordered to be returned as apparently it was still possible to re-sell the property at a profit.
- *Dimsdale Developments v De Haan*: the Court reluctantly ordered the return of a deposit where the vendor had suffered damage but resold at a greater profit. A deduction was made equivalent to the vendor's damages.
- *Tennaro Ltd v Majorarch Ltd*: deposits were returned where the value of two flats had risen and re-sale without loss was possible. A third deposit remained forfeit as the failure to complete was due to lack of funds and the value of the flat had fallen.

It should be remembered that the Court will not always take such a generous view and cases exist which demonstrate both a stricter and narrower approach, such as in *Omar v El-Wakil* where the Court took as its starting point that the deposit should not normally be repaid (even though here the vendor was also at fault). The Court referred to the importance of certainty "attaching to the consequences of paying a deposit". It will be difficult to recover a deposit in a commercial transaction between businesses with access to professional advice.

It is sometimes said that the Court also has a discretion in equity where forfeiture is penal and it is unfair for the vendor to retain the deposit. The scope of the Court's jurisdiction is uncertain and has varied between seeking certainty (i.e. against the return of a deposit) and seeking justice in the particular case. The present trend appears to be in favour of certainty - bad news for purchasers - but Lord Hoffman (in *Union Eagle Ltd v Golden Achievement Ltd*) left open the possibility that the law of restitution and estoppel might develop in such a way as to prevent the unjust enrichment of vendors.

A couple of other points that may be worth noting are that since deposits are not genuine pre-estimates of loss likely to be incurred by breach, they are an exception to the general rule that penalties are unlawful. However, a 25% deposit has been held to be unlawful and ordered to be repaid (the Court refused to allow the retention of a reasonable sum such as 10%). Further, the Court's jurisdiction under Section 49 cannot be ousted by contract. Damages for breach of contract can be claimed even if a deposit is returned and the Court has discretion to award interest on a returned deposit. In addition, a defaulting purchaser can recover both (1) instalments of the purchase price that are not a deposit, and (2) a deposit paid in the absence of an executed contract.

Generally therefore, as with many aspects of conveyancing, it is a case of caveat emptor, save perhaps where no fault attaches to the purchaser or where the value of the subject property has risen.

Alexander Bastin

Did you see..... ? Recent cases you may have missed

Real Property

Trusts; Proprietary Estoppel; Detrimental Reliance

(1) Martin Powell & (2) Janet Powell v Betty Benney [2007] EWCA Civ 1283

Mr. and Mrs Powell appealed against the decision that they were not entitled to a declaration that the Respondent held two properties on trust for them, which had previously belonged to her late cousin (H) who had died intestate. Mr. and Mrs Powell had befriended H some time before and following the death of his mother assisted with his day-to-day affairs. P indicated on several occasions that he was going to leave his two properties to Mr. and Mrs Powell and even recorded his in writing, but it was ineffective as a will. Mr. and Mrs Powell argued that either by constructive trust or proprietary estoppel principles, the properties were their's beneficially, but the judge rejected this contention, holding that there was an insufficient causal link between H's promise and any detriment suffered by Mr. and Mrs Powell. He awarded them £20,000 for sums expended plus a sum to reflect their disappointment. Mr. and Mrs Powell appealed on the basis that because H had intended the properties to be left to them and had made a clear promise to that effect, the case fell within the bargain category of proprietary estoppel cases.

Held: The appeal was dismissed. Although H had promised to leave the properties to Mr. and Mrs Powell, he had not required them to do the detrimental acts they had relied on, such as assisting H and tidying up the properties. These acts had been done out of friendship and sympathy rather than reliance, and Mr. and Mrs Powell had been offered the use of the properties and had accepted, which involved them incurring some expenditure, but there was no bargain or other consensual relationship that brought the case within the bargain category, and as it was of the non-bargain variety there was no reason for the judge to have awarded damages on the expectation measure.

Planning

Damage to Property; Tree Preservation Order; Nuisance, Town and Country Planning Act 1990

Perrin & Another v Northampton Borough Council [2007] EWCA Civ 1353

The Local Authority appealed against the decision of the judge that when determining whether to cut down, uproot, top or lop a tree subject to a Tree Preservation Order ("TPO") for the prevention or abatement of a nuisance, it was irrelevant for the purposes of s.198(6)(b) of the Town and Country Planning Act 1990 that there were other possible works that could abate or prevent the same nuisance. The tree at issue was a large oak tree that had caused damage to Mr. Perrin's land and he had sought a declaration that he was entitled to fell the tree because it was 'necessary for the prevention or abatement of a nuisance'.

Held: The appeal was allowed. The underlying purpose of the legislation was to preserve trees that were the subject of a TPO and it would be counterintuitive if, when considering the minimum necessary to prevent or abate a nuisance caused by such a tree, steps that might be taken other than to the tree itself had to be ignored. Such a restrictive approach was not required either expressly or impliedly by the legislation.

Landlord and Tenant

Common Parts; Managers; Power to impose reasonable rules. Reasonableness.

Shah and Others v Colvia Management Company Ltd [2007] All ER (D) 217

The Claimant leaseholder of a unit in an industrial park sought an injunction to prevent the Management Company from introducing an overnight parking scheme to cover the cost of business rates for a communal car park, pursuant to their right to prescribe reasonable rules and regulations.

Held: The scheme was not reasonable as charges were levied without consideration of the market price and sought to recover costs referable to the whole estate from one particular group of tenants (those users of car park who used it overnight).

Case summaries Alice Marshment and Andy Creer

The members of the Hardwicke Property Team have specialised skills and experience in all aspects of the law relating to Real Property, Landlord & Tenant, Housing and other property-related subjects.

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