LxMac McCOY, G.J. The recoverability of unpaid deposits.

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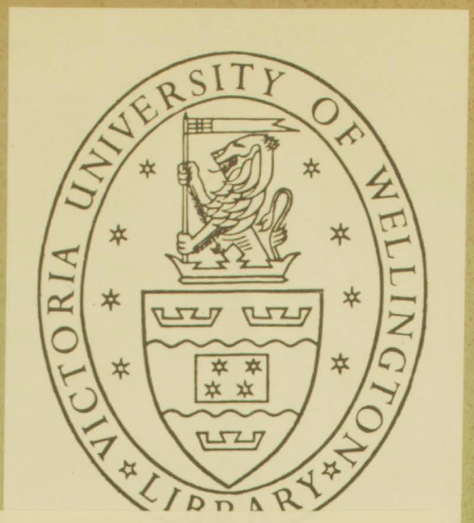

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THE RECOVERABILITY OF UNPAID DEPOSITS

LEGAL WRITING REQUIREMENT FOR THE LL.B (HONS) DEGREE

VICTORIA UNIVERSITY OF WELLINGTON,

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The Recoverability of Unpaid Deposits in Contracts

The Problem Stated; Vendor: "I am heinously unprovided" (Shakespeare)

In a typical vendor and purchaser relationship, the vendor promises to convey a good title in consideration for the sale price, which includes a deposit, usually ten per centum of the sale price. The consolidated law on the payment of deposits is reasonably clear. However, there is a conflict of authority in the situation where a purchaser pays a deposit by negotiable instrument which is subsequently dishonoured, or more fundamentally when the prescribed deposit payment is not made at all. The extent of the vulnerability of the non-defaulting vendor to recover the unpaid deposit has, surprisingly, been judicially examined in only a few reported cases.

The object of this paper is to attempt to synthesize the case law as a distortion or legitimate development of contractual principles, and to suggest a rationalisation of the law.

Johnson v. Jones[1]

This is the most recent decision to add to the confusion. The appellant agreed to purchase from the respondent a property, conditional upon raising mortgage finance. The learned Magistrate and McMullin J. respectively held that the appellant was in breach of her contract, presumably for failure to make reasonable efforts to secure finance, although the case is not reported on this point.

The appellant only paid $1,000 in respect of the $2,000 deposit required by the contract. She explained to the vendor's agent that

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1. [1972] NZLR 313 In Monigatti v. Minchin 32 MCR 67 Luxford S.M. held that in law an unpaid deposit was recoverable.

it would be necessary to sell some shares to make up the outstanding $1,000, to which the agent replied that this was "all right". Upon repudiation the vendor claimed the $1,000 balance of deposit. In a considered judgment, Mr Mullin J. found for the repudiating purchaser, holding that if a vendor, having stipulated for the payment of a deposit which would have been forfeited had it been paid, failed to collect it before he rescinds or accepts the purchaser's rescission, he cannot subsequently sue for the deposit.

McMullin J.'s decision is based on three reasons for preventing recovery:-

(a) The parties had decided for themselves by their choice of words that, upon default the vendor, "may rescind this contract of sale and thereupon all moneys theretofore[2] paid shall be forfeited to the vendor as liquidated damages".[3]

(b) "The very nature of a deposit is such that before it can be forfeited it must first be paid".

(c) Even rescission de futuro does not "entitle the respondent to sue for the recovery and forfeiture of something which he could have insisted upon being in his hands at the time he rescinded or elected to accept the purchaser's rescission"[4].

Each reason is certainly worthy of individual analysis. With respect it is submitted that McMullin J.'s interpretation of the argument clause overlooks what in fact the parties did agree. There was

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2. At 317 138 the supposedly vital word "theretofore" is emphasized but is incorrectly written as "therefore" (sic)
3. P317 110
4. P318 18

not a bland agreement that "all moneys theretofore paid" only were to be forfeited. This, by itself, is misleading, it is only an example of one of the vendor's rights. The parties specifically prefixed that option as being "without prejudice to (the vendor's) other remedies".[5] There is no limitation to the generality of rights accruing upon default by the vendor. The contractual right to bring an action to recover the unpaid deposit, is neither extinguished nor modified by the intention of the parties as manifested in the contract. No ~~The~~ remedy is circumscribed. It is submitted that the vendor is not precluded from maintaining an action for the unpaid deposit by the terms of the contract, contrary to which McMullin J. decided; but that it is merely one instance of a remedy enhanced by the unlimited nature of the rights available contractually and encompassed within them.

The second reason advanced by McMullin J. is that the theoretical nature and function of a deposit is such that it cannot be forfeited unless it is paid. This reason naturally, determines the lifespan of any action for an unpaid deposit. Logically stemming from McMullin J.'s reason is the proposition that, should a purchaser contractually promise to pay a deposit, as part of the total consideration for the vendor's mutual promise, but does not in fact do so, he is freed from any obligation in that respect. The answer to this issue, it is submitted, lies in the evolutionary nature of the deposit. Admittedly the vendor could not recover the full purchase price and no authority is needed for stating that the forfeiture of instalments amounts to a penalty. But a deposit is different. It has been recognised that a deposit is conceptually distinct from other payments ever since the reformative doctrine propounded in Howe v. Smith[6].

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5. p315, line 1
6. (1884) 27 CL.D. 89 approved in Sprague v. Booth (1909) A.C. 576, 580

> "A deposit is not merely a prepayment of the purchase money, it is also an earnest to bind the bargain, a guarantee for the performance of the contract creating by the fear of its forfeiture a motive in the payer to perform the rest of the contract".7

All three members of the Court of Appeal attributed to the term "deposit" a clear meaning that upon repudiation it is to be forfeited. However, they were confined to the facts before them where the deposit was in fact paid. Why should a restrictive interpretation be superimposed on the definition of "deposit" as to exclude a promise to pay a deposit? McMullin J. reasons that "there can be no forfeiture or fear of it until the deposit has first been paid".[8] He reasons that you cannot lose something you have not given. It is submitted this premise is inaccurate. A deposit should, because of its special, intrinsic nature as a compensatory mechanism, be automatically forfeited to the vendor on default whether paid or payable, because it serves as

> "A guarantee that the purchaser means business' and if there is a case in which a deposit is rightly and properly forfeited it is ... when a man enters into a contract to buy real property without taking the trouble to consider whether he can pay for it or not"9

Further, in the typical vendor/purchaser contract, it is a promised right which has conditionally accrued, subject only to the vendor's ability to execute his consideration, (default obviates the need to convey, of course), and therefore the right <u>has</u> been given and may be lost accordingly.

McMullin J. states that, "it can hardly be said to be a deposit until it has been deposited".[10] Why does the identity of a deposit only crystallize when it is paid? The deposit, as a right, does not

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6. continued ..
and applied in New Zealand, see, <u>Martin</u> v. <u>Finch</u> (1923) NZLR 570
7. At 101.
8. p318, line 28

exist in suspended animation. Upon the signing of the contract, it is created as a security for the vendor. He has the right to retain or obtain it. Presumably a vendor can show that he is entitled to an unpaid deposit by showing that the purchaser agreed to that. If the contract vests property of the deposit and (eventually) possession then, subject to an ability to convey, failure to actually pay, upon rescission de futuro is not to the vendor's detriment; the right having already accrued. Are these conditions satisfied in Johnson?

It is submitted that the vendor's security lies in general property of the deposit, evidenced by the contract, which entitles him ultimately to actual possession. It is a credit calculation. The promise to pay a deposit is a guarantee that the contract will be performed.

The deposit is enforceable if supported by executed consideration. Usually payment is execution. However, there is a recognized exception to this principle. It is stated in Ruddenklau v. Charlesworth [11] by Sir John Salmond:-

> "In an executory contract ... in which by the express terms of the contract the purchase money or any part thereof is made payable on a fixed day, not being the agreed day for the completion of the contract by conveyance (i)n all such cases the purchase money or such part thereof becomes on the day so fixed for its payment a debt immediately recoverable by the vendor irrespective of the question whether a conveyance has been executed and notwithstanding the fact that the purchaser may have repudiated the contract".12

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9. Soper v. Arnold (1889) 14 App Cas 429, 435 per Lord Macnaghten
10. p.318, line 29
11. (1925) NZLR 161, 164-165, upheld an appeal (1925) NZLR 171 and quoted with approval in McDonald v. Dennys Laschelles (1933) 48 C.L.R. 457, 476
12. See Reynolds v. Fury (1921) V.L.R. 1, 17, Ruwald v. Halling 27 S.R. (NSW) 334

It is respectfully submitted that this is too wide. The recoverable payments could include instalments, but it is contended that the principle that the deposit is a debt "irrespective of the question of whether a conveyance has been executed" is correct. The vendor bargains for the deposit, it is given by the purchaser as evidence of good faith. Of course when the deposit is promised to the vendor he assumes an obligation not to sell the land to any other person. He suffers a detriment in being restrained in his dealings. The payment of the deposit is not conditional upon completion of the contract. That follows from the nature of a deposit as a guarantee. But also the agreement to pay the deposit is given in consideration of the conrtract not in consideration for a conveyance. As the vendor agreed to sell and would have but for the purchaser's default the consideration is fully executed, and the right is vested before rescission, as it is created contemporaneously upon the formation of the contract. Forfeiture of the deposit means that the vendor does not return it to the purchaser, it does not mean that the purchaser must surrender it for he has only a contingent interest in it fructifying only upon the vendor's default. The vendor has property. In Stockloser v. Johnson[13] in the context of a claim by a purchaser that the forfeiture of his deposit amounted to a penalty, Denning, L.J. said:-

> "In the present case, however, the seller is not seeking to exact a penalty. He only wants to keep money which already belongs to him".

It is submitted this is exactly the case but Denning L.J. continues:-

> "The money was handed to him in part payment of the purchase price and, as soon as it was paid, it belonged to him absolutely".

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13. (1954) 128 476 488-489

McCOY, G.J. The recoverability of unpaid deposits.

Why must it first be paid to create a right in the vendor? The vendor is not seeking restitution. His claim is to a right which he was given, based upon executed consideration. In Johnson the purchaser does not wish to pursue her contract but seek relief from the consequences of her default. Ostensibly, McMullin J. discusses this issue. He adopts a statement from the judgment of Dixon J. in McDonald v. Dennys Lascelles Ltd.[14] Unfortunately the learned judge incorrectly cites it. Upon rescission in Australia and New Zealand:[15]

> "Both parties are merely discharged from the further performance of the contract but rights are not divested or discharged which have already been conditionally (sic) acquired".

Although not cited in Johnson, Dixon J. continued:-

> "Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected".

Dixon J. actually stated that, "rights are not divested or discharged which have already been unconditionally acquired". From this error, between conditionally acquired and unconditionally acquired rights McMullin J. adduces that the vendor is not entitled:-

> "To sue for the recovery and forfeiture of something which he could have insisted upon being in his hands at the time when he rescinded or elected to accept the purchaser's rescission".16

He clearly states that possession is essential. It is respectfully submitted it is irrelevant. Possession is only an additional security

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14. (1933) 48 C.L.R. 457, 477

15. White v. Ross /1960/ NZLR 247

16. P318, Line 9

The vendor has property. Possession need not be coextensive with property. A pledgee has possession without property; a vendor may have property without possession. The nature of the deposit as a security is that it is owned or owed subject to the vendor's unilateral default. Non-performance of the payment of a security against non-performance does not affect the right to that payment as it is bargained for and by making the contract it vests property, enforceable as a debt, irrespective of conveyance. It has legal personality as a debt. By his default the purchaser loses the right to restitution and incurs a contractual liability.

McMullin J. attempts to mollify the plight of the vendor by stating:-

> "In short, a vendor who fails to get in the amount of the deposit loses the benefit of a possible windfall".17

The vendor would argue that he would never have entered into the contract without the deposit being paid or eventually payable. In Johnson the appellant agreed to pay the remainder of the deposit to the land agent. She asked for a concession and was given one; this has been held fatal to the vendor. The vendor cannot plead estoppel as it does not give a cause of action. The vendor may have an action against the agent. An agent has no implied authority to sell on extended terms[18] or to give credit instead of obtaining an immediate cash payment.[19]

In Johnson it is difficult to reconcile the parties' intentions and the result. The case is, it is submitted, an example of the very evil Horridge J. had in mind in Dewar v. Mintoft[20] when he said:-

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17. p317, line 54
18. Boyd v. O'Connor (1923) VLR 608
19. Breese v. Lindsay (1882) 8 V.L.R. (E) 98
20. [1912] 2KB 373, 387

"The defendant could not put himself in a better position by refusing to pay the deposit than if the deposit had in fact been paid".

A Direct Conflict of Authority

In Johnson McMullin J. prefixes his reasoning by mentioning a direct conflict of authority. He refers to Dewar v. Mintoft in which Horridge J. very summarily allowed the recovery of an unpaid deposit and to Lowe v. Hope[21] in which PennycuickJ., in refusing to follow Dewar denies this possibility. Unfortunately Farrant v. Leburn[22] decided in the Supreme Court of Western Australia and in which Lowe was rejected was not cited in Johnson. Very recently in Brien v. Dwyer[23] the Court of Appeal of New South Wales in an obiter statement approved Dewar. In none of these authorities was the early English case, decided by a court comprising Lord Campbell C.J., Coleridge, Erle and Crompton J.J. of Ockenden v. Henly[24] referred to or considered.

In Ockenden a condition of sale was that the successful bidder should "forthwith pay into the hands of the auctioneer a deposit 20 per cent on the purchase money, and sign the agreement" and "If the purchaser shall fail to comply with the conditions, the deposit shall be actually forfeited to the vendor".

The reason for this particular type of wording was to escape the then possibility that on default the vendor could not forfeit the deposit as there was no specific provision to this effect. The defendant purchaser did not pay the deposit or complete the purchase.

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21. [1969] 3 All ER 605
22. [1970] W.A.R. 179
23. Unreported 373/74 16 December 1976 N.S.W. Court of Appeal
24. (1858) 27 LJQB 361

It was held that the vendor could recover, in addition to the deposit, only so much of the difference between the two prices and of the expenses of the resale, as the deposit did not recover. Lord Campbell C.J. states that, "the seller having obtained a right to the forfeited deposit" could claim it. He also states that, "a pecuniary deposit upon a purchase is to be considered as a payment in part of the purchase money and not a mere pledge". One hundred and eleven years later PennycuickJ. in Lowe characterised the deposit as a "contractual pledge".[25] It is submitted that the deposit is not a contractual pledge, it is a contractual entity paid for by the vendor's promise. By stating that the vendor had obtained "a right" to the unpaid deposit, the Court must necessarily have seen this "right" as surviving repudiation and therefore vested before it. The case is of limited importance in that the judgment is very brief and unclear, but it is the first case historically concerned with unpaid deposits.

In Dewar v. Mintoft[20] Horridge J. in three lines out of a lengthy judgment, held that a defendant should not be able to put himself in a better position by refusing to pay a deposit than if the deposit had in fact been paid, when it would have been forfeited. This case has been swept under the mat in England (Lowe) and New Zealand (Johnson) "contrary to principle"[26]. It contains no reference to principles of rescission and is more a statement that a purchaser should not "profit" from his default than a reasoned decision. However, it is submitted the result is correct. It stresses the inviolable nature of contracts and states that it would be unjust and oppressive for the purchaser to obtain more than

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25. p608 E

26. p609 C

he could have obtained had the contract been performed.

Lowe v. Hope[21] was followed by McMullin J. in Johnson. In this case the defendant paid only a small part of the deposit and failed to complete the purchase. PennycuickJ. held that once the vendor had rescinded the contract there was no outstanding obligation of the purchase in respect of which the vendor could be entitled to be protected by a pledge.

> "The vendor having elected to bring the contract to an end by rescission, is not entitled to insist on the performance of the contract in relation to the deposit. This is admittedly so, insofar as the deposit bears the character of part of the unpaid purchase money".27

The initial criticism is that rescission does not affect the right of the vendor. Secondly it is a deceptive characterisation to label the deposit as "unpaid purchase money". The deposit must be distinguished from instalments.

PennycuickJ. continues:-

> "In the present case the vendor has elected for rescission and he is not entitled, as a preliminary (sic: to) the rescission, to obtain an order for payment which he could only obtain if he were insisting on performance of the contract".

It is respectfully submitted that the vendor need not perform the additional function of requiring an order for payment as the right to payment clearly exists and that it is not one he can only obtain by performing the contract.[28]

In 5 New Zealand University Law Review 292, 293 Mr B. Coote rationalises the conflict between Dewar and Lowe for historical reasons. He would appear to accept what Swift J. explained in Harold Wood Brick Co. v. Ferris[29]:-

> "It seems to me that ... it was not appropriate ... in the Chancery Division, to put into one order an order rescinding the contract and an order providing for the assessment of damages for breach of contract".

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27. p608D
28. p609E
29. /1935/ 1K.B. 613, 615

Dewar was decided in the Kings Bench, while Lowe was a Chancery case. Coote states:-

> "The idea that discharge for breach terminates a contract as to the future only, and leaves intact rights accrued up to the point of termination, is a common law invention and one which it would seem, some Chancery lawyers at least have never accepted".

A further expression of this reticence is demonstrated in Horsler v. Zorro[30] where Megarry J. says, in England:-

> "For long the law students' adage has been: 'You can't both rescind and claim damages'".

This is usually incorrect in New Zealand: White v. Ross.[15]

Recently in Hunt v. Hyde[31] Casey J. held that "rescission" may be ab initio or de futuro. He decided that a clause which enables a vendor to rescind whereupon all moneys "theretofore paid" to the vendor shall be forfeited, does not limit the damages which may be claimed against a party who breaks off the contract altogether. The clause is identical with that in Johnson when an opposite conclusion was reached.

It is submitted that in Lowe, Pennycuick J. applied principles of rescission not acceptable in New Zealand. Pennycuick J. cites with approval Williams on Vendor and Purchaser (4th edn) at p1006 where the effects of rescission ab initio are outlined. In 91 Law Quarterly Review 337 Mr M. Albeny Q.C. in an article titled, "Mr Cyprian William's Great Heresy" states that Mr William did not understand the fundamental principle of the law of contract. Assuming that Pennycuick J. is incorrect for present purposes, what obligations remain payable if rescission is de futuro? It has been in three cases both decided by Full Courts, i.e. Reynolds v. Fury[12]

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30. [1975] 1 All E.R. 584, 595

31. [1976] 2 NZLR 453. See also Kinleyside v. Irwin [1961] W.A.R. 169,

Ruwald v. Halling[12] and Ruddenclau v. Charlesworth[11] that although the vendor had not executed a conveyance, he was entitled to sue before completion inasmuch as the contract fixed a definite date for the payment and did not postpone it until completion or until after completion. As long as the payment of the deposit is not made a condition concurrent with a conveyance the vendor:-

> "can recover as a debt all instalments of purchase money payable prior to the due date of the balance of the purchase money".

The deposit is paid as part of the purchase price. It is payable because the vendor assumes potential positive obligations towards the vendor. After the exchange of contracts the purchaser requires an equitable interest in the land. It is submitted that the payment of the deposit is consideration for this equitable right. The promise to pay having been given, it constrains the vendor as he cannot sell the land to another person. If the vendor cannot convey then the purchaser may recover damages and his deposit, Warring v. Brentnall[32].

In Farrant v. Leburn Wickham J. held that an unpaid deposit was recoverable as a debt after rescission de futuro. The learned judge refused to follow Lowe. He rejects that decision, and consequently the reason which has resurfaced in Horsler, as relying on rescission ab initio which is not the law in Australia or New Zealand, unless it is the irresistible inference. Because of the fundamental misapprehension in Lowe Wickham J. declares himself free to look at the matter anon. He restates the McDonald passage from Dixon J.'s

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Coates v. Sarich /1964/ W.A.R.2 Two rare examples where the court has held rescission to be ab initio on the contract are: Pitt v. Curotta (1931) 31 S.R. (NSW) 477 and Jeeves Ltd v. Rogers (1936) 36 SR (NSW) 430 cf Smith v. Fennell /1931/ GLR 161

32. 1975 2 NZLR 401

judgment and examines its criteria:-

> "The question here is whether the promise to pay by the purchaser has given rise to an unconditional debt as distinct from a claim for unliquidated damages for breach of an executory contract".33

The answer is seen in the nature of the deposit. It masquerades perhaps as part of the purchase price but it differs as it is not conditional upon completion and is the absolute property of the seller subject to its return if the vendor cannot make good title.

> The plaintiff's right to the balance of the deposit in this sense was not only vested prior to rescission but it was vested upon an executed consideration and can be in debt or upon an indebitatus assumpsit". Turner v. Bladin (1951) 82 C.L.R. 463, 474.34

The action for recovery of a deposit is an action at law based on indebitatus assumpsit: Zsadony v. Pizer.[35] There is no question of total failure of consideration before rescission as the plaintiff's right to the balance was vested before rescission.

Very recently in Brien v. Dwyer[23] in the New South Wales Court of Appeal Hutley J.A. said obiter, in a statement in which Moffitt P. and Samuels J.A. agreed,

> "If Dewar v. Mintoft is rightly decided, which I believe it is, the vendor can sue for the deposit even after rescinding. However, Pennywick J. refused to follow it in Lowe v. Hope and if this is right the vendor could only recover anything by proof of the amount of his damages - a most material detriment".

The law on the unpaid deposit is quite unclear. Not since 1858 has a Full Court been presented with the issue. Because of the unpredictability and uncertainty at the moment, it can only be hoped that some indefatigable litigant will eventually take this issue to our own Court of Appeal to be definitively resolved.

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33. p183, line 21
34. p184, line 16
35. (1955) V.L.R. 496, 502

Is Payment of a Deposit a Condition Precedent to the Formation of a Contract?

This issue was never considered in Johnson or Lowe. The Courts always assumed there was a contract on which rights had been constructed. However, in Myton v. Schwab-Morris[36] contracts were exchanged, and the buyer's cheque for the deposit was subsequently dishonoured. The vendors maintained that the payment of the deposit was a condition precedent. If this was correct contractual relations were precluded from being established. Goulding J. held that:

> "The vendor in the normal case never intends to be bound by the contract without having the deposit".

It is submitted this is incorrect. A deposit is not necessary to the validity of a contract of sale and a vendor cannot require a deposit in the absence of any stipulation, Perry v. Suffields Ltd[37]. In Stembridge v. Morrison[38] in the New Zealand Court of Appeal, Stout C.J. and Sim J. believed:-

> "that the payment of the deposit is a condition precedent to the purchaser being entitled to obtain a contract".39

Woodhouse J. in Watson v. Healy Lands Ltd[40] said in the contract of a dispute over the payment of a deposit:-

> "In my opinion it is clear ... the deposit ... is a condition precedent to the purchaser being entitled to any contract at all".

This is inconsistent with an earlier statement[41] that:-

> "Even if the contract had been rescinded before any payment by the plaintiff, I think it likely that the defendant here would still have been entitled to sue directly for the unpaid deposit".

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36. (1974) 1 All E.R. 326
37. (1916) 2 C.L. 187, 191
38. 16 G.L.R. 210
39. At 212
40. [1965] NZLR 511, 517
41. At 516

The situation where a deposit is deferred by consent is the same as that when no deposit is made and it could not be said in the earlier case there is no contract. In Brien Huntley J.A. speaking for the Court of Appeal said:-

> "If there is an exchange of counterparts without the payment of a deposit, a contract comes into existence. I cannot accept as sound that portion of the judgement of Goulding J. in Myton v. Schwab-Morris in which His Lordship held that the payment of a deposit was a condition precedent to the contract coming into existence".42

To create a condition precedent it is highly desirable that express words should be used. It is concluded that a deposit is not usually a condition precedent to the existence of a contract, although the parties are always free to contract for this. It follows that a deposit need not be paid on the signing of the contract, Chard v. Willett.[43]

The Recovery of an Unpaid Deposit - a Penalty?

In the Law of Restitution Goff and Jones state at 349:-

> "Equity has always refused to countenance the exaction of penalties not yet paid".

The defaulting purchaser could argue that the recovery of an unpaid deposit is tantamount to a penalty. But Goff and Jones qualify their initial statement by stating that:-

> "Relief should in any event be refused to a claimant who has wilfully broken his contract".44

It is difficult to see how a deposit can become a penalty because a vendor has not collected it earlier or because he graciously gave the purchaser a concession before he broke his contract. It is

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42. At 4
43. (1933) St.RQd 182 See also, Hartl v. Gibbons /1974/ Qd. R.9, Re Lockwood's Caveat /1973/ Qd. R. 373 What is a deposit? In Bramich v. Patmore (1920) 17 Tas L.R. 57 a "down payment"

not unconscionible to make a profit even out of default.[45] It is submitted that the unpaid deposit could only be a penalty if it was of such proportion as to be unfair and oppressive. In Codot Developments Limited v. Potter & Cherry [46] Wild C.J., adopting the view of the majority in Stockloser held that a paid deposit of $10,000 in a contract price of $20,000 was a penalty. The reasonable basis is that expressed by Lord Hailsham C.C. delivering the advice of the Privy Council in Lingi Plantations Ltd v. Jagatheesan:-[47]

> "There is nothing unusual or extortionate in a 10% deposit on a contract for the sale of land, and if the sale price is over $3,000,000 the deposit will be over $300,000".

In general, unless the unpaid deposit was wielded oppressively because of its sheer size in relation to the contract price it is contended it will not amount to a penalty.

The Position of Negotiable Instruments and IOUs

In Johnson McMullin J. mentions Hodgens v. Keon[48] and Hinton v. Sparkes[49] as cases where a claim for an unpaid deposit had been sustained. In Hinton, instead of depositing the £50 deposit, the

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was said to be a deposit. In Bradley Bros (Oshawa) Ltd v. A to Z Rental Canada et al 32 D.L.R. (3d) 521 a "down payment" was held not to be a deposit as was an "initial payment" in Galbraith v. Mitchenall Estates Ltd (1965) 2 Q.B. 473. See also Tims v. J. & L. Trembath 8 M.C.R. 153.

44. At 349

45. See Windsor Securities Ltd v. Loneldal Ltd and Lester, The Times, 10 September 1975 p10 where Counsel urged that the vendors were to be congratulated rather than consoled regarding the effects of his client's breach! In Vernon v. Godfrey (unreported A 1762/74 11 September 1975 Auckland S.C. Coates J.) the learned judge held the purchaser liable for an unpaid deposit of $7,000 in a total contract price of $13,400. It is submitted the unpaid deposit amounted to a penalty in this case.

46. (unreported 23 November 1976 A 186/76 Wellington S.C., Wild C.J.)

47. (unreported 7 December 1971, Privy Council Appeal No. 22 of 1970 Lord Hailsham L.C., Lord Hodson, Lord Cross of Chelsea)

48. [1894] 2 I.R. 657

49. (1868) L.R. 3 C.P. 161

purchaser gave an IOU for the amount. He promised to pay the money the next day. In argument it was put that, "the plaintiff therefore, was clearly entitled to recover the sum independently of the agreement". This was accepted. Bovill C.J. said:-[50]

> "Treating the IOU as money, the deposit was in the hands of the vendor. Assuming that to be the state of things could the purchaser have recovered back the £50? Clearly not".

Willes J. the other judge is more precise.[51]

> "The only question is, whether the vendor is to be in any worse position because the deposit was not paid down at the time. I cannot see why the rights of the vendor should be affected by the purchaser's having committed two breaches of contract instead of one. All doubt, however, is removed by the giving of the IOU. If the money had been paid, the purchaser clearly could not have recovered it back".

The IOU is treated as a further acknowledgment of the purchaser's pre-existing susceptibility for the deposit. The court sees the right as surviving repudiation. The question is whether the IOU provides a further ground of liability or merely compounds the action for a debt. In Hodgens the Court of Exchequer, affirmed by the Irish Court of Appeal, held that an action lay at the suit of the auctioneer against the purchase for the amount of the IOU for a deposit. Palles C.B. said:-

> "On the other hand, where the agreement (to accept the IOU) is without such consent (from the vendor) there can be no extinguishment of the obligation to the vendor to pay the deposit as provided by the conditions".52

McMullin J. concludes in Johnson that "the IOU of itself represented an undertaking by the purchaser to pay the amount for which it was given and so constituted a separate head of liability between the auctioneer and the purchaser".53

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50. At 165
51. At 166
52. At 660
53. p318 line 23

A promisory note of acknowledgment of debt gives an independent cause of action; as Alderson B. said in Porter v. Cooper[54].

> "An admission of a certain sum being due in respect of a demand for which an action would lie, is evidence sufficient to support a court on an action stated".

On this basis, the purchasers' statement in Johnson to the effect that she intended to pay the remaining $1,000 after she had sold some shares, would give a good cause of action.

In Pollway Ltd v. Abdullah[55] the English Court of Appeal recently held that an agent (auctioneer) had a valid claim against the defendant on a dishonoured cheque against the defendant for the "very short reason ... they were never the holders of the cheque and cannot sue on it". It was also said:-

> "It is true that the auctioneers by reason of condition 3 received the deposit as agents for the vendors and are accountable to them for its proceeds. That accounting is a matter between the vendors and the auctioneers".

The purchaser was under an obligation to honour the cheque by virtue of the contract between him as the drawer of the cheque and the auctioneer as the named payee. The vendors consideration was the ability to complete the sale, if necessary. The vendor's right to rescind and to claim damages was not disputed. Roskill L.J. speaking for the Court of Appeal said:-

> "I am unable to follow on what principle of law the vendor's subsequent rescission (of the contract with the purchaser) can operate to divest the auctioneers of their already accrued cause of action".

Presumably the vendor would have had this right if the cheque was made out to him as payee. Roskill L.J. concluded:-

> "For my part I am not prepared to accept that in a case such as the present an agent who receives a cheque made payable to himself in the course of a transaction effected on behalf of his principal obtains no enforceable right against the drawer of the cheque".

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54. 1 C.M. & R. 387, 395

55. /1974/ 2 All E.R. 381, 383

This, it is submitted is the correct position. Is there any difference between a dishonoured cheque and the failure to pay at all? When a cheque is accepted in payment of a debt, it operates to extinguish the debt, subject to the condition that if upon due presentation the cheque is not paid the original debt revives just as if the cheque had never been given; Charles v. Blackwell;[56] Cohen v. Hale[57]. It has been submitted that the unpaid deposit creates a debt immediately owing and recoverable. If this is correct, then non-payment and dishonoured payment are on the same footing. In Pollway the vendors would eventually recover their unpaid deposit. Their agents have successfully recovered it from the purchaser for them. Agency is merely an instrumentality. The vendor recovers.

In Farrant v. Leburn Wickham J. allowed the vendor, as opposed to his agent, to recover an unpaid deposit on a dishonoured cheque. The cheque was payable to the vendor's agents. Defence counsel submitted in argument that the plaintiff could not sue on the cheque for the reason that the plaintiff was not the payee and, if he became a holder at all, did not become a holder until after the cheque had been dishonoured.

Wickham J. in concluding that where a deposit was payable and was not in fact or was paid by dishonoured cheque, it amounted to a cause of action as a debt and as:-

> "This determines the case in favour of the plaintiff it is not necessary for me to deal with the cause of action on the cheque or the defence thereto, about which I say nothing, either on the law or on the facts".58

In England under Pollway only the vendor's agent would have had an action on the cheque. It is submitted that although the final result is the same, both vendors obtain the unpaid deposit, they do so for different reasons. Farrant is indiscriminate in that the plaintiffs right is not tied to an action on the cheque itself.

The cheque is almost seen as extrinsic evidence. The right is to the deposit which is a recoverable debt in Farrant. In Pollway the right is to an action of a cheque given to extinguish a debt.

In Hodgens v. Keon the auctioneer-agent had a right to sue on the IOU. It was made out to him. It is submitted that either the agent or the principal may sue to recover the deposit as a debt. They may sue in the alternative but both cannot succeed for that would amount to double liability. Usually the agent should bring the action as he is bound to the principal anyway. On a cheque that has been dishonoured the right may be seen in two perspectives. It is a debt immediately recoverable and there is a specific and alternative action on the cheque by the payee.

The Principles Involved

Coote in 5 New Zealand University Law Review 292, 294 states that in Johnson McMullin J. has taken the view that the vendor's rights to retain a deposit are "something alien to a possessory lien" which is "entirely consistent with McMullin J.'s preference for Lowe v. Hope.

> "The essential question then becomes whether a possessory rule used to justify retention of the deposit is an exception to restitutio in integrum should be used to deny recovery as an exception to the quite different rule that rights accruing before termination should remain enforceable thereafter".

It is respectfully submitted that the essential question is whether the contract vests property in the deposit in the vendor. If it does, possession does not affect the right. Not all rights survive termination but a right given absolutely (subject to the infrequent occasion when the vendor has not the ability to convey) or a right substantiated by executed consideration remains enforceable.

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56. 2 C.P.D. 151, 158
57. 3 Q.B.D. 171
58. p185, Line 8

In Munro v. Pedersen[59] Sir John Salmond said in the context of an action for the refund of a deposit:-

> "When a contract becomes impossible without the default of either party, both parties are discharged from their obligations to further performance, but moneys already paid under the contract before it becomes impossible cannot be recovered, and moneys already payable before that date remain payable"

The alleged justification for the rule that, if a party binds himself by contract absolutely to do a thing, he cannot escape liability by pleading impossibility, is that a party to a contract can always guard against unforseen contingencies by express stipulation. By analogy where the purchaser has contracted absolutely to pay the deposit (otherwise breach of a fundamental term) and defaulted, he cannot escape liability. The vendor would never have made the contract, if he had thought, that upon default the purchaser was to go free.

In Monnigatti v. Minchen[60] Ostler J. held that an action for an unpaid deposit was in substance distinct from one for damages. Much of the case was concerned with the doctrine of anticipatory breach. Ostler J. said:-

> "But if in pursuance of the contract and while he is keeping alive money has become payable to him as a deposit or as an instalment of purchase-money, he may sue on the contract for the recovery of that money. Such an action is in no sense one for damages for breach of the contract, for there has been no breach accepted as such; it is an action on the contract for a debt due thereunder. Now this is exactly what the first action was in this case. It was an action for the deposit which ought to have been paid".61

If this is correct the action for the unpaid deposit is certainly viable. However, Ostler J. indicates that this is subject to the vendor "keeping (the contract) alive". It is unclear whether this means the deposit is only recoverable before rescission or that after rescission de futuro the contract is alive in that the deposit is recoverable. If, and it is submitted Ostler J. referred to recovery

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59. [1921] NZLR 115, 116
60. [1937] NZLR 49

being available only before rescission, then it is respectfully contended to be incorrect. On this basis the vendor must, when the time for payment has passed, indicate his intention to sue for the unpaid deposit and rescind. The usual case will be that "by the terms of the agreement the defendant was bound to pay the purchase money ... without any conveyance at all".62

In Turner v. Bladin[63] it was said:-

> "The consideration moving from the plaintiffs to the defendant was fully executed with the result that the defendant became indebted to the Plaintiffs for the balance of the purchase money and interest. An action to recover these sums would not be an action brought on the agreement but an action of indebitatus assumpsit".

If this is correct it illustrates that the deposit may be recovered dehors the contract or in the alternative the executed consideration straddles the concept and permits recovery on the contract itself.

In New Zealand Loan and Mercantile Agency Co. Ltd v. Foster & Anor[64] in the context of a sale of land, where the deposit was paid by a promissory note endorsed by a third party, Chapman J. said:-

> "There is no difference between paying a deposit and acknowledging a sum due as a deposit".

This is exemplified in Davidson v. Murphy[65] where Pennefather J. held that a cheque given by a purchaser in payment of a cash deposit must be paid, although subsequently to its dishonour the purchaser discovered that at the time of sale the vendor had no title to a portion of the land. This, it is submitted, is an example of the true nature of the deposit. It must be paid, it is owed to the vendor unless he has not the ability to convey. The learned judge states if the purchaser had simply omitted to pay the £200 which was the deposit, the vendor:-

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61. At 52
62. Laird v. Pim 7 M & W 474 per Parke B.
63. (1951) 82 CLR 463, 474

"could have enforced payment of it if he could succeed in negotiating to purchase that part of the total land which he did not own".

Analagously it can be reasoned that the unpaid deposit would have been enforced if he had a full good title when the payment of the cheque was stopped.

One other illustrative case in the area of unpaid deposits is Guildford Timber Co. Ltd v. Wright[66]. An agreement for the sale of certain land contained a provision for payment contemporaneously with its execution a sum by way of deposit. On the respondent repudiating and failing to pay the deposit the learned magistrate held that payment of the deposit and conveyance being concurrent conditions, he was not entitled to sue independently of the execution of a conveyance. On appeal Ostler J. allowed the appeal and held that the appellant was not limited to the remedies provided for in the contract in the event of the respondents' default. In Johnson the table of vendors rights upon rescission was given "without prejudice to his other remedies." A proviso of the Guildford contract stated that if the purchaser failed to comply the vendor could "enforce payment of all moneys payable under these presents, in which case the whole of the purchase-money shall be deemed to have become due and payable to the vendor".

Ostler J. said quite clearly

"The contract provides that the deposit and the stamp duty shall be payable by respondent on the signing of the contract: they have not been paid, therefore they are debts which appellant company is entitled to recover." [67]

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66. (1930) NZLR 545.

67. At 553.

Earlier he said [68].

"A debt is a sum certain (sic) payable in respect of an immediate liability by a debtor to a creditor and immediately recoverable"...

It is submitted that this encompasses the unpaid deposit.

Another interesting point is "was the deposit made?" In McCully v Frampton & Mair[69]. the deposit payable was $1543. Only $1500 was paid. Roper J. stated in his lines that "what (the vendor) now seeks to do is make an unfair use of the letter of his contract." But in Stembridge v Morrison the Court of Appeal were divided over 1s. 6d! On appeal [70]. McCully was reversed on another point. Cooke J. delivering the judgment of the Court said :

"(iv) There is much to be said for the view that failure to pay the deposit when due or in full would be fault .... we prefer not to express a concluded opinion on the deposit points."

It is submitted that the deposit must be paid in full and promptly otherwise the omissions manifest themselves as an intention not to be bound by the contract. The vendor should be sued for the unpaid amount.[71].

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68. At 552.

69. Unreported A 163/74 28 Feb. 1975 Christchurch S.C. Roper J.

70. (1976) INZLR 270.

71. See Morrow Carty (1955) N.I. 174.

CONCLUSION

There is no emerging judicial trend of opinion on the question of the unpaid deposit. Only Lowe and Johnson refuse recovery. Only three cases have allowed recovery, yet seven others have wider statements to the effect that recovery is the better course. The conclusions reached from an examination of the authorities are as follows:-

The unpaid deposit is recoverable as a debt.

In New Zealand rescission is invariably de futuro , rescission ab initio preventing ex hypothesi any action for the unpaid deposit. A deposit is not a condition precedent to the formation of a contract unless the parties explicitly state that the unpaid deposit is recoverable as an unconditional right for which the parties have contracted independent of any conveyance. A dishonoured cheque or IOU provides a further cause of action for the payee. An unpaid deposit would only be a penalty if excessively large or oppressive.

Johnson v Jones is incorrect. It relies on Lowe which is based on rescission ab initio. The right to the deposit was vested prior to rescission. The terms of the contract were "without prejudice" to the vendors' other remedies. The deposit was recoverable as a debt. Many relevant authorities were not also to McMullin cf especially Farrant which refused to follow Lowe.

It is submitted that unless there is a specific clause to the contrary an unpaid deposit is recoverable.

Gerard McCoy

August 1977

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