LXTU TURTON, J.A. The role of the deposit in the sale and purchase of land.

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"THE ROLE OF THE DEPOSIT IN THE SALE AND PURCHASE OF LAND"

LEGAL WRITING : Ll.B. HONOURS

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THE ROLE OF THE DEPOSIT IN THE SALE AND PURCHASE OF LAND.

I. THE ROLE AND NATURE OF THE DEPOSIT.

The deposit almost invariably forms part of the proceedings relating to the sale and purchase of land. Its nature is that of a monetary payment or is at least capable of being assessed in monetary terms and because of this the respective parties involved can look upon it as something of inherent value. The payment of a deposit denotes that the parties have reached an important stage in their bargaining or are using it to seal a concluded contract. As negotiations move through contractual motions the deposit acquires greater status. It then expresses the purchaser's intention to perform the contract so that on default of his stated obligations it may be transformed into a compensatory sum to be awarded to the vendor for the loss of the bargain. This unique characteristic of the deposit changes it into a contractual tool far removed from its initial significance as a mere outlay of money within the natural course of dealings.

A. Dual Nature of the Deposit.

Before an analysis can be undertaken as to the nature, role and associated qualities of the deposit, within the contractual context of the sale and purchase of land, a differentiation must be made as between a deposit paid in a pre-contractual context and one where a contract is completed.

The precontractual situation or what is frequently termed 'subject to contract' may be interpreted as one where the parties have entered into negotiation or discussion as to the subject matter of a perhaps prospective transaction. Neither party is bound by the negotiations. The legal limbo created by the word 'subject to contract' has been explained by Sachs of in Goding v. Fraser[1] "This is a device which is often referred to as a

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(1) [1966] 3.All.ER.234 at page 239

gentleman's agreement, but which experience shows is only too often a transaction in which each side hopes the other will act like a gentleman and neither intends so to act if it is against his material interests." The deposit when offered in this context has no binding force for it is paid as earnest money. The purchaser may make a demand for its return and the vendor has no claim to its title.

The deposit when paid in the past contractual situation acquires legal standing and force. This is because the parties having competed in preliminary bargaining roles have reached a conclusive stage in the negotiations. Such negotiations are normally finalised by the drawing up and signing of a contract containing all the agreed terms. In this situation if the contract is completed the deposit is taken into account as part of the purchase price. However if the contract goes off because of the purchaser's default he forfeits the deposit which may then be regarded as a compensatory sum to be awarded to the vendor, for the purchaser is creating an informal check on his actions, and is sealing his stated intentions with a gesture of good faith. Such considerations must play an important role in the initial determination of the purchaser as to the amount to pay as a deposit. It also acts as a guarantee that he will be wary of endangering the contract by any conduct which will result in its dissolution.

The nature of the deposit and its associated qualities varies according to which context it is placed. There are however features common to them both which the parties and any critical observer could recognize.(2)

B. Mechanical Aspects of the Deposits.

The deposit also exists and operates within the regime of

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(2) "The deposit is a valid contract and actionable according to English law, for the consideration furnishes for the contract is the parting of the possession of the goods". Comments drawn on this statement ref. "A difficulty in the Doctrine of Consideration". 1886 5 LQR 34 by Erwin Grueber.

the sale of land as an instrument of contractual convenience. This notion of convenience arises for the respective parties involved after an appraisal has been made as to what significant value the deposit represents to them both. By adopting the physical form of a monetary payment, both vendor and purchaser are aware of the value of the deposit, for money is the standard medium of exchange in transactions of sale and as such is a universally accepted symbol of power. So too, the practical aspects of the deposit is clearly borne out in the concluded contract context. For here the deposit represents a calculated percentage of the purchase price and is brought into account.

At the same time the demand and payment of the deposit arises after preliminary negotiations have been entered into. It represents an important phrase has begun. Both parties realize their bargaining has solidified to a certain degree. The purchaser even in the pre-contract context has committed himself to the vendor. He has laid down this payment as a display of his willingness and potential capacity to compete in the transaction being formulated. Simultaneously the vendor, conscious of the value of such a payment, is able to discern the seriousness of the purchaser's intentions towards his property.

The parties directly involved are not the only persons aware of the contractual significance of this stage of events arrived at. Others such as other interested purchasers, real estate agents, solicitors and even those who will be potential purchasers if negotiations break down can recognize that the payment of a deposit alters the format of the negotiations and legal nature of the relations as effected between vendor and purchaser. It also modifies their behavious towards the parties

directly concerned.

C. Psychological Value of the Deposit.

The mere existence and role of the deposit forms not only part of the practical mechanics of the contract law relating to the sale of land, as a stage in the negotiations, but also it exists to satisfy a psychological need felt by both vendor and purchaser. The indirect effects produced by the alleviation of the psychological wants felt by both parties are more difficult to assess as they are more intangible in form. They are however just as important in ensuring that the course of bargaining runs smoothly. The form such effects take are relative in their meaning to either party as to when the deposit is paid.

1. In relation to the purchaser.

The party interested in the property by offering a deposit is displaying his potential effectiveness as a purchaser and thereby hopes the vendor will look upon him favourably. In the pre-contract situation he hopes to secure an exclusive option to purchase or as Lord Russell of Killowen in Sorrell & Another v. Finch(3) stated "a foot in the door". This consideration is especially relevant if a housing shortage exists or if there is severe competition with respect to the property in question. The purchaser is appealing to the vendor's sense of moral commitment that he will honour this display of willingness to complete.

In the concluded contract situation the purchaser becomes aware of the greater significance the deposit holds to the extent that if he defaults in the performance of his contractual obligations the deposit will be forfeited. The

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(3) [1976] 2.All.ER. 371 at p.383(g)

fear of forfeiture must act as a deterrant to fickle behaviour and provide the purchaser with a compelling motive to perform the rest of the contract.

2. In relation to the vendor.

The vendor is, as the courts have held, reassured of the purchaser's capacity and willingness to complete the contract if a deposit is paid. Coupled with the threat of forfeiture in the concluded contract context such a consideration must be very comforting to the vendor, for he can confidently assert that the purchaser will attempt as far as possible to complete the contract.

In the pre-contract situation the vendor is, through the payment of a deposit, assured of a person interested in his property. He is placed in a favourable bargaining position by the presence of this pecuniary state.

D. Emotional Considerations Attached to the Deposit.

By appealing to these psychological values the role and nature of the deposit reflects the attitude held by most people that land possesses some form of inherent mystical value. Land is recognized by society as a symbol of power and wealth. To the ordinary man to attribute the land such status is understandable for contracts relating to the sale and purchase of land are usually the largest and most important transaction he will enter into - important not only in terms of the amount of finance transferred but also in the ultimate provision of a home in which to live and perhaps land on which to work.

As a consequence of this, emotional considerations have been attached to such transactions. The idea that both parties should have a serious and respectful attitude not only to each other

but to the negotiations is extended to the arena of payment and forfeiture of the deposit. Lord McNaughton in Soper v. Arnold(4) reinforces this idea - "if there is a case in which a deposit is rightly or properly forfeited it is I think when a man enters a contract to buy real property without taking the trouble to consider whether he can pay for it or not". The judicial reasoning of this authoritative decision did not arise as an extension of conceptual legal rules. Emotionally charged considerations have considerable interplay in the formulation of such decisions. The courts recognize the status attributed to land and so will adopt an active role to formulate and implement a judicial rule to alleviate what they consider to be the 'unjustified imposition of loss'. If the purchaser defaults in performance of any terms of the contract the vendor is generally as a right entitled to forfeit the deposit. The loss he may have suffered may be no more than considerable disappointment and inconvenience. The deposit could thereby be regarded as a pre-estimation of a compensatory payment to the vendor for the loss of a contract. Simultaneously the purchaser is being punished by the loss of his money for not assuming the appropriate attitude required of him, and that is to treat the contract seriously. The issue as to whether the doctrine of forfeiture can be regarded as analogous to the principles governing penalties or liquidated damages will be expanded upon later in the writing.

The role the deposit performs and the purposes it serves validates the previous comments, the desire for contractual convenience, the need of a psychological reassurance for both parties, the appeasement of judicial qualms and the fortification of emotional attachments to the land.

There is no compulsion to pay a deposit, although it has

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(4) (1889) 14.App-Cas.429 at p.436.

become an accepted feature of the contract law relating to the sale and purchase of real property that purchasers will do do. In sales by auction it is usual for the contract or memorandum that is signed by the parties to contain a provision for the payment of a deposit. So too in contracts drawn up by a real estate agency similar provisions are included. In contracts by private treaty the demand for a payment is dependent on what terms the parties have agreed upon, although vendors would usually if not invariably insist upon such payments before they bind themselves to a contract. The importance of a deposit would obviously operate as a direct form of pressure bearing down upon the purchaser to comply with vendor's wishes.

E. The Role of the Deposit.

In the case of Soper v. Arnold(5) Lord McNaughton laid down a definitive statement as to the role of the deposit. This comment has become the precedental statement as to deposits given in the post contract situation "the deposit serves two purposes if the purchase is carried out it goes against the purchase money but its primary purpose is this - it is a guarantee that the purchaser means business".(6) This latter expression of the deposit representing a security for performance is the justification given for the forfeiture doctrine. To attach such legal significance to this byproduct of contractual negotiations may or may not be warranted but this issue will be examined later.

The deposit money paid during negotiations that are expressed to be 'subject to contract' serves a different purpose. Such money is commonly referred to as 'earnest money'. Unlike the deposit given under a concluded contract for sale - the payment

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(5) (1889) 14. App.Cas.429.

(6) 1966 3. All ER. 234 at page 239.

of earnest money guarantees nothing for either party. The vendor has signed no contract and may refuse to enter into one without fear of reprisals of legal action. The purchaser may also demand the deposit's return at any stage irrespective of the vendor's wishes. This is because neither party have bound themselves to any contract or document, which the other can enforce.

The purposes for which deposit moneys are required or paid are entirely relative to each party concerned. They appeal to the bargaining senses of each individual involved by serving to cushion the other party's psyche. J.R. Murdoch - in his article 'The Lost Deposit'[6a] - suggests three possibilites as to the role the deposit plays in relation to the vendor and purchaser and real estate agent.

(1) In relation to the vendor:

"The ability to purchase is one of the qualities which one looks for in a purchaser. Accordingly the requirement for the payment of a sum of money by way of deposit would seem to me permissable as evidence of some ability to purchase and or some indication that the proposed purchaser was not a man of straw."[7] The value of the deposit - if this is the consideration it alludes to - would appear to be minimal. A sum deposited in no way indicates that the depositor has the necessary wherewithal to complete the contract. What can be termed 'prospective purchaser' may be just making a notional investigation into the property market - for he can afford to be capricious in his actions as no fear of forfeiture exists - the persuasive element that acts as an assurance to the vendor that the purchaser will maintain a serious decorum in conjunction with his

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(6a) Vol.36 The Conveyancer 5.
(7) Ryan v. Pilkington (1959) to All ER 689 at p.693 per Hodson L.J

offer. The only actual value that can be attributed to the deposit in relation to the vendor is that he is satisfied he has an interested and agreeable bargaining opponent.

(2) In relation to the purchaser:

A prospective purchaser may feel that it is in his own interest to pay earnest money in the hope of placing the vendor under a moral obligation not to sell to anyone else. Lord Denning in Burt v. Claude Cousins & Co. & Another(8) infers that such an assumption can be made after a review has been undertaken as to the practice adopted by real estate agents - in relation to property on the market when a deposit 'subject to contract' is paid. The property is usually taken off the market until negotiations are completed. It is thereby not subject to the scrutiny nor open to offers by other interested persons. Yet the occurance of such events is not an automatic consequence of the paying of earnest money. As to what procedure is adopted is entirely relative to the attitude of the parties at the time.

(3) In relation to the real estate agent:

Another reason why the demand and payment for a deposit may be called for is the real estate agent's desire to safeguard his commission. However the estate agent being only a party who performs a very limited function - within the negotiations - he cannot support any legal action with which to sanction his mark of self-protection. This is because he seldom becomes entitled to a commission unless the purchase is completed and "he can only exercise an agent's lien over money to which the vendor is entitled".(9)

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(8) 1971 2 All ER. p.618

(9) Skinner v. the Trustee of property of Reed (1967) Ch.1194

His right to a commission depends upon the terms of his assignment. If his duties only extended to the finding of a prospective purchaser - then his entitlement to commission is secured. However, he is not entitled to deduct his commission out of a deposit - placedin his hands - for it is the purchaser's property, for as Sachs J. in Burt v. Claude Cousins held "in the event of the purchaser demanding its return, before any contract is concluded, he has to return the deposit to him."(10)

F. The deposit as a condition precedent.

The above comments in relation to pre-contract deposits and deposits paid on or after the conclusion of a contract were once traditionally expressed in most legal textbooks,(11) and are indisputedly followed in court decision. However, as a result of recent litigation it may be permissable to comment that the role of the deposit has acquired greater legal status. Perhaps the seminal view of the deposit as representing itself as a guarantee or as a form of security of the purchaser's future performance might account for this change. Vendors will invariably insist on the payment of a deposit - for it requires the purchaser to seal his stated intentions. The general pattern - of the deposit being paid - must lead to the final consequence that vendors will be hesitant or will refuse to enter into a contract unless it is paid. The courts have recognised this and have attributed a condition requiring payment of a deposit the status of a condition precedent. This was established in the recent decision of Myton Ltd. v. Schwab Morris.(12) There the plaintiff had agreed to grant the defendant an underlease of a maisonette. It was a term of the agreement that the defendant

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(10) 1971 2 All ER. 611 at p.620(h)

(11) Halsbury's Laws of England Vol.34 p.322 3rd Edition
Williams on Vendor & Purchaser p.89 3rd Edition

(12) [1974]1 All ER. p.327

would pay on or before the signing of the contract a deposit. The cheque for such a payment was dishonoured thrice - after which the plaintiff stated that the contract was rescinded because of the fact that they treated non-payment as a fundamental breach of the contract. The court adjudicated on the issue whether the plaintiff was bound by the contract.

Goulding J. set down two grounds upon which he considered the vendor was not bound by the contract. The first ground - stemmed from the maxim that the deposit is demanded and paid as a display of the purchaser's ability and determination to complete the promise in due course. Following on from this, Goulding J. stated what he considered to be a general principle "the vendor in the normal case never intends to be bound by the contract without having the deposit in his own or his solicitor's possession as a protection against possible loss from default by the purchaser."(13) He concluded by stating that the payment of the deposit was a condition precedent to the contract taking place, so that non-payment entitled the vendor to rescind the contract.

Alternatively, Goulding J. held that if the payment of a deposit was not a condition precedent "it was a term of so radical a nature that the defendant's failure to comply with it would entitle plaintiff company to renounce further performance".(14)

Although the general practice as between vendor and purchaser provides for the payment of a deposit in most transactions relating to land, there is absolutely no compulsion to pay. However, following the decision of Myton Ltd. v. Schwab Morris(15) where there is a provision in the contract relating

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(13) Ibid p.330.
(14) Ibid p.331.
(15) [1974] 1 All ER 327

to the payment of a deposit, then if not complied with the vendor is entitled to set the contract aside. As most contracts contain a provision of this kind the purchaser if he wishes to compete must therefore forward a deposit. The deposit has thereby emerged from the realm of procedural mechanics into something of greater legal consequence for both parties. It is a novel proposition that the payment of the deposit is a condition precedent to the liability of the vendor.(16) Goulding J. also commented on the lack of authority on this point(17) and justified its absence by stating that in all probability it was too obvious a point to state, being generally understood by both the parties. This assumption may however be incorrect in view of the fact that the parties involved are usually not aware of the legal status and consequences attributed to the deposit. They can only recognise that it is a procedural course commonly undertaken. To impose upon the purchaser this extra requirement of diligence may be an unwarranted display of judicial interference.

In the 1974 Law Quarterly Review the following comment was made: "it seems to take the doctrine of fundamental breach very far to apply it to the non-payment of a deposit"(18). Goulding J.'s second ground is therefore subject to speculation and criticism, especially considering that the case he cited as being authoritative,(19) no fundamental breach had occurred. That article concluded that Goulding J. should have approached the issue by asking the question whether the defendant could have specifically enforced the contract. For, as the defendant was unable to make good the averment that he was willing to perform all terms of the contract he could not support an action of specific performance.

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(16) April 1974 90.LQR.147 at p.148 Notes.
(17) [1974] 1. All ER. 321 at p.330 (h-j)
(18) LQR vol.90 April 1974 147 at p.148
(19) Mersey Street & Iron Co. Ltd. v. Naylor, Benson (1884) 9 App.Cas.434

This case was the subject of comment in an article termed "Bouncing Deposits"(20). There it was stated that if Goulding J.'s second proposition is preferred - ~~yet~~ the purchaser remains at the mercy of the vendor's choice.(21) If his first proposition is right "then the defaulting purchaser too is left free from his contractual obligations which may please him so long as the property market droops"(22). However the decision of Pollway Ltd. v. Abdullah(23) where it was held that an auctioneer was entitled to sue the purchaser on a bouncing cheque, may hinder a purchaser's actions. The vendor's position in such a contract was not clearly stated although it was held he could accept the non-payment as a repudiation of the contract and rescind the contract. "Not the slightest suggestion can be detected anywhere that payment of a deposit might conceivably be a condition precedent to the contract".(24) So too in the case of Edgewater Developments Co. (a firm) v. Bailey the Court of Appeal treated a provision for payment of a deposit as equivalent; in effect to 'subject to contract', i.e. as being less contractual even than a condition precedent. The contract was held not to be binding for this and other grounds. "There is a great need for judicial cross-citation and reconciliation to render the position following non-payment of a deposit as clear as that following payment"(26). It is only fair to the parties involved to be able to predetermine the consequence of their actions. Parties should not be required to move blindly into contracts should any problems arise.

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(20) The Conveyancer - Notes vol.39 p.313
(21) Ibid p.314 - i.e. being able to rescind the contract
(22) Ibid p.314-315
(23) [1974] I.W.LR 493
(24) The Conveyancer - Notes vol.39 p.315
(25) [1974] 188 S.J. 312
(26) The Conveyancer - Notes vol.39 p.315

G. Unique characteristics of deposit.

(1) A pre-estimate of damage.

The deposit has, as a result of judicial decisions, been attributed other definitive terms. The principle governing the forfeiture or recovery of the deposit in the context of recission of the contract reveals its unique qualities and hence the descriptive terms. When the purchaser defaults the deposit is forfeited upon recission by the vendor. The rules applying to recission ab initio provide for the equitable doctrine of restitutio in integrum whereby the parties are restored to their former positions as far as is practical. A deposit, having been paid, relates to the performance of a contractual obligation and it would follow from this that it should be returned to the purchaser. Forfeiture of the deposit in this context would appear to operate as an exception to this equitable doctrine. The courts recognize and enforce this exception and have based their decisions on policy considerations.

The vendor should be indemnified for the loss he has suffered of his time, trouble and expense in making the initial sale.(27) The forfeitable nature of the deposit may be looked upon as a genuine pre-estimate of damage which is likely to be suffered but which cannot be accurately quantified in advance.(28) Whether such a principle of general application can be justified in individual cases is not an issue of judicial inquiry. They have accepted and formulated a generalised rule based on policy grounds that may arise from implication in contracts where forfeiture

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(27) Coates v. Sarich (1964) W.A.R.2 p.14 per Hale J.

(28) Ibid

clauses are absent. At the same time, equity has intervened to relieve hardship that has resulted from the application of such a rule although they are resistant to disturb contractual terms agreed upon by the parties.

(2) As a possessory lien.

It is with the realm of recoverability of unpaid deposits by a non-defaulting vendor that the deposit has acquired further descriptive status. Brian Coote in his article 'Recovery of Unpaid Deposits'(29) suggests that it's name is analagous to that of a possessory lien. He gains support for this suggestion from the comments drawn by McMillan J. in Johnson v. Jones(30) who stated "the nature of the deposit is such that before it can be forfeited it must first be paid"(31) and further on Coote stated "a deposit as a pledge or evidence required that it had to be held in possession if it was to operate at all"(32). Such statements are feasible in light of position an unpaid deposit plays in the context of recission. If the equitable doctrine of recission is applied, of rescinding the contract ab initio, then the general nature of forfeitability of the deposit operates an exception to the doctrine of restitutio in integrum. If the deposit is paid before termination of the contract then the possessory rule justifies its retention. At the same time such a rule is used to deny the recovery of unpaid deposits. This state of affairs is contrary to the common law view of rescission that discharge for breach terminates the contract as to the future only, and leaves intact rights accrued up to the point of termination.

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(29) 5 NZ.U.LR. 292
(30) [1972] NZLR 313
(31) Ibid p.318
(32) Coote April 1973 5 NZULR p.292

* Refer also to pages 52-55

The descriptive terms have been attached to the deposit in an attempt to explain the unique qualities it possesses when it is performing its role in relation to the contract law of sale and purchase of land. Judicial decisions vary as to what the views are to such doctrines of rescission. Ultimately however, they are guided by policy considerations as to what they consider to be fair or equitable in the circumstances. This is clearly borne out in the context of recoverability of unpaid deposits where conflicting case law still persists.

The deposit generally takes the form of a monetary payment though the parties may agree upon another form of payment as a substitute. A deposit must however be distinguished from a part payment. A deposit is a sum of money paid as "a guarantee that the contract shall be performed".(33) It is irrecoverable if the purchaser defaults(34) unless the contract otherwise provides.(35) A part payment is simply payment of part of the purchase price and it is recoverable(36) even if the sale goes off by virtue of the purchaser's default(37) unless an express provision in the contract is stated to be contrary. The converse applies however where instalments, although not termed as a deposit in the contract, are called and treated as such. In the case of Chard v. Willet(38) it was held that where the purchasor instead of paying the agreed deposit in cash at the date of the sale paid it by instalments, subsequent to the contract. The subsequent payments did not lose their character of a deposit by reason merely of being paid at a later date. It follows

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(33) Home v. Smith (1884) 27 Ch.D. 89 at p.45
(34) Supra
(35) Palmer v. Temple (1839) 9 A & E 508
(36) Mayson v. Clouet [1924] A.C. 890
(37) Harrison v. Holland & Hannan & Another (1922) 1 KB 211
Margetts v. Khan (1915) 11 Tas. L.R.147
(38) (1933) QSR 182 21 Aust'n. Digest 854

from this that the deposit need not be paid on the signing of the contract.

The amount of money usually paid by way of deposit in a sale or auction or by private treaty is ten per cent of the purchase price. There is however no general rule or custom as to how much shall be paid. The parties can arrange and agree upon an appropriate amount following consideration of such matters as the state of the property, the purchaser's financial capacity at that given time and the condition of the property market.

H. The Amount of the Deposit.

The amount of money demanded and paid as a deposit has raised the issue as to whether a substantial sum fixed can be looked upon as a penal sum the forfeiture of which equity will grant relief. Discussion on this point raises larger implications as to whether the deposit upon forfeiture may be regarded generally as a penalty or as liquidated damages.

The Supreme Court of Western Australia in Coates v. Sarich(39) formulated a clear line of analysis to undertake when asking if a deposit of a large sum is really a penalty. "If the deposit is surprisingly large and if there is no express forfeiture clause the question may arise as a matter of interpretation whether the parties when using the word 'deposit' mean that the payment in question was in truth to have the normal incidence of a deposit or whether it was merely an error of nomenclature. Secondly, if that question is answered that there was no error of expression, or if there is an express forfeiture clause, the

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(39) [1964] W.A.R. 2

* Refer also to pages 38-40

question may still arise whether what the parties have contracted for is in truth a penalty and in the later context the question whether the sum is a true deposit becomes the question whether it is a reasonable deposit or whether it was so unreasonable a sum to be forfeited that it should be treated as a penalty against which relief should be granted".(40)

The question as to whether a stipulated sum by way of deposit is reasonable must depend on the circumstancesof each case for a proportionately larger deposit may be very reasonable whether the subject matter of the sale is a wasting asset which may be quickly worked out; or whether it is a business which by mismanagement could be seriously prejudiced in a short time.(41) So too in Stockloser v. Johnson(42) Denning LJ. said "again suppose that a vendor of property in lieu of the usual ten per cent deposit stipulates for an initial payment of fifty per cent of the price as a deposit and a part payment"....."and when the purchaser fails to complete and the vendor sells the property at a profit and in addition claims to forfeit the fifty per cent surely the court will relieve against the forfeiture. The vendor cannot forestall this equity by describing an extravagant sum as a deposit, anymore than he can recover a penalty by calling it liquidated damages"(43) and later on "It must be unconscionable for the seller to retain the money"(44)

How then is the genuine pre-estimate of damage to be calculated? Each case will vary as to circumstantial evidence, such as what percentage the deposit bears to the purchase price, the delicate nature of the property as perhaps being susceptible to mismanagement, or deterioration which would put the business

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(40) Coates v. Sarich [1964] W.A.R. 2 p.15
(41) re Hoobin deceased [1957] V.R. 341
(42) [1954] 1 QB.476
(43) Ibid p.491-2
(44) Ibid p.490

* Refer also to pages 38-40

in jeopardy.(45)

I. Payment by Cheque.

An auctioneer has authority to receive payment by cheque(46) but he cannot be compelled to do so.(47) The Court of Appeal decision in Pollway v. Abdullah(48) raised another question in regard to deposits paid in connection with sale of land. The vendor put the sale of their land in the hands of auctioneers. The land was knocked down to the defendant who signed a memorandum with the auctioneers - as agents for the vendors. The condition of sale provided for the payment of the deposit. The purchaser made out a cheque for the deposit to the auctioneers, which was later dishonoured. The purchaser refused to compete so the land was resold by the vendors, who then joined force with the auctioneers and sued the purchaser for the cheque.

Roskill J. found that there was a separate contract between the auctioneers and the purchaser "independent from that between the vendors and the purchaser"(49).

The consideration for this contract was that at the moment when the cheque was given and received by the auctioneers they warranted to the defendant (purchaser) their authority to sign the memorandum on the vendor's behalf and to receive the cheque payable to themselves as named payees in diminution of the defendant's obligation to pay the full amount of the purchase price to the vendors.

The vendor's claim was disallowed, on the grounds that they were never holders of the cheque and so consequently could not

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(45) Perpetual Executors and Trustees Association of Australia Ltd. v. Hoobin (1957) V.R. p.341 ... was held that the delicate nature of the hotel business negated any issue of the deposit of 15,000 pounds being in the nature of a penalty.
Smyth v. Jessep (1956) VLR 230 per Monahan NJ. held that a deposit of 40 percent was penal in nature.
(46) Farrer v. Lacy Hartland (1885) 31 Ch.D. 42
(47) Johnson v. Boyes (1889) 2 Ch. 73
(48)(1974) 2 All ER. 381
(49) Ibid p.384 b.

sue on it.(50)

This decision has been criticised by A.A.S. Zucherman(51) who stated "It is difficult to see how the auctioneer's warranty of authority can be regarded as consideration for the cheque, for the warranty comes into effect before the purchaser's obligation to pay the deposit arises".(52) Nor can the conclusion that the cheque was given in consideration for the warranty to accept it be feasible since such a distinction is too artificial in form.

Zuckermann stated the claim for vendors and auctioneers should stand and fall together, despite the fact that the vendors could not be regarded as holders of the cheque in the sense given by sections 2 and 73 of the Bill of Exchange Act 1882. The auctioneers received the deposit as agents of the vendor(53) and therefore one might argue "that the vendors could sue on the cheque in the name of the auctioneers.(54)

The real issue then would become whether the vendors were entitled to forfeit the unpaid deposit, or sue on the deposit after having rescinded the contract (they were taken to rescind the contract after having resold the land). Zuchermann refers to the position regarding a vendor's claim of the recoverability of unpaid deposits. Following Lowe v. Hope(55) "the vendor cannot rescind the contract and insist on its performance in relation to the deposit". Zuchermann however distinguished that case holding that different considerations should be taken in regard to deposits paid by cheque. If the Lowe v. Hope(56) principle was enforced then "people would be

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(50) (1974) 2 All ER p.381 at p.383
(51) MLR vol.38 p.349 May 1975
(52) Ibid p.351
(53) (1974) 2 All ER p.381 at p.383 b.
(54) MLR vol.38 p.352
(55) (1969) 3 All ER 605 per Pennycuik J. at p.608
(56) Supra

reluctant to accept cheques in lieu of cash.(57) Zuchermann thereby concluded Polloway v. Abdullah(58) was rightly decided on wrong reasoning, and that to hold "the vendors had a good claim on the cheque, and that for this reason the auctioneers rightly succeeded being the vendors' agents" was the correct interpretation of the decision.

This construction of distinctions from stated principles begs attention to two separate considerations. Whether such policy grounds are acceptable to warrant the distinction and whether the general principle of forfeiture of deposits should not also be the subject of critical inquiry.

The time as to when deposit is paid may also be an important consideration. In a sale by auction once the auctioneers hammer has fallen the purchaser shall pay a deposit to the auctioneers or to the vendors' solicitors.(59)

In sale by private treaty the parties negotiate as to the time for payment. Usually it is when the contract is being signed or straight afterwards.

As to when a deposit is paid in a 'subject to contract' situation the procedure may be as follows: "When an offer acceptable to the seller is obtained, the prospective buyer will be told that his offer has been accepted and he is likely to be asked to pay the agent in normal cases, of not more than ten percent of the purchase price. Either in the receipt for this deposit or in some other way it will be stated that the agreement reached is 'subject to contract' so as to make it clear that it is not legally binding but is subject to a formal contract being drawn up and signed.(60)

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(57) MLR vol.38 p.353 ref. Hinton v. Sparkes (1968) L.R. 3 CP. supports the view that a vendor can sue on an IOU.

(58) (1974) 2 All ER 381.

(59) Stoneham - Law of Vendor and Purchaser at p.348. 1964 edition

(60) The UK Law Commission. Working paper No.51. 'Transfer of land subject to contract agreements' 3 July 1973.

II. PAYMENT TO WHOM AND THE CONSEQUENCES THAT FOLLOW.

To whom a deposit has been paid may vary according to the outcome of negotiations entered into by the parties. If the purchaser has been introduced to the vendor via a real estate agency commissioned for that purpose, then the deposit is normally paid to the agent whom they have dealt with. In a sale by auction, the deposit is invariably paid to the auctioneer, who holds the station of a stakeholder. If negotiations have been directly made with the vendor, without the presence of an intermediary, then the deposit may be given to the vendor's solicitors. Whether such persons hold the position as either stakeholders or sole agents of the vendor is entirely dependent on the circumstances and the intentions of the parties involved. Such distinctions may be crucial when the issue of repayment is raised the condition of dishonesty or insolvency has been proved in the party into whose hands the deposit has been entrusted. So too, the relevance of such title may vary according to the contractual nature the negotiations have reached.

A. Payment to Stakeholder.

It is preferable to pay a deposit into the hands of a stakeholder since he receives it on behalf of both parties and cannot part with it without the consent of both. It is known that it is his duty to keep it in his own hands until called upon to part with it.(61) In the event of premature payment to a party not entitled to it he is liable to account for it to the party intended to receive it.(62) If the contract is completed, it is his duty to pay it to the vendor. If no completed contract results, he must return it to the purchaser, unless of course, the sale has gone off due to the default of

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(61) Harrington v. Hoggart (1830) 1 A.B. and A.D. 577
(62) Burrough v. Skinner (1770) 5 Bur. 2638.

the purchaser. In that event, under the terms of the contract express or implied the deposit is to be forfeited to the vendor.

The duties of an estate agent or auctioneer in respect of the deposit are those of a stakeholder, in the absence of any express provision to the contrary(63).

An issue which has bided the courts' attention with respect to stakeholding is upon whom does the loss fall if the stakeholder has become insolvent or has absconded with the deposit. The position as to liability for loss occasioned is clear in regard to circumstances when a binding contract of sale has been concluded. Since the nineteenth century(64) the courts have imposed liability for loss of the deposit on the vendor; as Sir Thomas Plumer V.C. stated in the case of Annesley v. Muggridge(65) "for though the auctioneer is to a certain degree stakeholder for vendor and vendee yet so far as respects any risk to the deposit, the auctioneer is considered as the agent only of the vendor". This statement was relied on and applied in Rowe v. May(66) by Sir John Romilly M.R. The reasons why the vendor in the post contractual situation is deemed liable to bear the loss appear to be that (1) "the vendor chooses the person to whom the deposit is paid, (2) the deposit is intended by both parties to form part of the purchase price of the property, which has become payable under the terms of the contract. It should also be noted that the purchaser is normally bound by his contract with the vendor to pay the deposit to the stakeholder."(67)

What is the position however when the deposit is paid before any binding contract has been concluded? Before the

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(63) Edgell v. Day (1865) L.R. K.P. at p.84 ref. to an auctioneer Brodard v. Pilkington unreported April 20 1953. Note (1971) 2 QB 422 as to an estate agent.
(64) Fenton v. Browne (1807) 14 vess 144 p.150 per Sir William Grant, Smith v. Jackson (1816) 1 Madd 618 at 620 per Sir Thomas Plumer V.C.
(65) (1816) 1 Madd.593 although obiter. Sugden on Vendor and Purchaser 14 ed.(1862) at p.52 'a loss by the insolvency of the auctioneer will, in every case, fall on the vendor who nominates him and whose agent he properly is'.
(66) (1854) 18 Bev. 613 at p.616.
(67) The conveyancer vol.22 'the loss of the deposit' by

D. MacIntyre at p.260

recent House of Lords decision of Sorrell v. Finch[68] there appeared to be no direct authority on this issue. The only case that appeared to throw any light on this problem was Chillingworth v. Esche[69] where it was held that the deposit was returnable as no binding contract existed. The purchaser, in the view of Warrington L.J. has merely shown he had meant business. "He had not bound himself but in order to show a definite intention, he was willing to part with money and run the risk of the vendor spending the money and being unable to return it if negotiation was broken off."[70]

If this was the nature of the deposit then it was submitted the risk of the loss of the deposit should be borne by the purchaser, for the deposit could not be treated as belonging to the vendor.[71]

In Sorrell v. Finch [72] the House of Lords unanimously decided that where an estate agent receives a deposit from the prospective purchaser - in a subject to contract situation and fails to repay it - he alone is liable. The purchaser has an action against the estate agent only subject to the qualification that the estate agent had not been expressly authorised to take it.

It would appear from that decision that following an unsuccessful action by the purchaser against the agent he must sustain the loss of his deposit.

The use of the term pre-contractual stakeholder has however been the subject of criticism.[73] Lord Edmund Davies in Maloney v. Hardy and Moorshead expressed doubts as to the

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(68) (1976) 2 WLR 833

(69) (1924) 1 Ch.97

(70) Ibid p.112

(71) The Conveyancer Vol.22 p.261

(72) (1976) 2 All ER p.371

(73) LQR Vol.92 Oct.1976. F.M.B. Reynolds. Potters (a firm v. Loppert [1973] 1 All ER 658 at p.668. Maloney v. Hardy and Moorshead (1971) 2 All ER 630.

applicability of such a phrase for "the essence of stakeholding in vendor and purchaser cases is that a binding contract of sale has been entered into and the intending purchaser deposits with a third party a sum to be held pending completion; meanwhile the third party holding the deposit may part with it to neither contracting party without the consent of the other." In negotiations made and deposits paid subject to contract the purchaser can demand the return of the deposit at any stage and none can lawfully gainsay him. The true definition of stakeholding would therefore appear to have no application to situations such as that.

However to draw such a distinction would appear to be just an exercise in semantics. So long as the pre-contractual stakeholder and post-contractual stakeholders duties remain conceptually distinct no problem should arise. The initial confusion of the term stakeholder may account for one of the reasons why vendors were held liable for the loss of a deposit occasioned by a real estate agent's dishonesty.(74)

However, following Sorrell v. Finch(75), vendors are no longer liable unless estate agents are duly authorised by them to receive a deposit on their behalf. The position of a pre-contractual stakeholder may be summarised as follows: "The receiver of a pre-contractual deposit holds for the depositor alone, not only may he not pay the money to the prospective vendor unless authorised by the depositor, he must also repay the deposit to the purchaser on demand. His position is more like that of a stakeholder in a wagering contract - see Hampden v. Walsh.(76)

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(74) As held in Ryan v. Pilkington (1959) 1 All ER 689. Burt v. Claude Cousins and Another (1971) 2 All ER 611. If the Rowe v. May (1854) 18 Beav 613 principle held to apply, then the vendor would be liable for the loss.

(75) (1976) 2 All ER 371.

(76) (1878) 1 QB 189. ref. LQR Vol.92. Oct.1976 p.486.

When examined in practical terms, the objection raised against supplying the terms of stakeholder in the pre-contractual context must be discounted. This is illustrated by Pennycuick VC. in the case of Potters (a firm) v. Loppert[77] who was aware of the doubts expressed as to its accuracy and yet applied the term himself "I appreciate the force of that criticism but the term is used by estate agents themselves and so long as one appreciates the distinction between the duties of the depositee in relation to a pre-contractual deposit and those in relation to a contract deposit, I think the term may be used as a convenient label. It is difficult to think of a better one".[78]

B. The position as regards interest accumulated on the deposit.

Following from the decision in Potters (a firm) v. Loppert[79] a stakeholder with regard to a pre-contractual or post-contractual deposit is entitled to retain interest moneys accrued on it. Pennycuick V.C. stated that "It is to my mind conclusive apart from agreement to the contrary, a contract deposit paid to a stakeholder is not paid to him as trustee but on a contractual or quasi-contractual liability with the consequences that the stakeholder is not accountable for the profit on it".[80] The reason why this is so is based on the policy consideration expressed by Lord Tenterden C.J. in Harington v. Hoggart[81] "If he think fit to employ it and make interest on it my laying it out in the funds or otherwise, and any loss accrue he must be answerable for that loss, and if he is to answer for the loss it seems to me has a right to any immediate advantage that may

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(77) (1973) 1 All ER p.658.
(78) Ibid p.668.
(79) Ibid
(80) Ibid p.662
(81) (1830) 1 B and AD 577 at 586 587.

arise". Pennycuick V.C. then extended this right to interest to pre-contractual deposits. He stated after analysing the duties of a pre-contractual and post-contractual stakeholder "however one analyses the obligations of a stakeholder it seems to me that a stakeholder's capacity must remain constant throughout".(82) He refused to uphold the contention that in relation to a pre-contractual deposit, the depositor holds it as trustee and would therefore "be accountable for profit derived from the Trust property including income profit from its investment".(83) He based his claim for the nonaccountability of interest by the stakeholder following statements made in Barington v. Lee that "a claim for the return of the deposit lies in contract".(84) If the claim therefore sounds in the common law count for money had and received whether in contract or quasi-contract no claim can be pleaded in trust.

Criticism has been aroused against this decision.(85) Firstly as to the proposition put forward "that the stakeholder's capacity must remain constant throughout - viz. from the pre-contractual to the post-contractual stage". The recent decision of Sorrell v. Finch (86) indicates the two stages are juridically different. The form of obligations and duties undertaken by the stakeholder in the two situations cause a variance in his capacity, and must remain conceptually distinct so that the confused decisions as to the liability of vendors for dishonest estate agents' actions do not arise again.

A second ground of criticism was launched by R.M. Goode(87) who stated Pennycuick V.C.'s statements were erroneous in two respects. First in assuming that the defendant who is accountable for the corpus of a fund is entitled in principal to retain

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(82) (1973) 1 All ER 658 at p.668(h) per Pennycuick V.C.
(83) Ibid p.661
(84) (1971) 3 All ER 1231 at p.1238 per Denning M.R.
(85) LQR Vol.92 October 1976 p.486-87.
(86) (1976) 2 All ER p.371
(87) LQR Vol.92 July 1976 p.371.

interest and secondly in denying the status of a trustee to the estate agent, "there can be little doubt that an estate agent owes a duty to keep money deposited with him separate from his own moneys and is thus a trustee for the purchaser before the exchange of contracts and thereafter on trust to pay the vendor on completion, or if the contract is discharged without completion taking place, to return it to the purchaser. The reason why an estate agent was entitled to the accrued interest was not because he is not a trustee, nor because the plaintiff in an action for money had and received is in principle only entitled to receive the corpus of the fund, but because it was an implied term established by usage that an estate agent can retain the interest as a reward for his duties as stakeholder".(88) This latter consideration was also envoked by Pennycuick V.C., "the interest not merely represents a reward for the agent's trouble, but also a recompense for the sterilisation of the property vis a vis the estate agent during the period between the payment of the deposit and the conclusion of a contract or its breakdown with the consequence that the agent has no prospect of earning a commission on its sale to any other party so long as the property remains sterilised".(89) Perhaps the Judge would have been better advised to direct his mind to this principle of common usage than to have indulged in an analysis that called for criticism. It may be however that the above comments lack substance. This would be so if the practice was adopted that, "the property would probably be left on the market now".(90) This would enable estate agents the chance of becoming aware of other interested parties. The statement as to a reward for his trouble also

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(88) LQR Vol.92 July 1976 p.371 footnote 44.

(89) Potters (a firm) v. Loppert 1973 1 All ER 658 at p.669.

(90) The UK Law Commission working paper No.51 Transfer of land subject to contract agreements. 3 July 1973.

requires consideration. The agent will secure a commission only on the terms of his assignment. He may only be entitled to a payment once the contract is completed. It is difficult to see therefore why he should be recompensed for this trouble. For the vulnerability of his employment is only balanced by the standard of efficiency he displays as a salesman.

F.M.B. Reynolds(91) also suggested prior to Potter's(92) case, that if a stakeholder could be regarded as a trustee and so accountable for interest obtained on pre-contractual deposits, such payments may not be so readily asked for. Such possibilities however will not effect the dishonest estate agent. For such persons will assure against any possibilities arising where they have to account for the corpus, let alone the interest.

C. Payment to the vendor, solicitor, or agent:

A deposit paid to a vendor's solicitor or agent is received by him as agent for the vendor unless the contrary is stated.(93) In such a case the deposit is deemed to be paid into the hands of the vendor himself, in accordance with the general rule of agency that payment to an agent is equivalent to payment to his principal. As a result of this when the purchaser becomes entitled to the return of his money, it is the vendor from whom it is recoverable, whether or not it has actually been paid over to him.(94) Following on from this the purchaser cannot sue the agent when the deposit is still in his possession.(95) "An agent is bound to account for his principal for any profit which he makes as a result of his agency"(96) as was held by Lord Tenterden C.J. in Harington v. Hoggart "if an agent receives money for his principal the very instant he receives it it becomes the money of his principal. If instead of paying it

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(91) "Estate agents and deposits again LQR Vol.88 July 1972 184 at o.189.
(92) [1973] 1 All ER 658.
(93) Edgell v. Day [1865] 1 LR 1 CP 80 at 85.
(94) Norfolk v. Worthy [1808] 1 Camp 337.
(95) Bramford v. Shuttleworth (1840) 11 AD and EL 926
(96) Hippisley v Knee Brothers [1905] 1 KB.

over to his principal he thinks to retain it and makes a profit he may in such circumstances be liable to account for the profit".(97)

D. Estate Agent:

An estate agent who receives a deposit may either be a stakeholder or agent of the vendor in contracts for the sale and purchase of land. Estate agents are normally employed by vendors to find prospective purchasers. They may however be employed by intending purchasers looking for suitable real estate.

Estate agents have been subject of contentious litigation in the English courts for thirty to fifty years. The question that has troubled them for so long has been, on whom should liability be placed if an estate agent decamps with a deposit or loses it due to insolvency. Until the decision of Sorrell v. Finch(98) a vendor who employed an estate agent was held liable to account to the purchaser for the lost deposit from the agent's improper conduct. The first case that decided this point was Ryan v. Pilkington.(99) There an estate agent was instructed to find a purchaser. Upon doing so he obtained two separate sums of a hundred pounds each as deposit signing the receipts respectively as agent for the vendor and simply as agent. No concluded contract was entered into and the purchaser sued the vendor for the deposit upon evidence of the agent's insolvency. The Court of Appeal held the purchaser was entitled to obtain the deposit from the vendor even though he had not in fact received it. They held the principle to be applicable was that

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(97) (1830) 1 B and AD 577 at 586.
(98) (1976) 2 All ER p.371.
(99) (1959) 1 WLR 403.

stated in Bowstead on Agency.(100) "Every act done by an agent in the course of his employment on behalf of the principal and within the apparent scope of his authority binds the principal. The Judges described the estate agent's authority as both implied and ostensible. The judgements of Morris and Willmer L.J.J. were mainly concerned with the taking of the deposit as something 'reasonably incidental'(101) to the estate agents express instructions to find a purchaser - that is to say the decision was one of implied authority.(102)

This was the decided view taken of the case by the Court of Appeal in Burt v. Claude Cousins and Company Limited.(103) There they decided that where a deposit is paid to an estate agent in a subject to contract situation, he received it whether or not he could be described as a stakeholder, as agent for the prospective vendor, so that the vendor was liable if no sale subsequently occurred and the estate agent defaulted.

There the court reiterated the two types of authority as both implied and ostensible(104) (stemming from his being held out by the vendor as being entitled to act in that capacity), although the decision was founded on the basis of implied authority (vis a vis the principal/vendor there was an implied authority to take the deposit as it accorded with general practice).

The next case that ajudicated on this issue was Barington v. Lee.(105) In that case the estate agent expressly received the deposit as stakeholder and decamped with it. Lord Denning re-iterated the dissent he had expressed in Burke v. Claude Cousins and Company(106) that the vendor should not be liable, and also

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(100) 10th edition para.82 and cited in Navarrov.Moregrand Ltd. 1951 WN 335 at p.336.
(101) Ryan and Pilkington 1959 1 All ER 689 at p.695 697.
(102) 'The Lost Deposit' The Conveyancer Vol.36 5 at p.10.
(103) (1972) 2 All ER 611 following Sachs J. and Goding v. Fraser 1967 1 WLR 286.
(104) Although in the former cases the two epithets were used as if synonymously applicable to the same kind of authority ref. p.619c 621a,b.
(105) (1971) 3 WLR 962.
(106) (1972) 2 All ER 611.

suggested that the court was not bound to and should not follow that case. Lord Edmund Davies L.J. although sympathetic to the views expressed by Lord Denning decided with Stephenson L.J. that they were bound by that case. The three Judges distinguished Burt v. Claude Cousins and Company on the rather unsatisfactory grounds that in their case the purchaser had obtained a judgement although an unsatisfied one against the estate agent and so was barred from bringing an action against the vendor.

The House of Lords in Sorrell v. Finch(107) however, reversed these decisions, and decided unanimously that an estate agent who receives a deposit in a subject to contract situation and fails to repay it, he alone is liable in the absence of other indications that he is authorised by the vendor to accept the money. The vendor is no longer liable for the loss of the deposit by his mere engagement of the offending estate agent. Lord Denning's dissenting views were given voice too. Lord Edmund Davies stated that the purchaser can demand the deposit returned at any stage and simultaneously the vendor has not control over it; "in this alleged relationship of agency the vendor has no control over the property alleged to have been received on his behalf which makes it so unlikely and so wide a departure from ordinary law as to be unacceptable".(108)

The earlier cases were greatly influenced by the prejudice to the potential purchaser if he could not sue the prospective vendor. This is most clearly expressed in Burt v. Claude Cousins and Company Limited(109) where Sachs L.J. quoted the dictum of Holt C.J. "for seeing somebody must be a loser by this

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(107) (1976) 2 All ER 371
(108) Ibid at p.380 d-e
(109) (1971) 2 All ER 611

by this deceit, it is more reasonable that he that employs and puts a trust and confidence in the deceiver should be a loser rather than a stranger. (Hern v. Nichols 1701, 1 Salk 288)". But the House of Lords took a different view of the matter. Lord Edmund Davies stated, "while one must naturally have sympathy with the purchaser such intuitions of justice as I possess do not command that he should be recouped by a vendor who shares his innocence and differs from him only in engaging someone to find a purchaser for his house."

F.M. Reynolds commented on this case, "although the decision was described by a correspondent in the Times as 'elegant as law but diabolical as justice' it is submitted that it is to be welcomed as recognising the true position of the receiver of a pre-contractual deposit."(110) It is submitted that the observation made by the correspondent is dependent on one's conception of justice. Although it is recognised that in most circumstances if an estate agent decamps with a deposit he will ensure he will not be in a position to account for it. The other situation as to his insolvency guarantees the purchaser has lost his money.

The question that arises following Sorrell v. Finch(111) is when is a vendor liable for estate agents' dishonest actions? Lord Edmund Davies suggests the vendor is liable when the agent has an express or implied authority to receive the deposit on his behalf. He, however, provides no indication as to what form such authority will take, except that a prospective vendor's knowledge that a deposit has been received does not impose

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(110) LQR Vol.92 Oct 1976 p.486.

(111) (1976) 2 All ER 371.

liability on him to repay it.(112) The only comments that may be of assistance in attempting to define the scope of these terms were those made in relation to the case of Ryan v. Pilkington(113). Lord Edmund Davies stated that due to the uncontradicted evidence of the estate agent's express authority to receive a deposit it would have been impossible to exculpate the vendor from liability in that case. Such evidence referred to was as follows: The vendor never denied giving the estate agent authority to receive the deposit on his behalf, nor did he challenge the agent's authority when the prospective purchaser first informed him that the deposit had been paid. If these circumstances are indicative of the class of cases in which liability will be imposed on a vendor then a purchaser would be ill advised to submit a pre-contractual deposit unless he has been notified of the agent's express authorisation. So too, Lord Russell of Killowen offered no enlightening assistance to this question. He held that in the present case there was no implied or ostensible authority imparted. He also stated that, "when an estate agent offers no description as to his capacity or terms himself a stakeholder and then defaults, the vendor is not liable to account to the purchaser".(114) It is suggested following this decision that unless express authority representing a conference of power by the vendor is given, no vendor will be liable. The view as to what represents implied authority may refer to that expressed in Burt v. Claude Cousins.(115) It is common practice and established usage for estate agents to accept pre-contractual deposits on the vendor's behalf - and that the taking of the

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(112) (1976) 2 All ER 371 at p.381
(113) (1959) 1 WLR 403
(114) (1976) 2 All ER 371 at p.384(c)
(115) (1971) 2 QB 426

deposit is reasonably or ordinarily incidental to the agent's task of promoting a contract with a prospective purchaser.(116) If the above two factors are approved then the authority is deemed to have been given. It would appear however that such considerations may not be sufficient to impose liability following Sorrell v. Finch. Indications as to the capacity of the estate agent and the rights each party has claimed with respect to the deposit money will operate as guidelines for the court to follow.

What rights does the purchaser possess if the estate agent collects the money without prior express authorisation? Sachs J. in Burt v. Claude Cousins stated, "a claim manifestly does lie against the estate agent, whatever the answer to the question of status or capacity, i.e. as either trustee or stakeholder.(117) Lord Denning in Barington v. Lee held, "that a purchaser can sue an estate agent had and received based on an imputed promise to pay."(118) F.M.B. Reynolds suggests the above statement employs the terminology of quasi contract "the action against the agent is a subject to contract situation is surely quasi contractual or even equitable and is based on the fact that it is he who holds the money for the use of the purchaser or even that the money still belongs to the purchaser in equity."(119)

It would appear that an action manifestly lies against an agent by a wronged purchaser.(120) However if the agent is insolvent then the purchaser has no recourse and as Edmund Davies stated "one must naturally have sympathy with him".(121) The only advice tendered for a prospective purchaser is that "he

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(116) MLR Vol.33 July 1972 notes p.419

(117) (1971) 2 All ER 611 at p.622(a)

(118) (1971) 3 All ER 1237 at 1238

(119) "Estate Agents and Deposits Again" LQR Vol.88 184 at p.188

(120) The real estate institute headquarters in Auckland controls a fidelity fund, so that a deposit will be repaid to a purchaser following an estate agent's dishonest actions after a thorough investigation has been entered into. This fund does not extend to loss occasioned by an agency's insolvency.

(121) Sorrell v. Finch (1976) 2 All ER 371 at p.380(a)

should refrain from paying a deposit until he is sure that it is required by the vendor himself, if he allows himself to be coerced by suggestions on the part of the estate agent that there is competition to purchase the property he has only himself to blame".(122)

E. The need for reformative measures:

A lot of the confusion in this area has arisen as a consequence of the use of the term 'estate agent'. It was assumed that any person bearing that title who performed services with regard to the vendor's property was to be attributed the status of agent of the vendor. As Lord Edmund Davies stated "such confusion may never have arisen if the intermediary had been termed a realtor".(123) The term real estate agent is however a phrase coined by those persons undertaking such employment and is understood by the public generally. To evidence a change would result in substantial inconvenience that could not be justified.

F.M.B. Reynolds suggests a favourable solution to this problem, "at the very least the relevant professional association should prepare a standard form of memorandum of deposit making it clear what the agent is purporting to do. This would make the task of legal interpretation simpler and once the intended position on the agent's side was made more obvious the question of the value of the practice would be open to public scrutiny".(124)

The vendor could by such a form represent that the estate agent was acting expressly on his behalf coveting an awareness that should the agent default he is personally liable. So too, purchasers would lend greater consideration to the payment of pre-contractual deposits, being aware of their vulnerable positions in the event of estate agents acting without the sanction

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(122) 'The Lost Deposit' Vol.36 The Conveyancer, J.R. Murdoch p.12
(123) Sorrell v. Finch (1976) 2 All ER 371 at p.381(a)
(124) LQR Vol.88 April 1972 185 at p.189.

of prior authorisation.

III. FORFEITURE OF THE DEPOSIT.

The general right of forfeiture is ancilliary to the right to rescind the contract. If the purchaser defaults in the performance of his obligations then the vendor upon rescinding the contract may forfeit the deposit.(125) A qualification to this general right exists however if the contract contains an express intention to the contrary, such as when there is a clause that states in the event of a default a certain sum of money shall be forfeited.(126) The court will in such a case give effect to the clause.

A. Forfeiture by law and by contract:

Why this right of forfeiture exists is because of the nature of the deposit and the role it plays. The deposit is the parties' provision of a security for the fulfillment of the whole contract by the purchaser. The vendor is entitled to retain the deposit even if he has suffered no loss. It is well recognized by the authorities that in this regard, a deposit stands in an exceptional position when a vendor rescinds a contract for the sale of land for the purchaser's breach.(127) The right of forfeiture may be found in the express terms of the contract - such as in a forfeiture clause, or it arises by implication from the intention of the parties.(128) This is because it is part of an earnest on the part of the purchaser to bind the bargain and give some assurance that the purchaser means business. Such circumstances point to the conclusion that it was within the

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(125) Howe v. Smith (1884) 27 Ch.D.89 Collins v. Stimson (1883) 11 QB.D.143

(126) Palmer v. Temple (1839) 2 Ad. & E .508

(127) Coates v. Sarich (1964) W.A.R.2 at p.10 (25-30) per D'Arcy J.

(128) Howe v. Smith (1884) 27 Ch.D.89

intention of the parties that it should become the property of the vendor if the purchaser defaults even if the contract was silent on this point.

It has been said that such a right of retention is not a forfeiture but it is within the nature of liquidated damages.(129) The courts have consistantly refused to apply to deposits the rules regarding penalties - and the reason for this is not wholly satisfactory.(130) Such reasons include, "because they often bear a reasonable proportion to the loss likely to be suffered by the vendor".(131) The only difference Trietel suggests between "a guarantee that the contract shall be performed and a payment of money stipulated in errorem of the offending party lies in the emotive force of the words used".(132)

The courts have consistently looked upon the deposit as a payment of liquidated damages and for a sum to be liquidated damages it must be a genuine pre-estimate of damage.(133) It has been held a deposit may be looked upon as a pre-estimate of damage likely to be suffered. "It is intended as a compensatory sum to cover the vendor for the many hypothetical losses (difficult of precise specification or assessment)".(134) Such losses may be quantified as follows: "if the vendor resells his property he will be put to some trouble and expense in doing so and if he retains possession he will have lost the benefit of his time, trouble and expense in making the initial sale." A sum of five or ten percent of the purchase price has been held to be a genuine pre-estimate of damage. The courts have denied any right of inquiry in which no loss has been sustained,

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(129) Hinton v. Sparkes (1868) L.R. 3 C.P.161
(130) A.A.S. Zuckerman M.L.R. Vol.38 349 at p.354
(131) Treitel. The Law of Contract. 4th edition p.670
(132) Ibid
(133) Public Works Commissioner v. Hills (1906) AC.368 at p.375-6 (P.C.
(134) Coates v. Sarich (1964) W.A.R. 2 at p.6 per Wolff C.J.

and the sum paid is not penal even if justice demands their intervention.

(a) Forfeiture by Contract.

Some judges have even refused to grant equitable relief against forfeiture clauses of a penal character as Raner L.J. in Stockloser's case stated "there is no equity..... in favour of a purchaser who has failed to complete his contract through default of the vendor. For my part I share the reluctance which Farrell J. expressed to sponsor such an equity; it seems to me in the long run it is better that people who freely negotiate and conclude a contract of sale should be held to their bargains rather than the judges should intervene by substituting, each according to his own individual sense of fairness, terms which are contrary to those which the parties have agreed upon themselves". (135)

This statement was modified by the Court of Appeal in Starside Properties Ltd. v. Mustapha.(136) Raner J. had held that the court had no power to order repayment of forfeited instalments pursuant to a contractual provision, but that a purchaser should be afforded advance to repay the money in arrears. In Starside Properties the court stated it had the power to extend the time allowed for repayment or provide one more 'chance'. This doctrine of equitable relief allows the court to do "what the justice of the case is seen to require" and so thereby introduce flexibility into the court's role. This case is important in that it shows that the courts will intervene where contractual provisions are harsh or unconscion-

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(135) Stockloser's case (1954) 1 QB 476 at p.501
(136) (1974) W.L.R. p.816 at p.824 per Edmund Davies L.J.

able and grant the relief they consider appropriate. Such displays of active participation may ultimately lead to a re-appraisal by the courts of their former stand in regard to the inapplicability of the law of penalties as to deposits. It is unlikely however that the courts will do so, for even Lawton L.J. in Starside Properties voiced a warning that the process must not be taken too far and the court should only intervene to protect a clearly defined equity and should not make its decision by what it considers to be the length of the Chancellor's foot nor by taking on the role of a fussing judicial nanny seeking to protect the improvident from their folly by entering into disadvantageous contracts.(137)

The courts have, however, granted relief against penal provisions that represent deposits when equity demands. It has been held "that to decide whether a sum is a penalty or liquidated damages - the circumstances must be taken as a whole and must be viewed at the time the bargain was made".(138) The fact that the sum of money has been termed a deposit by the parties is not conclusive evidence that it is in the nature of liquidated damages, although some weight must be given to the fact that they termed it as such. The court will look at the amount paid in relation to the total purchase price, the type of property that is being sold and whether it is unconscionable for the vendor to retain the stipulated sum. By statute the court can also order repayment of a deposit paid under a contract for the sale of land even though the deposit is not penal.(139) But it seems that this power is hardly even (if at all) exercised to allow a defaulting purchaser to recover back the usual ten

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(137) (1974) W.L.R. 816 at p.826

(138) Public Works Commissioner v. Hills (1906) AC.368 (P.C.) at p.376

(139) Law of Property Act 1925 S.49(2) available in the UK.

percent deposit.(140)

If the deposit has been paid upon the signing of a preliminary contract and either party refuses to enter into a binding contract the deposit is returnable to the purchaser without interest.(141) In Chillingworth v. Esche there was a written agreement to purchase land, such agreement being made 'subject to a proper contract being prepared and an acknowledgement of money paid by the purchaser as deposit and in part payment'. The Court of Appeal(142) held that there was mere negotiation and therefore either party could draw back with impunity and the status quo be restored. Comment was drawn in the 1924 edition of the Law Quarterly Review(143) to the effect that such a case must not command universal acceptance. Doubt was therein expressed over the question of the consideration given in return for the payment and whether such consideration had wholly failed entitling the purchaser to maintain his action for money had and received. "If consideration was the execution of a formal contract then it had failed, but if it was paid by the purchaser for the benefit of entering into negotiation, or if it was paid as a guarantee for good faith, it is difficult to see how the consideration had failed".(144) The writer concluded that vendors should expressly stipulate for the right to retain the deposit. Such a suggestion is untenable. The purchaser has not guaranteed he means business and simultaneously the vendor has not offered anything in exchange except to compete in negotiations - which are within his interests to do.

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(140) James Macara v. Barclays Bank Ltd. (1944) 2 All ER 31, 32 afmd (1945) K.B.148

(141) Chillingworth v. Esche (1924) 1 Ch.97

(142) Following its earlier decisions in Rossdale v. Denny (1921) 1 CH.57 Coupe v. Ridout (1921) 1 Ch.291

(143) p.140 per A.E.R.

(144) 1924 LQR p.140 ref. A.E.R.

(b) When the right of forfeiture arises.

The vendor may exercise his right as soon as the purchaser is in default.(145) If time is expressed to be the essence of the contract then the purchaser is in default as soon as the day fixed for completion has passed and the purchaser has not completed the contract. However, if time is not stated to be the essence of the contract, the vendor can make it so by serving a notice on the purchaser, so long as a reasonable time for completion is given.(146)

Equity has always recognized that the parties may expressly contract that time is of the essence - on the other hand the law has recognized that the right of one party to unilaterally make time of the essence. The requirements to do so were laid down in Re Barrs contract as follows:(147) "The vendor must be able, ready and willing to proceed to completion. Secondly, at the time when the vendor purports to make time of the essence, the purchaser must be guilty of such a default as to entitle the vendor to rescind the contract subject to its being done by a reasonable notice. Thirdly once the right to serve a notice of the kind in question has arisen the time allowed by the notice must be a reasonable time". As to the second requirement, the position is not clear as to how long the vendor must wait before serving his notice. Stanley Robinson(148) suggests "the nature of the default and its relation to the conveyancing transaction is relevant in determining whether there has been such default as to entitle the vendor to terminate the contract, subject to it being done by reasonable notice". The length of the notice

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(145) Levy v. Stogden (1898) 1 Ch.478

(146) Stickney v. Keeble (1915) AC.386

(147) (1956) Ch.551 at p.556

(148) 'Making Time of the Essence' Australian Law Journal 1971 Vol.45 p.242 at p.244

deemed sufficient to enable the other party to perform the act spacified in the notice is dependant on the circumstances of each case. The person serving the notice must take into account such matters as economic circumstances and the preparation of instruments of transfer.

The parties may in the United Kingdom and Australia use the standard conditions of sale provisions in their contract. No such provisions are available in New Zealand although a working paper was prepared in 1972(149) following an investigation made as to the desirability of such conditions.

If however the purchaser's default is due to the delay of the vendor there is no right of forfeiture. The vendor may if he is able and willing to complete, rescind and retain the deposit at any time if the purchaser has expressly intimated that he is no longer bound by the contract or unable or unwilling to complete.(150)

(c) Recission and the availability of damages.

Contention has arisen in the area of recission as to what other rights are available to the rescinding party. If damages are available to the innocent party who terminates the contract following the other party's breach what role does the deposit play?

The English courts(151) have denied the right of a rescinding party to claim damages, whereas, in Australia(152) and New Zealand(153) vendors have been able to recover damages for the

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(149) Property Law & Equity Reform Committee. Working Paper No,2 1 December 1972

(150) Howe v. Smith (1884) 27 Ch.D.89 at p.95

(151) Horsler v. Zorro [1975] 2 W.L.R.183

(152) McDonald v. Denny Lascelles Ltd. (1933) 48 C.L.R.457 at p.477

(153) Hunt v. Hyde (1976) [1976] 2.NZLR 453

loss of their bargain. Such a variance of opinion may be explained by a historical sketch as to the remedy of recission. The article of Michael Albery (154) criticises the approach taken by the English courts and as perpetuated by Mr. Williams(155) whose text is widely followed. Albery states the traditional view was that recission as a remedy available for the innocent party only extended to a right where both parties were to be restored (if possible) in every respect to their former positions with regard to the subject matter of the contract. This condition or equitable remedy was termed restitutio integrum. In these circumstances the contract is deemed never to have existed or has been rescinded ab initio. Such a definition of recission negated any claim to damages for it would involve an affirmation of the contract, that is hereto deemed not to exist. The only other remedy available for the aggrieved party was to affirm the contract by performing his part and claim for damages arising out of its breach.

This interpretation of the term recission led to the commonly expressed term 'you can't rescind and claim damages'. Albery states however that the right to claim damages is possible if the innocent party treats the breach of the contract caused by the other party as a repudiation of the contract. This discharges him from having to perform any future obligations but enables him to be able to sue for damages for past breach. He goes on to suggest that the distinguishing features between the stricter and looser forms of recission are that the former relates to initial invalidity in the contract whereas the latter relates to a breach of a serious term of the contract.

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(154) 'Mr. Cyprian Williams' Great Heresy' 1975 91 L.Q.R. 837

(155) Vendor & Purchaser p.1010-1011

Recission ab initio with its associated remedy of restitutio integrum arises when the contract contains "an inherent cause of invalidity such as its procurement by misrepresentation or undue influence"(156) which makes it voidable at the suit of one of the parties.

The other procedure open to the party rescinding is to treat the other party's breach as a repudiation of the contract. Here the party has a right to sue on the breach for damages but he has discharged himself as to the performance of future obligations. If however he decides to affirm the contract, he can claim damages but he must perform his future obligations.

Francis Dawson,(157) in apparent appreciation of the distinction between the two heads of recission, states that the difference between them lies initially in the origin of the claim. Recission in its strict sense implies that the contract is rescinded ab initio and is deemed never to have existed. The innocent party can have no right to recover damages on the contract because it no longer exists, but he could seek restitution on the grounds that the defaulting party would be unjustly enriched. He is thereby to be returned to his original position as if the contract had never existed.

On the other hand when the defaulting party committed a serious breach of the contract the innocent party was entitled to maintain an action on the contract for damages. The measure for recovery was the sum that placed the innocent party into the position he would have been in had the contract been performed.

Dawson suggests that such an option as to the forms of

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(156) 'Mr. Cyprian Williams' Great Heresy' by Michael Albery

(157) Francis Dawson 1976 39 Mod. L.R. 215 Recission & Damages.

action available is open to the innocent party. When the term recission is used it must be examined in the light of what the party intended. Such intention may be shown through evidence of correspondence as took place between the parties, but it is entirely relative to individual circumstances. To review the institution of recission in terms of intention is a preferable method of analysis than that given by Albery - as to initial invalidity and serious breach. The denial of damages in association with pleading recission may also relate to the confusion that has arisen over the question of granting restorative instead of substitutive damages. Primarily in a claim for recission ab initio the innocent party intended to protect his restitutional interest and to prevent unjust enrichment. The innocent party was also entitled to a sum of "limited damages"(158) which enabled him to be "restored to his formed position in the same way as if the contract had never been made."(159) Dawson suggests that such damages appear to be for "the protection interest by an action on the contract".(160)

If recission in its strictest sense is to prevent unjust enrichment then why "should we artificially extend the concept of a valuable benefit to permit the recovery of some reliance expenditure".(161) He concludes that rather than award damages under the guise of protecting a restitutional interest - when they are substitutive in form - it is better to allow an alternative contractual remedy. Recission can therefore allow a contemporous claim for damages.

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(158) Horser v. Zorro [1975] 2 W.L.R. 183 at p.195(j) per Megarry J.

(159) Ibid p.195(d)

(160) 1975 39 Mod. L.R. p.217

(161) Ibid p.218-219.

WHAT IS THE POSITION IN THE UNITED KINGDOM AND NEW ZEALAND?

The case of Horsler v. Zorro reiterated the traditional view that recission and damages are incompatible. Megarry J. only acknowledges the strict form of recission with its associated restitutio in integrum. This case has been the subject of severe criticism by M. Albery in his article.(162) Not only does he suggest that Megarry J. was wrong to deny recission plus damages but he also revealed inconsistant principles put forward in that judgement.

Megarry J. recognised only two forms of remedial action available for the innocent party to rescind the contract ab initio, or affirm it and claim damages for its breach. He also stated "if a vendor repudiates the contract the purchaser may accept the contract as at an end and sue for damages for the breach of the contract".(163) The question that confused Albery was whether the above statement meant that acceptance of repudiation really refers to the affirmation of the contract. Such a formulation would in Albery's eyes "be a novel statement of the law without support either in principle or authority".(164) The recent English Court of Appeal decision of Capital v. Suburban Properties Ltd., Swycher & Others(165) however recognises the right to rescind a contract and recover damages. "If he pursues this common law remedy, he does so on the basis that he is no longer obliged to perform the contract, and he recovers damages on the footing that he will not do so and will retain the property agreed to be sold".(166) And further on, "the

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(162) 1975 91 L.Q.R. 837
(163) [1975] 2 W.L.R.183 at p.187
(164) 1975 91 L.Q.R. 837 at p.854
(165) [1976] 1 All ER p.881
(166) Ibid p.885(j) (g) per Buckley L.J.

word rescind does not import treating the contract at an end..... it means the vendor is no longer bound to perform his part of the contract in consequence of the purchaser's repudiation.(167) Sir John Pennycuick also recognised the two forms of recission and stated that the use of the word 'recission' sometimes causes confusion.(168) Although the above comments are dicta - they represent the correct or preferable statement as to the law. In the New Zealand case of Hunt v. Hyde(169) the vendor rescinded the contract following the purchaser's repudiation of it. Casey J. refused to follow Horsler v. Zorro(170) and instead held "it is now established that the word recission can also refer to an action of an innocent party accepting repudiation by the other" with its consequence of discharging him from further performance of the contract but still leaving intact the right to claim damages.(171) The authority upon which he based his assertion was the decision of White v. Ross(172) the articles hereto mentioned.(173) The question as to which sense of the word is being used by the innocent party depends on the evidence presented. In that case, as time was expressed to be of the essence of the contract, and the purchaser did not complete payment at the approved date - it was held a serious enough breach had been committed so as to entitle the vendor to accept the purchaser's actions as a repudiation of the contract. "Such a repudiation is one confirmed by the law and is not dependent on any express or implied term of the contract".(174) The vendor was thereby entitled to be placed in the same position financially as if the contract had been performed. Damages were extended to

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(167) [1976] 1 All ER p.886(a)
(168) Ibid p.888(e)
(169) [1976] 2 NZLR 453
(170) [1975] 2 W.L.R. 183
(171) [1976] 2 NZLR 453 p.457
(172) [1960] NZLR 247
(173) 1975 91 LQR 837 William Gummow 92 LQR Francis Dawson 1976 30 Mod.LR.214
(174) [1976] 2 NZLR 453 at p.458 (30-35)

cover the loss of the bargain estimated to be the difference between the contract price and present value. If the contract contains express provisions as to the payment of damages, the courts will give effect to them. The word 'rescind' may be used in whatever meaning the contract gives it. I see no reason why those terms should not contain an agreement for the payment of some sum by one to the other which may or may not be called damages.(175)

What is the position of the deposit when a contract is rescinded? The parties may expressly stipulate for the forfeiture of a deposit. If so the courts will give effect to such a term - unless of course the deposit is in the nature of a penalty. The deposit is however generally forfeited on recission as a matter of common practice. To rescind a contract ab initio - then by the equitable doctrine of restitutio integrum - the parties should be restored as far as possible to their original positions. All benefits conferred during the course of the contractual negotiations are to be restored to the parties who gave them. The general right of forfeiture, however, operates as an exception to this equitable doctrine. The reasons why this unique situation arises are founded on policy considerations. The deposit is given as a guarantee for the performance of the contract. If the purchaser defaults, then as an automatic consequence he loses it. It is compensatory sum - awarded to the vendor - even if he has suffered no real loss - except perhaps the inconvenience and the loss of an opportunity to secure the contract with another.

Megarry J. in Horsler v. Zorro suggests another reason why

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(175) Horsler v. Zorro [1975] 2 W.L.R. 183 at p.191

this situation exists - the deposit forms a pledge of performance.(176) This analogy of the deposit to some form of possessory lien is certainly an acceptable interpretation, especially when it is discussed in the realm of the recoverability of unpaid deposits.

The second form of recission is that which entitles the innocent party to treat himself as discharged from future obligations of the contract i.e. "one party is not bound to perform those promises which are dependent on the performance by the other party of his promises".(177) Such a right is however not retrospective and any rights and obligations that existed prior to the breach still remain. If this principle is applied to the rights - relating to unpaid deposits - it would appear the deposit once again exists as an exception to a general rule.

The right to recover damages raises the question whether it is fair to forfeit the deposit in addition. This leads on to the question of whether the vendor should have this general right of forfeiture. A.A. Zuckerman(178) contended that the law is not all that satisfactory in this respect. The courts have restrictively interpreted and exercised the application of s.49(2) of the Law of Property Act which grants them equitable jurisdiction to order the repayment of a deposit. He goes on to state that the comment made by Mullin J. in Johnson v. Jones that "a vendor who fails to get in the amount of the deposit (before rescinding) loses the benefit of a possible windfall should the purchaser default".(179) should be applied to the situation even when a vendor secures a deposit before

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(176) [1975] 2 WLR 183 at p.194
(177) Francis Dawson 'Rescission & Damages' 1976 39 Mod. LR. p.217
(178) WLR Vol.38 May 1975 - 349 at p.354
(179) [1972] NZLR 313 at p.317-318

rescission. Such a statement may be perfectly feasible especially in cases where a vendor has suffered no visible loss. There seems no reason why a vendor should be recouped for losses he did not sustain or secure a benefit under a contract that is no longer operative. "After all the purchaser does not have this protection"(180) of being able to get this loss should the vendor default.

Specific Performance.

"A decree if specific performance is a decree issued by the court which constrains a contracting party to do that which he has promised to do. It is a form of relief that is purely equitable in origin".(181) The party may obtain such a decree at the discretion of the Supreme Court.(182)

Under S.2 of the Chancery Amendment Act 1958(183) the High Court is not vested with the jurisdiction to award damages in addition to or in substitution for specific performance. No such comparative rights arise under the common law. It was held in Horsler v. Zorro that as the plaintiff's writ was amended so that the claim for specific performance was deleted no damages could be awarded in substitution of it.(184) There are obvious difficulties in awarding damages as a substitute for what is not even claimed.(185) This statement was criticised by Albery who contended, "why should not a plaintiff plead facts entitling him to specific performance and then claim and obtain damages in lieu of specific performance without claim-

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(180) MLR Vol.38 May 1975 349 at p.354
(181) Cheshire v. Fifoot - Law of Contract 4th edition p.520
(182) Lamare v. Dixon (1873) L.R. 6 HL.414 p.423 Ld. Chelmsford
(183) Lord Cairns Act
(184) Horsler v. Zorro [1975] 2 WLR 183 at p.188(d)(e)
(185) Ibid p.187(e) per Megarry J.

ing specific performance where it is fruitless to do so."[186] He bases his contention on an interpretation of Lord Cairns Act - that it did not give jurisdiction to award damages in all cases in which specific performance is claimed but in all cases in which the court of Chancery has jurisdiction to entertain an application for specific performance. This seems to be a perfectly feasible contention.

The Court of Appeal decision in Capital & Surburban Properties v. Swycher and Others[187] decided another important point. There it was held that if a vendor elects at trial to pursue a decree of specific performance he cannot thereafter, following a failure to comply with the decree turn around and sue for common law damages. "A vendor is entitled to rescind the contract if the purchaser fails to comply with a decree of specific performance, he may forfeit the deposit and claim any monetary relief which may avail to him under the terms of the contract".[188] The vendor however does not acquire anew the right to claim damages at common law.[189]

It would appear to follow as a consequence of these decisions the form of the writ claimed is a crucial consideration when in pursuance of available remedies. But in any event the deposit is forfeited[190] or retained by the vendor should he elect to pursue either course. In the assessment of damages - the amount of the deposit is always credited. It can therefore be looked upon as a compensatory sum.

Recovery of unpaid deposit by a non-defaulting vendor.

The vendor has a right to recover the deposit if it has

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(186) Albery 1975 91 LQR 837 at p.853
(187) [1976] 1 All ER. 881
(188) Ibid p.885(j) per Buckley L.J.
(189) Ibid p.887(e) per Pennycuick V.C.
(190) John Parker v. Littman [1941] Ch.405

been stipulated for under the contract. Yet he cannot sue to recover any part of the deposit which has not been paid to him after the breach has occurred and he has rescinded that contract on the grounds of that breach.(191) This was the English decision of Lowe v. Hope and the grounds for the decision was as follows: "it would I think be quite contrary to principle that a vendor having rescinded a contract so that the contract is at an end should not at any stage be entitled to insist that the purchaser should hand over to him a contract pledge with a view to its forfeiture".(192) Pennycuick in that case obviously had in mind the form of rescission ab initio. For if rescission is accepted in its looser form - as to acceptance of the other party's repudiation of the contract, obligations under the contract are discharged as to the future only. Obligations that have accrued prior to the rescission are still viable to enforcement or performance.

It would appear however following the New Zealand case of Johnson v. Jones(193) the denial of the recoverability of unpaid deposits following rescission would exist as an exception to this second form or common law definition of rescission.

The unique characteristic of the deposit however would seem to have had a plausible explanation - if it is explained in terms as expressed by McMullin J. in Johnson v. Jones: "the very nature of the deposit is such that before it can be forfeited it must first be paid" i.e. it must be held in possession if it is to operate at all.(194)

Brian Coote states following as from this comment "the

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(191) Lowe v. Hope [1970] Ch.94
(192) Ibid p.98
(193) [1972] NZLR 313
(194) Ibid p.317

essential question then becomes whether a possessory rule used to justify retention of the deposit as an exception to restitutio integrum should be denied recovery as an exception to a quite different rule that rights accruing before termination should remain enforceable thereunder".(195) Coote suggests that in logic one does not follow the other but really it is a policy question that is resolved individually according to one's view of the inviolability of contractual obligations.

This sentiment is clearly borne out in the various judgments relating to this issue. In the early decision of Dewar v. Mintoff(196) in which it was held a vendor had such a right of recoverability, Horridge J. based his decision on the policy consideration that the defendant could not put himself in a better position by refusing to pay a deposit than if the deposit had in fact been paid.(197) In the recent case of Myton Ltd. v. Schwab Morris(198) Goulding J. expressed favourable comments towards that decision and considered it to be still applicable despite the later decision of Lowe v. Hope.(199) Although those comments were dicta and the case was resolved on other grounds, the sentiment he expressed is understandable in light of the importance and emphasis he attached to the deposit as a contractual provision, terming it a condition precedent.

Policy considerations of a quite different nature were expressed by McMullin J. in Johnson v. Jones(200) where he looked upon the deposit as representing a possible windfall to the vendor. Whatever the final answer is to this issue will

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(195) 'Recovery of unpaid deposits' 1973 5 NZULR p.294
(196) [1912] 1 All ER 326
(197) Ibid p.387-388
(198) [1974] 1 All ER 326 at p.331-332
(199) [1970] Ch.94
(200) [1972] NZLR 313

obviously be determined by what status is attributed to the deposit by the various judicial quarters.(201)

Following the decision of Pollway v. Abdullah(202) however, if a deposit is paid by cheque (which is subsequently dishonoured) into the hands of an auctioneer he is entitled to sue for its recovery. The grounds for that decision - where the auctioneers were the named payees of the cheque, and their warranty of authority to collect the cheque - was the consideration for its payment. A.A.S. Zuckerman states that this decision is an acceptable exception from the general rule laid down in Lowe v. Hope because of the delicate nature of cheques. If the payment of cheques were to be held irrecoverable then "people would be reluctant to accept them in lieu of cash".(203) He also concludes that the vendors should have been able to sue on the cheque in the auctioneer's name as they were acting as his agents. This is a perfectly acceptable decision in view of the fact that had the purchaser paid in cash the deposit would have been forfeited.

Recovery of the deposit by the purchaser.

The purchaser is entitled as a right to recover his deposit paid as earnest money if no concluded or binding contract has been entered into.(204) He is also entitled to recover it upon such default of the vendor as entitles the purchaser to repudiate the contract. The purchaser must not however be in any way responsible for the default. He may in special circumstances be entitled to the interest accrued on the deposit normally at four percent and also his costs of investigating the title.(205)

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(201) ref. Guildford Timber Co. Ltd. v. Wright [1930] NZLR 545 was held that an unpaid deposit amounted to a debt which could be sued for.

(202) [1974] 2 All ER 381

(203) MLR Vol.38 May 1975 349 at p.353

(204) Chillingham v. Esche ref. notes

(205) re Bryant and Barninghams' Contract (1890) 44 Ch.218

The grounds for recovery may be as follows: the vendor's title is defective in some way. The onus is on the purchaser to prove the title is bad and if it is not ratified by the time fixed for completion the purchaser is entitled to recover his deposit. Delay by the vendor may also be grounds for recovery. But unless time is expressed as of the essence of the contract the purchaser may serve notice on the vendor and such notice must be reasonable in the circumstances.(206) It has been held that if a purchaser proceeds with negotiations he waives his right to complain of the delay.(207) Misdescription or misrepresentation by the vendor will also enable the purchaser to recover his deposit - provided that if the remedy of damages is available he will lose his right to recovery if he can be adequately compensated.(208)

The purchaser may also recover his deposit if it is in the nature of a penalty and is unconscionable for the vendor to retain it. This has been elaborated on earlier in the writing.

Recovery - a legal right.

Formerly where there was no breach of a contract there was no right in law or equity to recover the deposit.(209) In 1925 in the United Kingdom S.49(2) of the Law of Property Act was enacted and has provided that where the court refuses to grant specific performance of a contract or in any action for the return of the deposit the court may if it thinks fit order the return of the deposit. Previously the purchaser could not recover the deposit where there was a defect to which he could not object by reason of a special condition or where there was

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(206) Stickney v. Keeble [1915] AC 386
(207) Boyes v. Liddell (1946) 6 Jur.725
(208) Jacobs v. Revell [1900] 2 Ch.858
(209) Scott v. Alvarez [1895] 2 Ch.603

delay by the vendor which prevented the vendor from obtaining a decree of specific performance but did not render him liable to be ordered to return the deposit(210). But in those cases the court now has the discretion to order the return of the deposit. Megarry v. Wade(211) suggests that such a discretion makes very little difference in practice. It states a deposit is forfeited only when the purchaser is in breach of the contract and whether the court will exercise its discretion to relieve such a person from his liability is doubtful. Hereto the discretion has only been exercised in cases where the purchaser could have rescinded(212) (where there was a misrepresentation by the vendor). It is a useful means of restoring deposits without going into the technicalities of rescission.

New Zealand does not possess a comparable section. The consequences of this would be that the court could not intervene in circumstances where the deposit is unable to be recovered such as when he has bound himself to a special condition to accept the title of the vendor though it turn out to be defective.(213)

Purchasers' lien.

Where the purchaser has paid a deposit and the contract goes off for any cause than this fault he has an equitable lien on the property sold for his deposit.(214)

As has been previously mentioned the deposit possesses some unique characteristics whilst performing its role in the area of forfeiture, recovery and the initial negotiations of entry into the contract. Because of the consequences that follow from its payment or forfeiture a need for certainty of

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(210) Scott v. Alvarez [1895] 2 Ch.603
(211) The Law of Real Property 4th Ed.1975.
(212) Charles Hunt Ltd. v. Palmer [1949] 2 All ER 234
(213) Scott v. Alvarez [1895] 2 Ch.603
(214) Whitbread & Co. Ltd. v. Watt (1902) 1 Ch.835

its terms is required for all parties concerned. It is suggested as a reformative measure that such certainty may be obtained, at least to a certain degree, if a form of statutory conditions of sale were to be adopted.(215) Such conditions would incorporate terms as to the amount of the deposit, what status its receiver would have, and the results that would follow rescission. Parties would be at liberty to incorporate the standard conditions of sale in their contract, and should events arise concerning the deposit, it could be safely assumed that all involved are aware of the significance and role that the deposit plays. As a consequence of that consideration disputes such as over the liability of vendors for estate agents' dishonest actions could be easily resolved. As deposits are almost always paid in contracts for the sale and purchase of land this need for certainty would appear to be a highly desirable consideration, especially as it would tend to mitigate against the uniqueness of its character.

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(215) Such as a statutory enactment of the recommendations made by the property law and equity Reform Committee Working Paper No.1 Dec.1972