

Property Alert

Does releasing the deposit disadvantage a vendor?

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The Supreme Court of Queensland, in *Watpac Developments Pty Ltd v Latrobe King Commercial Pty Ltd & Anor* [2011] QSC 392, has again been asked to determine whether or not the early release of a 'deposit' to the vendor means the contract becomes an "instalment contract" and thus subject to the instalment contract regime under the *Property Law Act 1974 (PLA)*.

This issue has been the subject of conjecture and doubt in recent years.

Facts

The facts were relatively straight forward. The parties entered into a standard form of contract (REIQ Contract for Commercial Land and Buildings), with various special conditions. As a result of a number of requests made by the purchaser to extend the date for completion, the parties agreed to certain variations to the contract, including:

- standard provisions (which provided for repayment of the deposit to the purchaser where the contract was determined and no party was at fault) were deleted;
- the amount of the deposit was increased;
- the original deposit paid and held by the stakeholder was released to the vendor; and

- the balance of the additional deposit, which was to be paid by instalments, was to be paid directly to the vendor, on the condition that any part of the deposit paid was to be refunded to the purchaser if the contract was terminated due to default by the vendor.

The purchaser failed to pay the required instalments of the balance deposit as agreed. The vendor terminated the contract, treated the amount of the deposit paid as forfeited and sued the purchaser for the deficiency on resale, plus certain expenses.

Issues

The purchaser argued that the vendor was not entitled to terminate the contract because the contract was an instalment contract, as defined in section 71 of the PLA, and accordingly (by virtue of section 72 of the PLA) the contract could not be terminated by the vendor without the vendor first serving a notice to remedy default. Such a notice had not been given.

An 'instalment contract' is defined in section 71 of the PLA to mean '...an executory contract for the sale of land in terms of which the purchaser is bound to make a payment or payments (other than a **deposit**) without becoming entitled to receive a conveyance in exchange for the payment or payments.'

The term 'deposit' for the purposes of that section, is defined to mean:

'a sum:

- a) not exceeding 10% of the purchase price payable under an instalment contract; and
- b) paid or payable in 1 or more amounts; and
- c) liable to be **forfeited** and retained by the vendor in the event of a breach of the contract by the purchaser'.

The point to be determined by the Court was whether or not the payment or payments required to be made by the purchaser under the contract on account of the deposit were in fact a 'deposit' for the purposes of section 71 of the PLA.

As required by item (a) of the definition, the required payments did not exceed 10% of the purchase price and, even though the amount was to be paid in instalments, the PLA makes it clear that a deposit might be payable in more than one payment.

The remaining issue was whether or not the clauses which provided for the release of the payments made by the purchaser meant that those payments did not satisfy the requirements of item (c) of the definition in section 71 of the PLA because none of the payments were liable to be forfeited and retained by the vendor upon the purchaser's breach of the contract.

The purchaser argued that each amount paid by the purchaser to the vendor would be retained by the vendor, even where the contract was not completed, but not for the purchaser's default. The payments were to be made finally and not provisionally, so that there would be nothing to be forfeited of a payment once it was made.

Decision

The Court found in favour of the vendor, concluding that the contract was not an instalment contract on the basis that the payments required to be made by the purchaser were in fact a deposit.

The main difficulty encountered by the purchaser was that the parties expressly agreed that those payments would be categorised as a 'deposit' and were susceptible to being 'forfeited', as provided for by clause 13 of the standard conditions.

The Court made a number of observations regarding the payments:

- The correspondence exchanged between the parties through their lawyers regarding the proposed amendments to the contract consistently and unambiguously described the required payments, together with the payment previously made, as constituting the 'deposit'.
- Whilst clause 13 of the standard conditions provided for the deposit to be forfeited in the applicable circumstances, a deposit would still be liable to forfeiture by necessary implication in the absence of such an express provision.
- The fact that the payments were to be made to the vendor, rather than the stakeholder, did not put paid to the prospect of a forfeiture. There is nothing in the definition of 'deposit' in section 71 of the PLA to suggest that the payments had to be kept as a separate fund pending the completion of the contract or that they could not be made to the vendor, to be held by the vendor prior to completion.
- Even though breach of contract by the purchaser was not the only event which would result in the final and absolute extinguishment of any entitlement on the purchaser's part to the payments, that did not mean it was incorrect to say that the payments were liable to be forfeited upon breach of contract by the purchaser. The essential character of a deposit is that of a payment guaranteed to the vendor in the event that the purchaser fails to complete the contract. The possibility that the deposit might be lost to the purchaser for other reasons as well is not apt to deny its essential character as a guaranteed payment.

Comments

Whilst the decision goes some way to confirming that a released deposit will not necessarily by itself constitute an instalment contract, care should always be taken in drafting special conditions or negotiating amendments to prevent such unintended outcomes. The result in this case may well have been different if (for example):

- the amounts paid by the purchaser were expressed to be non-refundable by the vendor in any circumstances; or
- the payments required to be made by the purchaser had been referred to as something other than the deposit.

An instalment contract may also be the unintended result

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in certain other circumstances, such as where:

- a purchaser is allowed a rebate of the purchase price effective prior to completion, as the correct interpretation of such an arrangement may be a reduction of the purchase price, which could cause a deposit paid to then exceed 10% of the purchase price; and
- a purchaser is required prior to pay certain amounts under the terms of the contract (in addition to the usual deposit) prior to completion, particularly where the amount paid under the contract exceeds market value for what is provided in exchange, so that the payments may properly be treated as being in consideration for the supply of the property.

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