WHEN ONE PURCHASER SIGNS THE CONTRACT FOR SALE AND THE OTHER DOES NOT...
PART II: THE FATE OF THE DEPOSIT

Introduction

To recap the salient facts of ***Rabiu v. Marlbray Ltd*** [2016] 1 WLR 5147, without his wife's (C3's) authorisation (or even knowledge) a husband (C2) had signed a contract with the vendor (D), purportedly on behalf of both himself and his wife, in respect of their joint and several obligations, for the purchase of a 999-year lease of a room in a London hotel. Contracts were exchanged the same day and over the next two years the husband paid the deposit. Subsequently, in proceedings brought with other claimants who had purchased similar leases, C2 and C3 issued a claim against D seeking declarations that they had not entered into enforceable contracts with it and the return of their deposits. As a preliminary issue the deputy judge (Nicholas Strauss QC) held that the contract was not valid or enforceable because one of the intended parties, namely C3, had not entered into it. That decision was reversed by the Court of Appeal, who held that (i) there was a valid contract between the vendor and the husband for the sale of the lease, notwithstanding the absence of the signature of his wife and (ii) the contract complied with the requirements of s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 because the contract signed by the husband incorporated all the terms which the parties had expressly agreed and had been signed by or on behalf of each party to the contract, even though C3 not entered into the contract, since it contained all the terms of the several contract between the husband and the vendor and had been signed by or on behalf of both of them. Thus the several contract between C2 and D was valid and enforceable as between those parties. As Gloster LJ concluded [at 78]

> "For the above reasons, in my judgment, the requirements of s.2 were satisfied in this case. It would make a mockery of the policy of the section if [C2] could rely on technical arguments, such as those presented to the court on this appeal, to escape from his several contractual obligations, in circumstances where the failure to obtain his wife's authority to sign the contract was entirely his."

The previous case note considered the questions of the validity of the contract between the vendor and the co-purchaser and the formalities required by s.2 of the 1989 Act. This second case note considers whether, on the assumption that there was *no* valid contract as between the vendor and the co-purchaser (either because the contract had not been signed by the other co-purchaser, or because of want of the formalities required by s.2), the vendor was required to return the co-purchaser's deposit or could retain it.

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The Unjust Enrichment Issue

The Court of Appeal analysed the issue in terms of unjust enrichment and whether there had been a total failure of consideration entitling C2 to restitution on the facts as found by the deputy judge. In ordinary circumstances where a contract is void, there would usually be restitution of money, such as a deposit, paid under it. As the Law Commission stated in its Report on *The Transfer of Land: Formalities for Contracts for Sale of Land* (1987) (Law Com No 164) at para. 5.2:

> "where an anticipated contract is void because not made in accordance with statutory formalities, it does not follow that the parties will simply be left remediless by the law. Apart altogether from any possibilities there may be of suing for damages in tort (eg deceit or negligence), either of the parties would where appropriate be able to seek restitution. Thus if money has been paid as a deposit or part of the price by a prospective purchaser, recovery would generally be permitted because there would be a total failure of consideration."

But, as Toulson LJ said in ***Sharma v. Simposh*** [2013] Ch 23 at [14, 22]

> "The words "where appropriate" and "generally" are significant. The Law Commission did not suggest that restitution would automatically or always be available to a purchaser who had paid a deposit. It would depend on the proper application of the principles of restitution.
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> ...
>
> 'If money has been paid under a contract which is or becomes ineffective, the recipient is evidently enriched. It is a distinct question whether that enrichment is an *unjust* enrichment … In most of the situations, however, the ground of recovery is that the expected return for the payment, or consideration, as it is confusingly called, has failed'[1]."

He then analysed several cases on that question, one of which involved something of a procedural tangle which has to be unknotted to understand the present state of the law.

Chillingworth v. Esche

In ***Chillingworth v. Esche*** [1924] 1 Ch 97 the purchasers entered into a written agreement dated 10th July 1922 to purchase land from the vendor "subject to a proper contract to be prepared by the vendor's

[1] Citing Goff & Jones, *The Law of Restitution*, 7th ed. (2007), para.19-002.

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solicitors" and acknowledged having paid £240 "as deposit and in part payment of the said purchase money". A contract was prepared by the vendor's solicitors, approved by the purchasers' solicitor, executed by the vendor and tendered to the purchasers for execution. At that point the purchasers declined to proceed with the transaction and claimed the return of the deposit. Astbury J held that the purchasers were not in the circumstances entitled to recover the deposit, but his decision was reversed by the Court of Appeal. The first issue was whether the written agreement was a binding contract. The second was whether the vendor was entitled to retain the money if the agreement was not a binding contract. On the first issue the Court held that the proper interpretation of the agreement was that the parties intended that there should be no binding contract until a contract prepared by the vendor's solicitors had been executed.

On the second issue, Pollock MR said at pp 107–108:

> "This case … does not involve a decision of what a deposit may be in all cases, but simply what it is in this particular case. In *Howe v Smith* where the nature of a deposit was considered and the right of a purchaser to the return of it, Bowen LJ said: 'The question as to the right of the purchaser to the return of the deposit money must, in each case, be a question of the conditions of the contract. In principle it ought to be so, because of course persons may make exactly what bargain they please as to what is to be done with the money deposited. We have to look to the documents to see what bargain was made.' And Cotton and Fry LJJ say substantially the same thing. Therefore we have to consider what in fact was the effect of the document of 10 July 1922, not forgetting the contemporaneous documents, and to ask ourselves whether this deposit was by those documents intended to pass irrevocably to the vendor if the purchasers did not carry out the transaction. In all the circumstances of this case, I think the deposit is recoverable by the purchasers. There was no provision made in the documents which would justify the vendor in declining to return it; though if he had, by appropriate words, made provision for that in the document, such a provision could have been upheld."

Thus, Pollock MR did not consider that the language used in the agreement was sufficiently clear to show an intention that the deposit should not be repaid if the purchasers failed to proceed with the purchase. The other judgments of the Court were to the same effect. Warrington LJ said at p. 111:

> "Whether a vendor is entitled to retain a deposit depends in each case upon the construction of the document under which that deposit is made."

He concluded at p. 112, that it was:

> "a deposit paid in anticipation of a final contract and nothing more."

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Sargant LJ agreed. He said at p. 115:

> "I look on the whole payment as being sufficiently explained as being an anticipatory payment intended only to fulfil the ordinary purpose of a deposit if and when the contemplated agreement should be arrived at."

Gribbon v. Lutton

Like ***Rabiu*** the case of ***Gribbon v. Lutton*** [2002] QB 902 was bedevilled with procedural complexity which has to be explained before the relevant part of the decision in relation to the deposit can be understood. The reported case was an appeal from a judgment of Jacob J in which he dismissed G's action for professional negligence against his former solicitors, Luttons Dunford.

G was negotiating to sell some land to W. As a result of difficulties encountered during the negotiation, by December 1993 G was seeking a non-refundable deposit of £21,600 from W. It was to be held by Luttons as stakeholder on the basis that (i) if a binding contract was entered into, it would be treated as the deposit, (ii) if no contract was entered into for any reason other than the default of G, it was to be paid to G and (iii) if no contract was entered into owing to the default of G, it was to be repaid to W.

A meeting was held between G, W and their respective solicitors. W was reluctant to pay a non-refundable deposit and G threatened to walk away from the negotiations. Eventually W wrote out a cheque and handed it to G's solicitor on the basis that it would be non-refundable if he failed to enter into a conditional contract by 15th December. In the event no contract was signed and both G and W claimed the deposit. At that point Luttons Dunford issued interpleader proceedings. The firm appreciated that there might be a conflict of interest between it and its former client G and as a result it ceased acting for G, who was thereafter represented by different solicitors.

At the trial of the interpleader proceedings G's case, supported by evidence from his solicitor, was that (i) W had agreed that the deposit would be non-refundable in the event that a conditional contract was not entered into by 15th December for any reason other than G's default, and (ii) in return, G had agreed that he would not deal elsewhere until that date (i.e. there was a "lock-out" agreement). Both of these were disputed by W. It was common ground that, if it had been agreed that the deposit was non-refundable, G would only be entitled to the deposit if he could show that he had provided consideration in the form of the lock-out agreement. The recorder found that (i) the deposit was paid by W on the basis that it would be non-refundable if he failed to sign a conditional contract, but (ii) there was no lock-out agreement. In the absence of the only consideration asserted, the recorder found that the agreement that the deposit was not

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refundable was unenforceable, with the result that the deposit was repayable to W. G's lawyers advised him not to appeal. Luttons Dunford complied with the decision and paid the deposit back to W.

G then commenced proceedings for negligence against Luttons Dunford on the ground that either the solicitor should have ensured that the agreement that the deposit was non-refundable was legally enforceable or he should have advised that it was not.

At the trial before Jacob J, Luttons took only one point, namely that, contrary to the recorder's original decision, it was G and not W who was entitled to be paid the deposit. If that were right, then Luttons could not have been negligent. On the other hand, if the deposit were not payable to G, as the recorder had held, the solicitors were liable for negligence, the only remaining issue being quantum. G advanced two arguments: (i) that the recorder's decision was correct and the deposit was refundable to W (ii) even were that not the case, Luttons were precluded from asserting otherwise. They had participated in the proceedings before the recorder and were estopped from asserting that the deposit was non-refundable.

Jacob J did not accept either of these arguments and found for the firm. The result was that, in two separate legal proceedings both involving G and his solicitors, two different judges had come to opposite conclusions on the same facts. As between G and W, G was not entitled to the deposit, but, as between him and his solicitors, he was.

There were 2 issues which had to be determined on the appeal: (i) was G entitled to the deposit held by Luttons? (ii) were Luttons estopped from asserting that G was entitled to the deposit?

The appeal was allowed. All of the members of the Court held that, on the facts found by the recorder in the interpleader action, W should have lost any claim to the deposit when he failed to enter a contract with G.

The majority of the Court (Laddie J and Robert Walker LJ) found that Luttons ought not to have been permitted to challenge the recorder's decision since (per Robert Walker LJ) the doctrine of issue estoppel applied or (per Laddie J) no issue estoppel arose, but it would be an abuse of process in accordance with the wider doctrine of res judicata to allow him to do so.

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So far as the repayment of the deposit was concerned, Robert Walker LJ said at [64-65]:

> "64 ... If a prospective vendor has been as sorely tried as Mr Gribbon was by a prevaricating purchaser, and if he stipulates for the payment of a non-returnable deposit linked to a clearly-defined condition, the purchaser should lose any claim to return of the deposit if he fails to meet the condition. I agree with the judge that Sir Ernest Pollock MR was right in his dictum in *Chillingworth v. Esche* [1924] 1 Ch 97, 108:
>
> > "In all the circumstances of this case, I think the deposit is recoverable by the purchasers. There was no provision made in the documents which would justify the vendor in declining to return it; though if he had, by appropriate words, made provision for that in the document, such a provision could have been upheld."
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> There is nothing in *Walford v. Miles* [1992] 2 AC 128 which is inconsistent with this: in that case the House of Lords was concerned with whether there can be a valid and enforceable contract to negotiate.
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> 65 However this point was not pleaded or argued before the recorder. Before him the only issue was whether the parties had entered into a lock-out contract, and he found that they had not, and that Mr Wynn could reclaim his deposit. That decision was reached in interpleader proceedings commenced by Mr Lutton's firm in the Gloucester County Court. In my view Mr Lutton ought not to have been permitted to reopen that point in the proceedings commenced by Mr Gribbon."

In other words, G was entitled to the money because he stipulated for the payment by W of a non-returnable deposit linked to a clearly-defined condition which W failed to meet, i.e. to enter into the conditional contract. The payment was in the circumstances intended to operate as a sanction against withdrawal.

Pill LJ agreed at [86] with Robert Walker LJ that, on the facts found by the recorder, the "prevaricating purchaser" should have lost any claim to the return of the money when he failed to enter into a contract with the "sorely tried" prospective vendor. However, he considered that the solution lay in contract rather than restitution. He said at [81] that G's attendance at the meeting on 9th December 1993 and his remaining there to give W a yet further opportunity to enter into a contract was consideration which rendered W's promise enforceable. He added at [86] that he saw difficulties in following a non-contractual route and that he would "consider taking it only in a case … where the contractual route is closed". He did not therefore go so far as to exclude it. Robert Walker LJ, by contrast, did not consider that the solution depended on the existence of a contract. It was sufficient that the prospective purchaser had paid a non-returnable deposit on defined terms which he had failed to meet, i.e. he favoured a restitutionary analysis of the problem.

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Robinson v. Lane

In ***Robinson v. Lane*** [2010] EWCA Civ 384 L owned a flat which he agreed orally to sell to R; there was no written contract. L and R agreed that R would pay a deposit of £15,000, which he did, as part payment of the agreed purchase price of £45,000, with the purchase to be completed within 6 months. The purchase was not completed within the specified 6 month period and L sold the flat to a third party. The two parties entered into a subsequent oral agreement, stipulating that R would not press for the repayment of his deposit, but that L would pay R his deposit plus one half of the excess of the sale price over £45,000 once the flat was sold. R died before the flat was sold and the executors of his estate brought proceedings to recover the money owed to him. The judge awarded the deceased the sums which the parties had previously agreed, finding that the sum of £15,000 was a deposit, that L had agreed to repay the deposit and that R's agreement to forebear pressing for that payment in lieu of interest constituted consideration for the subsequent agreement, thus rendering it enforceable. On that basis the judge ordered that L should pay the £15,000 and also the sum that represented the balance between £45,000 and £88,000, making a total a sum of £42,000.

L's appeal was dismissed. Sir Richard Buxton, giving the lead judgment of the Court of Appeal, said at [14] that they had considered whether there might be an alternative analysis of the agreement between the parties, namely that the payment of the deposit was not a contractual deposit, but a deposit given pre-contractually in earnest of an agreement to enter into a ultimately enforceable agreement, something which R in fact did not do. In the first place, however, the payment was not a pre-contract deposit; it was a deposit made in the context of, and in the envelope of, what the parties thought was a binding agreement. Secondly, even if it had been a pre-contract deposit it was only in very rare circumstances that such a deposit was not returnable. He cited Pollock MR's summary of the position in ***Chillingworth*** at p.108 and cited Robert Walker LJ's adoption of that formula in ***Gribbon v. Lutton*** and concluded at [16]:

> "Mr Slater sought to argue that such a stipulation had been made in this case. That, with respect, is not so. It is quite clear that it would have to be, to qualify under Robert Walker LJ's rubric, an extremely precise and clear and express agreement to that effect. Quite apart from this not being a pre-contract deposit at all, there was no such precise agreement to that effect. These two gentlemen clearly did not turn their minds to those sorts of considerations."

Sharma v. Simposh

Sharma v. Simposh concerned a deposit paid in connection with an abortive property transaction. The claimants paid money to the defendant under an oral agreement giving the claimant an option to purchase property then under construction at an agreed valuation. Under the agreement the defendant was to

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complete the construction within an agreed timescale and in the meantime was not to market the property elsewhere. The agreement was void because it was oral, but the defendant honoured it by proceeding to complete the construction and refraining from attempting to market the property elsewhere. In the event the claimants decided not to proceed because of turmoil in the financial markets and they reclaimed the money paid under the agreement. The judge at first instance found that the payments were agreed to be non-refundable, but he held that in law the money was refundable. The defendant appealed successfully against that decision.

Giving the judgment of the Court of Appeal, Toulson LJ referred to the extract from the Law Commission Report cited above and continued:

> "25 It is easy to see why the Law Commission suggested that a purchaser who pays a deposit under an oral agreement for the purchase of land will generally be entitled to recover his deposit if the sale does not go ahead, for the state of affairs contemplated as the reason for the payment will have failed to materialise, but that is a generalisation and, like all generalisations, it is subject to the facts of the particular case.
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> 26 In the present case the judge found that the claimants got what they paid for; as agreed, the defendant took the property off the market pending its completion and kept open its offer to sell it to the claimants at a fixed price. The claimants' expectations were therefore fulfilled and there is no injustice in the defendant retaining the sums paid to it. The agreement did not amount to a legally binding contract, but is nevertheless highly relevant as a matter of fact to the question whether there was a failure in the fulfilment of the parties' expectations such that denial of repayment would leave the defendant unjustly enriched. There is no suggestion in this case of any inequality of bargaining power or overbearing behaviour which might be relevant when considering the justice of the defendant's position. It was a commercial transaction between people able to look after themselves."

Faced with that difficulty, the claimants submitted that it was unjust for the defendant to retain the money because it had no contractual right to it. They submitted that a vendor cannot lawfully retain a deposit paid by a prospective purchaser in respect of an intended purchase of land under a non-contractual agreement (i.e. an agreement made "subject to contract" or an agreement rendered void by the operation of s.2 of the 1989 Act) in the event of the purchase not proceeding. In support of that submission they sought to rely on the combined effect of the decisions in ***Chillingworth*** and ***Gibbon***. Toulson LJ analysed both decisions at some length and continued:

> "43 Underlying the discussion about what the Court of Appeal meant in the *Chillingworth* case there is an important point of principle. Property may pass

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between parties who are involved in a purchase transaction which is contractually ineffective. Property may pass by delivery with the necessary intention, and that may occur even in the context of a contract which is void for illegality. In ***Singh v. Ali*** [1960] AC 167, the plaintiff contracted to buy a lorry from the defendant. The contract of sale was unlawful, but the plaintiff paid for the lorry and it was delivered to him. Later the defendant removed the lorry from the plaintiff's possession and refused to return it. The plaintiff sued the defendant in detinue. In order to succeed he had to show that he had a right to immediate possession of the lorry. The defendant argued that because the contract was illegal and void, it could have no consequences in law and no property could pass to the plaintiff. The Privy Council rejected this argument. Giving the judgment of the Board, Lord Denning said, at p 176:

> "Although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out: and on that account it was effective to pass the property in the lorry to the plaintiff."

44 In the present case the agreement was not illegal in the same sense as in the *Singh* case, but it was void for failure to comply with the formal requirements of section 2 of the 1989 Act. As in the case of a contract void for illegality, so in the case of a contract void for lack of formal validity, it did not follow that property in the deposit could not pass to the defendant. That depended on the intention with which the payment was made. Was the payment intended to be conditional on the claimants completing the transaction or was it intended to be unconditional? If the former, the defendant would have obtained only a conditional title to the money and would have been bound to return it on the transaction falling through. If the property passed unconditionally, the defendant was prima facie entitled to retain it. In *Chillingworth v Esche ...* it was necessary to construe the document of 10 July 1922 for the purpose of determining the second issue, that is, in order to decide whether as a matter of fact the payment of the deposit was intended to be conditional or unconditional. In many cases where a deposit is paid under a contract for the purchase of land which is void under section 2 of the 1989 Act, and the transaction does not materialise, the purchaser will be entitled to the return of the deposit (as the Law Commission said) because the expectation which provided the reason for the payment would have failed, but that is a question of fact in each case."

Allowing the appeal, Toulson LJ concluded:

> "55 The fact that property was intended to pass and did pass does not, of course, exclude the possibility of a claim for restitution, but such a claim depends on the claimant being able to establish a recognised ground of restitution. In this case the only suggested ground is failure of consideration. Since the claimants obtained the benefit for which the payment was made, there is no merit in their claim and no injustice in the defendant retaining the money. The justice of the matter is entirely on the defendant's side."

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The Decision in *Rabiu*

Gloster LJ cited the judgment of Toulson LJ in ***Sharma*** at some length and continued at [90] that, while the contract in ***Sharma*** was void for being oral and therefore non-compliant with s.2, rather than, as in the present case, on the basis that there was no contract at all, because C2 had not been authorised to sign it on behalf his wife, there was no reason (subject to two points not within the ambit of the preliminary issue) to distinguish ***Sharma,*** which was binding on the Court. The first point was that, if at the main trial it were to be found that the contract as between D and C2 were an unconscionable bargain, or there had been overbearing behaviour on the part of D, that might affect the question as to whether D had been unjustly enriched and therefore entitle C2 to the return of the deposit. The second point was that there had to date been no consideration of the issue as to whether the deposit was a penalty, or was otherwise recoverable pursuant to s.49(2) of the 1925 Act, which again might be material to the question of unjust enrichment.

C2 essentially argued that he was entitled to repayment of the sums paid to the solicitor stakeholder because there was no valid or enforceable contract and therefore there was a total failure of consideration for the payments, but that was effectively a rerun of the argument in ***Sharma*** and was similarly problematic. The presence of the stakeholder was irrelevant as between D and C2. Gloster LJ continued:

> "92 In the present case, as in *Sharma's* case there has not been a total failure of consideration in the sense required under the law of unjust enrichment: see para 12-16 of *Goff & Jones on The Law of Unjust Enrichment*. [C2] has had part of the benefit which underpinned the payment of the deposit: namely the specific unit which he chose to buy has been taken off the market; it has been secured for his purchase at a specific price; the developer, no doubt (although I speculate) with the use of [his] deposit as collateral, has completed the works; and, upon payment of 10% of the deposit, [C2] became entitled to 10 free days stay at the Riverbank Park Plaza Hotel; see the rider to the particulars.
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> 93 Accordingly, in my judgment, even if I were to be wrong in my analysis (a) that there was in the present case a valid contract as between [D] and [C2] in respect of his several obligations under the contract, and (b) that such contract was section 2 compliant, the decision in *Sharma's* case disposes of this appeal. Indeed para 56 of the judgment of Toulson LJ in that case makes it clear that, in circumstances such as the present, the issue of estoppel, and whether it conflicts with section 2 of the 1989 Act, simply does not arise."

To hold otherwise would be to subvert the policy of the 1989 Act, which was not designed to enable parties to land contracts who had changed their minds to look around for expressly agreed terms which had not found their way into the final form of land contract which they signed, for the precise purpose of avoiding their obligations, on the ground that the lack of discipline of their counterparty, or even their own

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lack of discipline, had rendered the contract void, as here where it was C2's own fault that his wife had not signed (or even known of) the contract. That had been made clear by Briggs J and Longmore LJ in ***North Eastern Properties Ltd v Coleman*** [2010] 1 WLR 2715 where the Court of Appeal scotched an attempt by the defendant purchasers to wriggle out of their obligations on the basis that a 2% finder's fee had been omitted from each of 11 contracts when the exclusion of the fee had occurred at the express request (and to serve the commercial purposes of) the defendant purchasers themselves. A successful outcome for the purchasers on the s.2 issue would do nothing other than to provide a wholly unmerited escape from genuine obligations deliberately entered into.

C2 finally sought to argue that (i) he paid all the moneys conditionally upon the sale taking place and accordingly title in the money never passed to D and (ii) on the wording of the contract there was no provision that D would be entitled to retain the deposit in circumstances where the contract turned out to be invalid or void, as opposed to where the contract was rescinded or repudiated on account of C2's breach. Gloster LJ also rejected those submissions.

> "100 ... Title in the deposit moneys clearly did, and was intended to, pass to [the stakeholder]; there was no question of [the stakeholder] holding such moneys on trust for, or to the order of, [C2], whether under the terms of the contract or otherwise. In those circumstances, as Toulson LJ pointed out in *Sharma v Simposh Ltd* although passing of title does not exclude the possibility of a claim for restitution, such a claim depends on the claimant being able to establish a recognised ground of restitution, such as, in the present case, failure of consideration. That would require him to demonstrate that, as between himself and [D], the latter would be unjustly enriched if it were to retain the deposit.
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> 101 Whilst, on the express wording of the contract in the present case, there was no provision that [D] would be entitled to retain the deposit in circumstances where the contract turned out to be invalid or void, as opposed to where the contract was rescinded or repudiated on account of [C2's] breach, none the less the clear contractual intention was that, in circumstances where the sole reason for non-completion after payment of the full deposit was [C2's] fault, then [D] should be entitled to retain the moneys paid. Notwithstanding that, on this hypothesis, the situation is a non-contractual one, in my judgment the factual matrix of the intended contractual result serves as a clear guide as to on whose side "the justice of the matter" lies (as Toulson LJ put it). In circumstances where the fault for non-validity of the contract lay entirely with [C2], on the grounds of his breach of warranty of authority, I conclude that there is no merit in [C2's] claim and no injustice in [D] retaining the money."

Accordingly the order which the Court would make [at 103] would be to declare: (i) that there was a valid and enforceable contract as between D and C2 which was compliant with s.2 of the 1989 Act; and (ii) that,

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irrespective of the conclusion at (i) above, but subject to argument at trial in relation to the allegations of unconscionable bargain, penalty and s.49(2) of the 1925 Act, D was entitled to retain C2's deposit.

Comment

Thus, the present position with regard to the recovery of a deposit paid under an anticipated contract which does not materialise is that:

> (i) the usual position will be that recovery would generally be permitted because there would be a total failure of consideration; the state of affairs contemplated as the reason for the payment will have failed to materialise: the Law Commission Report
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> (ii) but recovery is not automatic: the inquiry will be fact specific in each case: ***Howe v. Smith*** per Bowen LJ, ***Sharma v. Simposh*** per Toulson LJ
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> (iii) in order to make the deposit irrecoverable the language used in the agreement must be sufficiently clear to show an intention that the deposit should not be repaid if the purchaser fails to proceed with the purchase: ***Chillingworth v. Esche*** per Pollock MR
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> (iv) there needs to be a precise, clear and express agreement to that effect. If the parties to the agreement do not turn their minds to that question the deposit is likely to be recoverable: ***Robinson v. Lane*** per Sir Richard Buxton
>
> (v) property in the deposit may pass between parties who are involved in a purchase which is contractually ineffective or which never comes into being; the key question is whether (a) the payment was intended to be conditional on the purchaser completing the transaction or (b) was it intended to be unconditional? If (a), the defendant would have obtained only a conditional title to the money and would have been bound to return it on the transaction falling through. If (b), the vendor is prima facie entitled to retain it: ***Sharma v. Simposh*** per Toulson LJ
>
> (vi) passing of title does not exclude the possibility of a claim for restitution, but such a claim depends on the claimant being able to establish a recognised ground

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of restitution, such as total failure of consideration: ***Rabiu v. Marlbury*** per Gloster LJ

(vii) if a prospective vendor has been sorely tried by a prevaricating purchaser and stipulates for the payment of a non-returnable deposit linked to a clearly-defined condition, the purchaser should lose any claim to return of the deposit if he fails to meet the condition: in such a case the deposit is a sanction against withdrawal: ***Gribbon v. Lutton*** per Robert Walker LJ

(viii) if the purchaser gets what he paid for e.g. if the vendor takes the property off the market pending completion and keeps open its offer to sell it to the purchaser at a fixed price, then the purchaser's expectations are fulfilled and there is no injustice in the vendor retaining the deposit; there has been no failure of consideration: ***Sharma v. Simposh*** per Toulson LJ

(ix) if the purchaser has had part of the benefit which underpinned the payment of the deposit (e.g. the property is taken off the market and secured for his prospective purchase at a specific price, or he has become entitled to some use of the property in the interim), again there has been no failure of consideration and there is no injustice in the vendor retaining the deposit: ***Rabiu v. Marlbury*** per Gloster LJ.

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