SUPREME COURT OF QUEENSLAND

CITATION:	*Willmott & Anor v McLeay & Anor* [2013] QCA 84
PARTIES:	**JOHN ALLAN WILLMOTT** (first appellant) **VIRGINIA DIANE WILLMOTT** (second appellant) **v** **JOHN LEONARD McLEAY** (first respondent) **JULIE ANN McLEAY** (second respondent)
FILE NO/S:	Appeal No 8020 of 2012 DC No 119 of 2012
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	District Court at Southport
DELIVERED ON:	16 April 2013
DELIVERED AT:	Brisbane
HEARING DATE:	14 March 2013
JUDGES:	Holmes and Fraser and White JJA Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. Set aside the orders made at first instance.** **2. Give judgment for the appellants in the amount of $235,335.78.** **3. Order that the respondents pay the costs of this appeal and of the proceeding at first instance on the standard basis.**
CATCHWORDS:	PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER UNIFORM CIVIL PROCEDURE RULES AND PREDECESSORS – SUMMARY JUDGMENT – where the parties entered into a contract for the sale of property – where the respondents failed to pay the balance deposit of $204,000 when required by the contract, or at a later date to which an extension was given, as well as the purchase price – where after the respondents' failure to complete the contract, the appellants gave notice of termination of the contract and demanded payment of the balance deposit – where the appellants sought summary judgment in the applications jurisdiction on the deposit due and owing, including interest and costs on an

indemnity basis – where there was no dispute of fact and the only issue was as to the construction of the contract – where the primary judge found that it was not an appropriate issue for determination in the applications jurisdiction – where the primary judge considered it possible that the respondents would prove to have a defence to the claim, and that because the matter was one which required detailed and considered submissions, it should proceed to trial – where on appeal, the respondents submitted that the appeal was one from the exercise of a discretion – where the primary judge did not purport to exercise any residual discretion, not being satisfied of either of the matters in r 292(2)(a) and (b) of the *Uniform Civil Procedure Rules* – where the question of construction was relatively straightforward – whether the primary judge was correct in concluding that the statutory pre-conditions for the exercise of the discretion to give summary judgment had not been made out by the appellants

CONTRACTS – GENERAL CONTRACTUAL PRINCIPLES – CONSTRUCTION AND INTERPRETATION OF CONTRACTS – INTERPRETATION OF MISCELLANEOUS CONTRACTS AND OTHER MATTERS – where the parties entered into a contract in standard REIQ form for the sale of property – where the respondents failed to pay the balance deposit of $204,000 when required by the contract, or at a later date to which an extension was given, as well as the purchase price – where after the respondents' failure to complete the contract, the appellants gave notice of termination of the contract and demanded payment of the balance deposit – where the contract provided for recovery of any unpaid part of the deposit as a liquidated debt – where the contract provided for the seller to have remedies in the event of termination for the buyer's default including a right to resell the property and a right to recover damages of any unpaid part of the deposit as a liquidated debt – whether, on the proper construction of the contract, the appellants had the right to recover the unpaid deposit as a liquidated debt only if the contract were affirmed – whether, on the proper construction of the contract, the appellants were entitled to recover the deposit in addition to the rights provided in the event of termination for default

APPEAL AND NEW TRIAL – APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF THE COURT – COSTS – where on application for summary judgment, the appellants sought indemnity costs and argued on appeal that costs of both the application and the appeal should be awarded on that basis – where the contract entitled the seller to claim damages for loss suffered from the buyers' default, including legal costs on an indemnity basis – where there had been no claim for damages – whether it was the intention of the parties to the contract for payment of costs to

be on an indemnity basis – whether the appellants established a clear right under the contract to warrant the exercise of the costs discretion in favour of granting indemnity costs

Uniform Civil Procedure Rules 1999 (Qld)

Ashdown v Kirk [1999] 2 Qd R 1; [1998] QCA 77, considered
Bolton Properties P/L v J K Investments (Australia) P/L [2009] Qd R 202; [2009] QCA 135, considered
Bot v Ristevski [1981] VR 120; [1981] VicRp 13, considered
Chen & Anor v Kevin McNamara & Son Pty Ltd & Anor (No 2) [2012] VSCA 229, considered
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd (2008) 167 FCR 372; [2008] FCAFC 60, cited
Kowalski v MMAL Staff Superannuation Fund Pty Ltd (2009) 178 FCR 401; (2009) 259 ALR 319; [2009] FCAFC 117, considered
Platinum United II Pty Ltd & Anor v Secured Mortgage Management Ltd (in liq) [2011] QCA 229, considered
Socratous v Koo (1993) 6 BPR 13,226, considered
Trpkovski v Russell [2001] FCA 1871, cited

COUNSEL: P H Morrison QC, with E Goodwin, for the appellants
C Jennings for the respondents

SOLICITORS: Hickey Lawyers for the appellants
Robinson and Robinson Lawyers for the respondents

[1] **HOLMES JA**: The appellants were the sellers under a contract for the sale of a Gold Coast property to the respondents. The contract provided in the "Reference Schedule" for the payment of an "initial deposit" in the amount of $1,000 on the respondents' signing of the contract, with the "balance deposit" of $204,000 to be paid within seven days. The respondents did not pay the balance of the deposit after seven days or at a later date to which they were given an extension; nor did they pay the balance of the purchase price. After the respondents had failed to complete, the appellants gave notice of termination of the contract and demanded payment of the balance of the deposit. They then unsuccessfully sought summary judgment on their claim for that sum; the refusal of the primary judge to grant summary judgment is the subject of this appeal.

The contract clauses

[2] The contract was in standard REIQ form. Clause 2.2 provided for the payment of the deposit, default and recovery:

"2.2 Deposit

(1) The Buyer must pay the Deposit to the Deposit Holder at the times shown in the Reference Schedule. The Deposit Holder will hold the Deposit until a party becomes entitled to it.

(2) The Buyer will be in default if it:

(a) does not pay the Deposit when required;
(b) pays the Deposit by a post-dated cheque; or
(c) pays the Deposit by cheque which is dishonoured on presentation.

(3) The Seller may recover from the Buyer as a liquidated debt any part of the Deposit which is not paid when required."

[3] Clause 2.4 set out entitlement to the deposit in varying circumstances:

"2.4 Entitlement to Deposit and Interest

(1) The party entitled to receive the Deposit is:
(a) If this contract settles, the Seller;
(b) If this contract is terminated without default by the Buyer, the Buyer; and
(c) If this contract is terminated owing to the Buyer's default, the Seller."

[4] Clause 9 dealt, *inter alia*, with the sellers' rights on the buyers' default, the relevant parts of the clause being:

"**9. Parties' Default**

9.1 Seller and Buyer May Affirm or Terminate

Without limiting any other right or remedy of the parties including those under this contract or any right at common law, if the Seller or Buyer, as the case may be, fails to comply with an Essential Term, or makes a fundamental breach of an intermediate term, the Seller (in the case of the Buyer's default) or the Buyer (in the case of the Seller's default) may affirm or terminate this contract.

...

9.4 If Seller Terminates

If the Seller terminates this contract under clause 9.1, it may do all or any of the following:

(1) resume possession of the Property;
(2) forfeit the Deposit and any interest earned;
(3) sue the Buyer for damages;
(4) resell the Property.

...

9.7 Seller's Damages

The Seller may claim damages for any loss it suffers as a result of the Buyer's default, including its legal costs on an indemnity basis and the cost of any Work or Expenditure under clause 7.6(3).

...

9.9 Interest on Late Payments

> (1) Without affecting the Seller's other rights, if any money payable by the Buyer under this contract is not paid when due, the Buyer must pay the Seller at settlement interest on that money calculated at the Default Interest Rate from the due date for payment until payment is made.
>
> (2) The Seller may recover that interest from the Buyer as liquidated damages.
>
> (3) Any judgment for money payable under this contract will bear interest from the date of judgment to the date of payment and the provisions of this clause 9.9 apply to calculation of that interest."

The pleadings and the application for summary judgment

[5] In their Statement of Claim, the appellants claimed $204,000 as the balance of the deposit, pursuant to cl 2.2(3); interest under cl 9.9; and their costs on an indemnity basis. They had re-sold the property at a loss of $55,000, but they made no claim for damages. The respondents filed a defence asserting that the appellants had exhausted their rights on termination by forfeiting the initial deposit of $1,000 under cl 9.4(2); alternatively, that they had waived their right to terminate under cl 9.1 by attending settlement as if the contract remained on foot and were thus estopped from demanding the deposit; and that the claim for the balance of the deposit amounted to unjust enrichment, given that the appellants retained the benefit of the property. No issue was taken as to the making of the contract, its terms or the non-payment of the balance of the deposit.

[6] On the application for summary judgment, there were similarly no disputes of fact; the questions were solely as to the appellants' rights of recovery. The appellants' written submissions dealt with all the grounds in the defence, but the respondents advanced only two contentions. They argued that the right to recover under cl 2.2(3) existed as an alternative to the remedies under cl 9.4, rather than as complementary to them, and could only be exercised before termination. The second argument was that when they terminated the contract, the appellants had acquired no right to the deposit, because it was at that stage payable to the deposit holder. As to that point, the respondents relied on *Socratous v Koo*.[1]

[7] In *Socratous v Koo*, the relevant contract contained no equivalent of cl 2.2(3). McLelland CJ in Eq observed that where the purchaser's obligation was to pay a deposit to a third party as stakeholder, the vendors had no accrued right to have the deposit paid to them and, consequently, could not recover the amount of the deposit as a debt, the obligation to pay which had accrued before termination of the contract. On the other hand, the vendors could claim the amount of the deposit as damages for breach of the obligation to pay the deposit.

[8] In reliance on that observation and finding, the respondents contended that the appellants had no right to claim the deposit under cl 2.2(3) because it was the deposit holder, not they, who was entitled to the deposit at the date of termination; and the appellants had not made any claim for damages in respect of the unpaid deposit. There was, counsel for the respondent suggested in oral argument, a question as to whether the stakeholder should have been joined as a party.

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1 (1993) 6 BPR 13,226.

[9] At the hearing of the summary judgment application, counsel for the respondent accepted, in light of a number of authorities[2] that, as a general proposition, a seller had the right to recover an unpaid deposit as a liquidated debt, a right which survived the termination of the contract. But that, he pointed out, was subject to the terms of the particular contract. Clause 2.2(3) of the contract here, counsel submitted, should be read as conferring the right to sue for the deposit only if the contract were affirmed, because to do otherwise – to allow the seller to recover the deposit in addition to damages which might be claimed under cl 9 - would confer an unfair windfall on the seller. In the absence of direct authority on those points, which warranted an exhaustive examination of the history of the clause in the REIQ contract and its judicial consideration, summary judgment ought not be given.

[10] In response, the appellants pointed out that cl 2.2(3) gave them, not the stakeholder, the right to recover the deposit, a right which had accrued when the deposit was not paid. The rights under cl 2.2(3) were clearly in addition to those under cl 9.1, which commenced with the words "without limiting any other right or remedy of the parties including under this contract". In circumstances where the facts were settled and the rights of the parties turned on construction of the contract, the primary judge was, it was submitted, in as good a position as a trial judge could be to determine the issue; so that it was unnecessary for the matter to go to trial.

The reasons for the refusal of summary judgment

[11] Rule 292 of the *Uniform Civil Procedure Rules*, pursuant to which the summary judgment application was brought, provides for the giving of judgment:

> "(2) If the court is satisfied that—
>
> (a) the defendant has no real prospect of successfully defending all or a part of the plaintiff's claim; and
>
> (b) there is no need for a trial of the claim or the part of the claim; ..."

[12] The primary judge concluded that the matter was not appropriately dealt with by way of summary judgment. He outlined the competing arguments as to the relationship between cl 2.2(3) and cl 9.3 and whether the right under the former could be exercised in the event of termination, continuing:

> "Whilst it's true to say as the applicants have submitted, that it may be that in some circumstances an applications Judge would be in the same position as a trial Judge to determine issues of law if the facts are not in dispute, I don't necessarily agree that that's the case in so far as this application is concerned today. This point would be, in my view, one which would require detailed and considered submissions given the brief overview that's really been placed before the Court during the course of this application today."

[13] His Honour went on to note the argument as to whether the right to the deposit rested in the appellants or in the stakeholder and observed:

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[2] *Bot v Ristevski* [1981] VR 120; *Ashdown v Kirk* [1999] 2 Qd R 1 (concerning an earlier and different version of the REIQ contract); and *Trpkovski v Russell* [2001] FCA 1871.

> "I've been told that there is no authority on this particular point, although I have been referred to some authorities by way of forming the basis of the submission and that a consideration of this issue will involve considerations both of contractual interpretation and Common Law considerations.
>
> Once again, it's not a straightforward point and, in my view, it is one which would require again detailed and considered submissions that are not before the Court today and would not be appropriate in the applications jurisdiction, in any event.
>
> That's not to say that the applicants don't have a good argument based upon the contract which has been signed by these parties but the determination of the issues that have been identified by the respondents, in my opinion, are not considerations delving into the realm of fantasy and that a potential outcome may well be one which provides the respondents with a defence to the claim."

His Honour concluded:

> "I bear in mind also in the course of considering this matter that summary judgment is not a step lightly undertaken and that the Courts do not embark upon ordering summary judgment unless it is in the most clear-cut of circumstances that it is the appropriate manner in which to proceed taking all relevant considerations into account.
>
> Having performed that task here today I'm of the view that this is not an appropriate argument to be dealt with by way of summary judgment and for the reasons that I've already explained this is a matter that should proceed to trial and, accordingly, the application is dismissed."

The appeal grounds

[14] The appellants' grounds of appeal were that the primary judge had erred in finding that it was not appropriate for the issues in question to be dealt with in the applications jurisdiction, given that there was no factual dispute and the issues raised could appropriately be dealt with on a summary basis; and that the learned judge erred in not finding that the respondents had no real prospect of successfully defending the claim, and ought to have determined the application in the appellants' favour.

Exercise of discretion?

[15] The respondents contended that the appeal was one from an exercise of discretion, so that it was necessary for the appellants to establish an error of the kind described in *House v The King*[3] before they could succeed. That led to competing arguments in the written submissions as to whether a judge who is satisfied of the matters in r 292(2) retains any discretion to refuse summary judgment. The appellants argued to the contrary (although in oral submissions counsel took the position that it was unnecessary to decide the point). That contention relied on dicta of Gordon J in

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3 (1936) 55 CLR 499.

Jefferson Ford Pty Ltd v Ford Motor Company of Australia Ltd[4] concerning s 31A of the *Federal Court of Australia Act* 1976, which provides that the court "may give judgment" if it is satisfied that the proceeding cannot be successfully prosecuted or defended, as the case may be. Gordon J regarded the section as conferring a power rather than a discretion.

[16] However, as the respondents pointed out, the Full Court of the Federal Court subsequently reached the contrary view in *Kowalski v MMAL Staff Superannuation Fund Pty Ltd*,[5] construing the section as conferring a discretion and observing, more particularly, that it was

> "a matter for a judge hearing a summary dismissal application to exercise some discretion as to whether questions of law that have been raised are so difficult that they ought not to be decided summarily".[6]

Similarly, in *Bolton Properties Pty Ltd v J K Investments (Australia) Pty Ltd*[7] Daubney J, after adverting to the matters of which the court had to be satisfied before granting summary judgment, went on to say that once the court was so satisfied, it remained to exercise the discretion conferred by the rule.

[17] That, in my respectful view, is the proper construction of the rule, but it does not assist the respondents here because the learned primary judge was not purporting to exercise a residual discretion. His Honour drew two conclusions: that the respondents had raised issues which might provide them with a defence; and that the complexity of the case was such as to require a trial. Since, as is obvious, he was not satisfied of either of the matters in Rule 292(2)(a) and (b), there was no occasion for him to exercise any discretion. The question is whether he was correct in finding that the statutory pre-conditions for the exercise of the discretion to give summary judgment had not been made out by the appellants.

Determining the prospects of a successful defence

[18] Determining what rights the sellers possessed under cl 2.2(3), is, in my view, a relatively straightforward process of construction of the contract, with very limited need for recourse to the common law. Counsel for the respondents here did not advance any further arguments than those made below as to whether the respondents had any real prospect of defending the claim. Those arguments were, in my opinion, entirely without substance.

[19] The fact that a deposit, if paid, is to be held by a stakeholder is irrelevant to the right to recover it when it is not paid. Under cl 2.2(3) the seller acquires a right to recover the unpaid balance of the deposit at the time when payment is required under the contract; in this case that right existed from 28 November 2011 (the date to which an extension of time for payment was given) and well before the contract was terminated by notice given on 9 February 2012. There is simply nothing in the contract which would warrant reading that right down to apply only where the contract is affirmed. Clause 9.1 makes it clear that the seller may terminate for the buyers' default without limiting its other rights under the contract.

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4 (2008) 167 FCR 372.
5 (2009) 259 ALR 319.
6 At 326.
7 [2009] 2 Qd R 202.

[20] There is nothing untoward about that result; under cl 2.4, had the deposit been paid the seller would have been entitled to receive it on the contract's termination. Clause 9.4(2), consistently with cl 2.4(1)(c), entitled the seller to forfeit the deposit on termination for the buyers' default. That conclusion that the sellers have an accrued right to claim the deposit as a debt in addition to the rights conferred by cl 9.4 does not entail, as was suggested in submissions below, an unfair windfall to the vendors; to the contrary, it accords with the dual character of the deposit as part payment of the purchase price but also as "a guarantee that the purchaser means business"[8] or as "an 'earnest' of the bargain or its performance".[9]

[21] The meaning of cl 2.2(3), in my view, is clear and leaves no room for doubt as to the appellants' right to recover the unpaid deposit from the respondents.

Whether there was a need for a trial

[22] Counsel for the respondents on the appeal focussed on what he characterised as the primary judge's exercise of his discretion to decline to determine the matter. As I have already indicated, I do not consider that any discretion arose; but the respondents' arguments in this regard go to the second limb of r 292: whether there was a need for a trial. Counsel contended that a judge was entitled to refuse an application for summary judgment where there were complex issues of law and the submissions made appeared deficient.

[23] Pressed as to what was lacking in the submissions, counsel responded that the respondents had at first instance raised the case of *Ashdown v Kirk*, in which the seller was held entitled to recover an unpaid deposit as liquidated damages, and had pointed out that it dealt with an earlier form of the REIQ contract. That, he said, raised the question of whether there was a difference between the provisions of the contract in *Ashdown* and those in the present case; an issue with which the appellants had not dealt in their reply before the primary judge. In reality, however, all that the respondents' submission concerning *Ashdown* amounted to was that it was necessary to look at the terms of the contract to see what the sellers' rights were in this case; and the appellants had advanced their arguments as to the construction of the contract.

[24] It may be accepted that there may be cases involving questions of law of such difficulty that an applications judge faced with inadequate submissions and a lack of assistance as to authority cannot resolve them. (The imperative in r 5 of the *Uniform Civil Procedure Rules* 1999 for expeditious resolution of issues in civil proceedings would indicate, however, that any such class of cases must be very limited.) But this was not such a case. The questions of construction raised were not particularly difficult, and the learned judge did not identify any respect in which he would have been assisted by further submissions. The matter could readily and properly have been resolved on a summary basis, with judgment reserved, if necessary, to enable reflection on the points raised.

[25] In my respectful view, the learned judge erred in failing to find, first, that the respondents had no real prospect of successfully defending the appellants' claim and, second, that there was no need for a trial of the claim. Those findings should have been made; once made, nothing was identified which would warrant an

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8 *Bot v Ristevski* [1981] VR 120 at 123.

9 *Ashdown v Kirk* [1999] 2 Qd R 1 at 8.

exercise of discretion against the granting of summary judgment. The order below, dismissing the application for summary judgment, should be set aside and, in lieu, judgment ordered for the appellants for the amount of the unpaid deposit, $204,000 with interest as provided for by cl 9.9(1) of the contract. The parties agreed as to the rate at which the latter should be paid if judgment were given; the amount resulting is $31,335.78.

Costs

[26] The appellants, in their statement of claim, sought indemnity costs and here argued that the costs both of the proceedings below and of the appeal should be awarded on that basis. The argument was based on cl 9.7 of the contract. But, as counsel for the respondent pointed out, that clause entitles the seller to claim damages for loss suffered from the buyers' default, including legal costs on an indemnity basis; in the present case there had been no claim for damages.

[27] The appellants referred to *Platinum United II Pty Ltd & Anor v Secured Mortgage Management Ltd (in liq)*[10] in which one of the appellants was held, by virtue of the terms of the agreement between it and the respondent, to be liable to indemnity costs. But the agreement there specifically required the appellant to "indemnify and upon demand reimburse the [respondent] for all legal fees on an indemnity basis". As Fraser JA observed in that case, a court would usually exercise the discretion as to whether to give costs otherwise than on the standard basis so as

> "to give effect to a contractual provision which 'plainly and unambiguously' provides for taxation on another basis".[11]

[28] The respondent also pointed to this statement by the Victorian Court of Appeal in *Chen & Anor v Kevin McNamara & Son Pty Ltd & Anor (No. 2)*:[12]

> "An agreement to pay costs will be construed as an agreement to pay costs on a party and party basis, unless it is plain from its terms that costs are to be paid on a 'special basis.' Where the terms plainly and unambiguously provide for costs to be assessed on some special basis, the court will take such a provision into account but it is not bound to give effect to any extra-curial contract as to costs. An agreement to pay costs on a 'special' basis is only a factor informing the exercise of the court's discretion, but not requiring the exercise of that discretion in a particular way. Generally however, where the parties have unmistakeably agreed to the making of a special costs order, such a term will be given effect to [sic] unless there is some other discretionary consideration that militates against the making of such an order."[13] (Citations omitted.)

[29] This is not a case in which the parties have contracted "plainly and unambiguously" for payment of costs on an indemnity basis. The right to claim such costs as a component of damages for loss resulting from the buyer's default is a different and less certain thing; apart from anything else, the recovered deposit could be brought to account in calculating the loss. Because the appellants have not

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10 [2011] QCA 229.
11 At [6].
12 [2012] VSCA 229.
13 At [8].

established a clear right under the contract so as to warrant the exercise of the costs discretion in favour of granting indemnity costs, I would confine the award of costs here and below to costs on the standard basis.

[30] I would make the following orders:

1. Set aside the orders made at first instance.

2. Give judgment for the appellants in the amount of $235,335.78.

3. Order that the respondents pay the costs of this appeal and of the proceeding at first instance on the standard basis.

[31] **FRASER JA:** I have had the advantage of reading the reasons for judgment of Holmes JA. I agree with those reasons and with the orders proposed by her Honour.

[32] **WHITE JA:** I have read the reasons for judgment of Holmes JA and agree with her Honour's reasons and the orders which she proposes.