SUPREME COURT OF QUEENSLAND

CITATION:	*Phillips and Anor v Scotdale Pty Ltd* [2007] QSC 368
PARTIES:	**CRAIG GEREGORY PHILLIPS and TRACIE LEE ARNOLD** (Applicant) **v** **SCOTDALE PTY LTD** **ACN 103 671 316** (Respondent)
FILE NO:	SC No 9692 of 2007
DIVISION:	Trial
PROCEEDING:	Application
COURT:	Supreme Court
DELIVERED ON:	18 December 2007
DELIVERED AT:	Brisbane
HEARING DATE:	12 November 2007
JUDGE:	Fryberg J
ORDER:	**1. Declare that the agreement in writing dated 17 July 2007 between the applicants and the respondent for the sale of property at 392 Gilston Road, Gilston in the State of Queensland more particularly described as Lot 1 on RP 127511 County Ward Parish Gilston Title Reference 14621004 was validly terminated by the applicants;** **2. The respondent's application filed 7 November 2007 is dismissed.**
CATCHWORDS:	Conveyancing – Breach of contract for sale and remedies – Entitlement to deposit – Right of vendor to forfeit under special condition upon purchaser's default Contracts – General contractual principles – Illegal and void contracts – Effect of illegality or invalidity of special condition – Severance – General test of severance applied – Nature of contract unaltered – Severance possible *Property Agents and Motor Dealers Act 2000* (Qld) s379, s384, s385 *Property Law Act 1974* (Qld) s71, s72 *Brickles v Snell* [1916] 2 AC 599 referred to *Brien v Dwyer* (1978) 141 CLR 378 cited *Carney v Herbert* [1985] AC 301 referred to

Firmin v Gray and Co Pty Ltd [1985] 1 Qd R 160 referred to
Howe v Smith (1884) 27 Ch D 89 cited
Humphries v Proprietors "Surfers Palms North" Group Titles Plan 1955 (1994) 179 CLR 597 referred to
Legoine v Hateley (1983) 152 CLR 406 cited
McFarlane v Daniell (1938) 38 SR(NSW) 337 applied
Starco Developments Pty Ltd v Ladd [1998] QCA 344 distinguished
Steedman v Drinkle [1916] 1 AC 275 referred to
SST Consulting Services Pty Ltd v Rieson (2006) 225 CLR 516 referred to
Take Harvest Ltd v Liu and Another [1993] AC 552 cited
Thomas v Brown (1876) 1 QBD 714 referred to
Thomas Brown and Sons Ltd v Fazal Deen (1962) 108 CLR 391 referred to
Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd (1978) 139 CLR 410 cited

COUNSEL: Applicant: P Hackett
Respondent: R Lilley SC and R Oliver

SOLICITORS: Applicant: Michael Sing Lawyers – Legal Solutions
Respondent: Hemming and Hart Lawyers

[1] **FRYBERG J:** Mr Phillips and Ms Arnold ("the vendors") are the registered proprietors of a residential allotment at Gilston. By a contract dated 17 July 2007 they agreed to sell it to Scotdale Pty Ltd for $3.5 million. The contract was in the standard form for houses and land approved by the Real Estate Institute of Queensland Limited and the Queensland Law Society Incorporated (Fifth Edition), with a number of special conditions added. A schedule, called "Reference Schedule", set out how the deposit was payable:

> "Deposit $10,000.00 payable when Buyer signs this contract
> $90,000.00 payable on: 14 days from date hereof."

Centrepoint First National ("Centrepoint"), one of the agents for the vendors, was nominated as "Deposit Holder" in the schedule and was a party to the contract in that capacity. Time was expressly of the essence of the contract in all relevant respects.

[2] Under the contract, settlement was originally to take place on 22 August 2007 at Nerang. On 20 August, Hemming & Hart, the solicitors for Scotdale, wrote to Mr Michael Smith, the solicitor for the vendors, requesting an extension of time for settlement to 27 September. Negotiations took place over the following two days and eventually, agreement was reached. There were a number of conditions ("Extension Terms") to that agreement, but the two which are presently relevant were as follows:

> "1. The Settlement Date is extended to 4 September 2007.
> 2. If our client pays a $100,000 further part deposit to the agent on or before 4 September 2007, the Settlement Date is

> further extended to 27 September 2007, and Special Condition 1 of the Contract is varied as provided in the Fax in italics."

[3] The varied special condition 1 referred to was in the following terms:

> "1. Despite any other clause contained in this Contract (including the Terms of Contract) the parties agree the Purchase Price of $3,5000,000.00 is to be paid to the Seller as follows:
>
> (a) $100,000.00 by way of part deposit payable as set out in the Reference Schedule; and
> (b) $100,000.00 by way of further part deposit payable on 4 September, 2007 to be released immediately to the Sellers (and for the purpose of clarity the parties agree that Special Condition 13 shall also apply to this further part deposit); and
> (c) $800,000.00 on the Settlement Date; and
> (d) $2,500,000.00 (**Balance Price**) on or before 17 July 2008 (**Repayment Date**), and in accordance with these Special Conditions and the first registered mortgage granted to the Seller, a copy of which is annexed to this Contract as Annexure "B" (**Mortgage**)."

In the contract as it stood before variation, the opening words and paras (a) and (d) of that condition were in the same terms, save that para (d) was numbered (c). The previous para (b) provided for payment of $900,000.00 on the Settlement Date.

[4] Special condition 13, referred to in cl 1(b), was as follows:

> "13. The parties mutually acknowledge, authorise and agree that as soon as practicable after the payment of the balance deposit the deposit holder shall pay to the Seller the Deposit (less the agents commission and any GST payable on that commission which sums shall be retained in the Agent's Trust Account pending settlement or earlier termination of the contract) and the Buyers shall have no claim against the Sellers (provided the Sellers are not in breach of the provisions hereof) or the deposit holder except where the Seller is in breach of its obligations under this Contract in which case nothing will prevent the Buyer from recovering from the Seller any amounts entitled to it under this Contract or at law."

For the present, I shall assume that this condition was valid.

[5] On 4 September 2007 the Extension Terms were varied at Scotdale's request by (in effect) replacing the references to 4 September 2007 with references to 10 September 2007. On the latter date, again at Scotdale's request, that date was varied by agreement to 13 September. On 13 September Scotdale, again unable to pay the required $100,000, requested a further variation. The parties agreed that the money should be payable in parts, $45,000 by noon on that day and $55,000 by 14 September.

[6] The $100,000 referred to in cl 1(a) above was paid and by close of business on 14 September, so was the further $100,000 referred to in cl 1(b). Both amounts were paid to Centrepoint.[1] Consequently, the settlement date was extended to 27 September 2007. Arrangements for settlement were duly made between the solicitors, but on the day for settlement, Scotdale requested a further extension of time. The stated reason was that settlement of a business sale from which it was expecting to source funds to settle had been extended. The vendors refused that request and required settlement. Scotdale responded by asserting its inability to pay the balance purchase price and alleged for the first time that the contract was an instalment contract for the purposes of division 4 of the *Property Law Act 1974* ("the Act"). The vendors elected to terminate the contract and forfeit the deposit. They purported to do so by letter dated 2 October 2007. They made no attempt to serve a notice pursuant to s 72 of the Act.

[7] Two applications are now before the court. By the first the vendors seek a declaration that the contract was validly terminated and that they were entitled to forfeiture of the deposit moneys of $200,000.00. By the second Scotdale seeks a declaration that the contract was an instalment contract. The parties are agreed that if it was not an instalment contract, the vendors must succeed and that if it was, Scotdale must succeed. They are further agreed that whether the contract was an instalment contract depends upon whether the deposit moneys were a deposit within the meaning of s 71 of the Act. "Deposit" is there defined:

> "***deposit*** means a sum—
> (a) not exceeding 10% of the purchase price payable under an instalment contract; and
> (b) paid or payable in one or more amounts; and
> (c) liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser."

Since the sum of the amounts paid ($200,000) did not exceed 10% of the price payable under the contract, the question at issue between the parties was whether that sum fell within the wording of para (c).

[8] On behalf of Scotdale Mr Lilley SC referred to the fact that from the inception of the contract the buyer was bound to pay $100,000, which amount (save for its commission and GST) Centrepoint was obliged to pay to the vendors. Scotdale had only a conditional right to recover that sum by action; it was not liable to be forfeited because it had to be paid away under special condition 13 and would not be there to be forfeited. A forfeiture was an amount of money to which two people were entitled and one person's claim would be forfeited on a certain event occurring. Special condition 13 defeated the possibility of forfeiture because the money was to be paid away. The same was true of both the original $100,000 and the further $100,000 under the varied condition. Therefore, he submitted, under the contract "there is no fund '*liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser*'."[2]

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1 There was no suggestion that this was not in accordance with the contract. I assume that Centrepoint still holds the money: see s 385 of the *Property Agents and Motor Dealers Act 2000.*

2 Italics in the submission. Mr Lilley declined to argue that para (c) of the definition of deposit should be construed as though the words "but only in the event" were inserted after "event".

Forfeiture of a deposit at common law

[9] It is trite law that whether a vendor is entitled to forfeit a deposit and, conversely, whether a purchaser is entitled to the return of a deposit paid under a contract for the sale of land depends upon the construction of the contract. Ordinarily, money paid to a vendor for consideration which has totally failed will be repayable. However by the end of the 19th century it had become settled law that in the absence of any express provision for forfeiture, the use of the word "deposit" implied a right of forfeiture in the event that the contract was terminated as a result of the default of the purchaser. That result followed from the nature of a deposit:

> "There is a variance, no doubt, in the expressions of opinion, if not in the decisions, with reference to the return of the deposit, but I think that the judgment of Lord Justice James gives us the principle on which we should deal with the case. What is the deposit? The deposit, as I understand it, and using the words of Lord Justice James, is a guarantee that the contract shall be performed. If the sale goes on, of course, not only in accordance with the words of the contract, but in accordance with the intention of the parties in making the contract, it goes in part payment of the purchase-money for which it is deposited; but if on the default of the purchaser the contract goes off, that is to say, if he repudiates the contract, then, according to Lord Justice James, he can have no right to recover the deposit."[3]

> "We have therefore to consider what in ordinary parlance, and as used in an ordinary contract of sale, is the meaning which business persons would attach to the term 'deposit'. Without going at length into the history, or accepting all that has been said or will be said by the other members of the Court on that point, it comes shortly to this, that a deposit, if nothing more is said about it, is, according to the ordinary interpretation of business men, a security for the completion of the purchase? *[sic]* But in what sense is it a security for the completion of the purchase? It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover the deposit, because that would be to enable him to take advantage of his own wrong."[4]

> "Money paid as a deposit must, I conceive, be paid on some terms implied or expressed. In this case no terms are expressed, and we must therefore inquire what terms are to be implied. The terms most naturally to be implied appear to me in the case of money paid on the signing of a contract to be that in the event of the contract being performed it shall be brought into account, but if the contract is not performed by the payer it shall remain the property of the payee. It is not merely a part payment, but is then also an earnest to bind the bargain so entered into, and creates by the fear of its forfeiture a motive in the payer to perform the rest of the contract.

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3 *Howe v Smith* (1884) 27 Ch D 89 at p 95 per Cotton LJ.

4 *Ibid* at p 98 per Bowen LJ.

> The practice of giving something to signify the conclusion of the contract, sometimes a sum of money, sometimes a ring or other object, to be repaid or redelivered on the completion of the contract, appears to be one of great antiquity and very general prevalence. It may not be unimportant to observe as evidence of this antiquity that our own word 'earnest' has been supposed to flow from a Phoenician source through the *ἀρραβών* of the Greeks, the *arra* or *arrha* of the Latins, and the *arrhes* of the French."[5]

The same approach is applied in Australia.[6]

[10] Two points emerge from those passages. First, a deposit could, and in the paradigm case would, be held by the vendor. Neither the possibility of "forfeiture" nor the purchaser's right to the return of the deposit depended upon its being held by a stakeholder or trustee. Second, a deposit might be paid in money, but it might also be effected by the deposit of chattels. In either case the law spoke of the forfeiture of the deposit in the event of the purchaser's default. In the latter case, (unless, possibly, the chattel formed part of the purchase price), the vendor would presumably acquire only a possessory right in respect of it, not any form of title to it. Where the deposit consisted of money, the vendor acquired title to it by reason of the nature of money[7] and was therefore entitled to use it as its own pending completion of the contract. There was no obligation to hold the money in trust or as a separate fund. But the absence of any such obligation was no impediment to its "forfeiture".

[11] The use of "forfeit" and its derivatives in relation to the right of a vendor to retain a deposit when a contract is terminated by reason of the default of the purchaser is time honoured. It is however not technically accurate. Forfeiture occurs where a person is deprived of an interest in property:

> "[F]orfeiture involves the loss or determination of an estate or interest in property or a proprietary right, eg, a lease, in consequence of a failure to perform a covenant."[8]

Where a cash deposit has been paid to a vendor, the purchaser has no proprietary right to the money. Until the contract is terminated the purchaser may have a chose in action, viz a contingent contractual right to repayment of an amount equal to the deposit in the event that termination occurs without its default. If so, the contingency would become impossible of fulfilment at the latest upon the vendor's election to terminate the contract for breach. No separate act of forfeiture would be required. When relief is granted to a purchaser it is not properly characterised as relief against forfeiture:

> "There is, however, a real distinction between 'penalty' and 'forfeiture' and it is unfortunate that the terms have been frequently used in a way which blurs it. The claims made by the purchasers in *Steedman v Drinkle*[9] and *Brickles v Snell*[10] were for relief against the

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5 *Ibid* at pp 101-2 per Fry LJ.

6 *Brien v Dwyer* [1978] HCA 50; (1978) 141 CLR 378.

7 *Sinclair v Brougham* [1914] AC 398 at 418.

8 *Legione v Hateley* [1983] HCA 11 at [32]; (1983) 152 CLR 406 at p 445, per Mason and Deane JJ.

9 [1916] 1 AC 275.

10 [1916] 2 AC 599.

> 'forfeiture' of instalments of purchase money. The relevant contracts, like the modern contract of sale, permitted the vendor to 'forfeit' instalments of purchase money. In this situation, despite the use of the word 'forfeit', relief is granted on the footing that the contractual provision entitling the vendor to retain the instalments is in substance a penalty, or in the nature of a penalty, because it is designed to ensure payment of the entire purchase price and it exceeds the damage which he suffers by reason of the purchaser's default."[11]

Forfeiture of the deposit under the contract

[12] That would be the position where the contract was silent on the question of forfeiture of the deposit. In the present case the contract was not silent. Special conditions 1 and 13 have been set out above, but it is necessary to refer also to some of the standard conditions in the printed form of contract:

> "**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 post-dated cheque; or
>
> (c) pays the Deposit by cheque which is dishonoured on presentation.
>
> …
>
> **2.4 Entitlement of Deposit and Interest**
>
> (1) The party entitled to received 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.
>
> (2) The interest on the Deposit must be paid to the person who is entitled to the Deposit.
>
> (3) If this contract is terminated, the Buyer has no further claim once it receives the Deposit and interest, unless the termination is due to the Seller's default or breach of warranty.
>
> (4) The Deposit is invested at the risk of the party who is ultimately entitled to it.
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> …

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11 *Ibid*.

> **9. Buyer's Default**
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> **9.1 Seller May Affirm or Terminate**
>
> If the Buyer fails to comply with any provision of this contract, the Seller may affirm or terminate this contract.
>
> …
>
> **10.8 Interpretation**
>
> …
>
> (4) **Inconsistencies**
>
> If there is any inconsistency between any provision added to this contract and the printed provisions, the added provision prevails."

[13] Under the contract as ultimately varied, the total deposit was payable by four instalments: $10,000 when Scotdale signed the contract; $90,000 14 days from the date of the contract (17 July 2007); $45,000 by noon on 13 September; and $55,000 by 14 September.[12] The opening sentence of cl 2.2 required that the instalments be paid to Centrepoint. Nothing in the special conditions was inconsistent with this; indeed special condition 13 assumed that they would be so paid. It is true that when the contract was varied, there was no explicit variation to the reference schedule, and that schedule made no provision for the time of payment of the third and fourth instalments. Neither party suggested that this detracted from the obligation to pay them to Centrepoint, and that was what in fact occurred. By the second sentence of that clause Centrepoint was obliged to hold the deposit until a party became entitled to it. Again, there was no inconsistency with the special conditions.

[14] With one exception the same can be said of cl 2.4. In my judgment it is plain that that clause is dealing with the receipt of the deposit upon the termination of the contract. It is not concerned with what happens to the deposit in the meantime. So interpreted all of the clause except (arguably) sub-cl (1)(b) can operate conformably to the special conditions. The parties disagreed about whether that sub-clause was inconsistent with special condition 13.

[15] That condition is not well drafted. The expression any "amounts entitled to it" is clumsy. It is not altogether clear whether the second part of the condition[13] (which incidentally displays some uncertainty as to the number of buyers) applies only to claims in respect of the deposit or to all claims (eg: rescission for innocent misrepresentation). It is arguable that the second part applies only in the event of compliance by Centrepoint with its obligation under the first part of the condition (why else would the two parts be conjoined?), but such an interpretation seems a little improbable and neither party advanced it. The parties disputed whether the clause meant that Scotdale could recover the deposit only if the vendors were in breach of their obligations under the contract (as Scotdale submitted) or whether it could do so under cl 2.4(1)(b) provided it was not in default. In other words, what would happen if the contract were terminated by frustration, abandonment or agreement?

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12 See paras [2] to [4].

13 "and the Buyers shall have no claim …".

[16] In my judgment special condition 13 would prevent Scotdale from recovering the deposit in all of these cases. I see no scope for interpreting the second part of the condition as excluding the vendors' right in the three cases mentioned. The wording of the condition simply does not permit such an outcome. I accept Mr Lilley's submission that the condition is inconsistent with sub-cl 2.4(1)(b). I approach the balance of the submissions on this basis. (It was not suggested that on this interpretation the condition was void because it imposed a penalty, and I need not consider that possibility).

[17] As already noted, the contract required all of the deposit to be paid to Centrepoint in the first instance, and that was what occurred. Centrepoint paid the money into its general trust account, presumably to comply with s 379 of the *Property Agents and Motor Dealers Act 2000* ("*PAMDA*"). Presumably again, this was what the contract contemplated, at least in the first instance. Once it was so deposited Centrepoint held it on trust for both parties to the contract, to the extent of their respective rights under the contract. In other words, Centrepoint held it on trust to apply it in accordance with special condition 13.

[18] In my judgment that did not affect the operation of cl 9.1 of the contract. Upon Scotdale's default, the vendors would become entitled to terminate the contract. That right was unaffected by whether or not the money remained in the trust account or had been paid (save to the extent of the agent's commission) to the vendors. In the former case the contingency upon which the existence of any beneficial interest in Scotdale depended would on any such termination become impossible of fulfilment and Scotdale would thereupon cease to have any interest in the trust fund. In the latter case, by analogy with the position at common law, the contingency upon which Scotdale's chose in action depended would become impossible of fulfilment. In either case the deposit would be forfeited in a relevant sense. In other words special condition 13 did not have the effect, while the contract remained executory, of making forfeiture impossible.

Forfeiture of the deposit under the Property Law Act

[19] Does "forfeited" carry some different meaning in s 71 of the Act? Scotdale's submission that the money was not a deposit because there was no "fund" liable to be forfeited suffers from the preliminary difficulty that the statutory definition refers to a "sum" liable to be forfeited, not a "fund" so liable. There is no requirement for a separate fund which would be destroyed by a payment to the vendors. On the contrary the reference to a sum "liable to be forfeited and *retained* by the vendor" seems to contemplate the very case where the vendor already has the sum in question at the time the contract is terminated. Nothing in the wording seems to support Scotdale's submission.

[20] However counsel submitted that this position was supported by the decision in *Starco Developments Pty Ltd v Ladd*.[14] I reject that submission. In *Starco*, the deposit was precisely 10% of the purchase price. A variation to the contract authorised the solicitor holding it in his trust account to pay it, together with interest accrued on it, to the vendor prior to settlement. The majority[15] did not interpret this

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14 [1998] QCA 344; [1999] 2 Qd R 542.

15 De Jersey CJ and McPherson JA.

as authorising a forfeiture of the deposit. Nonetheless they held that the variation made the amount "payable" within the meaning of the Act because with the authority of the purchaser, money in which the purchaser had an equitable interest was transferred to the vendor, thus destroying the purchaser's interest in it. It was indisputable that the inclusion of the interest took the amount payable beyond 10% of the purchase price. For this reason the deposit exception in s 72(1) of the Act did not apply.

[21] In the present case it may be accepted that special condition 13 made a sum "payable" within the meaning of cl (b) of the definition of "deposit". The question here is whether the condition "defeat[ed] the possibility of there being a forfeiture", to use Mr Lilley's words. That question was not raised in *Starco*. The decision does not assist Scotdale's submission.

[22] I hold that the money paid by Scotdale was a deposit within the meaning of s 71, and consequently that the contract was not an instalment contract for the purposes of Division 4, of the Act.

Illegality

[23] After reserving judgment in this matter, I sought further assistance from the parties on the question whether s 385[16] of *PAMDA* meant that special condition 13 was void for illegality. The vendors submitted that it was and that it was severable. It would follow if the clause or at least the first part of it were severed that no question of an instalment contract would arise. Not surprisingly, Scotdale's submissions were to the contrary on both points.

[24] The starting point for discussion of this aspect of the case involves a question of interpretation of the condition. The vendors submitted that the intent of the condition was to authorise Centrepoint to pay part of the deposit to them before the completion or earlier termination of the contract. That interpretation is supported by the expressions "as soon as practicable after the payment of the balance deposit" and "pending settlement or earlier termination of the contract". The second expression in particular clearly applies to the commission and GST remaining in the trust account after the payment to the vendors. In my judgment the special condition, or at least the first half of it, was intended to authorise payment of part of the deposit to the vendors before the finalisation of the contract.

[25] Scotdale submitted that the obligation to make a payment "as soon as practicable" limited the operation of the first half of the condition so that it did not have the effect that Centrepoint was bound to make a payment in a way not permitted by *PAMDA*. It submitted that those words must include "legally possible". Whatever flexibility might have existed in the words "as soon as practicable" had they stood alone, it is not in my judgment possible to read them in the sense for which Scotdale contends in the present context. Scotdale submitted that the purpose of the condition was to alter forever the parties' rights to the deposit so that it had no right to the deposit once it was paid, only a right to recover the deposit on one event. That submission in effect separated the second half of the condition from the first. In my judgment it does not matter which way one approaches the question of

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16 Strictly I should have referred to the combined effect of ss 384 and 385.

separation. The condition is intended to provide for early payment of the deposit to the vendor, and at least the first part does so.

[26] *PAMDA* provides:

> "**384 When payments may be made from trust accounts**
>
> (1) An amount paid to a trust account must be kept in the account until it is paid out under this Act.
> Maximum penalty – 200 penalty units or 3 years imprisonment.
>
> (2) An amount may be paid from a trust account only in a way permitted under this Act.
> Maximum penalty – 200 penalty units or 3 years imprisonment.
>
> **385 Permitted drawings from trust accounts**
>
> (1) A licensee may draw an amount from the licensee's trust account to pay the licensee's transaction fee or transaction expenses in relation to a transaction only if—
> (a) the amount is drawn against the transaction fund for the transaction; and
> (b) the licensee is authorised to draw the amount under this section.
> Maximum penalty – 200 penalty units or 3 years imprisonment.
>
> (2) The licensee is authorised—
> (a) to draw an amount from the transaction fund to pay a transaction expense when the expense becomes payable; and
> (b) when the transaction is finalised, to draw an amount from the transaction fund that is equal to the difference between—
> (i) the balance of the transaction fund; and
> (ii) the total of the licensee's transaction fee and any outstanding transaction expense;
> to pay the person entitled to the amount or in accordance with the person's written direction; and
>
> *Example of when transaction is finalised—*
> The settlement of a contract for the sale of property or the termination of the contract
>
> (c) to draw the licensee's transaction fee from the transaction fund when the amount, if any, mentioned in paragraph (b) has been paid and when the transaction is finalised.
>
> (3) For subsection (2)(b) or (c), if a dispute about the transaction fund arises, the transaction is not taken to be finalised until the licensee is authorised to pay out the transaction fund under section 388.

(4) The licensee must pay an amount mentioned in subsection (2)(b) to the person entitled to it or in accordance with the person's written direction —

(a) if the person asks, in writing, for the balance — within 14 days after receiving the request; or

(b) if the person has not asked, in writing, for the balance — within 42 days after the person first had the right to the balance.

Maximum penalty – 200 penalty units or 3 years imprisonment.

(5) In this section—

transaction expenses means the expenses the licensee is authorised to incur in connection with the performance of the licensee's activities for a transaction.

transaction fee means the fees, charges and commission payable for the performance of the licensee's activities for a transaction.

transaction fund means the amount held in a licensee's trust account for the transaction."

[27] The vendors submitted that the payment under the special condition was of the type described in s 385(2)(b). Under that provision the licensee is authorised to act only when the transaction is finalised. Consequently the special condition was contrary to that section and s 384 and was illegal.

[28] For a Scotdale it was submitted that it would be an absurd construction if s 385 were to have the effect that beneficiaries who are sui juris could not, by direction to their trustee, direct how the trust fund was to be paid as between themselves. It was submitted that the special condition was consistent with s 385(4) because the obligation there expressed was not conditioned on "finalisation", referring only to the "*amount* mentioned in subsection (2)(b)".

[29] I have some sympathy for the first part of that submission. It does seem odd that a licensee/trustee should be prohibited from giving effect to the wishes of all the beneficiaries. It is difficult to reconcile this outcome with the objects set out in s 10 of *PAMDA*. However in my judgment the words are too clear to permit any other construction. Section 385(4) is concerned with the timing of the payment; it does not purport to authorise anything not already authorised by s 385(2)(b). Special condition 13 required Centrepoint to pay money to the vendors, something it was prohibited from doing by s 384. It was a contract to do something which that Act forbade. The consequence in the present case is that it (or at least the first part of it) is void and unenforceable:

> "It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as

> has been said in many cases of authority, that the test is whether the contract is prohibited by the statute."[17]

Scotdale did not submit otherwise; no doubt counsel was conscious of the objects set out in s 10.

[30] In *Humphries v Proprietors "Surfers Palms North" Group Titles Plan 1955*, McHugh J said:[18]

> "In the case of promises that are invalid, the general test for determining whether they are severable from the agreement of which they form part was laid down by Jordan CJ in *McFarlane v Daniell*[19] in a passage approved by this Court in *Thomas Brown and Sons Ltd v Fazal Deen*[20] and by the Privy Council in *Carney v Herbert,*[21] Jordan CJ said:[22]
>
> > 'When valid promises supported by legal consideration are associated with, but separate in form from, invalid promises, the test of whether they are severable is whether they are in substance so connected with the others as to form an indivisible whole which cannot be taken to pieces without altering its nature ... If the elimination of the invalid promises changes the extent only but not the kind of the contract, the valid promises are severable.'
>
> However, this is not an exclusive test. The test of severability is a flexible one. 'There are not set rules which will decide all cases'.[23]"

Thomas Brown and Sons Ltd v Fazal Deen was applied by this court in *Firmin v Gray and Co Pty Ltd,*[24] a decision also cited by the Privy Council with approval in *Carney v Herbert.* Although there are signs that the general test may be destined for some revision,[25] it is clearly applicable in the present case.

[31] In the present case, special condition 13 does not in my judgment "form an indivisible whole which cannot be taken to pieces without altering [the contract's] nature". The essence of the first part of the condition is a variation from the standard form contract in the identity of the deposit holder in respect of a portion of the deposit; that of the second part is a slight variation in the range of contingencies upon which the deposit is forfeited (depending upon the interpretation of that part[26]). It makes no difference whether the whole clause be severed or only the first part. The kind of contract constituted by the unsevered balance is unchanged.

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17 *Yango Pastoral Company Pty Ltd v First Chicago Australia Ltd* [1978] HCA 42 at [5]; (1978) 139 CLR 410 at p 413 per Gibbs ACJ.

18 [1994] HCA 21 at [29]; (1994) 179 CLR 597 at p 618.

19 (1938) 38 SR(NSW) 337.

20 [1962] HCA 59 at [14]; (1962) 108 CLR 391 at 411.

21 [1985] AC 301 at 310-311.

22 *McFarlane v Daniell* (1938) 38 SR(NSW) 337 at 345.

23 *Carney v Herbert* [1985] AC 301 at 309.

24 [1985] 1 Qd R 160.

25 *SST Consulting Services Pty Ltd v Rieson* [2006] HCA 31 at [48]; (2006) 225 CLR 516 at p 531, per Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ.

26 See para [15].

[32] Scotdale submitted that the condition was not severable because it was not possible to conclude that the vendors would have extended the settlement date without agreement to have the second payment released to them. A similar argument was advanced in *Carney v Herbert*. It suffices to say that the Privy Council held that any such enquiry was irrelevant.[27]

[33] I conclude with two statements of general import:

> "In an era in which most human activity is regulated by legislation imposing penalties for its contravention, it is often difficult to avoid infringing legislated prohibitions whether known or unknown to those concerned. It would be remarkable if the mere presence in any agreement, however extensive or complex it might be, of an insignificant provision were to invalidate the whole contract simply because that provision embodied an agreement to do an act prohibited by statute."[28]

> "Subject to a caveat that it is undesirable, if not impossible, to lay down any principles which will cover all problems in this field, their Lordships venture to suggest that, as a general rule, where parties enter into a lawful contract of, for example, sale and purchase, and there is an ancillary provision which is illegal but exists for the exclusive benefit of the plaintiff, the court may and probably will, if the justice of the case so requires, and there is no public policy of objection, permit the plaintiff if he so wishes to enforce the contract without the illegal provision."[29]

Summary

[34] The contract was not an instalment contract for two reasons: first, the only part of it that might have produced that result was illegal and void (but severable); and second, even if it was not illegal, the money paid by Scotdale was a deposit within the meaning of para (c) of the definition of "deposit" in s 71 of the Act.

Orders

[35] The vendors accept that on their application it is sufficient that there be an order in accordance with para 1 of the application. Scotdale's application should be dismissed. I will hear the parties on costs.

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27 [1985] AC 301 at p 316.

28 *Firmin v Gray and Co Pty Ltd* [1985] 1 Qd R 160 at pp 178-9 per McPherson J.

29 *Carney v Herbert* [1985] AC 301 at 317.