SUPREME COURT OF QUEENSLAND

CITATION:	*Watpac Developments Pty Ltd v Latrobe King Commercial Pty Ltd & Anor* [2011] QSC 392
PARTIES:	**WATPAC DEVELOPMENTS PTY LTD** **ACN 011 003 795** (Plaintiff) v **LATROBE KING COMMERCIAL PTY LTD** **ACN 005 759 839** (First Defendant) and **WARREN ALFRED THOMPSON** (Second Defendant)
FILE NO/S:	BS 6394 of 2010
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court
DELIVERED ON:	12 December 2011
DELIVERED AT:	Brisbane
HEARING DATE:	25 October 2011
JUDGE:	McMurdo J
ORDER:	**Judgment for the plaintiff against the defendants in the sum of $1,849,553.31**
CATCHWORDS:	CONVEYANCING – FROM CONTRACT TO COMPLETION – INSTALMENT CONTRACT – GENERALLY – where the plaintiff contracted to sell real property to the first defendant – where the second defendant guaranteed the first defendant's performance of the contract and indemnified the plaintiff – where the contract was varied allowing for an extension of the date for completion and for the first defendant to pay additional monies via instalments – where the first defendant failed to pay those instalments – where the plaintiff terminated the contract and treated the monies as a deposit which was forfeited – where the plaintiff resold the real property resulting in a deficiency – whether the contract was an instalment contract under s 71 of the *Property Law Act 1974* (Qld) – whether the plaintiff was entitled to terminate the contract

CONVEYANCING – THE CONTRACT AND CONDITIONS OF SALE – DEPOSIT – WHAT CONSTITUTES – whether the instalments constituted a deposit within the meaning of s 72 of the Act – whether the monies were 'liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser'

Property Law Act 1974 (Qld), s 71, s 72
Supreme Court Act 1995 (Qld)

Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd (2008) 236 CLR 342, cited
Howe v Smith (1884) 27 Ch D 89, cited
Phillips v Scotdale Pty Ltd [2008] QCA 127, applied
Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd [1993] AC 573, cited

COUNSEL: M Gynther for the plaintiff
DA Savage SC with RW O'Regan for the defendants

SOLICITORS: Corrs Chambers Westgarth for the plaintiff
Connolly Suthers for the defendants

[1] The question in this case is whether the contract between the parties was an instalment contract under s 71 of the *Property Law Act 1974* (Qld). This depends upon whether the payment or payments required to be paid before completion were a "deposit" as defined in that section.

[2] By this contract dated 21 May 2007, the plaintiff ('the vendor') agreed to sell real property to the first defendant ('the purchaser'). The second defendant guaranteed the purchaser's performance of the contract and agreed to indemnify the vendor against any loss or expense arising from the purchaser's default.

[3] The purchase price was $3.7 million with completion to occur 12 months from the contract date. Originally the deposit was $185,000 to be paid to the vendor's real estate agent as the stakeholder on the formation of the contract. The contract was in terms of the standard commercial conditions for commercial land and buildings adopted by the REIQ and the Queensland Law Society, with some modifications.

[4] In April 2008, the parties agreed to vary the contract in three ways. The date for completion was extended to 22 September 2008. The buyer agreed to pay interest on the balance purchase price from the original completion date to that extended date, the interest being payable upon completion. And critically for this case, they agreed to increase the amount of the deposit to $370,000 on the condition that:

> "The deposit of $370,000 be immediately released to the seller on the condition that the deposit is to be refunded to the purchaser if the

> contract is terminated due to default by Watpac Developments Pty Ltd."[1]

[5] On or about 17 April 2008, the original deposit of $185,000 was paid by the stakeholder to the vendor. But the purchaser did not pay the other $185,000 immediately as had been agreed. On or about 29 May 2008, the parties agreed to further vary the contract. The date for completion was extended to 30 November 2008. The additional deposit of $185,000 was to be paid as to $35,000 on 30 May 2008 and then by six monthly instalments, each of $25,000, commencing on 20 June 2008. In recording this further variation, the vendor's solicitors then wrote:

> "[T]he additional deposit of $185,000 (which was due to be paid on 20 May 2008) be paid directly to the seller, by way of instalments as set out below, on the condition that any part of the additional deposit paid is to be refunded to the purchaser if the contract is terminated due to default by Watpac Developments Pty Ltd…"[2]

[6] The purchaser paid that sum of $35,000 and the first of the required payments of $25,000. But it failed to pay the amount of $25,000 due in July 2008. On or about 8 August 2008, the vendor notified the purchaser that in consequence of that non-payment, the vendor terminated the contract and treated the amount of the deposit paid to that date ($245,000) as forfeited.

[7] The vendor sued the purchaser and the second defendant in the District Court to recover the balance of the deposit, an amount of $125,000. On 5 February 2009, the defendants paid that sum, together with interest, to the vendor and the District Court proceedings were discontinued.

[8] On 14 May 2010, the vendor resold the land, resulting in a deficiency of $1,552,406.03 (when compared with what the vendor would have received under the subject contract, giving credit for the deposit). The amount of that deficiency is uncontested as is the fact that the vendor incurred expenses totalling $44,676.91 which it would not have incurred had the contract been fulfilled. It is conceded that if the vendor was entitled to terminate the contract, then pursuant to cl 13.3 of the standard commercial conditions, the vendor was entitled to the amounts of that deficiency and the expenses, a total of $1,597,082.94 from the purchaser and, in turn, from the second defendant.

[9] The defendants say that the vendor was not entitled to terminate the contract as it did, because it was then an "instalment contract" as defined in s 71. Consequently, by s 72 the contract could not be determined for the purchaser's default in paying the required sum of $25,000 in July 2008 without service upon the purchaser of a notice to remedy its default. No such notice was given. The vendor says that it was not required to be given because this was not an instalment contract.

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1 Exhibit 1, Tabs 12 and 13.

2 Exhibit 1, Tab 14.

[10] Section 71 defines that the term "instalment contract" to mean:

> "… an executory contract for the sale of land in terms of which the purchaser is bound to make a payment or payments (other than a deposit) without becoming entitled to receive a conveyance in exchange for the payment or payments."

[11] As is common ground, the result of the variation to the contract made in April 2008, as well as the further variation made in May 2008, was to require the purchaser to make a payment or payments without becoming entitled to receive a conveyance in exchange. The question then is whether the required payment or payments were a deposit. That term is defined by s 71 as follows:

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

[12] The required payments, including the original $185,000, totalled $370,000, equivalent to 10 per cent of the purchase price. As subparagraph (b) makes clear, a deposit in this sense might be payable in more than one amount. The issue here concerns subparagraph (c).

[13] The standard commercial conditions, as incorporated in this contract, provided for the deposit as follows:

> "3.1 The Deposit shall be paid by the Purchaser to the Stakeholder immediately upon the formation of this Contract.
>
> 3.2 If the Purchaser:
>
> (a) fails to pay the Deposit as provided in clause 3.1;
>
> (b) pays the Deposit by cheque which is postdated; or
>
> (c) pays the Deposit by cheque which is not honoured on presentation;
>
> then, the Purchaser shall be in substantial breach of this Contract and the Vendor may:
>
> (i) affirm this Contract and exercise the rights expressed in clause 13.2; or
>
> (ii) terminate this Contract and exercise the rights expressed in clause 13.3.

> 3.3 The rights and powers conferred by clause 3.2 are in addition to any other rights the Vendor may have at law or in equity.
>
> 3.4 The Deposit shall be retained by the Stakeholder until completion or earlier termination of this Contract whereupon the Stakeholder shall pay the Deposit to the person entitled to it.
>
> 3.5 If this Contract is terminated pursuant to the provisions of clauses 7.6, 9.3(a), 19, 20.1, 21.1, 31.1, 31.5, 32.2 or 32.3(2), the Deposit and other moneys paid under this Contract shall be refunded to the Purchaser by the Vendor or the Stakeholder as the case may be but without interest, costs or damages and the same shall be accepted by the Purchaser in full and final satisfaction of all claims."

[14] Clause 3.5 of the standard conditions was qualified by the special conditions of the contract. By cl 35.2(a) of the special conditions it was agreed that in cl 3.5, the references to clauses 7.6, 9.3(a), 20.1, 31.1, 31.5 and 32.3(2) of the general conditions be deleted. That apparently left cl 3.5 with some work to do, which was in circumstances of the termination of the contract under clauses 19, 21.1 or 32.2 of the general conditions.

[15] Clause 19 of the standard conditions provided that if any consent was required by statute to the sale or to the performance of the contract, the contract was subject to such consent being given and that if the consent was refused or not granted by the date for completion, either party could terminate the contract.

[16] Clause 21.1 gave the purchaser a right to terminate the contract if at the date of the contract the property was adversely affected by, for example, a proposed road widening, if the relevant facts were not disclosed in the contract. By the special conditions the parties agreed to amend that clause so that the right of termination would exist only where there was the additional circumstance that the vendor was aware of the facts as at the date of the contract. In that way, the right of termination in cl 21.1 depended upon some fault of the vendor although, it must be emphasised, not a breach by the vendor of the contract.

[17] Clause 32 of the standard conditions applied if the land was being sold subject to a lease, which was not the case with this contract.

[18] The defendants argue that none of the so-called "deposit" was a deposit as defined by s 71, because none of the payments was liable to be forfeited upon the purchaser's breach of contract. Rather, it is said, each was paid to the vendor to be retained by it even where the contract was not completed but not for the purchaser's breach. It is submitted that this is evident from the amendments made to the standard commercial conditions, the effect of which was to delete each of the standard conditions which provided for a repayment of the deposit where no party was at fault. (The submission includes, in that respect, the amendment to cl 21.1 of

the standard conditions.) Consequently, the defendants argue, the parties agreed that if the contract was, for example, frustrated, the vendor would be entitled to retain the deposit because the contract would not have been terminated due to its default. This is said to indicate that the payments of the so-called deposit were to be made finally and not provisionally, so that there would be nothing to be forfeited of a payment once it was made. That argument encounters the difficulties that the parties expressly agreed that those payments would be "deposited", and were susceptible to being "forfeited".

[19] Clause 13 of the standard conditions relevantly provided as follows:

> "13.1 If the Purchaser:
>
> (a) fails to pay the balance of the Purchase Price as provided in clause 4; or
>
> (b) fails to comply with any of the terms or conditions of this Contract;
>
> then the Vendor may:
>
> (i) affirm this Contract; or
>
> (ii) terminate this Contract.
>
> …
>
> 13.3 If the Vendor terminates this Contract pursuant to clause 3.2 or clause 13.1, the Vendor may elect to:
>
> (a) declare the Deposit (or so much of it as shall have been paid) forfeited and/or sue the Purchaser for breach; or
>
> (b) declare the Deposit (or so much of it as shall have been paid) forfeited and/or resell the Property and if the resale is completed within 2 yeas from the date of termination any deficiency and any expense arising from such resale shall be recoverable by the Vendor from the Purchaser as liquidated damages;
>
> and in either case the Vendor may recover from the Purchaser as a liquidated debt the Deposit or any part of it which has not been paid by the Purchaser.
>
> 13.4 The rights and powers conferred upon the Vendor by this clause 13 are in addition to any other right or power which the Vendor may have at law or in equity."

The special conditions made some amendments to the general conditions but they are of no present significance. By failing to pay $25,000 on the required day in July

2008, time being of the essence,[3] the vendor became entitled to terminate the contract, subject to the purchaser's argument about s 72. Upon terminating the contract, it was entitled to declare that the deposit was forfeited. When the contract was made, the deposit was the sum of $185,000 which had been paid to the stakeholder. The relevant correspondence between the parties, through their solicitors, in April/May 2008 consistently and unambiguously described the required payments, together with the payment of $185,000 originally made, as constituting the "deposit". Accordingly, if the vendor terminated the contract under cl 13.1, the parties expressly agreed that such of the $370,000 which had been paid could be "forfeited" and retained by the vendor.

[20] Further, a deposit is liable to forfeiture, by necessary implication, absent such an express provision for forfeiture. In *Howe v Smith*, Fry LJ said:

> "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."[4]

[21] The fact that the deposit was to be paid to the vendor, rather than to the stakeholder, did not put paid to the prospect of a forfeiture, as was explained in *Phillips & Anor v Scotdale Pty Ltd*.[5] In that case, the contract was in terms of the REIQ and QLS contract for houses and land, but varied by some special conditions. According to cl 2.4 of the standard conditions, the deposit was to be held by the vendor's agent and was to be paid to the seller only if the contract settled or if it was terminated owing to the buyer's default. Clause 2.4 expressly provided that if the contract was terminated without default by the buyer, the deposit would be repaid to it. However, the special conditions of the contract provided otherwise. Of the price of $3.5 million, $100,000 was to be paid "by way of part deposit" to the agent followed by a further $100,000 "by way of further part deposit" on a subsequent date but prior to completion. By special condition 13, upon payment of that second sum to the agent, the total of $200,000 (less the agent's commission) was to be paid by the agent to the sellers. Clause 13 provided:

> "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

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3 Clause 26 of the general conditions.

4 (1884) 27 Ch D 89 at 101 as discussed in *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd* (2008) 236 CLR 342 at 349-352; see also *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573 at 578.

5 [2008] QCA 127.

> 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."[6]

[22] Keane JA, who wrote the principal judgment (de Jersey CJ and White J agreeing), accepted the trial judge's view that special condition 13 was inconsistent with, and overrode, the standard conditions with respect to the deposit. The appellant's argument was that these moneys were not a deposit within s 71 because, by virtue of the terms of special condition 13, they were not liable to be forfeited and retained by the vendor in the event of a breach of contract by the purchaser. The argument was that special condition 13 entitled the vendors to be paid the moneys immediately, without waiting to see if the purchaser breached the contract, thereby defeating the possibility of a forfeiture.[7] The respondents' argument was that they became entitled to forfeit and retain the moneys in accordance with special condition 13 only if they did not breach the contract. The respondents' argument prevailed. Keane JA noted that there was nothing in the definition of "deposit" in s 71 to suggest that the money had to be kept as a separate fund pending the completion of the contract or that it could not be paid to the seller to be held by the seller prior to completion.[8]

[23] Keane JA referred to the buyer's right to sue the sellers to recover this sum if the sellers breached the contract, a right which he said was recognised, if not created by, the terms of special condition 13. The existence of that entitlement was inconsistent with the proposition that the buyer had "once and for all lost all entitlement to that sum when it was paid to the [sellers] under special condition 13". His Honour continued:

> "[24] Whatever the shades of meaning of 'forfeiture' or 'liability to forfeiture' under the general law or in other statutory contexts, there can be no doubt that, when s 71 of the PLA speaks of the sum in question being 'liable to be forfeited and retained by the vendor', the liability referred to is a liability to the loss of the sum which is final and absolute, not provisional or defeasible. One must give force to the words 'and retained by the vendor' in para (c) of the definition of 'deposit'. These words confirm that the liability to forfeiture there referred to is a liability in the purchaser to lose the sum finally and absolutely to the vendor. Special condition 13 did not operate of its own terms finally and absolutely to extinguish the purchaser's entitlement to the moneys payable by the purchaser under special condition 1. That loss of entitlement could only occur upon the occurrence of subsequent events, one of which was breach of the contract by the purchaser.

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6 Ibid at [9] per Keane JA.
7 Ibid at [14].
8 Ibid at [18].

…

> [26] It is true that breach of contract by the purchaser was not the only event which would result in the final and absolute extinguishment of any entitlement on its part to the moneys. That there were other events, such as frustration of the contract, which might bring about the same result does not, however, mean that it is incorrect to say that the sum was liable to be forfeited upon breach of contract by the purchaser. At the hearing before the learned trial judge, Senior Counsel for the purchaser declined to argue that subclause (c) of the definition of 'deposit' in s 71 of the PLA should be read as if it concluded with the words 'and in no other event'. It is not clear that the purchaser adhered to that position in the argument in this Court. To the extent that the purchaser argued to the contrary of the position it adopted below, I consider that the position it adopted below was correct.
>
> [27] It has long been recognised that the essential characteristic of a deposit in a contract for the sale of land is that it is susceptible to being forfeited by a buyer to a seller upon the buyer's breach. Its essential character is that of a payment guaranteed to the vendor in the event that the purchaser fails to complete the contract. The possibility that the deposit might be lost to the buyer for other reasons as well is not apt to deny its essential character as a guaranteed payment. The circumstance that the purchaser's entitlement to recover the payment may be lost by virtue of events other than the breach of contract by the purchaser does not detract from the character of the payment as a guaranteed payment to the vendor. Indeed, the circumstance that a payment made by a buyer may be forfeited to the seller by reason of events additional to the buyer's breach serves to strengthen the character of the payment by the buyer as a guaranteed payment to the vendor."[9]

[24] In the present case, the purchaser seeks to distinguish *Phillips v Scotdale*, arguing that "the difference between *Phillips* and this case is that the deposit was only forfeitable upon breach – here in various circumstances there was no obligation to repay even if there was no breach".[10] It submits that what was said in paragraph [26] of that judgment was *obiter dictum*, although it did not attempt to establish an error in that reasoning. In any case, the argument cannot be accepted because the present contract is indistinguishable from that in *Phillips* and what was said at [26] of that judgment was not *obiter dictum*.

[25] As I have noted, Keane JA accepted that it was special condition 13 of that contract which prescribed the respective entitlements to this sum once it had been paid to the

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9 Ibid at [24], [26] and [27]

10 Defendant's written submissions, paragraph 17.

seller and this was also accepted by the respective arguments on the appeal. The special condition expressly recognised the right of the buyers to recover the sum where the seller was in breach and it provided that otherwise the buyers should have no claim to it. In *Phillips*, paragraph [26] of the judgment was necessary for the outcome, because by reason of special condition 13 of that contract, "there were other events, such as frustration of the contract, which might bring about the same result [of the final and absolute extinguishment of any entitlement on the buyer's part to the moneys]". In the present contract, the relevant condition as to the deposit became effectively the same, by the variations made in April and May 2008.

[26] Accordingly, in this contract the amounts paid and agreed to be paid as the deposit together constituted a "deposit" as defined in s 71. The contract was not an instalment contract. Time being of the essence, the vendor was entitled to terminate the contract as it did.

[27] It is conceded that if the contract was duly terminated by the vendor, it is entitled to liquidated damages according to cl 13.3 as follows:

Deficiency on resale	$1,552,406.03
Expenses incurred by having to resell and hold the property pending resale	$44,676.91[11]
Total damages	$1,597,082.94

[28] The statement of claim seeks interest under s 47 of the *Supreme Court Act 1995* (Qld), or alternatively pursuant to cl 11 of the standard conditions. According to cl 11, if any money (including the deposit) payable under or by virtue of the contract was not paid when payable, that money should bear interest from the due date for payment until the date of payment at a certain rate, which in this case would be a rate fixed from time to time by the Queensland Law Society. As I have noted, the vendor successfully sued in the District Court for the balance of the deposit and recovered that amount together with interest upon it. What is now sought are amounts payable under cl 13 of the standard conditions. However, cl 11 provides that the interest "shall be paid contemporaneously with the balance of the Purchase Price". It is far from clear that interest is payable under cl 11 on an award of liquidated damages under cl 13. There was no argument on this question. I will award interest under s 47. The vendor's cause of action, being to recover liquidated damages under standard condition 13.3, accrued upon the resale, which was completed on 14 May 2010. The interest awarded will be at the rate of 10 per cent from that date until the date of this judgment, which upon the sum of $1,597,082.94 is an amount of $252,470.37, resulting in a total of $1,849,553.31. There will be judgment for the plaintiff against the defendants in that sum.

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[11] As claimed in paragraph 38(ii) of the Second Further Amended Statement of Claim.