

THE HIGH COURT

[2009 No. 510 COS]

IN THE MATTER OF PROTIM ABRASIVES LIMITED (IN LIQUIDATION)

AND

IN THE MATTER OF THE COMPANIES ACTS 1963 – 2009

BETWEEN

KIERAN WALLACE

APPLICANT

AND

PADRAIC ROWLEY

RESPONDENT

Judgment of Mr. Justice Kevin Feeney delivered 19th day of February, 2013.

1.1 The applicant is the official liquidator of Protim Abrasives Limited ("the Company") having been appointed by order of this Court on the 12th November, 2009. The respondent is a businessman of Staffordstown, Dunboyne, County Meath. By notice of motion dated 26th March, 2012, the applicant sought directions from the Court pursuant to s. 231(3) of the Companies Act 1963. The liquidator sought directions from the Court in respect of three matters:

(a) whether a valid and binding contract of sale exists between the Company and Padraic Rowley concerning the sale of the Company's fee simple interest in lands situate at Tolka Industrial Park, Ballyboggan Road, Parish of Finglas, Castleknock, Barony of County of Dublin, together with the benefit of a right of way;

(b) if no such valid or binding contract of sale exists between the Company and Padraic Rowley regarding the property, whether Padraic Rowley has any lien, charge or other equitable or proprietary interest in a sum of €267,500 paid by him to Messrs. John B. O'Connor & Co., Solicitor, which monies are currently held in the latter's client account; and

(c) in the alternative to (b), whether Padraic Rowley is an unsecured creditor of the Company with regard to the sum of €267,500 so that the monies currently held in the client account of Messrs. John B. O'Connor & Co., Solicitor, should be paid by that firm to the official liquidator to be applied in the winding up of the Company.

1.2 Prior to the date of the liquidation of the Company, Padraic Rowley had issued proceedings as plaintiff against Protim Abrasives Limited bearing record No. 2009/1212P. In those proceedings, Padraic Rowley, as plaintiff, sought a declaration that he was lawfully entitled to the return of a deposit of €267,500 paid to the Company's solicitors in respect of the possible acquisition of the defendant's interest in certain premises at Ballyboggan, Castleknock, County Dublin. After the date of the liquidation of the Company, Padraic Rowley sought liberty pursuant to s. 222 of the Companies Act 1963 granting him liberty to continue the proceedings against Protim Abrasives Limited in liquidation. Padraic Rowley duly delivered a statement of claim within the High Court proceedings on the 29th July, 2011 wherein it was pleaded that the Company was at all material times the owner of the premises at Ballyboggan Road, Castleknock, County Dublin and that negotiations had taken place between Padraic Rowley and the Company's respective advisers and that at all material times such negotiations were expressly stated to be "subject to contract/contract denied" and, in addition, that it was agreed that no binding contract should exist until signed contracts were exchanged and a deposit paid and accepted and that in the premise any negotiations were subject to a suspense of condition which precluded the existence of any completed or binding agreement unless and until compliance had been achieved by execution and exchange of contracts. In those proceedings it was pleaded at paragraph 5 by Padraic Rowley:

"Following negotiations between the parties, the plaintiff (Padraic Rowley) returned the draft contract executed by him together with a deposit in the sum of €267,500 which agreement was expressly subject to the same qualification of 'subject to contract/contract denied' and to the proviso that no such contract should exist until both copies of the contract were signed by all parties, the contracts exchanged and a deposit paid in full. The deposit was refundable in the event of no binding contract being entered into."

The statement of claim went on to claim that the draft contract document executed by Padraic Rowley was subject to certain amendments and constituted a counter offer capable of being withdrawn by the plaintiff unless and until unconditionally accepted by the Company and that thereafter the Company failed to execute the contract or to agree to the amendments contained in the draft contract returned by Padraic Rowley's solicitor and further by letter dated 4th June, 2008 that Padraic Rowley acting through his solicitors advised that he did not intend to proceed with the proposed transaction and sought the return of his deposit. It was further pleaded in response to the letter of 4th June, 2008 that the Company's solicitor wrote to Messrs. Lisneys, who were the Company's own auctioneers, purporting to enclose a signed contract and to agree to the proposed amendments as set out in the counter offer. Padraic Rowley further pleaded in the proceedings:

"8. The defendant (the Company) is not entitled to accept an offer which was withdrawn or to disregard the suspense of conditions which had been introduced by both plaintiff and defendant as a pre-condition to the existence of any binding contract. At the time of the purported acceptance, no binding contract existed which was capable of being executed and the purported execution and dispatch of the contract to the defendant's (the Company's) agents, Messrs. Lisneys, did not constitute a valid or lawful acceptance of any agreement nor an exchange capable of complying with the suspense of condition herein before referred to."

Padraic Rowley claimed within these proceedings that at the date of the purported execution of the contract, no contract in fact existed and that he was lawfully entitled to treat the same as discharged as the plaintiff had done and that in the premise he was "entitled to the return of the deposit which was intrinsically refundable in the event of the transaction not proceeding".

1.3 All parties accept that no valid or binding agreement of sale exists between the Company and Padraic Rowley for the sale of the Company's fee simple interest in lands situate at Tolka Industrial Park, Ballyboggan Road, Castleknock, Dublin together with the benefit of a right of way. It follows that the first matter in respect of which the direction of this Court is sought is accepted and acknowledged by the parties as a matter which should be determined on the basis that there was no valid or binding contract of sale and I do so. Another application for directions under s. 231(3) of the Companies Act 1963 relates to the issue as to whether the official liquidator of Protim Abrasives Limited (the Company) or Padraic Rowley is entitled to payment of the sum of €267,500 currently held in the client account of John B. O'Connor & Co., Solicitors, the Company's former solicitors. The determination of that matter will decide whether Padraic Rowley is an unsecured creditor of the Company with regard to the sum of €267,500. It is accepted by the parties that if the Court concludes that Padraic Rowley is an unsecured creditor, that the monies currently held in the client account of Messrs. John B. O'Connor & Co., Solicitors, should be paid by that firm to the official liquidator to be applied in the winding up of the Company.

2.1 The central facts in this case are as follows. In 2008 Padraic Rowley was interested in purchasing the Company's premises at Ballyboggan, Castleknock, County Dublin. Certain negotiations and discussions took place between the Company and Padraic Rowley and each of those parties was represented by their own solicitor with John B. O'Connor & Co. acting for the Company and Brendan Clarke & Co. acting for Padraic Rowley. During the course of the negotiations, John B. O'Connor & Co., acting on behalf of the Company, forwarded a draft contract for sale to Padraic Rowley's solicitors, Brendan Clarke & Co. The covering letter accompanying that draft contract can no longer be located but the parties have proceeded on the basis and accepted that the draft contract was provided on the basis that it was subject to contract/contract denied. After receipt of the draft contract, Padraic Rowley's solicitors replied by letter of 29th February, 2008 enclosing and returning the contract for sale. That contract for sale had been amended not only to alter the quantum of the purchase price but also by the addition of two hand-written special conditions set out at 5(xiii) and (xiv). The letter of the 29th February, 2008 enclosing the amended contract for sale was headed "Subject to contract/contract denied" and in the body of the letter it was stated:

"We enclose herewith contract and deposit cheque in regard to the above.

Please note that no contract shall exist until both copies of the contract are signed by all parties, contracts exchanged and deposit paid in full."

On receipt of that letter, John B. O'Connor & Co., who were acting for the Company lodged the cheque of €267,500, which had been calculated on the basis of ten per cent, of the amended purchase price, into that firm's client account.

2.2 On the 27th May, 2008 a meeting took place between a representative of the Company and Padraic Rowley and following that meeting, Mr. Lynch of the Company executed the version of the contract for sale which had been returned with the letter of the 29th February, 2008. That executed contract for sale was sent, not to the purchaser's solicitors, that is, the solicitors acting for Padraic Rowley or to Mr. Rowley in person, but to Lisney & Co., who were a firm of auctioneers acting for the Company in and about the negotiations for the proposed sale of the property. The executed contract which had been signed by Mr. Lynch, on behalf of the Company, was at no time forwarded, delivered or sent to either Padraic Rowley, the proposed purchaser, or to his solicitors. On the 4th June, 2008, Brendan Clarke & Co., the solicitors acting for Padraic Rowley, wrote to the solicitors for the Company, John B. O'Connor & Co., and stated:

"Due to various factors our client is not proceeding with this matter at the present time. If circumstances change in the future, our client would be interested in looking at the matter again. However please return the deposit monies already furnished."

That letter was headed, in handwriting "Subject to contract/contract denied". The position therefore is that the contract for sale was not completed prior to the purchaser's withdrawal and it is accepted and acknowledged by all parties that there is no valid or binding contract of sale between the Company and Padraic Rowley. The sum of €267,500, the so-called deposit, was not returned to Padraic Rowley and that remained the situation as of the date upon which the Company was placed in liquidation. The deposit continues to be retained by John B. O'Connor & Co. The issue which I have to decide is therefore whether or not Padraic Rowley has any lien, charge, or other equitable or proprietary interest in the sum of €267,500 paid by him to Messrs. John B. & Co., Solicitors. In considering that issue, I also have to address the related matter as to whether the monies in question were received by John B. O'Connor & Co. as stakeholder or alternatively as agent for the Company.

3.1 Padraic Rowley, the respondent in this application, contends that the payment of the sum of €267,500 enclosed with the letter of 29th February, 2008 was the payment of a deposit which was subject to the conditions set out in the contract for sale which was enclosed with the letter. As part of his argument, it is claimed that such conditions resulted in John B. O'Connor & Co. holding the sum of money as a stakeholder. It is claimed that the monies were accepted and received in circumstances which resulted in John B. O'Connor & Co. having an obligation pursuant to condition 5(c) of the Law Society Contract General Conditions to hold the monies paid as a deposit by or on behalf of the purchaser. It is claimed that the monies were held by the recipient thereof as trustee for the purchaser. It is claimed on behalf of Padraic Rowley that condition 5(c) of the Law Society of Ireland General Conditions of Sale (2001 Ed.) applied and in effect it was agreed by the parties and therefor condition came to be binding on the parties. Such term, it is claimed, was contemplated by both the vendor and the purchaser and the deposit was paid and received on that basis.

3.2 On behalf of the liquidator it is claimed that the payment of the deposit of €267,500 was not subject to the conditions for sale, as claimed on behalf of Padraic Rowley, in that there was no contract for sale, either at the time that the payment was made or at any time thereafter. As part of that argument, the liquidator contends that the deposit sum paid by the purchaser during the course of the negotiations was paid to the Company's solicitor and that in a case such as this which was a proposed sale by private treaty and where both parties were represented by separate solicitors, it follows that each solicitor is the agent of and has power to bind his or her respective client. It follows that any deposit payment received by a solicitor is, unless a contrary agreement is made, deemed to the property of the client of the solicitor to whom it is sent. It is also claimed on behalf of the liquidator that there was no agreement to the contrary and since the payment was made to the Company's solicitor that that payment is the property of the Company.

4.1 The proposed sale in this case was by way of private treaty. It was not a sale by public auction where the payment of a deposit to an auctioneer is, unless a contrary agreement is made, deemed to be received by that auctioneer as stakeholder. That arises in circumstances where the auctioneer is recognised as simultaneously being the agent for both the vendor and purchaser. In this case, the deposit was paid to the solicitor who was acting for the Company, the proposed vendor of the property, and the sale was to be

by private treaty. The deposit was not paid to the Company, that is to the vendor, personally and the issue which arises in this case is in what capacity John B. O'Connor & Co. received the deposit.

4.2 The capacity of a deposit holder is considered in the textbook "Irish Conveyancing Law" (Wylie and Woods) 3rd ed., at para. 10.25, page 292, where it states:

"If the deposit is not paid to the vendor personally, the question arises as to what is the capacity of the third party who receives it. The general law recognises two basic capacities in such a case, namely, receipt as *agent* for the vendor and as *stakeholder*. The significance of the distinction is this. If the deposit is paid to the vendor's agent, e.g. his auctioneer or solicitor acting in that capacity, the agent is liable to pay it to the vendor on demand. He must also account to the vendor for any interest earned or other profit made from the deposit. If the sale falls through, the purchaser can sue the vendor only, not the agent, for recovery. The advantage from the vendor's point of view is that he can demand the deposit immediately and use it, e.g. in connection with some other transaction such as the purchase of a new house. It has been suggested that there are dangers in this from the purchaser's point of view in that, if the vendor suddenly goes bankrupt and the deposit has been spent by him, the purchaser may have difficulty in recovering it. The same principle applies to, e.g. a *pre-contract* deposit paid to an agent receiving it on behalf of a builder or developer, for then the builder or developer can use the money immediately in connection with the building or development. On the other hand, it is settled that, if the deposit is paid under the contract to the vendor's agent, the purchaser has a lien on the vendor's land for its return, and in this respect the purchaser is better off than he would be if the deposit were paid to a stakeholder."

In considering the facts of this case, I have to address whether or not the deposit paid in this case was paid under the contract to the vendor's agent or whether the circumstances are such that the deposit was paid to the vendor's solicitors as a stakeholder. Wylie and Woods went on in their textbook to further consider the issue of the capacity of a deposit holder at paragraph 10.28, page 294, where it is stated:

"There remains to be considered the question of what is the capacity in which each of the various parties who may be involved in a sale of land receives the deposit. The first principle is that this may be specified expressly in the contract and we saw earlier that the *Law Society's General Conditions of Sale (2001 edition)* provide that the deposit is to be paid to the vendor's solicitors as "stakeholder", whether the sale is by public auction or private treaty. Otherwise, the matter must be determined according to the general law, a subject to which we now turn."

In dealing with a deposit paid to a solicitor, Wylie and Woods state at paragraph 10.30, page 295:

"Again in the absence of a contrary agreement, a deposit paid to the vendor's solicitor is treated as paid to him as the vendor's agent rather than as a stakeholder."

In the following paragraph, 10.31, pages 295 and 296, dealing with estate agents, Wylie and Woods state:

". . . the vendor should insist once the contract is entered into, upon the money held by the estate agent or other person holding the pre-contract payment being handed over to his solicitor to be held with the balance paid by the purchaser. All this, of course, only becomes relevant if condition 5 comes into play which it will not do if the parties never get as far as entering into a contract in the Law Society's standard form. Condition 5(c) which was inserted by the 2001 edition of the *General Conditions of Sale*, provides that prior to the date of sale any deposit monies paid to a person appointed or nominated by the vendor shall be held by the recipient as trustee for the purchaser."

I accept the above statements concerning the legal position and the capacity of deposit holders as set out in Wylie and Woods as being a correct statement of the law and it follows that if there was no agreement to the contrary, or if condition 5(c) of the Law Society's General Conditions of Sale did not apply, then the deposit paid to John B. O'Connor was paid to that firm as the vendor's agent rather than as a stakeholder. For Padraic Rowley to be entitled to the return of the deposit he must establish either that there was an agreement that the deposit paid to the vendor's solicitor was to be treated as paid to that firm as a stakeholder or that condition 5(c) of the Law Society's General Condition of Sale applied. If Padraic Rowley does not establish one or other of those matters, then according to general law John B. O'Connor & Co. received the money as the vendor's agent rather than as a stakeholder. In those circumstances, Padraic Rowley can sue the Company only and not the agent for recovery.

4.3 In cases where a sum of money is paid over by a proposed purchaser to his counterparty in the course of negotiations, the identity of the person to whom the monies are paid and the capacity in which that person acts are crucial to determining the basis upon which the sum of money or deposit is received. Where each party has a solicitor, that solicitor is agent of and has power to bind his or her respective client and any deposit or payment received by a solicitor is, unless there is either a contrary agreement or an express provision to the contrary, deemed to be the property of the solicitor's client.

4.4 The distinction between a vendor's solicitor being the agent of his client and being a stakeholder and the circumstances in which such distinction arises and the consequence arising therefrom was set out in *Bamford v. Shuttleworth* [1840] 11 AD & E 926. That was a case dealing with a sale of premises by auction where the memorandum of agreement to purchase and sell was signed by the auctioneer as agent for the purchaser and by the vendor's attorney subscribing himself as "agent for the said SS," the vendor. The purchaser in that case paid the deposit to the attorney who gave him a receipt signed by himself as "agent for SS". After the sale fell through as a result of the vendor's default and the deposit was not returned, proceedings were commenced and it was held "that the purchaser could not bring an action of money had and received against the attorney, for that he was not a stakeholder, but merely the vendor's agent, and payment of the deposit to him was payment to the vendor".

4.5 The principle of a vendor's solicitor being the vendor's agent and not a stakeholder as identified in the *Bamford* case was applied and followed in *Ellis v. Goulton* [1893] 1 QB 350. That case dealt with the sale of premises by auction where the purchaser paid a deposit to the vendor's solicitor as agent for the vendor. After the sale fell through as a result of the default of the vendor, the purchaser brought an action to recover the deposit from the vendor's solicitor and it was held that the payment of the deposit to the solicitor was equivalent to payment to the vendor and that the action against the solicitor could not be maintained. The decision in that case drew the distinction between a stakeholder and an agent for one of the parties; the former is the agent of both, but the latter is the agent of only one, and responsible only to that one. Bowen L.J. in his judgment held (at pp. 352 and 353):

"When a deposit is paid by a purchaser under a contract for the sale of land, the person who makes the payment may enter into an agreement with the vendor that the money shall be held by the recipient as agent for both vendor and purchaser. If this is done, the person who receives it becomes a stakeholder, liable, in certain events, to return the

money to the person who paid it. In the absence of such agreement, the money is paid to a person who has not the character of stakeholder; and it follows that, when the money reaches his hands, it is the same thing so far as the person who pays it is concerned as if it had reached the hands of the principal. If so, it is impossible to treat money paid under these circumstances and remaining in the hands of the agent as there under any condition or subject to any trust in relation to the payer. The solicitor of the vendor is, unless the contrary has been agreed on, the agent of the vendor to receive a deposit on his behalf."

Bowen L. J. concurred with the opinion expressed by Lord Esher M.R. in the case and concluded that the payment of the money to the solicitor was equivalent to the payment to his principal and that the deposit money could not be recovered from the solicitor whether he has paid it over to his principal or not.

4.6 It is clear from the judgment of Bowen L. J., and there is no issue raised on this point, that when a purchaser pays a deposit under a contract for sale, that person when making the payment may enter into an agreement with the vendor that the money shall be held by the party receiving the deposit as agent for both the vendor and the purchaser. It is in those circumstances that the person receiving the money becomes a stakeholder. If there is no such agreement, a payment by a proposed purchaser to the vendor's solicitor is identified as being the same thing insofar as the person who pays it is concerned as if the payment had reached the hands of the principal.

4.7 The statement of Bowen L. J. in *Ellis v. Goulton* was considered and approved by the Court of Appeal in the case of *Tudor v. Hamid & Ors.* [1988] 1 EGLR 251. Slade J. in giving the judgment of the Court of Appeal dealt with the statement of the law made by Bowen L. J. in *Ellis v. Goulton* (and quoted above) in the following terms:

"In argument before us Mr. Conlin, on behalf of Mrs. Tudor, submitted that the dictum of Bowen L. J. was *obiter* and that it was too widely expressed. I accept the former, but not the latter, submission. With respect to Bowen L. J., I think that his dictum accords both with commonsense and with principle. No authority has been cited to us which suggests to me that it is ill-founded.

Accordingly, I accept the submission of Mr. Godfrey that the relevant rule is that, in the absence of an express or implied agreement to the contrary, money paid by a purchaser of land to the vendor's solicitor is received by the solicitor as agent for the vendor, not as a stakeholder. It will therefore be necessary to look to see whether there was an express or implied agreement to the contrary in the present case."

4.8 I am satisfied that in the absence of an express or implied agreement to the contrary, money paid by a purchaser of land to the vendor's solicitor is received by that solicitor as agent for the vendor and not as a stakeholder. As I have indicated, it follows that unless Pdraic Rowley can identify that the vendor company's solicitor received the deposit in circumstances where there was an express or implied agreement that he would receive the money as stakeholder rather than as agent for the vendor, that the payment of the deposit to the solicitor was a payment to that solicitor's client.

4.9 As stated in *Irish Conveyancing Law* (Wylie and Wood) (3rd ed.) (at para. 10.27, pages 293 and 294):

"It seems to be accepted now on both sides of the Irish Sea that the vendor is responsible to the purchaser for the loss of the deposit under the contract, whether it is paid to his agent or a stakeholder. So far as payment to his agent is concerned, the general law of principal and agent confirms the principal's liability. Where the payment is to a stakeholder, the vendor is responsible partly for a reason stated by Kenny J. in *Leemac Overseas Investment Ltd. v. Harvey* [1973] I.R. 160 at p. 165:

"When the sale is by public auction, the stakeholder will be nominated by the vendor who drafts the conditions of sale and who is therefore liable for his default. Similarly if the sale is by private contract and if the stakeholder is nominated by the vendor, he is liable for his default:"

As pointed out (at para. 10.30) of the 3rd edition of Wylie's *Irish Conveyancing Law* in the absence of a contrary agreement a deposit paid to a vendor's solicitor is treated as paid to him as the vendor's agent rather than as a stakeholder. The Law Society's General Conditions of Sale provide a contrary position by agreement. The Conditions recognise the importance of there being an agreement if the general principle is not to apply. The Law Society's General Conditions of Sale (2001 edition) specify that a deposit is to be paid to the vendor's solicitor as "stakeholder". Absent that express agreement or an implied agreement, the position of the vendor's solicitor falls to be determined in accordance with general law.

4.10 The position of an auctioneer differs from that of a solicitor in that in the absence of an agreement to the contrary, an auctioneer, in this country, receives a deposit as a stakeholder and not as an agent of the vendor.

4.11 The statement of the legal position in this jurisdiction as set out in Wylie and Woods and quoted above was considered by Barrington J. in *Desmond v. Brophy* [1985] I.R. 449 where he adopted with approval a similar statement of the law by Mr. Wylie from the first edition of his textbook *Irish Conveyancing Law* in the following terms (at p. 455):

"At p. 469 of his book Mr. Wylie deals with deposits paid to solicitors and estate agents. In the case of a solicitor he puts the matter as follows: - 'Again in the absence of a contrary agreement, a deposit paid to the vendor's solicitor is treated as paid to him as the vendor's agent rather than as a stakeholder.' In the case of a deposit paid to an estate agent he puts the matter as follows: - 'In the case of a sale by private treaty, it is usual that the 'deposit' received by a house or estate agent will be a pre-contract deposit, and it would seem, in the light of recent authorities, that as a general principle this should not be regarded as being received as agent for the vendor, in the absence of express authority conferred by the latter. At most, therefore, the 'agent' should be regarded as receiving such a deposit as a stakeholder'."

Barrington J. went on (at p. 465) to state:

"In his judgment in *Burt v. Claude Cousins & Co.* [1971] 2 All E.R. 611 Lord Justice Denning distinguishes three situations in relation to a deposit. One is where a deposit is received "as agent for the vendor", another is where a deposit is received "as stakeholder" and a third is where nothing is said. It may be significant that in the first two cases Lord Justice Denning refers to "an estate agent or a solicitor" but in the third case he refers only to an estate agent. Referring to the third case he says at p. 615: -

"If an estate agent, before any binding contract is made, asks for and receives a deposit, giving the receipt in his

own name without more, the question arises: in what capacity does he receive it? As agent for the vendor? or as stakeholder? I cannot believe that he receives it as "agent for the vendor", for, if that were so, the estate agent would be bound to pay it over to the vendor forthwith, and the vendor alone would be answerable for its return. That cannot be right. Seeing that no contract has been made, the vendor is not entitled to a penny piece. If the estate agent should pay it over to the vendor, he does wrong; and if the vendor goes bankrupt, the estate agent is answerable for it.'

It seems to me doubtful if this kind of reasoning can be applied to the case of a solicitor. But, more important, I do not think that the present case can be resolved by such general considerations. I think the same applies to evidence which the court received concerning the practice of some solicitors who act for builders and whose practice, in the absence of clear instructions, is guided by admirable considerations of what they consider to be fair as between their builder clients and prospective purchasers in relation to the payment of booking deposits. In the present case Messrs. Barrett Apartments Limited had formulated a clear policy in relation to booking deposits and stage payments. These deposits and payments, whether received by the estate agent or the solicitor, were to go to the builder and the solicitor had no authority to accept these deposits except as agent for the builder. The fact that these deposits would go to the builder was explained by Mr. Lynch to Miss Boyle and Miss Desmond when they first showed interest in buying the flats."

The *Desmond v. Brophy* case dealt with booking deposits and that matter had also been dealt with by the Supreme Court earlier in the same year in the case of *In re Barrett Apartments Ltd.* [1985] I.R. 350. In that case, Henchy J. held (at p. 357):

"Where, as is the case here, no contract to purchase was entered into by the depositors, and the only payment made was what was called a booking deposit, which was accepted expressly on the basis that it would be returnable upon notification by either party and that the proposed purchase would be the subject of a written contract, the payment of the booking deposit did not give the payer any estate or interest, legal or equitable, in the property - as would have been the case if a written contract had been entered into and the booking deposit had been converted into a deposit paid on foot of the contract. There is no basis in law or equity, therefore, for treating the depositors as having, on payment of the deposit, acquired a purchaser's lien on the property."

We have not been referred to any case in which a purchaser's lien was allowed to anyone who was not a purchaser, that is to say, anyone who had not entered into a contract to purchase. The suggestion is that the reason for such absence of authority is that a booking deposit is a device of recent origin which has not yet attracted a judicial decision as to its impact on the property being sold. I cannot agree. Payment by prospective purchasers to prospective vendors of money on a provisional, conditional, or otherwise returnable basis, prior to a formal contract, has always been taking place. In my opinion, the fact that such a payment has not been judicially recognised as creating a lien is simply because the payer has not the legal standing necessary to found a purchaser's lien."

The Supreme Court held that where there had been no contract to purchase entered into between the parties and that the only payment made had been a booking deposit returnable upon notification by either party, and that where it had been expressly accepted that the proposed purchase would be the subject of a written contract, the payer acquired no stake or interest, legal or equitable, in the property. In his judgment in the *In re Barrett Apartments Ltd.* case, McCarthy J. (at p. 361) identified that justice did not demand that those who pay advances in respect of an anticipated contract should be put in a position better than that of trading creditors or professional creditors who have put their goods or their services at the disposal of the self same debtor without payment and whose claims can only rank as those of unsecured creditors.

5.1 I am satisfied that a consideration of the facts in this case disclose that the deposit sum of €267,500 paid by Padraic Rowley to John B. O'Connor & Co. was not subject to any agreement express or implied or to any stipulation that John B. O'Connor & Co. as solicitors for the proposed vendor were to receive the monies as a stakeholder. The monies were paid during the course of ongoing negotiations between a proposed purchaser and a proposed vendor in circumstances where both of those parties were represented by their own solicitors. At no time was there an agreement reached between the parties and the full terms and provisions of any proposed purchase were never agreed. Padraic Rowley accepts and acknowledges within his own High Court proceedings that the sum of €267,500 was paid over at a time when he made a counter offer containing amended terms which he submitted to the proposed vendor and that such amended terms were never accepted and the counter offer was withdrawn by him before any agreement came into effect or could be concluded.

5.2 Two arguments are advanced to support a claim that the solicitors received the deposit as a stakeholder. It is claimed on Padraic Rowley's behalf that it was in fact agreed that the solicitor would receive the deposit as a stakeholder. That contention is based on two separate grounds. First, it is claimed that the parties agreed that "the rubric adopted by them in the negotiation and possible completion of any contract, was under the Law Society's General Conditions of Sale (2001 edition)" and that in making payment to the vendor's solicitor, a purchaser was entitled to assume that the general conditions would apply unless these had been varied or excluded by agreement. The second ground is that it is claimed that the parties, that is the proposed purchaser and vendor, "contemplated no other terms of contract other than and except the Law Society's General Conditions (2001) edition save and insofar as same were the subject of express amendment contemplated by the parties".

6.1 To accept either of the arguments it would be necessary for me to decide either that there was a concluded agreement between Padraic Rowley and the Company providing that the deposit was paid under the Law Society's General Conditions or for me to decide that the parties agreed to proceed on the basis that the Law Society's General Conditions would apply, notwithstanding that there was no concluded agreement between the parties. I cannot accept either of those propositions. First, I am satisfied from my analysis of the case law that according to the general law the solicitors for the Company received the deposit as agent for their client, that is, for the proposed vendor and not as a stakeholder. Secondly, I am satisfied that the facts of this case establish that there was no agreement either express or implied nor was there any understanding that there was an agreement as to certain matters between the parties prior to there being a full completed agreement. In his own High Court proceedings Padraic Rowley contended that the negotiations between him and the Company were at all times subject to "a suspense of condition" under which it was agreed that no binding contract should exist until signed contracts were exchanged. No such binding contract ever came into existence and it follows that no agreement was ever reached between Padraic Rowley and the Company either in relation to the proposed purchase or in relation to the capacity under which the solicitor for the Company, the proposed vendor, received the deposit. Absent an agreement that the deposit was received by the vendor's solicitor as a stakeholder, the solicitor received that sum as agent for his principal. The solicitors acting for the Company acted as solicitors for the vendor and there was no agreement that the deposit monies would be received as a stakeholder.

6.2 I am satisfied, on the evidence, that no agreement either express or implied was ever concluded as to the capacity in which the Company's solicitor received the deposit and that the general position at common law applies. It follows that John B. O'Connor & Co.

Ltd., as solicitors for the Company, received the sum of money on behalf of the Company. The money received by them is to be treated as if it had reached the hands of the solicitors' principal, that is, the Company. It follows that the Company, through the official liquidator, is entitled to the transfer of the deposit monies into the liquidation account and to apply the money in the winding up. I therefore propose to answer the question set out at paragraph (b) of the notice of motion of the 26th March, 2012 by holding that since no valid or binding contract of sale exists between the Company and Padraic Rowley, and since the deposit monies paid by Padraic Rowley were paid, without any agreement to the contrary, to the solicitors for the Company and were therefore received by those solicitors for and on behalf of their client that Padraic Rowley has no lien, charge or other equitable or proprietary interest in the deposit sum of €267,500. It follows that Padraic Rowley is an unsecured creditor of the Company and that the monies currently held in the account of John B. O'Connor & Co. Solicitor, should be paid by that firm to the official liquidator to be applied in the winding up of the Company.