48/11; [2011] VSC 661

SUPREME COURT OF VICTORIA

FIORELLI PROPERTIES PTY LTD v PROFESSIONAL FENCEMAKERS PTY LTD & ANOR

Kaye J

13, 16 December 2011

CIVIL PROCEEDINGS – CONTRACT – CONTRACT FOR CONSTRUCTION AND INSTALLATION OF FENCE – UNILATERAL REPUDIATION BY PURCHASER – WHETHER PURCHASER ENTITLED TO REPAYMENT OF DEPOSIT LESS DAMAGES INCURRED BY VENDOR – WHETHER RELIEF AGAINST FORFEITURE IN EQUITY – FINDING BY MAGISTRATE THAT CLAIM FOR RETURN OF DEPOSIT NOT PROVED – WHETHER MAGISTRATE IN ERROR – APPEAL FROM MAGISTRATES' COURT – WHETHER COMPETENT TO RAISE QUESTION OF LAW NOT RAISED IN MAGISTRATES' COURT.

F. and PF. entered into an agreement whereby PF. would manufacture and install steel fencing and gates at F.'s premises. The agreement was evidenced in a written quotation for $47,300 with the sum of $17,300 to be paid by deposit. F. paid the deposit but unilaterally chose to repudiate its agreement with PF. before the fence and gates had been manufactured. When the repudiation occurred PF. had incurred losses in the sum of $2696.91 plus had spent approx. 200 hours in performing the contract. F. issued a claim for the return of the deposit and PF. by counterclaim claimed damages. The Magistrate rejected the claim made by F. and found that F. had wrongly repudiated the agreement. She held that the amount of $17,300 was correctly described as a deposit and she dismissed PF's counterclaim on the ground that PF. had not proved the quantum of the claim. Upon appeal—

HELD: Appeal dismissed.

1. The first submission made by F. was that the principles relating to the forfeiture of deposits upon breach of contract only applied to contracts for the sale of real property. The principles relating to the forfeiture of deposits, upon the failure of the party which paid the deposit to complete the contract, apply equally to contracts for the sale of real property and to all other contracts. The authorities demonstrate that the principles, stated by the Court of Appeal in *Howe v Smith* (1884) 27 Ch D 89, and which are longstanding, have been applied, regardless of whether the transaction, in respect of which the deposit is paid, concerns a contract for the sale of real property. Accordingly, the submission made by F. on this point was rejected.

2. The second submission made by F. was that as a result of the application of equitable principles the Magistrate should have ordered that PF. repay the deposit less the loss sustained by PF. This submission which was an alternative and different claim in equity was not made to the Magistrate. As this point did not raise an error of law, it did not fall within the ambit of an appeal which might be brought in relation to the Magistrate's decision.

3. Further, the onus was on F. the appellant, to satisfy the Supreme Court that, if it had made the claim based on the equitable principles, that claim could not possibly have been met by further evidence at the trial before the Magistrate. In light of the matters referred to, if the equitable claim had been made before the Magistrate, that claim might have been met by other evidence adduced before the Magistrate. For those reasons, F. ought not to be permitted to rely upon the second alternative argument, based on equitable principles, on the appeal.

4. *Obiter*: It could not be concluded that, on the evidence adduced before the Magistrate, the deposit was penal in nature, or that it was unconscionable for PF. to retain the whole of it. Accordingly, applying those principles in equity, F. would not be entitled to repayment of the amount of the deposit, less the losses sustained by PF as a consequence of the repudiation of the agreement F.

KAYE J:

1. The appellant brings this appeal, pursuant to s109 of the *Magistrates' Court Act* 1989, against a decision of the Melbourne Magistrates' Court made on 20 May 2011. By that decision, the Magistrate dismissed the claim by the appellant for repayment of a deposit, which it had paid under a contract for the construction and installation of a fence at its property at Hallam.

2. In the proceeding before the Magistrate, a number of the facts, relating to the issues

between the parties, were in dispute. The appellant does not, on this appeal, take issue with any of the factual findings made by the Magistrate. Rather, the issue on appeal is quite narrow. Accordingly, the facts relevant to the appeal may be stated in short compass.

Background facts

3. The appellant is the registered proprietor of a property at Hallam South Road, Hallam. The first respondent carries on business as the manufacturer and installer of steel fencing and gates. The second respondent is the director and principal shareholder of the first respondent.

4. On 12 March 2009, the appellant and the first respondent entered into an agreement by which the first respondent undertook to manufacture and install a steel fence and steel gates at the rear of the Hallam property. The fence was to consist of steel panels totalling 79 metres in length, with two small pedestrian gates in the middle. At either side of the fence, there were to be steel gates, each 8.7 metres wide, spanning two concrete driveways into the appellant's property.

5. The agreement between the parties was evidenced in a quotation dated 12 March 2009, prepared by the first respondent, and accepted by the appellant. The quotation specified that the price for the steel fence and gates was to be $47,300 (inclusive of GST). That price was to be paid by a deposit of $17,300, a first instalment of $15,000 (when all the fence panels were installed), and a second instalment of $15,000 (when the job was completely finished). The appellant paid the deposit of $17,300 to the first respondent on 17 March 2009. The appellant also provided to the first respondent a quantity of steel plates, which were to be used at the base of the steel posts for the fence.

6. At the time at which the agreement was entered into, the parties had not discussed the type of gates, which were to be installed at each end of the fence. The respondents proceeded on the basis that the gates were to have a wheel fixed underneath them, which would run along a steel track attached across the driveways entering the appellant's property. In early May 2009, Mr Pasquale Marvelli, a director of the appellant, requested that the first respondent vary the agreement so as to comply with a requirement, made by the local council, that one of the steel gates be doubled in width to 17.4 metres. At that point, Mr Marvelli stated that he wanted the two gates, at the property, to be constructed as cantilevered gates, so that they could open and close across the driveways without having a wheel fixed to them. The second respondent, on behalf of the first respondent, told Mr Marvelli that the respondents would not be able to build a gate of the wider size without using a floor tracker. He told Mr Marvelli that if he wanted a cantilevered gate of that width, Mr Marvelli would need to arrange with someone else to make it, but that the first respondent would manufacture and install the fence panels.

7. Subsequently, on 4 May 2009, Mr Marvelli telephoned the second respondent, and said that he had engaged another company to supply and install the fence and gates, and that, accordingly, the first respondent was not required to undertake the work. Mr Marvelli requested that the second respondent repay to him the deposit of $17,300, and return the steel plates to him. The Magistrate found, and it was accepted on this appeal, that, by that conversation, the appellant repudiated the agreement between itself and the first respondent, and that the first respondent accepted that repudiation as terminating the agreement. The first respondent did not return the $17,300 deposit, and the steel plates, to the appellant.

The Magistrates' Court proceeding

8. By its statement of claim attached to its complaint, the appellant sought recovery of the sum of $17,300 paid by it to the first respondent, and also sought return of the steel plates which it had provided to the first respondent. The appellant relied on three causes of action to support its claim for repayment of the deposit of $17,300. The first cause of action was that the respondent had breached the agreement, thus entitling the appellant to repayment of the deposit. The second cause of action was that the first respondent had contravened s52 of the *Trade Practices Act* 1974 (Cth), by misrepresenting to it that the first respondent could, and would, manufacture a fence and a gate in the same style as the fence of the neighbouring property of the appellant (in other words, a fence with cantilevered gates). The third cause of action claimed repayment of the $17,300 as moneys had and received, on the basis that there was a total failure of consideration by the first respondent.

9. The first respondent, by counterclaim, alleged that the appellant had wrongfully repudiated the agreement, thus entitling the first respondent to retain the deposit, and to claim damages.

10. The Magistrate, in a reserved decision, rejected each of the three causes of action relied on by the appellant. Her Honour found that the appellant had wrongly repudiated the agreement between itself and the first respondent, and that there had been no misrepresentation by the first respondent to the appellant. She was satisfied that the sum of $17,300, paid by the appellant to the first respondent, was correctly described as a deposit, and she held that, at law, the first respondent was entitled to retain the whole of that deposit. Her Honour also dismissed the first respondent's counterclaim, on the basis that the first respondent had failed to discharge the burden of proof on it in relation to the loss and damage claimed.

11. Accordingly, the Magistrate ordered that the respondents return the steel plates to the appellant, but that the appellant's claim otherwise be dismissed. On the counterclaim, her Honour made an order that the respondents were entitled to retain the deposit of $17,300. The respondents were ordered to pay the appellant's costs of the claim, and the appellant was ordered to pay the respondents' costs of the counterclaim.

12. In this appeal, the appellant only takes issue with the conclusion by the Magistrate that the first respondent was not required to repay to the appellant the deposit of $17,300 as moneys had and received. In his final submissions in the Magistrates' Court proceedings, counsel for the appellant had contended that, even if the Court found that the appellant had repudiated the agreement, so that the first respondent was entitled to terminate it, the first respondent was not entitled to retain the whole of the deposit of $17,300. Rather, it was submitted, the first respondent was only entitled to retain, out of the deposit, the amount of the cost of any materials, which it had purchased in respect of the steel fence and gates to be manufactured for the appellant's premises, together with a charge for any labour undertaken by the second respondent in respect of the manufacture of the steel fence and gates.

13. In rejecting that submission, the Magistrate concluded:

> "54. I have read the authorities and other materials to which both counsel referred in submissions, and more widely in relation to the law of deposits. After reviewing the evidence, submissions and the law, I am satisfied that the $17,300 referred to as a deposit, was a deposit and not a part payment. I do not agree with Mr D'Abaco's submission that the law about the forfeiture of deposits is restricted to contracts involving the sale of land.
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> 55. I have already found there was no express agreement, either in writing or orally, that the deposit in this agreement would be forfeited in the case of repudiation by the plaintiff. However, I am satisfied that under the common law there is an implied term to the contract to that effect."

The appeal

14. In its amended notice of appeal, the appellant has identified the question of law, on which the appeal is brought, as follows:

> "Was the first respondent entitled to retain the entire deposit amount of $17,300 paid to it by the appellant, after the court found:
> (a) the appellant repudiated the contract between itself and the first respondent;
> and
>
> (b) the first respondent accepted that repudiation as termination of the contract?"

15. In the amended notice of appeal, the appellant relies on four grounds. They are each based on the same proposition. It is alleged that the Magistrate erred in law by failing to determine that the first respondent was required to remit to the appellant the balance of the deposit of $17,300, after deducting from it the amount spent by the first respondent on purchasing materials for the contract, which the first respondent had not been able to use on other jobs.

16. That proposition is based on findings of fact by the Magistrate in respect of the first respondent's counterclaim for damages. Her Honour noted that the first respondent had spent the amount of $4,345.68 (including GST) on materials, which it purchased for the purpose of performing the agreement with the appellant. Her Honour found that the first respondent was

able to use materials to the value of $1,498.77 on other projects, and that it had sold some of the materials as scrap metal for the sum of $150. Thus, as a result of the repudiation of the agreement by the appellant, the first respondent suffered an actual loss of $2,696.91. The appellant contends that the Magistrate erred in failing to order that the first respondent repay to the appellant the amount of the deposit, less the amount of that loss. Accordingly, the appellant submits that the Magistrate erred in failing to order that the first respondent pay to it the sum of $14,603.09.

Submissions

17. Mr D'Abaco, who appeared on behalf of the appellant, relied on two principal submissions. First, he submitted that the principle, applied by the Magistrate, that a vendor is entitled to forfeit a deposit where the contract of sale is rescinded by reason of the default of the purchaser, is confined to contracts for the sale of real property. In support of that submission, Mr D'Abaco referred to a number of authorities, in which the principles, relating to the forfeiture of the deposit by the vendor, are expressed in terms relating to contracts for the sale of real property.[1] Mr D'Abaco submitted that, in most of the cases involving the sale of real property, the contract contained an express term providing for the forfeiture of the deposit in the event that the purchaser failed to complete the contract. Furthermore, he submitted, the function served by a deposit, in a contract for the sale of land, is different to the function of a deposit in other contracts, including the contract in this case. In a contract for the sale of real property, the deposit forms part of the purchase price if the contract is completed, and, in addition, it is an earnest on the part of the purchaser, to bind the purchaser to the bargain.[2] Thus, in a contract for the sale of real property, the deposit provides security to the vendor, enabling the vendor to take the property off the market, upon entering into the contract of the sale of land.[3] Mr D'Abaco submitted that that policy consideration does not apply to other contracts, which do not involve the sale of land. Accordingly, he argued, the deposit in the present case was not intended to perform the same function as a deposit in a contract for the sale of land. Thus, he submitted, the first respondent was only entitled to retain, from the deposit, an amount which is sufficient to compensate it for the actual loss, caused to it by the repudiation by the appellant of the agreement, namely, $2,696.91.

18. Alternatively, Mr D'Abaco submitted that if, as a matter of law, the first respondent was entitled to retain the whole deposit amount of $17,300, equity would assist the appellant to recover the amount by which the deposit exceeded the loss caused to the first respondent by the appellant's repudiation of the contract. In support of that contention, Mr D'Abaco relied, principally, upon the judgments of Denning LJ and Somervell LJ in *Stockloser v Johnson*.[4] He submitted that the principles, stated by Denning LJ in Stockloser, have been adopted by Monahan AJ in *Smyth v Jessup*[5] and by Kennedy J of the Supreme Court of Western Australia in *Yardley v Saunders*.[6]

19. In *Stockloser v Johnson*,[7] Denning LJ stated the principle, upon which Mr D'Abaco relies, as follows:

> "(1) When there is no forfeiture clause. If money is handed over in part payment of the purchase price, and then the buyer makes default as to the balance, then, so long as the seller keeps the contract open and available for performance, the buyer cannot recover the money; but once the seller rescinds the contract or treats it as at an end owing to the buyer's default, then the buyer is entitled to recover his money by action at law, subject to a cross-claim by the seller for damages ... .
>
> (2) But when there is a forfeiture clause or the money is expressly paid as a deposit (which is equivalent to a forfeiture clause), then the buyer who is in default cannot recover the money at law at all. He may, however, have a remedy in equity, for, despite the express stipulation in the contract, equity can relieve the buyer from forfeiture of the money and order the seller to repay it on such terms as the court thinks fit. ... The difficulty is to know what are the circumstances which give rise to this equity ... Two things are necessary: first, the forfeiture clause must be of a penal nature, in this sense, that the sum forfeited must be out of all proportion to the damage, and, secondly, it must be unconscionable for the seller to retain the money."

20. Mr D'Abaco submitted that, in this case, the amount of the deposit represented more than one third of the total contract sum of $47,300, and, as such, it was substantially in excess of an amount required to secure compliance by the appellant with the contract. He thus submitted that the amount of $17,300, as a deposit, was penal, in the sense defined by Denning LJ, namely, that it was out of all proportion to any loss potentially suffered by the first respondent as a consequence of a repudiation by the appellant of its agreement. Mr D'Abaco further submitted that it would be unconscionable for the first respondent to retain the whole deposit of $17,300, since, according

to the findings of fact made by the Magistrate, the first respondent had only sustained a loss in the amount of $2,696 as a consequence of the breach of the agreement by the appellant. He submitted that, if the first respondent were permitted to retain the deposit, it would thereby derive a considerable windfall, at the expense of the appellant.

21. In response, Mr Gisonda, who appeared on behalf of the respondents, submitted that the first proposition, advanced by Mr D'Abaco, was contrary to the fundamental notion of a deposit. He submitted that, in ordinary usage, a deposit is an amount given in earnest to secure a contract, which is liable to be forfeited if the party, which paid the deposit, fails to complete its obligations under the contract. He submitted that that effect has been given to amounts, specified as deposits, in a number of authorities.[8] Mr Gisonda pointed out that Mr D'Abaco has not been able to refer to any case, in which it has been decided that the principles, which apply in relation to deposits in contracts for the sale of real estate, do not apply in other contracts. He submitted that, in each case, the deposit consists of something given in earnest to bind the bargain, as a guarantee to the recipient that the party, paying the deposit, will perform its obligations under the contract. Thus, there is no reason why different principles should apply, depending upon whether the contract, in respect of which the deposit is paid, is a contract for the sale of real property.

22. Mr Gisonda further submitted that the appellant should not be permitted to rely on a claim for relief in equity against the forfeiture of the deposit. He submitted that the appellant had not sought to make a claim, based in equity, before the Magistrate. Consequently, the parties had not directed the evidence, called before the Magistrate, to a number of issues, which might arise in respect of any such claim. He submitted that, if the appellant had put forward such a claim in equity before the Magistrate, the respondent might have adduced other evidence in response to it. Thus, he submitted that the appellant should be confined to the causes of action, which it relied on before the Magistrate.[9]

23. Mr Gisonda further submitted that, in any event, the submissions made by the appellant, based on principles of equity, should be rejected for three reasons. First, he submitted that the equitable rights, identified by the Court of Appeal in *Stockloser v Johnson*, only apply where the defaulting party is ready and willing to complete its part of the contractual bargain.[10] In this case, the appellant had expressly refused to complete its obligations under the contract, and had withdrawn from it.

24. Secondly, Mr Gisonda submitted that the Court does not grant relief in equity against the forfeiture of the deposit, unless the deposit is, in all the circumstances, unreasonable.[11] Mr Gisonda submitted that the appellant had not demonstrated that, on the evidence led before the Magistrate, her Honour would have concluded that the deposit, paid by the appellant, the first respondent, was so unreasonable as to attract the intervention of equity.

25. Thirdly, Mr Gisonda submitted that, if the principles stated by Denning LJ in *Stockloser* applied to the payment of a deposit, the appellant has not demonstrated that the Magistrate, as a matter of law, erred in failing to conclude, on the evidence, that, at the time at which the parties entered into the contract, the amount paid by way of deposit was penal, and, further, that it would be unconscionable for the first respondent to retain the whole of the deposit, upon the wrongful repudiation of the agreement by the appellant.

Analysis

26. I turn, then, to the first submission, made on behalf of the appellant, namely, that the principles relating to the forfeiture of deposits, upon breach of a contract by the party who paid the deposit, only apply to contracts for the sale of real property.

27. Mr D'Abaco was not able to refer to any case, which supported the distinction for which he contended. When the authorities, relating to the forfeiture of deposits, are examined, no distinction is to be found, in the judgments, based on whether the contract in question is a contract for the sale of real property, or for some other matter.[12] Further, in my view, the distinction sought to be relied upon by the appellant is quite contrary to the well understood meaning and role of a deposit in contract law.

28. The nature and function of a deposit was examined, in some detail, in the well known decision of the Court of Appeal in *Howe v Smith*.[13] That case concerned a contract for the sale

of real estate for the price of £12,500. The contract provided for a payment of £500 "as a deposit and in part payment of the purchase money". The purchaser failed to complete the contract, and the vendor rescinded it, and re-sold the property. The Court of Appeal held that the plaintiff was not entitled to repayment of the deposit, notwithstanding that the deposit would have formed part of the payment of the contract sum if the contract had been completed.

29. Each of the members of the Court described the function of a deposit as something given in earnest, as a guarantee by the payer of the deposit that the contract will be performed.[14] They each stated the principles, relating to the forfeiture of deposits, in general terms, as being applicable to any contract, and not as being confined to contracts for the sale of real property. Thus, Bowen LJ stated:[15]

> "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. 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 enable him to take advantage of his own wrong."

30. In similar terms, Fry LJ stated:[16]

> "Money paid as a deposit must, I conceive, be paid on some terms implied or express. 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 it 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."

31. The fundamental functions of a deposit, as described by the members of the Court of Appeal in *Howe v Smith*, are equally applicable, whether or not the contract concerns the sale of real property. In any contract, a deposit constitutes an earnest, to bind the bargain, and a guarantee of due performance, of the contract, by the payee. Those two functions, of a deposit, have been long entrenched in contract law. Indeed, as Fry LJ explained in *Howe v Smith*,[17] the practice of giving something to signify the conclusion of a contract is one of great antiquity, deriving originally from Roman law, and which passed into the early jurisprudence of England. That practice was not confined to contracts for the sale of real property, but, it would seem, was common to all forms of contracts.

32. The principles, stated by the Court of Appeal in *Howe v Smith* have been applied in a number of subsequent cases.[18] In *Commissioner of Taxation v Reliance Carpet Co Pty Ltd*,[19] it was necessary for the High Court to examine, in some detail, the nature of a deposit, for the purposes of the goods and services tax, in a case concerning a contract for the sale of land. The Court, in its joint judgment,[20] noted five particular aspects of a deposit. They included, first, that a deposit is something provided "as an earnest to bind the bargain", and, secondly, that a deposit is "a form of security for [the] performance by the purchaser".[21] Their Honours adopted the historical explanation of the deposit, stated by Fry LJ in *Howe v Smith*. In a footnote,[22] they observed:

> "In the absence of an express contractual stipulation to the contrary, a vendor terminating a contract for default by the purchaser in completion is entitled to retain the deposit, as an implied term upon which the deposit was provided ..."

33. Certainly, much of the learning, in relation to deposits, has been developed in respect of contracts for the sale of real property, since it is in the context of such contracts that issues, relating to the forfeiture of deposits, most commonly arise. However, there are a number of cases, involving contracts, which do not involve the sale of real property, in which it has been accepted that the principles, stated in *Howe v Smith*, apply with equal force.

34. In *Dies & Anor v British and International Mining and Finance Corporation Limited*,[23] the plaintiff (Quintana) entered into a contract with the defendant to purchase a quantity of rifles and

ammunition for £270,000. Quintana paid £100,000 to the defendant, but failed to accept delivery of the goods. The defendant elected to bring the contract to an end. Quintana assigned its rights under the contract to Dies, who brought proceedings for the repayment of the sum of £100,000. The first issue in the case concerned the construction of a clause in the agreement, which is not relevant for present purposes. Having disposed of that issue, Stable J,[24] examined the right of the defaulting purchaser to recover part payments from the vendor, as moneys had and received. In doing so, Stable J referred to the decision of the Privy Council in *Mayson v Clouet*,[25] in which their Lordships,[26] applying the principles stated in *Howe v Smith*, distinguished the effect of a deposit, from a part payment, on the ground that a deposit is also an "earnest to bind the bargain". Stable J, having referred to those principles, concluded as follows:

> "In the present case, neither by the use of the word 'deposit' or otherwise, is there anything to indicate that the payment of £100,000 was intended or was believed by either party to be in the nature of a guarantee or earnest for the due performance of the contract. It was a part payment of the price of the goods sold and was so described."[27]

35. Stable J then proceeded to deal with, and reject, a submission, by the defendant, that the rule, by which a purchaser in default is entitled to recover a part payment of the purchase price, is applicable only to contracts for the sale of land. His Lordship quoted a passage from the seventh edition of *Benjamin on Sale*, and concluded that the principle, relating to the recovery of a part payment by a defaulting purchaser, is a general rule, which is not confined to contracts for the sale of land.[28]

36. In *Baltic Shipping Co v Dillon*,[29] Mason CJ applied the distinction between a deposit on the one hand, and a part payment on the other hand, in considering whether a fare paid by a passenger could be recovered by the passenger. In that case, the plaintiff was a passenger on a cruise vessel. She suffered injury when the vessel sank ten days into a fourteen day cruise. In proceedings against the ship owner for damages of breach of contract, she was awarded, at first instance, damages, which included a refund of the whole of the fare, together with compensation for disappointment and distress. On appeal, the High Court held that the passenger was not entitled to a refund of the fare, because there had not been a total failure of consideration. In considering that part of the appeal, Mason CJ referred, with approval, to the views stated by Stable J in *Dies*.[30] He quoted a passage from the judgment of Stable J to the effect that, where there is no express term of the contract entitling the seller to retain a payment, the law confers on the purchaser the right to recover his money, unless the language of the contract gives rise to an inference to the contrary. Mason CJ then stated:

> "This statement in turn accords with the distinction ... between a deposit which was to be forfeited if the plaintiff should not perform the contract and a mere part payment the right to which depended upon performance of the contract. ... The question whether an advance payment, not being a deposit or earnest of performance, is absolute or conditional is one of construction."[31]

37. The principles, relating to the nature and effect of a deposit, as stated by the Court of Appeal in *Howe v Smith*, have been applied in two New Zealand cases, which involved contracts for the sale of motor vehicles. In *Commission Car Sales (Hastings) Ltd v Saul*,[32] the purchaser entered into a contract for the purchase of a Plymouth motor car. The price was to be paid by the trade-in by the purchaser of a Oldsmobile motor car as a deposit, and by payment of the balance in cash within a few days. Having provided the Oldsmobile to the vendor, the purchaser refused to complete the purchase and returned the Plymouth to the vendor. The purchaser claimed the amount of the deposit, being the trade-in value of the Oldsmobile car, from the vendor. The Magistrate gave judgment in favour of the purchaser. The vendor successfully appealed to the Supreme Court. Turner J, applying *Howe v Smith*, held that the vendor was entitled to retain the Oldsmobile vehicle, notwithstanding that the amount for which it had re-sold the Plymouth vehicle, together with the value of the Oldsmobile, exceeded the amount of the purchase price payable under the original contract with the purchaser.[33]

38. In *Reid Motors Limited v Wood & Anor*,[34] the Supreme Court of New Zealand was concerned with two contracts for the purchase of vehicles. The deposits for the two vehicles, totalling £6,000, were to be provided by the trade-in of a Holden motor vehicle worth $3,000, and a cheque for $3,000. The cheque for $3,000 was not cleared. The vendor accepted the purchaser's repudiation of the agreements, and brought an action against the defendants on the dishonoured cheque.

Coates J dismissed the claim. His Honour stated that the critical issue was whether the sum of $3,000 was properly described as a deposit, or whether, on the other hand, it was intended to be a payment towards the purchase price, and not a deposit, or earnest for completion of the transaction. He concluded that, in the circumstances of the case, in substance, the cheque was given as a payment towards the purchase of the vehicle, rather than as a deposit. In reaching that conclusion, Coates J identified the principles, which were applicable to the case, as follows:[35]

> "The next question for consideration is whether the sum of $3,000 appearing in the cheque signed by both defendants and given to the plaintiff was a payment by way of a deposit or was a pre-payment of part of the purchase price. If it was a deposit to be regarded as a security for completion of a purchase it could be retained by the vendor if the purchaser repudiated the contract: *Howe v Smith* (citation omitted). If it was in the nature of a part payment of purchase money and the goods were not delivered because of the buyer's default, the seller's only remedy would seem to be to recover damages for the default while the buyer – notwithstanding his default – would be entitled to recover the purchase price he has paid, possibly less the amount of damages which the seller can establish as a result of the buyer's default: *Dies v British and International Mining and Finance Corporation Limited* (citation omitted)."

39. Accordingly, it is clear that the principles relating to the forfeiture of deposits, upon the failure of the party which paid the deposit to complete the contract, apply equally to contracts for the sale of real property and to all other contracts. There is no basis in principle for the distinction contended for by Mr D'Abaco. The authorities, to which I have referred, demonstrate that the principles, stated by the Court of Appeal in *Howe v Smith*, and which are longstanding, have been applied, regardless of whether the transaction, in respect of which the deposit is paid, concerns a contract for the sale of real property. For those reasons, I reject the first submission made by Mr D'Abaco.

40. I turn, then, to the second submission relied on by the appellant, namely, that, as a result of the application of equitable principles, the Magistrate should have ordered that the first respondent repay to the appellant the amount of the deposit less the loss sustained by the first respondent as a result of the repudiation of the agreement by the appellant.

41. It is clear that, in the proceedings before the Magistrate, the appellant did not prosecute a claim for repayment of the deposit on the basis of the principles of equity on which it now seeks to rely. Indeed, Mr D'Abaco conceded that that was so. As I have already noted, the statement of claim did not plead such a cause of action. Counsel for the appellant opened his case to the Magistrate on the basis of the three causes of action pleaded in the statement of claim. He did not refer, in any manner, to the claim now sought to be made in equity. None of the evidence, which was adduced in the trial, was directed to the issues raised by the equitable principles, on which Mr D'Abaco seeks to rely. The only factual issues, which might be referrable to such a claim, arose as a result of the counterclaim by the first respondent for damages. In final submissions before the Magistrate, counsel for the appellant did not seek to argue a claim based in equity. Rather, counsel relied on the same proposition, which is now advanced by Mr D'Abaco as his first submission, namely, that the principles, relating to the forfeiture of deposits, in respect of contracts for the sale of land, are different to those which apply to deposits paid in respect of other contracts.

42. The question, then, which arises is whether the appellant ought now to be permitted to rely on a cause of action, or a basis of claim, not asserted by it before the Magistrate. There are, I consider, two obstacles to the appellant being permitted to follow that course. The first arises from the particular nature of the proceeding before me, which is an appeal under s109 of the *Magistrates' Court Act*. Section 109(1) provides that such an appeal may only be brought "on a question of law" from a final order made by a Magistrate. The point, raised by the alternative submission now relied on by the appellant, is that, if the appellant had based its claim for repayment of the deposit on the equitable principles stated in *Stockloser v Johnson*, the Magistrate, as a matter of law, would have been required to find in favour of the appellant.

43. The difficulty with that submission is that it does not identify an error of law made by the Magistrate. Rather, at best, it points to a different conclusion, at which the Magistrate might (or, the appellant submits, would) have arrived, if the appellant had made the claim in equity, on which it now seeks to rely. The appeal, which is brought pursuant to s109, is an appeal in the

strictest sense, and it is not, in any form, a re-hearing.[36] It is necessary for the appellant to be able to identify a relevant error of law, made by the Magistrate, before it is entitled to relief from this Court. By its alternative submission, the appellant does not point to any error of law made by the Magistrate. Rather, as I have stated, the proposition, on which it seeks to rely, is that the Magistrate would have been obliged to find in its favour, if the appellant had made the claim, based in equity, on which it now seeks to rely.

44. The conclusion to the question, whether the appellant might now rely on the point advanced by it, is not to be resolved solely by reference to the manner in which the causes of action, relied upon by the appellant at first instance, were formulated in the statement of claim, or, indeed, articulated in argument. Rather, it is necessary to consider the substance, and not just the form, of the proceeding which was brought before the Magistrate.[37] However, that said, it is clear that the appellant is now seeking to rely on a significantly different right of action to that which it propounded before the Magistrate. The claim before the Magistrate was made strictly on principles of law. The appellant now seeks to rely on an alternative, different, claim in equity. In effect, the appellant is now submitting that, notwithstanding the position at law, equity should and would intervene, to provide relief to it against the forfeiture of its deposit, which would otherwise take place according to the terms of the contract between itself and the first respondent, and according to the principles of law which apply to that contract.

45. The views, which I have just expressed, are supported by authority. In *Emer v Queen Victoria Women's Centre Trust*,[38] the respondent lessor issued proceedings in the Magistrates' Court for payment of moneys due to it by the appellant under a lease, and for possession of the demised premises. The appellant filed a defence, and resisted the claim on a number of grounds. The Magistrate found in favour of the respondent. On appeal, the appellant sought to argue, *inter alia*, that the lease was illegal. That point was not taken in the proceedings before the Magistrate. Accordingly, McDonald J, on appeal, held that the question, which was sought to be raised, was not a question of law from the final order of the Magistrates' Court.[39]

46. Similar views were expressed by Ashley J in *Mond v Lipshut*.[40] In that case, the respondent, who was the assignee of a cheque, sued the appellant, the drawer of the cheque, based on its dishonour. The appellant relied on a number of substantive defences before the Magistrate, which did not succeed. The Magistrate gave judgment for the respondent. On appeal, the appellant sought to rely on an argument based on s49 of the *Cheques Act* 1986 (Cth), namely, that the assignee of the cheque had no title to sue on it. That point had not been raised before the Magistrate. Ashley J expressed the view – without, it would seem, conclusively determining – that, as the appellant had not raised the point before the Magistrate, s109 of the *Magistrates' Court Act* precluded him from raising it on appeal. His Honour observed:

> "It appears to me, consistently with the various inhibitions upon opening up new points on appeal to which I have referred, that s109 might be thought to deny to an appellant the right to appeal upon a question of law — even a 'pure' question of law — which could have been but was not raised at first instance; one which, had it been raised, would have obliged an outcome favourable to the appellant."[41]

47. For those reasons, I consider that the point, now sought to be advanced by the appellant, on this appeal, does not raise an error of law by the Magistrate. Accordingly, it does not fall within the ambit of an appeal which might be brought under s109(1) of the *Magistrates' Court Act*.

48. If I am wrong in that conclusion, I consider that, in any event, the established principles, relating to the raising on appeal of a new point, which was not relied on at trial, would preclude the appellant from relying on the alternative argument advanced by Mr D'Abaco. Those principles, as stated by the High Court in *Whisprun Pty Ltd v Dixon*,[42] are to the effect that a party is not entitled, on appeal, to raise a point which was not taken at trial, unless that point "could not possibly have been met by further evidence at the trial".[43]

49. As I have already indicated, in *Stockloser v Johnson*, Denning LJ held that, in order for the equitable principle to be engaged, the forfeiture clause must be of a penal nature, and, secondly, it must be unconscionable for the party, to whom the deposit was paid, to retain it. It is common ground that the first question, namely, whether the forfeiture clause is of a penal nature, must be determined at the time of contract.[44] In the proceedings in the Magistrates' Court, no evidence was directed to either of the two conditions which were specified by Denning LJ. In particular, no

evidence was directed to the first issue, namely, whether, at the time of the contract, the deposit sum of $17,300 could have been properly characterised as "penal", in the sense that it was not a legitimate pre-estimate of the potential damages to be sustained by the respondent, if the appellant failed to complete its obligations under the contract.

50. If such a point had been raised at the trial of the proceeding before the Magistrate, a number of issues of fact would have been at large. In particular, one relevant question would have been whether the amount of the deposit, payable in respect of the contract between the appellant and the first respondent, was a normal, or usual amount, for the type of contract which was involved. In that connection, I note that, in fact, when the appellant engaged another contractor to carry out the works, it agreed to pay a deposit, which constituted thirty per cent of the contract price.

51. Secondly, as I have already noted, the second payment (of $15,000), which was due under the agreement in this case, was to be paid when all of the fence panels had been completed and installed by the first respondent at the appellant's premises. Until that part of the contract had been fulfilled by the first respondent, the only payment, made by the appellant to the first respondent, would have been the deposit of $17,300. If the question, as to whether the deposit was penal, at the time of the contract, had been raised before the Magistrate, it would have been relevant to ascertain the amount of work and expense, which was required to be undertaken by the first respondent, to complete the stage of the works, at which the second payment of $15,000 was due and payable. In other words, one question, which might have been addressed, is whether, given the amount of labour and expense necessary to reach the stage at which the fence panels were installed, the sum of $17,300 was a legitimate pre-estimate of the losses, which might have been sustained by the first respondent, if the appellant, at any time (including up to that stage), repudiated its obligations under the contract.

52. None of those matters were addressed before the Magistrate, because the equitable principles, upon which the appellant now relies, were not then raised. In accordance with the principles stated by the High Court in *Whisprun Pty Ltd v Dixon*,[45] the onus lies on the appellant, on this appeal, to satisfy me that, if it had made the claim based on the equitable principles, on which it now seeks to rely, that claim could not possibly have been met by further evidence at the trial before the Magistrate.[46] In light of the matters, to which I have just referred, I am not satisfied that, if the equitable claim, now sought to be relied on by the appellant, had been made before the Magistrate, that claim might not have been met by other evidence adduced before the Magistrate. For those reasons, I consider that the appellant ought not to be permitted to rely upon the second alternative argument, based on equitable principles, on this appeal.

53. Notwithstanding that conclusion, I shall, nevertheless, consider the substance of the second submission raised by the appellant. I do so in deference to the submissions which were made in respect of that matter by counsel for each side.

54. The question as to the nature and content of the equitable principles, stated by Denning LJ in *Stockloser v Johnson*,[47] is not without difficulty. Mr Gisonda made two submissions in that respect. First, he submitted that the principles, stated by the Court of Appeal, do not apply where the defaulting purchaser is not willing and able to complete its obligations under the contract. Secondly he submitted that the principles do not apply, so as to preclude forfeiture of a "reasonable" deposit.

55. The members of the Court of Appeal, in *Stockloser v Johnson*, were, in fact, divided on the question as to the existence and content of any right, by a defaulting purchaser, to relief, in equity, from the effect of a contractual term which provided for the forfeiture of money paid by it. Denning LJ considered that equity would intervene to relieve against forfeiture, notwithstanding that the defaulting party is not ready and willing to perform its obligations under the contract.[48] As I have already outlined, he considered that, in such a case, equity will provide relief from forfeiture of monies paid by a defaulting party under a contract, if the forfeiture clause is of a penal nature, and it would be unconscionable for the other party to retain the money paid to it.[49] Somerville LJ, in a separate judgment, substantially agreed with Denning LJ.[50] On the other hand, Romer LJ considered that equity would only intervene to relieve a purchaser, from a contractual liability to forfeiture of instalments already paid by it, by giving the purchaser a further chance and time to complete its obligations under the contract, provided that the purchaser was able and willing to

do so.[51] Otherwise, his Lordship considered that no relief, of any other nature, could properly be given to a defaulting party, in the absence of some special circumstances, such as fraud, sharp practice or other unconscionable conduct by the vendor.[52]

56. The views, stated by Denning LJ and Somerville LJ in *Stockloser v Johnson*, have had a mixed reception in subsequent cases. In *Campbell Discount Co Ltd v Bridge*,[53] Holroyd Pearce LJ expressed preference for the views of Romer LJ. Harmon LJ[54] and Davies LJ agreed. In *Galbraith v Mitchenall Estates Ltd*,[55] Sacks J considered that, in light of the *Campbell Discount Company case*, he was at liberty to decide between the two competing views of Denning LJ and Romer LJ, and he concluded that he should follow the views stated in the judgment of Romer LJ.[56]

57. A similar division of views has appeared in the Australian authorities. In *Smyth v Jessup*,[57] Monahan AJ followed Denning LJ in *Stockloser v Johnson*. On the basis of those principles, he ordered repayment of a deposit to a defaulting purchaser. In the next year, O'Bryan J decided in *Re: Hoobin (deceased)*.[58] That case involved the sale, by executors of an estate, of the freehold of a hotel. The purchaser failed to comply with the terms of the contract, and the executors rescinded the contract. The purchaser claimed repayment of the balance of the deposit, after taking into account the loss sustained by the executors on the re-sale of their property. The parties reached a compromise, on the basis that the purchaser would be repaid part of the claimed amount. O'Bryan J rejected the application by the executors for approval of that compromise. In doing so, his Honour expressed a strong preference for the views stated by Romer LJ in *Stockloser's case*. He concluded that it was improbable that any court would regard the deposit as being other than a true deposit, and in no sense a penalty. Accordingly, he held that it was unwise for the executors to make the agreement of compromise proposed.[59]

58. The question was also considered by the Full Court of Western Australia in *Coates v Sarich*.[60] In that case, the appellant, who was the purchaser under a contract of sale of land, paid a deposit and two other instalments to the vendor, and then repudiated the contract. The appellant commenced proceedings, claiming return of all the payments made by him including the deposit. The trial judge rejected the claim for repayment of the deposit. The appeal to the Full Court was dismissed. Wolff CJ, having referred to the differing views of the Court of Appeal in *Stockloser v Johnson*, stated:

> "This case is by no means a satisfactory authority concerning the right to retain a deposit on default of the purchaser. I think that in Australia it is clear that where the sum of money, as in this case, is in fact a deposit as distinct from a penalty and the contract provides for its forfeiture on default, there is no equity on the part of the purchaser to get a refund of the whole or any portion of the deposit *McDonald v Dennys Lascelles Ltd* [1932] HCA 64; (1933) 48 CLR 487."[61]

59. D'Arcy J expressed similar views. His Honour considered that *Re: Hoobin (deceased)* contained a "reliable statement of the law" on this topic, and noted that it is well recognised by the authorities that a deposit stands in an exceptional position, where a vendor rescinds a contract for sale of land for the purchaser's breach.[62] The third member of the court, Hale J adopted a different approach. His Honour rejected the proposition that different rules apply to a deposit than those which apply to other amounts, which are the subject of a forfeiture clause. He considered that, in each case, the relevant question is whether the amount to be forfeited could be properly considered to be a penalty on the one hand, or, on the other hand, liquidated damages.[63]

60. In the subsequent case of *Tropical Traders Ltd v R & H Goonan (No 2)*,[64] Jackson J referred to the different approaches between, on the one hand, Wolff CJ and D'Arcy J, and, on the other hand, Hale J, in *Coates v Sarich*. The uncertain state of the authorities was further adverted to by Kennedy J in *Yardley v Saunders*[65] and, more recently, by Hansen J in *Deputy Commissioner of Taxation v Advanced Communications Technologies (Australia) Pty Ltd*.[66] However, in neither case was it necessary for the court to resolve the point.

61. In light of the differing views contained in the authorities, it is, I consider, undesirable that I endeavour to resolve the question, as to which view should be followed, at first instance, unless it is necessary for me to do so. If it were necessary, I would prefer the views stated by O'Bryan J in *Re: Hoobin* and by Romer LJ in *Stockloser v Johnson*. However, the issue was not the subject of detailed argument before me. For reasons which I shall shortly state, I consider that the submission made by the appellant, on this aspect of the case, must fail, even if the views stated

by Denning LJ in *Stockloser's case* were applied. Thus, I shall refrain from stating any concluded view on whether the principles stated by Denning LJ are good law in Australia.

62. I should further add that, if the principles stated by Denning LJ in *Stockloser's case* are applicable, it is open to doubt whether they apply, at least without significant modification, to the question of whether relief should be afforded by equity against forfeiture of a deposit.[67] In *Stockloser*, Denning LJ equated a deposit with a forfeiture clause. Certainly, a deposit has one common feature with a payment that is made, and which is subject to a forfeiture clause, namely, that both the deposit and the payment are liable to be forfeited upon default by the payer. However, otherwise, the two payments have quite different characteristics. The authorities, to which I have earlier referred, identify the special characteristics of a deposit, namely, that it acts as an earnest to bind a bargain, and that it constitutes a guarantee for the performance, by the payer, of its contractual obligations. In such a case, it is difficult to understand how a deposit could be regarded as penal, or how it could be unconscionable for the recipient to retain it on default by the payer, where the parties had freely bargained, before entering into the contract, for the payment of the deposit, and for the amount of it. Thus, if there is any right in equity for relief from forfeiture of monies paid by a defaulting party – a question which is the subject of competing views in the authorities – it would seem to me that, at the least, the principles, stated by Denning LJ in *Stockloser*, may need significant modification, in order to take into account the special characteristics of a deposit.

63. However, as I have stated, it is not necessary for me to determine whether the principles, stated by the majority in *Stockloser*, apply in Australian law, and, in particular, whether they apply to a deposit. For, as I have already indicated, in my view, if those principles do apply, I am not persuaded that, on the facts of this case, they would have the result that the appellant ought to have been entitled to repayment of the deposit sum paid by it, less the losses sustained by the first respondent by reason of the repudiation of the agreement by the appellant.

64. In determining that question, it is, of course, important to bear in mind that I am not deciding this matter *de novo*, or by way of rehearing. Rather, as I have already emphasised, this matter is brought by way of appeal, on a point of law, from the Magistrate. The question, which I must determine, is whether, on the facts proven in evidence before the Magistrate, her Honour erred in not concluding that, on the proper application of equitable principles as stated by Denning LJ in *Stockloser v Johnson*, the appellant was entitled to repayment of the amount of the deposit, less a deduction for the losses sustained by the respondent as a result of the repudiation by the appellant of the contract.

65. In determining that question, it is important to bear in mind that the appellant has not sought to impugn the conclusion by the Magistrate that the payment of $17,300 by the appellant to the first respondent, was truly described, in the quotation document dated 12 March 2009, as a deposit. Thus, the appellant has accepted that the amount of $17,300 was not just a part payment of the purchase price, but, rather, that it was a deposit in the sense, which I have already discussed. Accordingly, the starting point for consideration, of the argument relied upon by the appellant is that the deposit was given in earnest by the appellant to bind the agreement between itself and first respondent, and that it constituted a guarantee for the performance by the appellant of its obligations under the contract with the first respondent.

66. If, as contended by the appellant, the principles of equity, as stated by Denning LJ in *Stockloser v Johnson*, should be applied, then, in order to succeed on this point, the appellant must first demonstrate that the Magistrate ought to have concluded, on the balance of probabilities, that the deposit, paid by it to the first respondent, was penal in nature. As I have already stated, it is common ground that that question is to be determined at the time of contract.[68] The appellant, as the party seeking relief, bore the onus of proving that the payment was penal in nature. As I have earlier stated, no evidence was led before the Magistrate that the amount of the deposit was out of the ordinary for the type of contract which is involved in this case. Further, no evidence was adduced as to whether the amount of the deposit was so disproportionate to the expense, time and labour, which was required to be incurred by the first respondent, before it became entitled to the second payment under the contract, that it should be characterised as penal in character. The evidence, in that respect is, in large measure, silent. Thus, there was no evidence before the Magistrate, which would justify a conclusion that the Magistrate would have been required to

characterise the deposit as penal, if her Honour had considered the issue.

67. The second question, to be considered according to the principles stated by Denning LJ in *Stockloser v Johnson*, is whether the evidence before the Magistrate was such as to require a conclusion that it would be unconscionable for the first respondent to retain the whole of the deposit paid to it by the appellant. In this respect, Mr D'Abaco relied on one principal submission, namely, that the amount of the deposit was so disproportionate to the losses sustained by the first respondent, as a consequence of the repudiation by the first appellant of the contract, that it would be unconscionable for the first respondent to retain the whole of the deposit. In particular, Mr D'Abaco relied on the findings by the Magistrate, on the counterclaim brought by the first respondent, that the losses incurred by the first respondent, in respect of the materials purchased and used by it in performing the contract, amounted to the sum of $2,696.91. Mr D'Abaco submitted that, if the first respondent were permitted to retain the whole of the deposit, it would reap such a windfall that equity should intervene to require payment to the appellant of the difference between the deposit and the losses sustained by the first respondent.

68. There are a number of difficulties with that proposition. Certainly, the Magistrate found that the first respondent had only proven, on its counterclaim, that the losses, which it incurred on the materials acquired by it for the purpose of forming the contract, amounted to the sum of $2,696.91. However the second respondent gave evidence that he had worked approximately 200 hours in performing the contract, before the appellant repudiated it. The second respondent also stated that he worked "long, long hours", sometimes working two shifts. He said that, on some occasions, he worked until 11pm to perform the contract. In her reasons for decision, the Magistrate noted the evidence given by the second respondent as to the amount of work which he performed. She observed that no evidence was given as to his hourly rate, and that his evidence was not corroborated by independent expert testimony. However, her Honour did not reject the evidence so given by the second respondent. If the balance of the deposit (after taking into account the first respondent's retrieval losses) were to be divided by 200 hours, the retention by the first respondent of the deposit would have the effect that it would be compensated, for the second respondent's labour, at the rate of $73 per hour, which could hardly be characterised as unreasonable.

69. Further, and in any event, I do not regard the fact that the first respondent might have made a profit, and even a sizeable profit, by the retention of the deposit, would necessitate a conclusion that it would be unconscionable for the first respondent to retain the whole of the deposit paid to it by the appellant. Commercial transactions are entered into on the basis that a party, providing labour or goods, will make a profit. On occasions, the performance by a contractor of a commercial contract may produce a large profit for him; on other occasions, the contractor might sustain a loss. In the present case, the parties, at arm's length, negotiated that a deposit would be paid by the appellant to the first respondent, and the amount of that deposit. That deposit was not forfeited, in this case, due to some minor or technical default by the appellant. Rather, the appellant, having paid the agreed deposit, unilaterally chose to repudiate its agreement with the first respondent. In those circumstances, I am not persuaded that the evidence adduced before the Magistrate was such that, on the proper application of equitable principles, the Magistrate would have been required to conclude that the retention by the first respondent of the whole of the deposit was unconscionable.

70. Thus, if the principles, stated by Denning LJ in *Stockloser's case* apply, in Australian law, to a deposit, I would not conclude that, on the evidence adduced before the Magistrate, the deposit was penal in nature, or that it would be unconscionable for the first respondent to retain the whole of it. Accordingly, applying those principles, I would not be persuaded that, in equity, the appellant would be entitled to repayment of the amount of the deposit, less the losses sustained by the first respondent as a consequence of the repudiation of the agreement by the appellant.

Conclusion

71. For the reasons which I have stated above, it follows that the Magistrate did not err in concluding that the first respondent was entitled to retain the whole of the deposit amount of $17,300 paid to it by the appellant. Accordingly, the appeal must be dismissed.

[1] *In re Hoobin deceased; Perpetual Executors and Trustees Association of Australia Limited v Hoobin* [1957]

VicRp 49; [1957] VR 341, 344-5; [1957] ALR 932 (O'Bryan J); *Howe v Smith* (1884) 27 ChD 89, 98 (Bowen LJ); *Brien v Dwyer* [1978] HCA 50; (1978) 141 CLR 378, 401; 22 ALR 485; 53 ALJR 123 (Jacobs J), 406 (Aickin J); *Workers Trust and Merchant Bank Limited v Dojap Investments Limited* [1993] AC 573, 578; [1993] 2 All ER 370; [1993] 2 WLR 702; [1994] ANZ Conv R 145.
[2] *Brien v Dwyer* [1978] HCA 50; (1978) 141 CLR 378, 386-7, 392, 398, 401, 406; 22 ALR 485; 53 ALJR 123.
[3] *Brien v Dwyer*, above, 401 (Jacobs J).
[4] [1954] 1 QB 476; [1954] 1 All ER 630.
[5] [1956] VicLawRp 38; [1956] VLR 230, 232; [1956] ALR 982.
[6] [1982] WAR 231, 237.
[7] [1954] 1 QB 476, 489-90; [1954] 1 All ER 630.
[8] See, for example, *Commissioner of Taxation v Reliance Carpet Co Pty Ltd* [2008] HCA 22; (2008) 236 CLR 342, 351 (footnote 30); (2008) 246 ALR 448; (2008) 2008 ATC 20-028; (2008) 68 ATR 158; (2008) 82 ALJR 968; *Havyn Pty Ltd v Webster* [2005] NSWCA 182, [131]; *Howe v Smith* (1884) 27 ChD 89.
[9] *Whisprun Pty Ltd v Dixon* [2003] HCA 48; (2003) 200 ALR 447; (2003) 77 ALJR 1598, 1608 [51]; [2003] Aust Torts Reports 81-710.
[10] *Galbraith v Mitchenall Estates Limited* [1965] 2 QB 473, 484 (Sachs J); *Legione v Hateley* [1983] HCA 11; (1983) 152 CLR 406, 429; 46 ALR 1; (1983) 57 ALJR 292 (Gibbs CJ, Murphy J).
[11] *Legione v Hateley* (above) 458 (Brennan J); *Havyn Pty Ltd v Webster* [2005] NSWCA 182, [132]-[133]; *Workers Trust and Merchant Bank Limited v Dajap Investments Limited* [1993] AC 573, 580-581; [1993] 2 All ER 370; [1993] 2 WLR 702; [1994] ANZ Conv R 145.
[12] For example, *Sprague v Booth* [1909] AC 576, 579-80; *Stockloser v Johnson* [1954] 1 QB 476, 490; [1954] 1 All ER 630 (Denning LJ); *Dies v British and International Mining and Finance Corporation* [1939] 1 KB 724, 740, 742 (Stable J).
[13] (1884) 27 ChD 89.
[14] Above, 95 (Cotton LJ), 98 (Bowen LJ), 101 (Fry LJ).
[15] Above, 98.
[16] Above, 101.
[17] Above, 101-2.
[18] *Brien v Dwyer & Anor* [1978] HCA 50; (1978) 141 CLR 378, 386-7 (Barwick CJ), 392 (Gibbs J), 398 (Stephen J), 401 (Jacobs J); 22 ALR 485; 53 ALJR 123; *Ward v Ellerton* [1927] VicLawRp 72; [1927] VLR 494, 499-500; 33 ALR 360; 49 ALT 49.
[19] [2008] HCA 22; (2008) 236 CLR 342; (2008) 246 ALR 448; (2008) 2008 ATC 20-028; (2008) 68 ATR 158; (2008) 82 ALJR 968.
[20] Gleeson CJ, Gummow, Heydon, Crennan and Kiefel JJ.
[21] Page 351.
[22] Footnote (30), p351.
[23] [1939] 1 KB 724.
[24] Pages 736 and following.
[25] [1924] AC 980.
[26] [1924] AC 980, 986.
[27] Page 742.
[28] Page 743.
[29] [1993] HCA 4; (1993) 176 CLR 344; (1993) 111 ALR 289; (1993) 67 ALJR 228; [1993] ASC 58; [1993] Aust Contract Reports 90-022.
[30] Footnote above.
[31] Page 352.
[32] [1957] NZLR 144.
[33] Page 745.
[34] [1978] 1 NZLR 319.
[35] Page 325.
[36] *Carter v Reid* [1992] VicRp 22; [1992] 1 VR 351, 363; (1991) 13 MVR 229 (Hedigan J).
[37] *Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491, 497; (1988) 77 ALR 193; (1988) 62 ALJR 209; [1988] Aust Torts Reports 80-160.
[38] [1999] VSC 115; see also *Patterson v Royal and Sun Alliance Assurance (Aust) Ltd* [2000] VSC 457, [39] (Hedigan J).
[39] Above, paras [48]-[49].
[40] [1999] VSC 103; [1999] 2 VR 342.
[41] Above, p 351 [50].
[42] [2003] HCA 48; (2003) 200 ALR 447; (2003) 77 ALJR 1598, 1608 [51]-[53]; [2003] Aust Torts Reports 81-710.
[43] See also *Coulton v Holcombe* [1986] HCA 33; (1986) 162 CLR 1, 8-9; 65 ALR 656; (1986) 60 ALJR 470.
[44] [1956] VR 230, 232 (Monahan A-J).
[45] Footnote above.
[46] See also *Zanjani v Sutcliffe & Anor* [2002] VSC 282, [8] (Balmford J).
[47] [1954] 1 QB 476; [1954] 1 All ER 630.
[48] Page 491.
[49] Page 490.

[50] Pages 485, 488.
[51] Page 499; see also *Starside Properties Ltd v Mustapha* [1974] 1 WLR 816; [1974] 2 All ER 566.
[52] Page 501.
[53] [1961] 1 QB 445, Holroyd Pearce LJ, 457-8.
[54] Page 458-9.
[55] [1965] 2 QB 473.
[56] Page 484.
[57] [1956] VicLawRp 38; [1956] VLR 230; [1956] ALR 982.
[58] [1957] VicRp 49; [1957] VR 341; [1957] ALR 932.
[59] Page 349-50.
[60] [1964] WAR 2.
[61] Above page 8.
[62] Page 10.
[63] Page 14.
[64] [1965] WAR 174.
[65] [1982] WAR 231, 237.
[66] [2003] VSC 487, [151].
[67] Compare *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573, 578-9; *McDonald v Dennys Lascelles Ltd* [1933] HCA 25; (1933) 48 CLR 457, 470 (Starke J), 478 (Dixon J); 39 ALR 381.
[68] *Smyth v Jessup* [1956] VicLawRp 38; [1956] VLR 230, 232; [1956] ALR 982 (Monahan AJ).

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