# THREE RECURRING ISSUES FOR PROPERTY LAWYERS

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### TOPICS COVERED

This paper will address three re-occurring issues in drafting leases and sales contracts:

(i) Sales contracts where the purchaser is named as *X or nominee;*
(ii) Assigning leases, and the withholding of consent; and
(iii) Split deposits

### SALE TO X OR NOMINEE

A third party may become a "substituted contracting party" by novation of the original contract. Novation generally requires the agreement of the original and the substituted party although the original contract itself may, as a matter of its true construction, authorise a party to substitute a contracting party in its place without need for a further tri-partite agreement: see *Harry v Fidelity Nominees Pty Ltd* (1985) 41 SASR 458 at 460 (see more fully below).

When there is a novation, there is no assignment of rights and obligations, but rather the creation of new rights and obligations in a new contract: *Olsson v Dyson* (1969) 120 CLR 365 at 388.

"…. one difference between novation and assignment is that assignment is not a transaction between creditor and debtor, but only between the creditor and the assignee, to which the assent of the debtor is not needed.": [1]

[1] *Olsson* p 388

In *Karangahape Road International Village Limited v Holloway* [1988] NZHC 159; [1989] 1 NZLR 83, 101, Chilwell J noted that:

"Novation can be inferred from acts and conduct but ordinarily it is not to be inferred from conduct without some distinct request."

Mr and Mrs Holloway agreed to sell land to Jackson "or nominee". Jackson nominated Karangahape Road International Village Limited as nominee.

KRIV argued that there had been a novation, thereby leading to a new contract between itself and the Holloways (and terminating the contract between Jackson and the Holloways) based on conduct, e.g. the Holloways executing a memorandum of transfer to the company and addressing their settlement statement to the company.

As the conduct of the parties was consistent with an alternative explanation (that is, that KRIV remained Jackson's nominee for the purposes of completing the contract), it was held that there was insufficient evidence of a novation by conduct.

Ordinarily when a purchaser is described as "A or his nominee", A is treated as having the power to nominate the person to whom the property purchased is to be transferred. The nominee does *not* become a party to the contract, much less a party with the rights and obligations of the purchaser: *Tonelli v Komirra Pty Ltd* [1972] VicRp 87; [1972] VR 737.

i.e. [2] the contract remains one between the vendor and the originally named purchaser.

However, a contract may permit the purchaser to nominate a person that will stand in his place as the purchaser under a *novated contract*: *Salter v Gilbertson* (2003) 6 VR 466, 473-475; *Commissioner of State Revenue v Politis* [2004] VSC 126 at [16]. A nomination clause must clearly provide for this, to have such an effect: *Harry v Fidelity Nominees Pty Ltd* (1985) 41 SASR 458, 460 per King CJ.

Further, in *Lambly v Silk Pemberton Ltd* [1976] 2 NZLR 427, 432 Cooke J arrived at the same view, in this words:

"And in the absence of compelling language I do not think the court should impute to the parties an intention to allow an original signatory to substitute for himself a man of straw.[3]"

Extracts now follow from a recent Victorian SC case on the topic, *Vercorp Pty Ltd & Anor v*

[2] Usefully gathered in para [25] to *Vercorp Pty Ltd & Anor v ACN 096 278 483 Pty Ltd as trustee of the Williams Family Trust (No 2)* [2010] QSC 405
[3] Cited with approval in various Australian jurisdictions e.g. para [9] of *Avzur Hotels Pty Ltd v Ivanhoe Entertainment Pty Ltd* [2009] FCA 701

*ACN 096 278 483 Pty Ltd as trustee of the Williams Family Trust (No 2)* [2010] QSC 405:

"[25]……Many of the cases say that it is open to the parties to agree that upon the original purchaser's nomination, the nominee will become a party to the contract or at least, to a contract with the vendor. But there are several observations to the effect *that clear words would be needed to achieve that result.* Thus in Harry v Fidelity Nominees Pty Ltd, King CJ said that he would be "most unwilling to construe a contract as containing a provision of such unusual character ... unless the language of the contract was quite clear".[16] And in *Salter v Gilbertson*, Phillips JA said:[17]

As has been pointed out often enough, although it must be so if the context so demands, it is a strong thing to regard the words "or nominee" as authorising B, unilaterally and in his or her own absolute discretion, to nominate a purchaser to stand *in the place of* B, with all the attendant consequences for A [the vendor]. For such a construction 'compelling language' is required ... ."

[26] In Harry v Fidelity Nominees Pty Ltd, King CJ remarked that not only was the notion of a vendor binding himself to accept an unknown nominee, as the party to whom he must look exclusively for performance of the contract, an unusual one, it was "by no means clear that such a provision could be made legally effective".[18] King CJ said that "[t]he substitution could only occur if the nominee subsequently agreed, for a fresh consideration or under seal, to perform the [original purchaser's] obligations under the contract".[19]

[27] However, there is at least one case where this intention, to substitute the nominee as the party to be contractually bound, was identified, which is the judgment of Green CJ in Parland Pty Ltd v Mariposa Pty Ltd.[20] In that case the defendant contracted with two individuals to sell land the subject of a proposed rezoning application. Shortly after the contract was made, the purchasers said that they wished to nominate another purchaser and to amend the agreement by adding the words "and/or nominee". The response by the defendant, through its solicitors, was that "[t]he matter therein raised will be attended to at or prior to settlement". A form of transfer was then submitted to the defendant which showed the plaintiff (the nominee) as the transferee. Subsequently, the contract was settled, when the executed transfer was handed over together with an amended contract by which the words "or their nominee" were added after the names of the individual purchasers. *Importantly, the contract contained a condition that in the event that "the purchaser" was unsuccessful in having the property rezoned within three years from the date of completion, then the purchaser might require the vendor to repurchase the property upon certain terms.* The plaintiff was unsuccessful in having the property rezoned and called upon the defendant to repurchase it. The defendant refused upon the basis that the plaintiff was not a contracting party and was not "the purchaser" for the purposes of that clause. After referring to some of the cases and setting out a passage from Harry v Fidelity Nominees Pty Ltd, Green CJ said:[21]

Whilst accepting the above statements and also accepting that in this particular case there was evidence of the conveyancing practice referred to in those passages it must be kept in mind that every case must be determined on the basis of the circumstances and terms of the particular contract under consideration.

*In my view the following circumstances militate in favour of a conclusion that the first plaintiff was not merely the transferee of the property but was a contracting party*.

The contract was 'between ... the vendor of the one part and Andrew Hamilton and Andrew McGregor or their nominee [hereinafter called 'the purchaser'] of the other part'. *Prima facie* the effect of those words is that if Hamilton and McGregor did not nominate anyone the contract was between the vendor of the one part and Hamilton and McGregor [thereinafter called 'the purchaser'] of the other part and that if they did nominate someone then the contract was between the vendor of the one part and the person nominated [thereinafter called 'the purchaser'] of the other part. It follows that *prima facie* the person nominated was a contracting party and that the word 'purchaser' refers to the person nominated wherever it appears in the contract. Another internal indication supporting that construction is provided by the fact that the only way in which the rezoning referred to in cl15 could have been achieved was by an objection by the owner or occupier of the property pursuant to the *Local Government Act* 1962, s727 (4). If the defendant's contention is correct and for the purposes of cl15 'the purchaser' should be construed as referring to the second and third plaintiffs notwithstanding that the first plaintiff was nominated as the transferee, the clause would have been unworkable from the beginning because the second and third plaintiffs were not the owners and would not have had standing to lodge the objection which was necessary to achieve the rezoning.

*There are two matters which were of apparent importance for the result in that case. The first was that the contract was amended at the same time as the original sale was settled, with the result that there was no outstanding obligation to be performed by the plaintiff as the nominee. Secondly and importantly for the present case, the provisions in the contract which were to operate after settlement of the sale would have been unworkable if they were unenforceable by the plaintiff.*

…….

[31] Ordinarily a vendor is taken to have agreed to transfer the land to the purchaser or to the purchaser's nominee, whether or not the contract specifically provides for such a nomination: Lord v Trippe".

***Worked Case Examples***

In *Lambly v Silk Pemberton Limited* [1976] 2 NZLR 427 (CA) Lambly entered into a contract to sell land to "Nigel Pemberton of Auckland or his nominees". Pemberton later nominated Silk Pemberton Limited. When Lambly refused to settle, Silk Pemberton Limited sued Lambly for specific performance. Silk Pemberton Limited argued that the contract gave Pemberton the power to bring about a novation, so that there was continuously a binding contract but one party to it could be altered by unilateral action.

This was described as "novel", with the judges concluding that:

"No doubt it is theoretically possible for a vendor to authorise a purchaser to bring about a substitution of some other person of his own choosing as a new purchaser under the agreement, directly responsible to the vendor as a matter of privity of contract. But the whole concept is so unusual in practice that *I would look for much clearer words than are to be found in the present agreement* . . . .

*[I]n the absence of compelling language* I do not think the court should impute to the parties an intention to allow an original signatory to substitute for himself a man of straw . . . .

The real difficulty in the idea of novation is that novation involves a new contract, to which (it is usually said) the consent of all parties must be obtained . . . . In the present case the vendor did not in fact consent, and any implied consent which might arguably arise from the contract was withdraw before the nomination of Silk Pemberton Ltd."

As noted by Justine Kirby in her article (below, and whose case summary I have relied on with minor editing), the "Court left open the possibility that, absent a withdrawal of consent, the consent in a sufficiently clear prospective substitution provision may itself be sufficient agreement to a novation at a later time."

At common law, there are various exceptions to the above stated general principle, as follows [as noted by Justine Kirby in her article (below), and lightly edited versions of her case summaries:

(a) An assignee takes rights "subject to equities".

(b) In *Tito v Waddell (No 2)* [1977] Ch 106, 290 [*Tito*], Megarry V-C, referring to one aspect of this principle, stated that an assignee may obtain "a conditional or qualified right, the condition or qualification being that certain restrictions shall be observed or

> certain burdens assumed, such as an obligation to make certain payments" which are "an intrinsic part of the right".

*Rhone v Stephens* [1994] UKHL 3; [1994] 2 AC 310, 322 (HL) [*Rhone*], Lord Templeman accepted that conditions relevant to the exercise of a right could be attached to that right in express terms or by implication.

This can occur when the assignor must perform certain obligations prior to and as a condition of the non-assigning party performing its obligations. After the assignor assigns its rights to the assignee, the assignee is in no better position than the assignor. Thus, the assignee must perform the assignor's obligations itself (or have someone else do so) before it can enforce its rights against the non-assigning party.

This principle was applied in *Field v Fitton* [1988] NZCA 20; [1988] 1 NZLR 482 (CA) [*Field*], where a purchaser of land assigned its interests. The NZ Court of Appeal held that the assignees were not entitled to have the land transferred to them as neither they (nor anyone else) had performed the assignor's obligations under the agreement.

Compare and contrast *HEB Contractors Limited v Verrissimo* [1990] 3 NZLR 754 [*HEB Contractors*], where an assignee who had fulfilled the assignor's obligations under an agreement for sale and purchase of land was granted specific performance of that contract.

Thus, as noted by Justine Kirby in her article (below), “there is a risk for assignees relying on assigned rights where their ability to enforce those rights depends on the performance of obligations (especially performance by someone other than the assignee), such as banks who are assigned, as security for a loan to the assignor, the assignor's rights under an executory contract”.

In *Tito*, Megarry V-C held that there is also a "pure principle of benefit and burden" whereby independent burdens pass because "he who takes the benefit must bear the burden".

This point is hardly clear in Australia. The “pure principle" was rejected in *Government Insurance Office (NSW) v K A Reed Services Pty Limited* [1988] VicRp 75; [1988] VR 829, 841 (Full Court of the Supreme Court of Victoria) per Brooking J.

However, a defence (which I pleaded) in *Bank of Western Australia Ltd v Love* [2009] NSWSC 1421 based on the “pure principle” of benefits and burdens, was not struck out , despite application by the Bank forcefully argued by experienced counsel.

**STAMP DUTY IMPLICATIONS**

Where a contract for the sale of land contemplates a "nominee", that may well trigger an obligation to pay double stamp duty: first, by the named purchaser, second, by the nominee: see *See NSW - Duties Act 1997 s 18(2); Qld - Duties Act 2001 s 22(2); WA - Duties Act 2008 s 74(4); SA - Stamp Duties Act 1924 s 31(2); NT - Stamp Duty Act 1978 s 17A; ACT - Duties Act s 17(2).*

*See further Revenue Ruling No DUT 010 for the ATO's construction of (and practice in relation to) Sec 18 (2). Numerous cases / extracts are cited in the ruling.*

**ASSIGNMENT OF COMMERCIAL LEASES (with a brief mention of retail leases)**

Commercial leases : *Conveyancing Act s 133B(1)(a)*

(1) In all leases whether made before or after the commencement of the Conveyancing (Amendment) Act 1930 containing a covenant, condition, or agreement against assigning, underletting, charging, or parting with the possession of demised premises or any part thereof without licence or consent, such covenant, condition, or agreement shall, notwithstanding any express provision to the contrary, be deemed to be subject:

(a) to a proviso to the effect that such licence or consent is not to be unreasonably withheld, but this proviso does not preclude the right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with such licence or consent ...

*JDM Investments Pty Ltd v Todbern Pty Ltd* [2000] NSWSC 349

By a sub lease dated 28 July 1964 ("the sub lease") Super Centre sublet the premises to W H Duffy (Holdings) Pty Limited ("Duffy") for a term commencing on 1 June 1981 and terminating on 28 May 2011. The rental reserved was $3,000 per annum.

Argument centred on clause H.2 of the sub lease which stipulated:

"CLAUSE H.2 Assignment and Subletting.

The Lessee shall not sublet, license, assign, transfer or part with the possession of the demised premises or any part thereof or the lease thereof or any estate or interest therein to any person BUT the Lessee may assign sublet license or transfer the whole of this lease if

(i) The proposed assignee licencee or transferee or sublessee is a respectable, responsible, solvent fit and suitable person the onus of providing which shall be upon the Lessee.

(ii) The Lessee procures the execution by such assignee or transferee or sublessee of any assignment or transfer or sublease of these presents to which the Company is a party in such form as the Company and its solicitors shall approve.

(iv) [sic] All rent or other moneys then due or payable shall have been paid and there shall not then be any existing unremedied breach of the covenants, conditions and agreements herein contained but breaches which have been waived by the Company shall not be deemed to be unremedied breaches for the purpose of this sub-clause.

(v) Such assignment or transfer or sublease shall contain a covenant by the assignee or transferee [sic] with the company that the assignee or transferee or sublessee will at all times during the continuance of the term hereby granted duly pay the rent and other moneys hereby reserved at the times and in the manner hereinmentioned and perform and observe all the covenants, conditions and agreements of this lease on the part of the Lessee to be performed and observed.

(vi) Such assignment or transfer or sublease is approved by the Solicitors of the Company at the cost and expense in all respects of the Lessee.

(vii) The Lessee pays to the Company all proper costs, charges and expenses incurred by the Company of and incidental to any proper and reasonable enquiries which may be made by or on behalf of the Company as to respectability, responsibility, solvency, fitness and suitability of any proposed assignee or transferee or sublessee.

(viii) The consent in writing of the Commissioner for Railways is obtained and for the purposes of obtaining such consent the Lessee shall supply to the Commissioner particulars of the parties to, the premises the subject of, the term of, the consideration or rental to be paid for and other provisions of the proposed assignment, transfer, demise sublease or licence or agreement and shall within 7 days after the execution thereof deliver to the Commissioner an attested copy of such Deed or other instrument and of any plan or other instrument endorsed thereon or annexed thereto and the Lessee shall pay to the Commissioner a reasonable sum in respect of any legal or other expenses incurred in relation to such consent or approval.

Where the proposed assignee or transferee is a corporation the Company may *as a condition of its consent* to such assignment or transfer require that the covenants contained therein by the assignee or transferee or sublessee shall be guaranteed by the Directors or principal shareholders of such company AND any change in the principal shareholding altering the effective control of the Lessee (if a company) shall be deemed an assignment of this lease and will require the consent of the Company as aforesaid."

*Edited excerpts from Justice Hamilton's judgment follows:*

[25] The course of dealing relating to the premises and their leasing over the years has been complicated and at times confused. ……. A number of questions arise for decision in these proceedings. The first that arises is *the interpretation* which should be placed upon the terms of clause H.2 of the sub lease, itself an unhappy and confused provision.
…….

[26] ……The difficulty that arises from its (ie CL H2's) terms is the reference in the last paragraph to consent. The pattern of the clause is that it proceeds by way of a prohibition against subletting, assignment, etc, but then in terms makes an exception to that prohibition if conditions numbered (i) to (viii) are met. It should be noted that (iii) is missing. After these seven numbered conditions have been set out there is a final paragraph, which has been called for convenience during the argument of this case "the postscript". Both parties have argued the case on the basis that the postscript is a separate paragraph in the body of clause H.2, and should not be regarded as part of condition (viii). In my view, this is correct. *The principal difficulties in the interpretation of clause H.2 arise from the reference in the postscript to what the sublessor may do "as a condition of its consent to such assignment or transfer", there being no previous reference in clause H.2 to any requirement of consent.*

[27] The plaintiff has contended that the clause should be interpreted as if it imposed a requirement of consent in all circumstances. If that be the effect of the covenant, then the covenant attracts the operation of Sec 133B CA……

The Lesssee (plaintiff) argued that consent has been asked for and unreasonably withheld, and that the Court should either so declare, or make a declaration to the effect that it was entitled to assign to QSR.

The Landlord, Todbern argued that:

(i) The postscript was meaningless, and ought be treated as surplusage.

(ii) Alternatively, if the clause be construed as requiring consent, it should be construed as doing so only where the proposed sublessee or assignee is a corporation, and that the earlier portion of the clause should be interpreted as containing a prohibition upon assignment or subletting, but providing an exception to that prohibition if certain conditions be fulfilled; if those conditions be fulfilled, then the sublessor is entitled to assign and no consent is necessary.

(iii) If consent is required in the circumstances, it concedes that it has not given consent, but contends that consent has not been unreasonably withheld.

[30] The legal background is as follows. A sub lease creates an estate or interest in land which may be transferred or assigned by the holder. *However, even taking into account s 133B(1), a prohibition by covenant of the transfer or assignment of a lease or sub lease is not prohibited by law. If a lessee sub leases or assigns contrary to such a covenant, that does not invalidate the sub lease or assignment, but the sub lease or assignment is a breach of covenant, for which the lessor may in appropriate circumstances forfeit the lease*. Equally, the law does not prohibit the stipulation of a precondition to the exercise of a right to sublet or assign with consent. In such a case the question of the consent does not arise until the precondition be met. Thus, in *Creer v P & O Lines of Australia Pty Limited* [1971] HCA 65; (1971) 125 CLR 84, the High Court dealt with a case where the covenant was not to assign, sublet, etc, without the consent in writing of the lessor, such consent not to be unreasonably withheld, with a proviso that, should the lessee desire to sublet, assign, etc, it should "before doing so offer in writing to the Lessor to surrender this Lease in respect of ... the premises

without any consideration." In that case the surrender had not been offered, and the lessee sought a declaration that the lessor had unreasonably withheld consent, or that the proviso to the covenant was void. Windeyer J said at 91:

"A tenant for a term has, if there be no stipulation to the contrary, a right to assign his term or to create a sub-lease. A covenant not to assign or sub-let without the consent of the landlord is valid. It is, however, in New South Wales made subject, by s 133B just mentioned, to a proviso that consent is not to be unreasonably withheld. This proviso prevails notwithstanding any express provision to the contrary. And the parties cannot restrict its operation by a stipulation as to what shall be deemed reasonable or unreasonable. ……

*Although I think that the verbiage of the clause is inelegant, certainly not beyond criticism as a matter of draftmanship, the meaning is plain enough. The requirement that the lessee wishing to assign his term must first offer to surrender it is introduced by the phrase `provided that'. That in the circumstances seems to me apt. A statutory enactment that is in form a proviso may be, as Lord Loreburn said, `in substance a fresh enactment, adding to and not merely qualifying that which goes before': Rhondda Urban District Council v Taff Vale Railway Co* [1909] AC 253, at p 258. The same thing can sometimes be said of a contractual stipulation couched as a proviso. If the latter part of the clause in question be read as an independent covenant is it clearly valid and efficacious. But not I think the less so if it be read, as I think it should be read, as it is expressed to be, a proviso, limiting the effect of the earlier part without entrenching upon its validity. The first part of the clause states and controls the manner and circumstances in which the lessee may assign his rights under the lease. The later part states that the right to assign, thus recognized and regulated by the first part, is not to be exercised unless the lessee has first offered to surrender the lease. That qualifies what has gone before. It does so by prescribing a condition which must be fulfilled before an assignment pursuant to the clause is permissible."

See also *Adler v Upper Grosvenor Street Investment Ltd* [1957] 1 WLR 227; *International Drilling Fluids Ltd v Louisville Investments (Uxbridge) Ltd* [1986] Ch 513.

[31] Against this background, I turn to the interpretation of clause H.2. The excision of the postscript would make the clause simpler, and remove the problems which are now faced. However, I do not accede to the submission that the postscript can or ought be treated in this way. There is a duty to give to this commercial document meaning and operation, unless this is "utterly impossible": **……**."

[32] *JDM says that a term that subletting, assignment, etc, should be permissible only with consent should be implied, so that the operation of s 133B(1) is then attracted*. The relevant principle according to which such implication should be made is set out in the well known passage in the judgment of Mason J (as his Honour then was) *in Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* [1982] HCA 24; (1982) 149 CLR 337 at 347:

……

[33] *In my view, clause H.2 should be construed as showing an intention of the parties to the sub lease that at least in some circumstances the consent of the lessor is required. I come to this conclusion as a result of the construction of the clause by the Court, rather than by the implication of a term.* But the passage set out above correctly states the principle by which such a term might be implied, and I should, if that were necessary, hold that such a term was implied. *By whichever route this solution be reached, the difficulty is whether the intention should be taken to be that all transfers and assignments require consent, or only sub leases, assignments, etc, to corporations*. JDM presses for the first alternative. If there be any reason as to why consent should be required only in the case of corporations, it is perhaps to be derived from the notion that "$2 companies" are more common than $2 individuals, and this receives some support from the concern the clause shows for the obtaining of guarantees, some of which at least should be by natural persons, in the latter provisions of the postscript. On the other hand, it is put on behalf of JDM that at least some of the numbered conditions in the clause are more appropriate if they be regarded as part of a consent process, than if they are regarded simply as conditions which, if met, will give an absolute right to sublet, assign, etc. One condition which is pointed to is condition (ii), which requires the approval both of the lessor and of its solicitor. However, whilst this provision is slightly curious, it is plain in its terms that the approval required is only as to the form of the sub lease, assignment, etc. Even though the approval of the lessor itself, as well as of its solicitors is required, as is more usually the case, it seems to me that the approval spoken of clearly relates only to the form of the lease, and that refusal to grant the approval except by reference to matters of form rather than outside commercial considerations would not be valid: see Caney v Leith [1937] 2 All ER 532; Provost Developments Ltd v Collingwood Towers Ltd [1980] 2 NZLR 205 at 209; and see generally W D Duncan, Commercial Leases in Australia (3rd ed, 1998) 16 - 17; CCH NSW Conveyancing Law and Practice 220. It is also argued that some of the conditions may only be met after consideration by the lessor of the transaction, and that that indicates that they should be taken to be co-extensive with a process of consideration of consent. Thus, payment is required of the expenses of considering the suitability of the proposed subtenant, assignee, etc, and also payment of the legal expenses of the approval of the sub lease, assignment, etc. But, as Bryson J pointed out in Spintar Pty Ltd v Ranieri Nominees Pty Ltd 1 February 1991 SCNSW unreported in relation to similar provisions, the point of time at which preconditions must be met is not until the time of actual perfection of the assignment.

……

[35] What seems to me to be of importance in construing clause H.2 is its structure. It opens with a clear and absolute prohibition upon subletting, assignment, etc. The conditions (i) to (viii) are articulated to that absolute prohibition by the clear words "BUT the lessee may assign, sublet ... if", and the statement of the conditions follows. The postscript appears thereafter, and opens with the words "Where the proposed assignee or transferee is a corporation ...", and then follows the reference to a condition that shall apply if consent be granted.

[36] In all the circumstances it is my view that the correct interpretation to be given to this troublesome clause is that there is an absolute prohibition upon assignment, subletting, etc.; that an exception is provided to that absolute prohibition if conditions (i) to (viii) are met, in which case no question of consent arises; but that, after those conditions are met, if the subletting, assignment, etc. is to a corporation, then there is a further requirement that the

consent of the lessor be obtained and there are certain stipulations as to what may be required in that case. Section 133B(1)(a) attaches at that point the requirement that the consent stipulated for shall not be unreasonably withheld. But, as I have said, the occasion for consent does not arise if conditions (i) to (viii) be fulfilled; in that case the prohibition upon subletting, assignment, etc., ceases to prevail.

**Retail Leases**

Sec 39 *Retail Leases Act* (NSW) provides as follows:

(1) The lessor is entitled to withhold consent to the assignment of a retail shop lease in any of the following circumstances (and is not entitled to withhold that consent in any other circumstances):
    (a) If the proposed assignee proposes to change the use to which the shop is put,
    (b) If the proposed assignee has financial resources or retailing skills that are inferior to those of the proposed assignor,
    (c) If the lessee has not complied with section 41 (Procedure for obtaining consent to assignment),
    (d) The circumstances set out in section 80E.

(2) This section does not preclude any right of the lessor to require payment of a reasonable sum in respect of any legal or other expenses incurred in connection with the consent, so long as the lessor has substantiated those expenses to the lessee at the request of the lessee.

Section 43 of the *Retail Leases Act*, however, provides:

"Section 133B (Covenants against assigning) of the Conveyancing Act 1919 does not apply to a retail shop lease to the extent that the section is inconsistent with this Act (or any conditions implied in a lease by this Act)."

See further *Lockrey v Historic Houses Trust of New South Wales* [2012] NSWCA 249

**SPLIT DEPOSITS**

*Rana v Dalla Costa* [2014] NSWSC 1113 was an appeal form the Local Court , as to whether the second payment of a split deposit constituted a penalty or not. In that case, Harrison As J had the occasion to review and summarise a long line of cases dealing with split deposits, from *Ashdown* onwards, and what follows is a series of lightly edited extracts from her Honour's with respect, excellent case summaries.

*Ashdown v Kirk* [1997] 2 Qd R 12

In *Ashdown* , the Court of Appeal of Queensland enforced a provision in a contract for the sale of land that provided for a split deposit to be paid by two instalments. The contract provided for $50,000 to be paid 180 days from the signing of the contract and $200,000 to be paid 360 days from the signing of the contract. The purchasers failed to pay the first instalment of the split deposit and the vendors terminated the contract. Clause 13.3 stipulated that if the vendor terminated the *contract " ... the vendor may recover from the Purchaser as a liquidated debt the deposit or any part of it which has not been paid by the Purchaser."*

The issue before the Court was whether the whole of the unpaid deposit could be recovered. The Court held that under clause 13.3 of the contract, there was no basis for distinguishing between the $50,000 already payable when the contract was determined and the $200,000, which had not yet became due and payable at the time of that determination.

It was also held that both sums were recoverable as liquidated damages.

In *Ashdown*, after referring to the principles set out in *Ringrow*, McPherson JA stated at p 8:

"There is therefore no conflict or inconsistency between the provisions of Standard Condition cl. 13.3 prescribing the consequences of termination of the contract, and those of Special Condition 3, providing that the contract shall be at an end and that all deposit moneys are to be 'non-refundable'. The two contractual provisions are not only consistent and capable of standing together but may fairly be considered as mutually supplementary. For all these reasons, there is no basis for supposing that Special Condition 3 was designed to be exhaustive or in some way to 'cover the field' of non-payment of the deposit moneys to the exclusion of the detailed provisions of Standard Condition 13.3. Indeed, in at least two instances (cll.2 and 8) where it was intended to displace provisions of the Standard Conditions, the Special Conditions expressly so provide.

... A deposit is considered an 'earnest' of the bargain or its performance (*Brien v Dwyer* [1978] HCA 50; (1978) 141 CLR 378 at 385) that is designed to demonstrate the sincerity of the contracting party who is to pay it. For that reason, it is ordinarily beyond the reach of equitable relief against penalties or forfeiture, at least if it is not excessive or unconscionable in amount, of which in Queensland the equivalent of 10 per cent of the purchase moneys is ordinarily considered the upper limit: *Freedom v A.H.R. Constructions Pty Ltd* [1987] 1 QdR 59. Since the purchase price was $2.6 million, the deposit required under the contract was in

this instance less than 10 per cent of that total. The fact that it was payable post-contractually in two amounts, rather than by a single sum on signing the contract, is uncommon in practice but certainly not unknown. It has been held to have the consequence of leaving the vendor with the right to recover the unpaid balance after terminating the contract. See *Bot v Tistevski* [1981] VicRp 13; [1981] VR 120; *Pendergast v Chapman* [1988] 2 NZLR 177, both of which were referred to with approval by this Court in *Cleargate Pty Ltd v Pacific Commerce Finance Limited* (App No 186 of 1993, May 10, 1994, unreported). The defendants' complaint that this involves an acceleration, without any express contractual provision in that behalf, of the date for payment of the second deposit instalment of $200,000 is not sustainable in the face of the provisions of cl. 13.3 and the decision in *Cooper v Ungar* [1958] HCA 9; (1958) 100 CLR 510. Far from suggesting that the express provisions of the contract or the Special Conditions were intended to displace this state of affairs, those provisions tend on the contrary to confirm it."

In *Boyarsky v Taylor* [2008] NSWSC 1415 Mr Taylor, the purchaser, claimed specific performance of a contract for the sale of a property. One of the issues was whether a provision in the contract requiring payment of a second instalment of the deposit upon the completion date was void as a penalty.

Special condition 12 provided that "the deposit is 10 per cent of the price, but payable in instalments with half of the deposit payable on exchange and the balance of the deposit payable on the completion date". Brereton J stated:

"[48] ... In *Luu* ... Bryson JA... held that provisions requiring a 5 per cent deposit to be topped up to 10 per cent on default were void as a penalty. In *Iannello*... Hodgson JA... rejected two attempts to distinguish the relevant condition in that case from that in *Iannello v Sharpe*.

...

[49] ... Where the right to receive such a payment arises on the happening of any number of events, some only of which are breaches of contract and some of which are not, but the event in the particular case is one which is a breach of contract, then the provision is a penalty and void [*Cooden Engineering Co Ltd v Stanford* [1953] 1 QB 86; *Bridge v Campbell Discount Co Ltd* [1962] AC 600; *O'Dea v All States Leasing System (WA) Pty Ltd* [1983] HCA 3; (1983) 152 CLR 359, 367, 390; *AMEV-UDC Finance Ltd v Austin* [1986] HCA 63; (1986) 162 CLR 170, 184-185, 211; *Bartercard Ltd v Myallhurst Pty Ltd* [2000] QCA 445, [2]]. Even if, which for reasons to which I shall come I doubt, the second payment was exigible in events other than breach of contract, on the facts of this case it is exacted on breach of contract, and in those circumstances is a penalty and void.

[50] In any event, I do not see how it could become payable under the present contract in circumstances that did not involve a breach by the purchaser of the contract. ... As Hodgson JA said (at [33]), an unconditional promise to pay an amount on default cannot itself count as a deposit, because that is the very sort of promise that would normally amount to a promise to pay a penalty, unless it is a genuine pre-estimate of damages. In the light of *Luu* and *Iannello*, it could not seriously be argued, and indeed it was not, that the second instalment of five per cent could be seen as a genuine pre-estimate of damages."

Brereton J held that the provision requiring payment of the second deposit upon the completion date was void as a penalty

[58] A deposit is considered an "earnest of the bargain for its performance that is designed to demonstrate the sincerity of the contracting party who is to pay it". The question of whether the second $25,000 is a deposit or a penalty turns on how it is characterised under the contract. As the authorities demonstrate, this characterisation is a question of construction to be decided upon by the terms and inherent circumstances of each particular contract, judged as at the time of the making of the contract, not as at the time of the breach.

[59] In *Iannello*, special condition 14 provided that the first $225,000 constituted part of the deposit. It was purportedly agreed that in the event of default, the remaining $225,000 would become immediately due and payable and the purchaser would forfeit the sum of $450,000. However, what is important in these cases is the timing stipulated in the contract for when the second payment is due. In *Iannello*, the remaining $225,000 was due on the date of completion. This allowed Hodgson JA, with whom Santow and Basten JJA agreed, to conclude that the second payment would have maintained no good faith or earnest character, as it would never be payable before the completion date, and thus its only purpose was to penalise the purchaser for defaulting. This meant that despite special condition 14 categorising the remaining funds as deposit money, it was in reality, by virtue of the date that it was due, a penalty.

[60] The same could be said for *Boyarsky*, where the second instalment of the deposit was due upon the date of completion and was thus found to be void as a penalty. This specific similarity between *Boyarsky* and *Iannello*, is what led Brereton J to find in *Boyarsky* that the second payment was void as a penalty

[61] Turning to *Luu*, the clause being relied upon in that case obligated the purchaser to pay up to 10 per cent of the purchase price upon defaulting. This clause was designed as a penalty clause aimed at discouraging default. It is not a deposit clause that seeks to foster the payment of further deposit money so that the purchaser can demonstrate continued earnest to fulfil the purchase contract

[62] Similarly, both special condition 14 in *Iannello* and special condition B7 in the present case are to the same effect. That effect, in substance, is that where the full deposit has not been paid, the unpaid deposit money becomes immediately due and payable. These special conditions could thus be characterised as penalty clauses. However, in this case Ms Dalla Costa relies on clause 9.1 and special condition B14 of the purchase contract, which potentially entitles them to "keep or *recover* the deposit (to a maximum of 10 per cent of the price)" [Emphasis added]. Ms Dalla Costa is not arguing that as a result of default on the part of the purchaser that special condition B7 requires that they be paid the remaining $25,000. Instead, Ms Dalla Costa seeks to recover the unpaid deposit money that was due and payable, and which they argue still carries the characteristics of a deposit payment.

[63] In this appeal the second payment was due 70 days after the date of the contract, which was 140 days or just over 4 months prior to the completion date of 15 November 2011. Payment of this second sum would have enabled the purchasers to further demonstrate their

earnest in complying with the contract and completing the purchase by the later date that was stipulated. In my view the second payment still contains the characteristics of a deposit payment. This factual difference of timing allows this case to be distinguished from *Iannello* and *Boyarsky*.

**DU BUISSON PERRINE -v- CHAN [2016] WASCA 18**

This case centred on whether upon the proper construction of the contract between the parties, was a 'terms' contract within the meaning of s 5 of the *Sale of Land Act 1970* (WA) (the Act); because if it was, 28 days notice of termination had to be given, thereby giving the defaulting party the opportunity to remedy its default.

In this context, there arose for consideration whether the character of certain payments was that of a deposit or not.

In September 2012, the parties entered into a contract pursuant to which the vendors agreed to sell to the purchasers a property in East Perth for $2,090,000. The contract was in the WA standard form.

The contract provided that a deposit of $150,000 was to be paid by the appellants, according to a particular schedule; which was varied such that the deposit of $105,000 was to be paid as follows:

1. $5,000 on 3 September 2012;
2. $10,000 on 19 October 2012;
3. $30,000 on 12 December 2012; and
4. $60,000 by 1 March 2013.

The settlement date was also changed to 7 March 2013.

The deposit was paid but settlement did not occur on 7 March 2013. On 21 March 2013, the vendors served a default notice on the appellants, asserting that were in default, in that they failed to complete Settlement on 7 March 2013.

The default notice required the purchasers to remedy the default within 11 days, but despite that notice, settlement did not occur. On 16 April 2013, the vendors served a notice of termination of the contract. It stated that:

1. the purchasers had failed to remedy the default specified in the Sellers' Default Notice dated 21 March 2013;

2. the Seller terminates the Contract; and
3. the Seller reserves all of its rights under the Contract or at law.

Clause 3 of the General Conditions is headed 'Settlement'. 'Settlement' is defined in the General Conditions to mean 'the completion of the sale and purchase of the Property in accordance with clause 3'. Clause 3 provides, by cl 3.1 to cl 3.4, for the completion of the antecedent steps necessary for settlement, including the preparation, execution and delivery by the purchaser of the land transfer, and the payment of stamp duty. Clause 3 then provided:

**3.5 Completion of settlement**
Each Party must complete Settlement on:

(a) the date for Settlement specified in the Contract; or

(b) if no date for Settlement is specified in the Contract ...
...

**3.7 Balance of purchase price**

The [appellants] must on Settlement pay:

(a) to the [respondents]; or

(b) to any other person as the [respondents] or the [respondents'] Representative has directed in writing not later than 2 Business Days before the Settlement Date,

by 1 or more bank cheques the balance of the Purchase Price and;

(c) any other money payable by the [appellants] at Settlement;

(d) less any deductions allowed under the Contract.

*Edited excerpts follow*

[119] The question of construction in relation to the terms contract issue requires an understanding of the meaning and effect of a deposit under the general law. A deposit is not necessary to the validity of a contract for sale of land. In the absence of a stipulation in the contract in that regard, a seller cannot require a deposit, or any part of the purchase money, to be paid prior to completion……

[120] The word 'deposit' has a 'long-established legal meaning'[17] in the context of the sale and purchase of land. A deposit is a 'guarantee that the purchaser means business',[18] and is an 'earnest to bind the bargain'.[19]

[121] In *Romanos v Pentagold Investments Pty Ltd*,[20] the plurality observed:

In *Brien*, Jacobs J described a deposit as:

"An assurance to the vendor, a security to him pending completion. He can take his property off the market and not concern himself with other offers in case the sale should go off, with the comfort at least that the deposit is there for his security."

*This reasoning is no less applicable to contracts providing for the payment of a deposit in particular instalments at times each stated to be essential. That is the present case. Further,* ***Brien*** *is authority for the proposition that once there has arisen an entitlement to rescind for failure to pay the deposit, that entitlement may be exercised without the necessity that the purchaser first be given notice requiring payment to be made at a reasonable time.*

[122] In *Farrant v Leburn*,[21] Wickham J explained that *the payment of a deposit, as opposed to the payment of instalments towards the purchase price, is not conditional upon completion*:

The [vendor's] title to the instalments whether actually received or whether due and payable is conditional upon completion, ie, upon the executory consideration becoming executed. This is not so in the case of a deposit, the payment of which is in no way conditional upon completion and which is the absolute property of the seller if received. The reason for this has been said to be found in the nature of a deposit as a guarantee but this, I think, is not the only way of stating the reason. Here the purchaser made an unconditional promise to pay a deposit immediately and, although if the contract was completed the moneys would according to ordinary principles be credited towards the purchase price and until then would constitute an earnest for performance, the agreement to pay was not in consideration of conveyance but was in consideration of the contract. It was the price or part of the price of the vendor's promise to sell and this promise, having been given by the vendor the consideration for the purchaser's promise was fully executed.

……

[124] The question of whether a payment, although described as a deposit under the contract, is intended to possess the normal incident of a deposit depends upon the proper construction of the contract.

[125] In *Freedom v AHR Constructions Pty Ltd*,[24] McPherson J observed:[25]

[T]here is an antecedent question to be asked, which is whether the payment, although described as a deposit, is intended to possess the normal incident of a deposit, which is that is liable to forfeiture upon default in completion by the purchaser. One factor that comes into consideration is the proportion that the 'deposit' bears to the total purchase price. In ***Mehmet v Benson*** (1963) 81 WN (Pt 1) (NSW) 188, 191, Jacobs J had this to say about the matter: 'Before dealing with these terms I should state my conclusion that the initial deposit in this case of £3,000 goes beyond a deposit as an earnest of the bargain between the parties and must be regarded to the extent to which it exceeds a normal deposit, as an instalment of

purchase money.

In my view a normal deposit is ten per cent. I realise that upon one view I should have expert evidence of what usually is the course of business in regard to the amount of deposits, but it seems to me that to require such evidence, when so many contracts are observed in these courts and generally in the community, with a deposit of ten per cent, is to substitute rigidity for reality in one's approach to the matter.'

His Honour was there speaking about conditions in New South Wales, but common experience in Queensland is the same. In this State, at least in regard to the purchase of residential properties, a deposit of 10 per cent of purchase price is the almost invariable rule, and may be thought to have received a degree of legislative recognition in s 71 (2)(a)(i) of the *Property Law Act*. A payment that exceeds this conventional percentage may therefore be at some risk of being regarded, at least as to the excess, as incorporating an element of part payment and so of not attracting the implication referred to by Fry LJ in ***Howe v Smith***. That is ultimately a matter of interpretation of the terms of the contract which, as Hale J. points out, is distinct from any question whether equity will relieve wholly or in part against forfeiture of the sum paid.

*Braidotti v Queensland City Properties Ltd* [1991] HCA 19; (1991) 172 CLR 293.

It may also be noted that there was another issue in *Braidotti* concerning the deposit. As noted earlier, the deposit was $150,000 payable as to $1,000 on execution with the balance of $149,000 payable upon the gazettal of rezoning.[64] Rezoning did not occur, although the condition for it was waived. No provision was made for the payment of the balance of the deposit in that event. The vendors nevertheless also argued that they were entitled to terminate for non-payment of the balance of the deposit. The majority found, in effect, that as events transpired, the $149,000 became payable on completion as part of the purchase price and lost the character of a deposit.[65]

**Further Reading**

Kirby, Justine --- *Assignments and Transfers of Contractual Duties: Integrating Theory and Practice* [2000] VUWLawRw 21; (2000) 31(2) Victoria University of Wellington Law Review 317, and the treasure trove of references in that, with respect, excellent article, e.g. to M P Furmston *The Assignment of Contractual Burdens* (1998) 13 Journal of Contract Law 42.

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