CONTRACTS FOR THE SALE OF LAND

- AFTERMATH OF THE DOJAP JUDGMENT -

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The ghost of the Dojap decision, better known as "THE DEPOSIT CASE", is up and about, and doing much damage, and has caused much uncertainty in the law relating to Contracts for the Sale of Land.

Since 1984 there was a change in the rate of the deposit required in contracts for the sale of land from the traditional and customary 10% of the purchase price, as a consequence of the Stamp Commissioner enforcing the provisions of the Stamp Duty Act for contracts to be stamped within thirty days.

The deposit rate therefore had to be changed to provide funds sufficient to cover Transfer Tax and Stamp Duty which is cumulatively 12-1/2% of the purchase price. Deposits therefore were required in excess of the 10% and it appears that a practice developed for deposits to be 15% of the purchase price.
This practice worked fairly well until it was struck down by the decision of **WORKERS BANK TRUST COMPANY LIMITED vs DOJAP INVESMENTS LIMITED.**[1]

Whilst the decision may be welcomed by defaulting purchasers, it certainly was unpalatable for vendors. The law is certainly not without unpleasant surprises.

1. (1993) 2 W.L.R. 702.

In the Dojap case, the mortgagee Bank had put up the premises for sale at public auction. The contract stipulated for a deposit of 25%. The other provisions of the contract provided that time was of the essence and for forfeiture of the deposit on the purchaser' default.

The purchaser duly paid the 25% deposit, but failed to pay the balance of the purchase price within the stipulated time, and as time was of the essence, the contract was rescinded and the deposit forfeited.

The purchaser brought an action for specific performance and for relief from forfeiture of the deposit. The action was heard by the learned Chief Justice who dismissed the claim for specific performance as he held that the contract was validly rescinded. The question left for consideration before the Chief Justice was that of relief from forfeiture.

It is of paramount importance to appreciate the evidence relevant to this issue, which was given by the Plaintiff's and Defendant's Attorneys who gave evidence. It is therefore necessary to quote the relevant passages of same.

In examination in chief, this is what was said by the Plaintiff' Attorney -

> "In my experience as a conveyancer the usual deposit varies from contract to contract 15 to 20 per cent is the customary amount. Usually the vendor uses the deposit to stamp the document. Therefore the vendor has to pay out to stamp the contract 7.5 per cent for transfer tax, roughly 5 per cent for stamp duty then the Attorney would like to ensure that his costs are included."

It will be seen that this evidence relates to what is the usual deposit in contracts for the sale of land, and not specifically for auction sales. This therefore represents what was the practice in Jamaica, certainly since 1984.

In cross examination when dealing with auction sales this is what he said -

> "I have seen 10%, 15%, 25%, 40%. It is not unusual to see a deposit of 25% required in auction sales. In an auction sale there is in addition Auctioneers' costs and expenses. The Auctioneer's commission is usually 5% if the property is sold, in addition to costs and expenses. More expenses are accruable in an auction if the sale goes through. The same expense could apply in a normal sale where there is an estate agent."

This was the evidence relating to auction sales, and as it can be seen there is a difference in the rate of deposits in auction sales from other sales. On the other hand, the Attorney-at-Law for the Defendant Bank gave the following evidence in examination in chief -

> "The deposit was 25 per cent of the sale price.
>
> It is fixed at 25 per cent.
>
> (1) There are attendant costs at auction sales which had to be paid immediately following the auction
>
> (2) It is a sum which is set to ensure that persons do not bid frivously at the auction.
>
> The deposits required at auction sale by other banks are similar to the 25 per cent. There is one bank which requires 50 per cent deposit at auctions."

The learned Chief Justice having had evidence that these were the rates of deposits that were then customary in Jamaica from

both Attorneys-at-Law, held that a 25% deposit at an auction sale was reasonable, and having reviewed the authorities which established that a genuine deposit was never considered a penalty in English Common Law, and there could be no relief from forfeiture therefrom, rejected the Plaintiff's claim for relief.

The extracts of evidence have been highlighted because it will be seen that a factual error crept into the judgment of the Court of Appeal, and which the Privy Council placed great reliance in coming to its decision.

The Court of Appeal in a novel judgment, held that the vendor was only entitled to forfeit 10% of the purchase price which was the customary deposit; which was approved by the Courts, as established by the cases and consequently the purchaser was entitled to relief on the balance of the 25% of the purchase price paid as a deposit.

In delivering his judgment the President of the Court of Appeal Mr. Justice Rowe stated as follows:-

> "The evidence shows that Bankers in Jamaica have been describing payments ranging from 20% - 25% of the purchase price as "deposits" in real estate transactions which sums are liable to forfeiture on default by the purchaser. There is clearly no warrant for such an arbitrary departure from a settle practice hallowed by time and approved without dissent in numerous decisions of the Courts. In my view to permit forfeiture of deposits in excess of 10% would be undue punishment for purchasers. Equity should intervene to grant relief from such unconscionable demands."

It is quite clear that this statement of fact by the learned President is incorrect and not supported by the evidence. The evidence quoted above given by the Plaintiff's Attorney was to the effect as to what was the rate of deposits in ordinary sales and what was the rate at aution sales. It did not state that it was only Banks at auction sales that required 25%.

Whilst it is a fact that the case before the Court involved a Bank, nevertheless, the evidence did not state that the practice was one introduced by Banks, even for ordinary sales.

Suffice it to say, Mr. Justice Forte in delivering his judgment stated that the decision of the Court was contrary to the evidence before the Chief Justice.

Although existing authority is scant, it appears that Courts have done what the Court of Appeal did in this matter by granting relief against forfeiture for part of the sum paid as a deposit.

In **MEHMET vs BENSON**[2], the contract stipulated for a deposit of 19% of the purchase price. The Judge took the view that the amount went beyond a deposit as an earnest of the bargain between the parties and was to be regarded to the extent to which it exceeded a normal deposit, as an instalment of the purchase price. He held that a normal deposit is 10% of the purchase price,

2. (1963) 81 W.N. (N.S.W.) 188; noted (1964) 38 A.L.J. 102, (1967) 41 A.L.J. 60.

and granted relief against forfeiture of that part of the deposit which exceeded 10% of the purchase price.

Whilst the matter went on appeal and the Court of Appeal decided the case on different grounds. It appears from dicta therein, that the Court agreed with the approach of the Judge.[3]

A similar approach was taken in a Canadian case of **DESROSIERS v KOTOWITZ**[4] where there was a deposit of $8,000.00 out of a purchase price of $15,000.00, relief against forfeiture was granted, except as to the sum of $1,500.00.

The Dojap case was taken to the Privy Council which held that as the customary deposit both in the United Kingdom and Jamaica was 10%, a vendor seeking to obtain a greater sum of a forfeitable deposit had to establish special circumstances justifying it; that since the Bank failed to show that the deposit of 25% was to encourage performance of the contract or that a deposit exceeding 10% was reasonable, the provision for its forfeiture was a penalty.

The Privy Council therefore granted relief from forfeiture for the entire deposit of 25% and disapproved of the middle course taken by the Court of Appeal on the basis that as the Bank had contracted for a deposit consisting of one globular sum, being 25% purchase price. If a deposit of 25% constituted

3. (1965) 113 C.L.R. 295 at 309 (per Barwick C.J.) and 315 (per Windeyer J.)

4. (1981) 4 W.W.R. 260

an unresonable sum and is not therefore a true deposit, it must be repaid as a whole.

Without carefully reviewing the opinion of the Board, one would easily be led to the conclusion that the Privy Council's decision established that there could not be a deposit in excess of the customary and usual rate of 10% of the purchase price, unless there were special circumstances justifying same. Further, that the customary deposit of 10% could not be changed by practice. This is not so, as in delivering the opinion of the Board, Lord Browne-Wilkinson stated as follows:-

> "Zacca C.J. tested the question of "reasonableness" by reference to the evidence before him that it was of common occurrence for banks in Jamaica selling property at auction to demand deposits of between 15 per cent and 50 per cent. He held that, since this was a common practice, it was reasonable. Like the Court of Appeal, their Lordships are unable to accept this reasoning. In order to be reasonable a true deposit must be objectively operating as "earnest money" and not as a penalty. To allow the test of reasonableness to depend upon the practice of one class of vendor, which exercises considerable financial muscle, would be to allow them to evade the law against penalties by adopting practices of their own.
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> However, although their Lordships are satisfied that the practice of a limited class of vendors cannot determine the reasonableness of a deposit.[5]

It is clear that the Privy Council placed great reliance on the statement in Mr Justice Rowe's judgment, that it was the Banks who introduced the practice of increasing the rate of deposits above the customery 10% of the purchase price.

5. (1993) 2 W.L.R. 702 at 708

The Privy Council therefore stated that one class of vendor in a society could not alter the practice. This is clearly contrary to the evidence before the Chief Justice, which established that in ordinary sales transactions involving all classes of the society, the deposit rate was no longer 10% of the purchase price, but a sum in excess thereof, usually 15%, similarly for auction sales a sum of 25%.

The Privy Council therefore was of the view that the practice had not changed in so far as Jamaica was concerned, but that it was only a limited class of vendor which was flexing its financial muscles and was introducing this new practice, and consequently held that this limited class could not change what was the norm, despite the fact that it was pointed out in arguendo that the statement of Mr. Justice Rowe was incorrect. Nevertheless, it appears that the Privy Council has used same as the basis of coming to its decision. It is regrettable that this was done, because it has certainly thrown the whole practice into chaos as a result of the decision.

It is now established law that forfeitable deposits must remain at 10% of the purchase price and can only exceed that amount, unless there are special circumstances to justify same, thereby throwing the onus on a vendor who requires a deposit in excess of 10% to establish what are such special circumstances.

For those who cry out loudly for the establishment of a Jamaican jurisprudence and for a break away from the English tradition and custom, the Court of Appeal clearly failed to take the opportunity of so doing in this matter and gave a decision which was contrary to the evidence before it, and also what was the current practice since 1984, and instead adhered to the customary rate of deposits as established in the United Kingdom and Jamaica.

One therefore now has to analyse what is the effect of the decision and how the profession is to cope with same in contracts for the sale of land.

It seems to have been widely held that the Privy Council decided in the Dojap case that deposits have to be limited to 10%. Further, that deposits over 10% constituted a penalty, and so cannot be forfeited. The effect of which is that for deposits to be forfeitable such deposits must not exceed 10%.

The Privy Council did not decide that deposits had to be limited to 10% or that deposits could not in any way exceed 10%. What the Privy Council decided is stated in the opinion of the board by Lord Browne-Wilkinson as follows:-

> "Since a true deposit may take effect as a penalty, albeit one permitted by law, it is hard to draw a line between a reasonable, permissible amount of penalty and an unreasonable, impermissible penalty. In their Lordships view the correct approach is to start from the position that, without logic but by long continued usage both in the United Kingdom and formerly in Jamaica, the customary deposit has been 10 per cent. A vendor who seeks to obtain a larger amount by way of forfeitable deposit must show special circumstances which justify such a deposit."[6]

6. (1993) 2 W.L.R. 702 at P.706

What the Privy Council decided is that where there is a customary deposit of 10% of the purchase price which is the practice in Jamaica and the United Kingdom, such is deemed to be a reasonable deposit as earnest money to bind the contract and is not to be considered a penalty, which is supported by several authorities.[7]

What the Privy Council has held is that where a vendor wishes to obtain a deposit larger than the customary deposit of 10%, then the vendor must show special circumstances to justify such a deposit.

This is quite a different thing from saying the Privy Council limited deposits to 10%. What was decided is that where a larger deposit is required, then the vendor has to show that there are circumstances justifying such a deposit.

The Privy Council then examined the facts in the Dojap case to ascertain whether or not there were any special circumstances which could support a deposit of 25%.

The fact is that in a contract for sale of land funds are required to pay the Transfer Tax and Stamp Duty. Further, the statutory machinery requires the tax to be paid within thirty (30) days failing which there is a penalty. This is what was responsible for the development, of the practice where the

7. LINGGI PLANTATIONS LTD. v JAGATHEESAN (1972) 1 M.L.J. 89
BEACH CLUB ENTERTAINMENT LTD. vs HORIZON MANAGEMENT LTD. (1980-1983) C.I.L.R. 223

contractual deposit was increased from 10% to at least 15% of the purchase price. The vendor then pays the Transfer Tax and Stamp Duty from the deposit.

After examining the implications of the Transfer Tax on deposits, the Privy Council found that evidence indicates that far from the amount of the deposit having been fixed upon a reasonable amount of earnest, the amount was substantially influenced by fiscal considerations having nothing to do with encouragement to perform the contract.

The Privy Council therefore concluded, agreeing with the Court of Appeal, that the evidence fell short of showing that it was reasonable to stipulate for a forfeitable deposit of 25% of the purchase price. In other words, the fact that Transfer Tax and Stamp Duty had to be paid within thirty days after execution of the contract and before the closing of a transaction, this did not constitute special circumstances as to justify a forfeitable deposit of 25% and in excess of the customary 10% deposit.

It is regretable that the Privy Council did not give any guidance as to what would constitute special circumstances justifying a deposit in excess of 10%.

However, it appears from some of the decided cases in another Commonwealth jurisdiction that contracts for the sale of land involving commercial property or property on which there is commercial activity, then certainly a larger deposit may be justifiable.

In the case of **RE HOOBIN**[8] it was held that a deposit of 25% of the purchase price on the sale of an hotel business was not a penalty, where the purchaser was let into possession upon payment of the deposit and balance of the purchase price was payable over eight years; when regard was had to the fact that the value of the hotel business depends greatly upon the business acumen of the purchaser, a deposit of one-quarter of the purchase price was not extravagant but a pre-estimate of the vendor's possible loss in the event of the purchasers repudiation of the contract during that eight years.

In another case in the **YARDLEY vs SAUNDERS**[9] relief against forfeiture of a deposit of 20% of the purchase price of a taxi business was refused, where the purchaser was to take possession of the business shortly after paying the deposit, and the balance of the purchase price was payable on terms over six months, and bad management of the business by the purchaser during this time would have resulted in the virtual destruction of the business.

Another case involving a sale of land was that of **COATES vs SARICH**[10] in which there was a sale of a farm, the terms of which stipulated for a deposit of 27% of the purchase price and the Court held that same could be forfeited as the farm constituted a

8. (1957) V.R. 341
9. (1982) W.A.R. 231
10. (1964) W.A.R. 2

business or a property on which a business was carried on, and that if the purchaser defaulted it could result in substantial damages to the vendor.

The cases seems to indicate that all the circumstances have to be looked at and a proportionately larger deposit may be reasonable where the subject matter of the sale is a wasting asset which may quickly be worked out or where it is a business which by mismanagement can seriously be prejudiced in a short time.

This is also illustrated in the case of **TROPICAL TRADERS LIMITED vs GOONAN**[11] where relief against forfeiture was refused in respect of a deposit of 21% of the purchase price under terms of a contract for five years for the sale of warehouse; the premises had proved difficult to sell, were situated in an unattractive part of Perth and was suitable only for limited purposes and it appears that the parties were businessmen on equal bargaining terms.

Whilst the foregoing does not constitute an exhaustive example of the situations in which the Court may hold that a larger deposit is justified, it is clear that each transaction has to be examined on its own peculiar facts to determine whether a larger deposit is reasonable. However, the trend of judicial authority seems to be that where the property is connected with a business or is in itself a part of the business, where there is a risk that if the purchaser does not honour the terms of the contract,

11. (1965) W.A.R. 174

the vendor could sustain loss and damages, then a substantially higher deposit is justified, to ensure that the purchaser is prepared to use his best endeavours to perform the contractual conditions.

If the effect of the Dojap judgment was that the vendor cannot require a deposit or a sum of more than 10% of the purchase price unless there were special circumstances, then certainly this would constitute a very serious hazard in contracts for the sale of land.

A vendor is required by law to have the contract stamped within 30 days of the execution of the contract which necessitates the payment of Transfer Tax and Stamp Duty which amounts to 12½% of the purchase price and other costs. If therefore a vendor is limited to a deposit of 10% of the purchase price in a normal transaction, then the vendor would be required to finance from his own resources funds to have the contract stamped in accordance with the law within the prescribed time. If he does not do so, then a penalty will be charged which is usually 100%, resulting in double the amount required to stamp the contract.

It is certainly absurd to expect persons selling land after entering the contract to have to put their hands in their pocket to find money to add to the deposit, so as to have the contract stamped within the prescribed time to avoid the penalty. Commercial logic dictates that this would certainly be nonsensical

and a situation that must cause chaos in real estate transactions. What then is the vendor to do in such a situation.

In coming to its decision, the Privy Council was not unmindful of this situation, as it was advanced in arguendo. The Privy Council, therefore, took the opportunity to give some guidance as to what can be done to alleviate such a problem. In delivering the opinion of the Board Lord Browne-Wilkinson stated:

> "As for the tax element the Board do not suggest that it would be unreasonable for a vendor to require advance payment of an amount sufficient to discharge the liability for transfer tax on or before completion. But it does not follow that such advanced payment of tax should be capable of forfeiture if completion does not take place, such tax is either not in the event payable or is recoverable by the vendor. However, quite apart from specific tax element in this case, there is in the view of the Board no sufficient evidence to justify a deposit of 25% as being a true deposit."[12]

The Privy Council has, therefore, given an answer as to what is to be done in cases where the deposit is limited to the customary amount of 10% of the purchase price. What the Privy Council has indicated is that it would not be unreasonable for a vendor in the contract to require an advanced payment of an amount sufficient to discharge the liability of Transfer Tax and Stamp Duty on or before completion.

It is therefore clear, that the vendor can stipulate in the contract for the customary deposit of 10% which is forfeitable in the event of the purchaser's default; and in addition thereto,

12. (1993) 2 W.L.R. 702 at 707-708

a provision requiring the purchaser to advance a further sum sufficient to pay the Transfer Tax and Stamp Duty, in order to comply with the statutory requirements of having same paid within 30 days, which sum is not forfeitable.

It is therefore now clear, that the decision in the Dojap Case has not created the hazard in the contracts for the sale of land as was apparently conceived it had, as it is quite legitimate to provide for a further payment for tax and avoid the absurd and untenable position of having the vendor to furnish same in order to stamp the contract.

The question that now arises, how one is to provide in the contract for the sale of land for this extra sum? Moreover, how are practitioners now to draft contracts for the sale of land having regard to the effect of the Privy Council's decision? In a case in which such an attempt was made the contract provided, inter alia, as follows:

"Consideration:	Five Million Five Hundred Thousand Dollars ($5,500,000).
Terms of Payment:	A deposit of FIVE HUNDRED AND FIFTY THOUSAND DOLLARS ($550,000.00) on the signing of this agreement. A second deposit of NINE HUNDRED AND FIFTY THOUSAND DOLLARS ($950,000.00) within Thirty (30) DAYS of the signing hereof and the balance by way of a mortgage to be given to the Purchasers by the Vendor and which shall be registered against the Certificate of Title.

5. TIME IS OF THE ESSENCE of this agreement. If the Purchasers fail to meet any of the dates set out herein for the payment of any sum or fails to execute a mortgage in favour of the Vendor within the time hereinbefore stated, the Vendor shall be at liberty to, by notice in writing of his intention so to do, rescind this agreement and to forfeit the first deposit and to refund the second deposit."

An examination of this effort by way of contract to obtain sufficient funds to stamp the contract and also to have a forfeitable deposit, is certainly not what was contemplated by the Privy Council, or for that matter, what is really permissible.

Under the captioned terms of payment one observes that there is a deposit on the signing thereof and a second deposit within 30 days thereafter. This certainly is inconsistent with the law relating to deposits. There cannot be two deposits for the same contract.

Even in the absence of express contractual provision, it is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture.[13]

This second deposit, therefore, must constitute an instalment of the purchase price and not a genuine deposit as

13. Dojap (1993) 2 W.L.R. 702 at P.705

understood in common usage and law. The fact that it is not forfeited under the Special Conditions of the contract does not in any way affect same.

This certainly is not the way to deal with the matter, as certainly, it must create confusion and uncertainty by having two deposits in the same agreement which is certainly not permissible by law. The proper way is to have a separate clause in the agreement providing for the payment of a further sum and not by way of a further or second deposit.

It appears, therefore, that in the future contracts for the sale of land may be prepared in the following manner:

(a) Where the vendor requires a deposit in excess of the customary 10% of the purchase price, then the contract should have Special Conditions therein setting out the reasons, in an endeavour to justify the larger deposit if same is forfeitable on the purchaser's default.

(b) Where the contract is the usual transaction and the vendor has stipulated for the customary deposit of 10% which is forfeitable, then the contract should stipulate for such a deposit and it should have conditions which provide:-

(i) that the purchaser is required on the signing to pay a sum of 5% of the purchase

price or such other amount as may be necessary for the purposes the payment of Transfer Tax and Stamp Duty and other costs;

(ii) if the contract is rescinded due to default on the part of the vendor, then the deposit and the further sum is refundable to the purchaser by the vendor delivering to the purchaser the stamped contract for submission to the Stamp Commissioner for a refund;

(iii) if the contract is rescinded on the default by the purchaser, then the deposit will be forfeited and the further sum provided for will be refunded to the purchaser after the vendor surrenders the executed contract to the Stamp Commissioner and receives the refund;

(iv) the contract should also provide that the vendor is at liberty to use the deposit and the further sum stipulated for the purpose of payment of Transfer Tax and Stamp Duty within 30 days of the contract.

The abovementioned are merely examples of what can be included in a contract for the sale of land, as a consequence of the Dojap decision, so as to enable parties to transact their business in a normal way and in accordance with prudent practice and not affected, when in truth and in fact, the decision of the Privy Council has not done so, but held that on the facts of the case, there were no special circumstances justifying a deposit in excess of the customary 10% of the purchase price.

The legacy of Dojap which limits forfeitable deposits to 10% of the purchase price, unless there are special circumstances justifying a higher deposit, is not confined to the United Kingdom or Jamaica. Courts in other Commonwealth jurisdictions have adhered to the conservative approach to deposits and have struck down deposits which exceed the traditional 10% of the purchase price.

In Australia, the jurisdiction has been exercised to relieve against the forfeiture of extravagant sums as "deposits". In the Victorian case of **SMYTH vs JESSEP**[14] relief was granted against forfeiture of a deposit of 40% of the purchase price.

In **SAUNDERS vs LEONARDI**[15] the Supreme Court of New South Wales granted relief against forfeiture of a deposit of 27% of the purchase price. In New Zealand, in the case of **CODOT DEVELOPMENTS LIMITED vs POTTER**[16] relief was granted to a purchaser against

14. 1956 (V.L.R. 230)
15. (1976) 1 B.P.R. 9409
16. (1981) 1 N.Z.L.R. 729

forfeiture of a deposit of 50% of the purchase price as it was held that such a deposit was out of the proportion to the damage suffered by the vendor.

Whilst the decision of Dojap has affected the practice that existed in Jamaica concerning deposits by limiting same to 10% of the purchase price to be forfeited unless there are special circumstances, an analytical review of the decision shows that it has not created any problem with reference to the tax element of having the contract stamped within 30 days of its execution, as it has given clear guidance as to how this aspect of the matter can be overcome by contractual ingenuity.

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