Effect Of Non-Contractual Non-Refundable Deposits

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Introduction

A recent decision of the Court of Appeal of England and Wales has turned the spotlight on the issue of recoverability of payments stipulated to be “non-refundable” when a contract turns out to be void. The same principles may apply to situations where payments are made in anticipation of contracts which fail to materialise.

Brief Facts

(1) In *Sharma v Simposh Ltd* [2011] EWCA Civ 1383, the plaintiffs were interested in purchasing a block of flats being developed by the defendant.

(2) The plaintiffs orally agreed with the defendant to pay a non-refundable deposit of £1,600 to secure a period of two weeks in which to consider the means of carrying out the purchase. This sum was not part of the plaintiffs’ claim.

(3) The plaintiffs also agreed orally with the defendant that upon the non-refundable payment of £55,000 (inclusive of the initial payment of £1,600), the defendant would within a certain period of time refrain from offering the relevant units to anyone else and to offer them to sell them to the plaintiff at a certain price.

(4) Under section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 applying in the case, an oral contract for an option to sell land was void.

a. Singapore law is somewhat different: such a contract would be unenforceable but not void (see section 6(d) of the Civil Law Act (Cap 43, 1999 Rev Ed)), so that terms in the contract could still
have legal effect falling short of actual enforcement.

b. Nevertheless, the principles in the case could still be relevant in Singapore in cases where a contract turns out to be void for other reasons, or where contractual negotiations fall through.

Holding of the High Court

After the transaction fell through, the High Court allowed plaintiffs to recover £53,400 as money paid under a void contract, even though the court was of the view that the plaintiffs got what they had bargained for (ie, the defendant had kept to its promise of not negotiating with anyone else for the stipulated period). The basis of the decision was that since the contract was void, the defendant was not contractually entitled to keep the payment.

Holding of the Court of Appeal

In the appeal, the plaintiffs’ only argument was that they were entitled to restitution because of failure of consideration, and that (following the reasoning of the High Court) the defendant had no contractual right to keep the money. The Court of Appeal affirmed the High Court’s finding that there was no failure of consideration. However, the Court of Appeal held, reversing the High Court, that the deposit was not recoverable.

The Court of Appeal held that even though the contract was void, property in the money was intended by the plaintiffs to pass, and did pass, to the defendant. Thus, prima facie, the defendant was entitled to money. The plaintiffs may recover the money in restitution if the plaintiffs could establish a restitutionary claim. However, its only argued ground for restitutionary recovery was failure of consideration, and this had not been made out on the facts.

Because the plaintiffs had strenuously argued that the defendant had no contractual right to retain the deposit under a void contract and that it must therefore return the money, the Court of Appeal also considered the legal status of deposits paid under a void contract. One important precedent considered was *Chillingworth v Esche* [1924] 1 Ch 97.

• In this case, the plaintiff had entered into an agreement “subject to contract” under which the plaintiff paid £240 as a deposit and part-payment. The plaintiff then declined to proceed with the transaction and claimed the return of the payment.

• The Court of Appeal in this case held that the parties had not made a binding...
contract and that the plaintiff was entitled to recover the sum. The £240 was seen as serving the ordinary purpose of a deposit if and when the contemplated agreement should be arrived at.

- However, Pollock MR went further to make a qualification:

  “There was no provision made in the documents which would justify the vendor in declining to return it; though if he had, by appropriate words, made provision for that in the document, such a provision could have been upheld.”

Thus, Pollock MR contemplated that it is possible for the parties to stipulate non-refundability, in which case, the payment could not be recovered in restitution even if a restitutionary ground could be made out. Pollock MR’s qualification was interpreted in two ways in the subsequent decision in Gribbon v Lutton [2002] QB 902.

(1) The majority of the Court of Appeal in this case took the view (in obiter) that Pollock MR meant that such a qualification could only come about as a result of a contractual provision (ie, a legally binding stipulation).

(2) On the other hand, the minority took the view that the stipulation need not have contractual force; the deposit could be made non-refundable by the common intention of the parties.

In Sharma v Simposh Ltd, the Court of Appeal expressed preference for the minority view in Gribbon v Lutton. This itself was an obiter view, since there was no basis of restitutionary recovery on the facts anyway. None of these observations are binding on a Singapore court in any event.

Concluding Words

If the view expressed by the Court of Appeal in Sharma v Simposh Ltd is accepted in Singapore, then it is possible as a matter of law to stipulate the non-refundability of a deposit without a contract, provided that a common intention can be found. It is suggested that this view is correct in principle. Acceptance of this proposition does not affect the fundamental requirement in the common law that a promise can only be enforced if supported by consideration or by promissory estoppel. Such stipulations may be highly relevant to the question of whether there was a failure in the fulfilment of the parties’ expectations such that denial of repayment would leave the recipient of the payment unjustly enriched.

In other words, it is a question of risk allocation by the parties. It is established law that non-contractual allocations of risk can affect restitutionary claims. For example, a plaintiff may fail in a restitutionary claim for mistaken payment if the court finds that he has voluntarily assumed the risk of the mistake; this voluntary assumption of risk may be
It is not clear, however, whether there are limits to the risk allocation principle in this context. It is established law that a deposit is earnest money intended as security for the performance of the party paying the sum, so that upon breach the sum may be forfeited by the innocent party without proof of actual loss. However, even so, there are limits to this principle, because an unreasonable deposit sum may be regarded by the court as a colourable part-payment and recoverable by the party in breach in restitution nevertheless (provided a restitutionary ground can be made out and subject to any counter-claim for damages for breach of contract). In addition, there is some uncertainty over whether equitable relief may be available in such cases. If some level of protection is afforded to the party in breach, it would be odd for the protection to be withdrawn when the plaintiff is not in breach but the contract turns out to be void or does not materialise eventually.

The main lesson from this case is that an agreement as to non-refundability of payments can have the legal effect of preventing a restitutionary claim even if the agreement is not contractually binding.