HIGH COURT OF AUSTRALIA

GLEESON CJ,
McHUGH, GUMMOW, KIRBY, HAYNE, CALLINAN AND HEYDON JJ

TANWAR ENTERPRISES PTY LIMITED APPELLANT

AND

JOSEPH CAUCHI & ORS RESPONDENTS

Tanwar Enterprises Pty Limited v Cauchi [2003] HCA 57
7 October 2003
S341/2002

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation:

F M Douglas QC with L J W Aitken and R C Scruby for the appellant (instructed by Alexander Lee & Associates)

I M Wales SC with M A Ashhurst for the respondents (instructed by Low Doherty & Stratford)

CATCHWORDS

Tanwar Enterprises Pty Limited v Cauchi

Vendor and purchaser – Contracts for sale of land – Default by purchaser – Notice of termination – Supplemental deed requiring completion by stipulated date – Time of essence – Default by purchaser – Notice of termination – Purchase price available following day – Specific performance – Whether unconscientious for vendors to exercise right of termination – Whether relief on the ground of "accident" available in face of essential time stipulation.

Equity – Relief against forfeiture – Contracts for sale of land – Default by purchaser – Whether unconscientious for vendors to exercise right of termination – Whether default occasioned by "accident" – Whether relief on the ground of "accident" available in face of essential time stipulation.

1 GLEESON CJ, McHUGH, GUMMOW, HAYNE AND HEYDON JJ. This is an appeal from the New South Wales Court of Appeal (Handley and Beazley JJA, Mathews AJA)[1]. That Court dismissed an appeal by the present appellant ("Tanwar") from orders by a judge in the Equity Division of the Supreme Court (Windeyer J)[2] dismissing an application by Tanwar for specific performance of three contracts dated 19 October 1999 under which Tanwar was the purchaser. The subject-matter of the contracts was three adjoining parcels of land at Glenwood near Blacktown. Two of the parcels were owned by one or more of the first, second and third respondents, members of the Cauchi family, and the third by the fourth respondent, Julian Dalley. The vendor under the first contract was Joseph Cauchi. The vendors under the second were Joseph, Angelo and Mary Cauchi. The vendor under the third contract was Julian Dalley. The total purchase price was $4,502,526.90.

The history of the litigation

2 The vendors' solicitor issued notices of termination of the contracts on the afternoon of 26 June 2001. The Equity proceedings were instituted on the next day and heard on 2 August. Windeyer J delivered his judgment on 9 August. By its amended summons, Tanwar sought declarations that the three contracts were still on foot and had not been validly terminated and orders for specific performance or, in the alternative, orders for specific performance consequent upon orders for relief against forfeiture of the contracts. An order also was sought, pursuant to s 55(2A) of the *Conveyancing Act* 1919 (NSW) ("the Conveyancing Act"), for a return to Tanwar of the deposits. The primary judge refused any relief and dismissed the amended summons.

3 Tanwar, by seeking relief against the termination of the contracts with a declaration that the contracts were still on foot, proceeded on the basis that, as a necessary preliminary, it was essential to reinstate the contracts[3]. In *Stern v McArthur*[4], Gaudron J left that matter open, and it is unnecessary to say any more here respecting it.

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1 *Tanwar v Cauchi* (2003) NSW Conv R ¶56-048.

2 *Tanwar Enterprises Pty Ltd v Cauchi* (2002) NSW Conv R ¶55-994.

3 cf *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liquidation)* (1965) 113 CLR 265 at 277-278.

4 (1988) 165 CLR 489 at 537.

4 The case did not proceed on pleadings. Had there been pleadings, the issues of legal principle with which the Court of Appeal was, and now this Court is, concerned may have more readily appeared. To plead its suit as purchaser for specific performance (and for related declaratory relief), Tanwar would allege the making of each contract and the relevant terms, its performance and its readiness and willingness to perform the terms of the contract then to be performed, and its readiness and willingness to do all matters and things on its part thereafter to be done[5]. To that, the respondents as vendors no doubt would respond that, in the events that had happened, and before the institution of the suit, the contracts had been brought to an end by the giving of the notices of termination on 26 June, there being contractual stipulations that time was of the essence.

5 It then would be for Tanwar to reply that, in the events that had happened, in equity time had not been of the essence on 26 June or, more precisely, that it was unconscientious of the vendors to plead the essential time stipulation and its breach as founding the purported termination on 26 June[6]. That would focus attention upon what, as a matter of law and fact, was involved in the alleged unconscientious use by the vendors of their legal rights, given in terms by the contracts, to terminate upon failure by Tanwar to complete by 4.00 pm on 25 June. That is the essential issue in the case as it stands in this Court.

6 The leading judgment in the Court of Appeal was delivered by Handley JA. His Honour gave detailed consideration to the decisions of this Court in *Legione v Hateley*[7] and *Stern*[8] and concluded that those two cases "lack a clear ratio which is binding on this Court". Handley JA also observed, with reference to the decision of the Privy Council in the Hong Kong appeal *Union Eagle Ltd v Golden Achievement Ltd*[9], that it was "also clear that equitable relief will be available in Australia in circumstances where it would be refused in England". In this Court, each side sought support from one or more of the

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5 *Fitzgerald v Masters* (1956) 95 CLR 420 at 434; *Green v Sommerville* (1979) 141 CLR 594 at 610.

6 cf Spry, *The Principles of Equitable Remedies*, 6th ed (2001) at 211.

7 (1983) 152 CLR 406.

8 (1988) 165 CLR 489.

9 [1997] AC 514.

judgments in *Legione* and *Stern*. Neither side sought leave to re-open those cases, but there was a measure of disagreement as to the propositions of law for which they are authority. Before returning to those matters, it is necessary to say something more respecting the facts in this appeal.

The contracts

7 The contracts were in the 1996 edition of the Standard Form prepared by the Law Society of New South Wales and the Real Estate Institute of New South Wales. The form was supplemented by further conditions issued by those two bodies in 1998 and by various special conditions agreed by the parties and dealing, in particular, with proposed development of the land.

8 The first and third contracts, those with Mr Cauchi and Mr Dalley, required Tanwar to obtain development consents for an "excision plan", whereby there would be excised from the subject parcel of land in each case a lot to be retained by the vendor. Further, in the case of the first contract, Tanwar was to obtain development consent for the subdivision of the lot to be retained by Mr Cauchi. In addition, with respect to the lots retained by Mr Cauchi and Mr Dalley, Tanwar was obliged to arrange for the provision of services such as water, sewerage and drainage.

9 The vendors retained the same firm of solicitors. The contracts stipulated the same completion date, 28 February 2000, but did not specify that time was of the essence in that regard. The contracts required payment of deposits in each case of some 10 per cent of the purchase price. Each of the contracts provided for the payment of the deposit by three instalments, the last to be paid on 28 February 2000.

10 On 5 November 1999, the contracts were amended by deeds which extended the settlement dates until a date in August 2000. On 18 February 2000, Tanwar obtained development consents under the *Environmental Planning and Assessment Act* 1979 (NSW) to the excision of the vendor's lots from the first and third contracts, the subdivision of the vendor's lot so retained by Mr Cauchi, and the subdivision of the land to be acquired by Tanwar.

11 Tanwar paid two sums of $225,126.32 on account of the deposits, the first on 19 October 1999 and the second on 30 May 2000. In addition, between 30 June 2000 and 20 July 2000, Tanwar paid a total of $397,473.40 on account of the purchase price. The contracts did not stipulate for payment of the purchase price by instalments and the reason for those payments is not readily apparent. However, it does appear that delays in readying the contracts for completion did

occur and the payments on account of the purchase price may have been the result of bargaining between the parties to keep the contracts on foot. At all events, on 20 July 2000 Tanwar also paid a total of $80,000 in consideration of an extension of the completion date.

12 At the trial, it appears not to have been disputed that Tanwar would be entitled in equity to relief against the forfeiture of the $397,473.40 representing part-payment of the purchase price were it to fail to obtain orders for specific performance of the contracts. If Tanwar were to succeed in obtaining specific performance, any question of this forfeiture would cease to be of significance. As indicated above, the essential issue in this case is different. It concerns the alleged unconscientious reliance upon the essential time stipulation to found the termination of the contracts which Tanwar, for its part, wishes to complete.

13 The distinction sought to be made in the last paragraph may be seen in the statement by Gaudron J in *Stern*[10]:

> "The issue raised by a purchaser who seeks specific performance of a contract which has been rescinded is not whether relief should be granted against the forfeiture of the interest arising under that contract, but whether specific performance remains an available remedy notwithstanding rescission."

14 Each contract provided that, if either side became entitled to issue a notice to complete making time of the essence, then 14 days was a reasonable and proper time to specify in the notice. On 20 August 2000, the vendors gave Tanwar notices of termination of the contracts, but negotiations between the parties appear to have followed. A significant period later, on 5 June 2001, Tanwar and the respective vendors entered into three deeds ("the 2001 Deeds"). The 2001 Deeds recited entry into the contracts on 19 October 1999, the amending deeds of 5 November 1999 and the notices of termination. Recital D stated that the parties had agreed to complete the sales on the terms and conditions contained in the 2001 Deeds.

15 Clauses 1, 2, 3 and 6 were in identical terms in each of the 2001 Deeds and should be set out in full:

> "1. The Notice of Termination dated 20th August, 2000 is withdrawn.

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10 (1988) 165 CLR 489 at 537.

2. Completion of the sale to take place by 4.00 pm on Monday 25th June, 2001, time of the essence.

3. The Purchaser will pay to the Vendor on completion the moneys as set out in the annexed settlement statement (after making adjustments for outgoings).

...

6. The Purchaser acknowledges that the contents of this Deed are a final arrangement to complete the sale of the Property. If the Purchaser does not complete the sale in accordance with the provisions of this Deed the Purchaser will:

   (a) forfeit all moneys paid pursuant to the Contract for Sale and acknowledges the Vendor's rights under clause 9 of the Contract for Sale;

   (b) withdraw any caveat against the property;

   (c) not commence any Court proceedings to dispute the Vendor's termination of the Contract for Sale."

16 The rights under cl 9 were stated to arise if the purchaser did not comply with the contract "in an essential respect". They included termination by serving a notice and thereafter, among other things, keeping the deposit to a maximum of 10 per cent of the price, recovering damages for breach of contract and holding part-payments as security for anything recoverable by the vendors under cl 9. Clause 9 read:

"Purchaser's default

If the purchaser does not comply with this contract (or a notice under or relating to it) in an essential respect, the vendor can terminate by serving a notice and after the termination –

9.1 keep or recover the deposit (to a maximum of 10% of the price);

9.2 hold any other money paid by the purchaser under this contract as security for anything recoverable under this clause –

9.2.1 for 12 months after the termination; or

9.2.2 if the vendor commences proceedings under this clause within 12 months, until those proceedings are concluded; and

9.3 sue the purchaser either –

9.3.1 where the vendor has resold the property under a contract made within 12 months after the termination, to recover –

- the deficiency on resale (with credit for any of the deposit kept or recovered and after allowance for any capital gains tax payable on anything recovered under this clause); and

- the reasonable costs and expenses arising out of the purchaser's non-compliance with this contract or the notice and of resale and any attempted resale; or

9.3.2 to recover damages for breach of contract."

Failure to settle

17 The parties agreed to settle at the Office of State Revenue on the afternoon of the last day available, Monday, 25 June 2001. Tanwar's sources of finance included foreign sourced funds to be provided by second mortgagees. Mr Cormack, of Corrs Chambers Westgarth, acted for those second mortgagees. He attended at the settlement meeting and informed the parties that his clients were unable then to proceed. Earlier on 25 June, Mr Cormack had become aware that the Singapore authorities were conducting additional checks on certain international money transfers; hence the delay. However, he told those present that the funds should be available on the next day.

18 That came to pass and, on 26 June, the funds were received from Singapore into a trust account conducted by Mr Cormack's firm. On that morning, Tanwar's solicitor informed the vendors' solicitor of this and that settlement could proceed. However, the vendors already had given instructions to terminate the contracts and confirmed those instructions when informed that the second mortgagees were now in a position to proceed to settlement. Thereafter, on the afternoon of 26 June, notices of termination were issued.

The essential issue

19 It now is convenient to return to the essential issue identified earlier in these reasons. Wherein lies the alleged unconscientious use by the vendors of their legal right to terminate upon failure by Tanwar to complete in accordance with the essential time stipulation imposed by the 2001 Deeds?

Unconscionable conduct

20 The terms "unconscientious" and "unconscionable" are, as was emphasised in *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd*[11], used across a broad range of the equity jurisdiction. They describe in their various applications the formation and instruction of conscience by reference to well developed principles. Thus, it may be said that breaches of trust and abuses of fiduciary position manifest unconscientious conduct; but whether a particular case amounts to a breach of trust or abuse of fiduciary duty is determined by reference to well developed principles, both specific and flexible in character. It is to those principles that the court has first regard rather than entering into the case at that higher level of abstraction involved in notions of unconscientious conduct in some loose sense where all principles are at large.

21 The term "unconscionable conduct" is used in authorities such as *Legione* and *Stern*. There is nothing new in this. The terms "unconscionable" and "against conscience" were, for example, used without distinction by Farwell J in *Mussen v Van Diemen's Land Co*[12] in 1937. However, as Deane J explained in *The Commonwealth v Verwayen*[13], with reference to the discussion by Story[14] of the lien of the unpaid vendor, the term "unconscionable" is used to refer to that which "ought not, in conscience," be allowed as between the parties; the purchaser, having taken a conveyance of the estate of the vendor, should not be

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11 (2003) 77 ALJR 926 at 933-934 [42]-[43]; 197 ALR 153 at 164.

12 [1938] Ch 253 at 262-263.

13 (1990) 170 CLR 394 at 440-441. See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 227 [45]; *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 77 ALJR 926 at 933 [41]; 197 ALR 153 at 164.

14 *Commentaries on Equity Jurisprudence*, 2nd Eng ed (1892), §1219.

allowed to keep it without payment of the full purchase price. Hence, as Deane J also pointed out[15], "unconscientious" is the more accurate term.

22 In the present case, that more accurate term directs attention to the question why the vendors ought not to be heard to assert the exercise of their legal right to terminate in answer to the claim by Tanwar for specific performance. The conscience of the vendors which equity seeks to relieve is, as Gleeson CJ put it in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*[16], a "properly formed and instructed conscience".

23 In *Guise v Kouvelis*[17], when considering the defence of qualified privilege in defamation law, Dixon J lamented the lot of the judge called upon to apply "'broad' or 'flexible' categories or tests of responsibility or immunity". Nevertheless, as this Court emphasised in the judgment in *Jenyns v Public Curator (Q)*[18], to which Dixon CJ was a party, the application of equitable doctrines and remedies may turn upon close analysis of the facts of the particular case. Cases of alleged undue influence and catching bargains are obvious examples; that is because the governing equitable principle in this field is concerned with the production by malign means of an intention to act. In that context, it is easy to speak of the conduct of the stronger party as unconscionable. But the phrase "unconscionable conduct" tends to mislead in several respects.

24 First, it encourages the false notions that (i) there is a distinct cause of action, akin to an equitable tort, wherever a plaintiff points to conduct which merits the epithet "unconscionable"; and (ii) there is an equitable defence to the assertion of any legal right, whether by action to recover a debt or damages in tort or for breach of contract, where in the circumstances it has become unconscionable for the plaintiff to rely on that legal right[19].

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15 (1990) 170 CLR 394 at 444.

16 (2001) 208 CLR 199 at 227 [45].

17 (1947) 74 CLR 102 at 116.

18 (1953) 90 CLR 113 at 119 per Dixon CJ, McTiernan and Kitto JJ.

19 cf *Kalamazoo (Aust) Pty Ltd v Compact Business Systems Pty Ltd* [1990] 1 Qd R 231 at 258-259.

25 Secondly, and conversely, to speak of "unconscionable *conduct*" as if it were all that *need* be shown may suggest that it is all that *can* be shown and so covers the field of equitable interest and concern. Yet legal rights may be acquired by conduct which pricks no conscience at the time. A misrepresentation may be wholly innocent. However, at the time of attempted enforcement, it then may be unconscientious to rely upon the legal rights so acquired. To insist upon a contract obtained by a misrepresentation now known to be false is, as Sir George Jessel MR put it in *Redgrave v Hurd*[20], "a moral delinquency" in a court of equity.

26 Thirdly, as a corollary to the first proposition, to speak of "unconscionable conduct" may, wrongly, suggest that sufficient foundation for the existence of the necessary "equity" to interfere in relationships established by, for example, the law of contract, is supplied by an element of hardship or unfairness in the terms of the transaction in question, or in the manner of its performance. The vendors contend that the thrust of the submissions by Tanwar reveals this weakness in its case.

Legione

27 In submissions, extensive reference was made to the decision in *Legione*[21]. That case made it plain that the principles identified as promissory or equitable estoppel may operate to preclude the enforcement of contractual rights and so may estop a party from treating the contract in question as terminated for failure to meet an essential time stipulation. The division of opinion within the Court turned upon the question whether a particular telephone conversation was sufficient to found the necessary estoppel; in particular, whether the conversation contained a representation of the necessary clarity to the effect that observance of the time stipulation was not insisted upon. The majority (Mason, Brennan and Deane JJ) held that the terms of the conversation did not meet the necessary standard. The facts of the present appeal supply no foundation for an estoppel against reliance by the vendors upon the essential time stipulation in the 2001 Deeds.

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20 (1881) 20 Ch D 1 at 12-13.

21 (1983) 152 CLR 406.

28 In *Legione*[22], the Court also received written submissions upon a further question. This was identified as being whether the purchasers should be relieved against "the forfeiture" brought about by the notice of rescission. Pursuant to the contract, the purchasers had been entitled to go into possession on payment of the deposit. They had done so and had built a house on the land before the due date for completion which was nearly 12 months after the date of the contract.

29 The "forfeiture point" had not been pursued to any degree at the trial in *Legione* and the order made by this Court was that the case be remitted to the Supreme Court of Victoria for the determination of that issue[23]. The conclusion reached by Mason and Deane JJ had been that the Supreme Court had the necessary jurisdiction to relieve against forfeiture and that there was a serious question to be tried in the exercise of that jurisdiction[24]. Gibbs CJ and Murphy J concurred in the order giving effect to that conclusion[25]. Brennan J dissented.

30 Subsequently, in the joint judgment of five members of the Court in *Ciavarella v Balmer*[26], it was held that there was no evidence to found any estoppel against termination of the contract for sale of land. An application to amend the notice of appeal in this Court so as to claim relief against forfeiture was refused[27]. The Court described as follows the circumstances which had led to the order of remittal in *Legione*[28]:

> "[T]he material in evidence strongly indicated unconscionable conduct on the part of the vendor in seeking to insist on the rescission of the contract in circumstances where the statement of the vendor's solicitors had helped lull the purchaser into a belief that the vendor would accept completion provided it took place within a few days and where the consequence of

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22 (1983) 152 CLR 406 at 411.

23 (1983) 152 CLR 406 at 459.

24 (1983) 152 CLR 406 at 450.

25 (1983) 152 CLR 406 at 429-430.

26 (1983) 153 CLR 438 at 449-450.

27 (1983) 153 CLR 438 at 453-454.

28 (1983) 153 CLR 438 at 453.

rescission was that the vendor would reap the benefit of the very valuable improvements which the purchaser had effected to the property."

31 In the present appeal, there is nothing to suggest that the vendors lulled Tanwar into any relevant false sense of security. To the contrary, the terms of the 2001 Deeds strikingly demonstrated an attitude by the vendors which would keep Tanwar on edge.

32 What then remains to support any case of unconscientious reliance by the vendors upon their legal right to terminate? It is convenient at this stage to consider the decision in *Stern*.

Stern

33 The dispute concerned an instalment contract made in 1969 under which the last instalment would be paid in 1983. Time was made of the essence, after various vicissitudes, by notice given in 1979. Completion did not take place when specified and, in response to an action for an order for possession, the purchasers cross-claimed for specific performance and relief against forfeiture of their estate and interest in the land. By majority (Deane, Dawson and Gaudron JJ), the Court upheld the order of the New South Wales Court of Appeal[29]. This ordered relief against forfeiture and specific performance on terms including an inquiry as to the balance of the purchase money still owing and the interest to be payable thereon.

34 Deane and Dawson JJ said that "the contract as it was carried into effect was essentially an arrangement whereby the appellants undertook to finance the respondents' purchase upon the security of the land" so that "there was a close and obvious parallel between it and a purchase with the aid of a mortgage"[30]. The contracts between Tanwar and the vendors do not share that characteristic.

35 Gaudron J, the third member of the majority in *Stern*, doubted whether the instalment contract there in question was in substance part of a security transaction[31]. Her Honour decided the appeal on a wider footing. This was that a

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29 *McArthur v Stern* (1986) 5 NSWLR 538 at 558.

30 (1988) 165 CLR 489 at 528.

31 (1988) 165 CLR 489 at 540; cf *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 at 522.

decree of specific performance would secure all that the vendors had bargained for, whereas to deny that remedy would prejudice the purchasers. A house had been built on the land, the land had increased in value and the balance unpaid was a relatively insignificant amount[32]. These circumstances, to which the vendors had not contributed, made it unconscionable for the vendors to insist on their contractual rights.

36 On the other hand, Mason CJ (in the minority as to the outcome) stressed that this was not a case like *Legione* where the conduct of the vendors had led to, caused, or contributed to, the breach of contract by the purchasers[33]. At bottom, the case put by Tanwar depends upon acceptance of the view of the equity jurisdiction taken by Gaudron J at the expense of that preferred by Mason CJ. The view of Mason CJ should be accepted.

Mason CJ and *Stern*

37 In *Legione*, Mason and Deane JJ instanced "fraud, mistake, accident, [and] surprise" as elements which may make it inequitable to insist on termination of a contract for failure to observe its strict terms[34]. Subsequently, in *Stern*[35], Mason CJ took *Legione* and *Ciavarella* as establishing that the court will not readily relieve against loss of a contract for sale validly rescinded by the vendor for breach of an essential condition; and, in particular, equity was not authorised "to reshape contractual relations into a form the court thinks more reasonable or fair where subsequent events have rendered one side's situation more favourable"[36]. That latter proposition is at odds with the approach by Gaudron J in *Stern*, to which reference has been made earlier in these reasons at [35], but, nevertheless, it should be accepted as an accurate statement of the law. The result, as indicated above, is that Tanwar's case on the appeal is significantly weakened.

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32 (1988) 165 CLR 489 at 540-541.

33 (1988) 165 CLR 489 at 503-504.

34 (1983) 152 CLR 406 at 447-448.

35 (1988) 165 CLR 489 at 502-503.

36 (1988) 165 CLR 489 at 503.

38 Mason CJ dissented as to the outcome in *Stern*, but this was to a significant degree because of the view he took of the nature of the particular contract in question and the denial of an analogy drawn, particularly by Deane and Dawson JJ[37], to a mortgage transaction. To the extent that what Mason CJ said in *Stern* represented a development (or, perhaps, a contraction) of what had been put in the earlier cases, then it is to be preferred.

39 In *Stern*[38], Mason CJ also stated that equity intervenes only where the vendor has, by the vendor's conduct, caused or contributed to a circumstance rendering it unconscionable for the vendor to insist upon its legal rights. That helps explain why mere supervening events and changes in the relevant circumstances are insufficient. But it should be noted that cases falling within the heads of mistake or accident will not necessarily be the result of activity by the vendor. In addition, his Honour spoke in *Stern*[39] of the circumstances being "exceptional" to attract equitable intervention. That also emphasised the insufficiency of subsequent events which are adverse to the interests of one side. However, the term "exceptional" is apt to be misunderstood, and it will be necessary to return to it later in these reasons under the heading "The present appeal".

Subsidiary questions?

40 In *Legione*, Mason and Deane JJ had concluded their analysis of what they saw as the relevant principles by saying as follows[40]:

> "In the ultimate analysis the result in a given case will depend upon the resolution of subsidiary questions which inevitably arise. The more important of these are: (1) Did the conduct of the vendor contribute to the purchaser's breach? (2) Was the purchaser's breach (a) trivial or slight, and (b) inadvertent and not wilful? (3) What damage or other adverse consequences did the vendor suffer by reason of the purchaser's breach? (4) What is the magnitude of the purchaser's loss and the vendor's gain if

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37 (1988) 165 CLR 489 at 528.

38 (1988) 165 CLR 489 at 502-503.

39 (1988) 165 CLR 489 at 502-503.

40 (1983) 152 CLR 406 at 449.

the forfeiture is to stand? (5) Is specific performance with or without compensation an adequate safeguard for the vendor?"

41 Tanwar relies upon those five "subsidiary questions". It accepts that the first question should be answered unfavourably because the conduct of the vendors did not contribute to Tanwar's breach. However, Tanwar says that its breach was trivial or slight, or inadvertent, that the vendors have suffered but nominal damage and no adverse consequences, that specific performance would be an adequate safeguard for the interests of the vendors, and that the vendors stood to gain the advantages flowing from the expenditure by Tanwar in obtaining the development approvals, together with the increase in value of the land which apparently occurred between the date of the contracts and the termination.

42 With respect to the third, fourth and fifth "subsidiary questions" posed in *Legione* by Mason and Deane JJ, the vendors respond that Tanwar entered into arrangements with the proposed second mortgagees dependent upon the arrival of funds from Singapore on the last day when settlement was required under the 2001 Deeds, and that notions of trivial or inadvertent breach must be considered in that light. With respect to the alleged increase in value, the vendors, correctly, emphasise that the first of the comparative dates is not 19 October 1999, but 5 June 2001, the date of the 2001 Deeds. This postdated the obtaining of the development approvals on 18 February 2000. In any event, there had been no valuation evidence to found any specific finding respecting increase in value due to those consents or to other market forces. No such finding had been made. However, it was accepted that the benefit of the approvals would, with termination, accrue to the vendors. But that was an inevitable outcome bargained for when the 2001 Deeds had been negotiated.

The "interest" of Tanwar

43 The vendors also challenge the doctrinal basis for treating as determinative of Tanwar's appeal these five "subsidiary questions". The vendors are correct in doing so.

44 What was said by Mason and Deane JJ in *Legione* respecting the "subsidiary questions" must be treated with care. That to which the questions are said to be "subsidiary" is the basic issue presented earlier in their joint judgment. This is expressed as[41]:

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41 (1983) 152 CLR 406 at 440.

> "the respondent's submission that she is *entitled to relief against the forfeiture of her interest in the land* upon terms that she pay to the appellants the amount of $30,188.24 that was tendered to them on 15 August 1979 and not accepted, being the balance of the purchase moneys under the contract". (emphasis added)

45 But what, if any, was the interest in the land enjoyed by Tanwar as purchaser? If there was such an interest, did it attract the exercise of the jurisdiction to relieve against forfeiture? What is the relationship between, on the one hand, the attitude of equity respecting forfeiture, and, on the other hand, the attitude of equity respecting the observance of express time stipulations?

46 Without answers to these questions, the significance for this appeal of the basic issue expressed in *Legione*, and thus the relevance of the five "subsidiary questions", cannot be assessed. But the answers are to be supplied only by a patient examination of several fundamentals, the understanding of which by equity courts has changed across time.

47 One commences by identifying the "interest" of a purchaser in the land the subject of an uncompleted contract. In *Lysaght v Edwards*[42], Sir George Jessel MR described the position of the vendor at the moment of entry into a contract of sale as "something between" a bare trustee for the purchaser and a mortgagee who in equity is entitled to possession of the land and a charge upon it for the purchase money; in particular, the vendor had the right in equity to say to the purchaser "[e]ither pay me the purchase-money, or lose the estate". This way of looking at the relationship in equity between vendor and purchaser before completion appeared also in the works of eminent writers of the period in which the Master of the Rolls spoke[43]. Later, Kitto J[44] and Brennan J[45] preferred to treat what was said in *Lysaght* as indicating that "to an extent" the purchaser acquired the beneficial ownership upon entry into the contract.

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42 (1876) 2 Ch D 499 at 506.

43 Maitland, *Equity*, 2nd ed rev (1936) at 314-315; Pomeroy, *A Treatise on the Specific Performance of Contracts*, (1879), §§315, 322, 389; Williams and Lightwood, *A Treatise on the Law of Vendor and Purchaser of Real Estate and Chattels Real*, 4th ed (1936), vol 1 at 59-60.

44 *Haque v Haque [No 2]* (1965) 114 CLR 98 at 124.

45 *KLDE Pty Ltd v Commissioner of Stamp Duties (Q)* (1984) 155 CLR 288 at 301.

48 This analogical reasoning in turn suggested (i) the purchaser had before completion an equitable estate in the land which would be protected against loss consequent upon termination of the contract by the principles developed in equity for relief against forfeiture and (ii) in the same way as failure to redeem a mortgage upon the covenanted date for repayment did not destroy the equity of redemption without the proper exercise of a power of sale[46] or a foreclosure suit in equity[47], failure to complete the contract on the due date did not bar the intervention of equity to order specific performance.

49 But what, on this way of looking at the matter, was the significance of a contractual stipulation specifying a date for completion as essential? The treatment by the English equity judges of this subject developed in the course of the nineteenth century, as Justice Lindgren has detailed in his extrajudicial writing on the subject[48]. While Lord Thurlow would have pushed the mortgage analogy to the extreme that a time stipulation in equity could never be essential unless there was something in the nature of the subject-matter of the contract, such as its fluctuating or depreciating value[49], to give it that quality, his view was doubted by Lord Eldon in *Seton v Slade*[50] and rejected by Sir Lloyd Kenyon MR in *Mackreth v Marlar*[51].

50 If the express contractual stipulation fixing time as an essential matter was not to be disregarded, how did that attitude stand with the analogy drawn from the relief against forfeiture cases? The answer given by Pomeroy[52], with

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46 *Latec Investments Ltd v Hotel Terrigal Pty Ltd (in liquidation)* (1965) 113 CLR 265 at 274-275.

47 Maitland, *Equity*, 2nd ed rev (1936) at 182-183.

48 *Time in the Performance of Contracts*, 2nd ed (1982), [210]-[222].

49 Hanbury, *Modern Equity*, 8th ed (1962) at 85-86.

50 (1802) 7 Ves Jun 265 [32 ER 108]. See also Pomeroy, *A Treatise on the Specific Performance of Contracts*, (1879), §389.

51 (1786) 1 Cox 259 [29 ER 1156].

52 *A Treatise on the Specific Performance of Contracts*, (1879), §391.

reference to *In re Dagenham (Thames) Dock Co, Ex parte Hulse*[53], was that equity would relieve the purchaser from the operation of an essential time stipulation, "and from the forfeiture", if the provision was inserted as a penalty to secure completion of the contract at the purchaser's risk of loss of the equitable interest in the land under the executory contract.

51 That reasoning, together with the authority of *Dagenham*, was relied upon in the majority judgments in *Legione*[54]. What the Court of Appeal in Chancery decided in *Dagenham*, and on what facts and grounds, is not fully apparent from the abbreviated report[55]. But it must be remembered that in *Dagenham* there had been forfeiture of a payment of half the purchase price, so that it was not surprising that the forfeiture was treated as penal[56].

52 It should be added that, in *Dagenham*, as in *Stern* and other instalment contract cases, there would have existed an equitable lien securing for the purchaser the payments so made[57]. It has been held in this Court that the lien may be enforceable even though there may be a good defence to a claim to specific performance of the contract[58]. It is the payment and retention of the moneys, not the availability of specific performance, which is critical[59]. But there remains the question, unnecessary to decide here, whether the lien of the purchaser necessarily is lost upon termination of the contract for breach by the purchaser of an essential time stipulation[60].

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53 (1873) LR 8 Ch App 1022.

54 (1983) 152 CLR 406 at 426, 441.

55 See Harpum, "Relief Against Forfeiture and the Purchaser of Land", (1984) *Cambridge Law Journal* 134 at 147-148.

56 Lang, "Forfeiture of Interests in Land", (1984) 100 *Law Quarterly Review* 427 at 434-435.

57 *Hewett v Court* (1983) 149 CLR 639 at 663-664.

58 *Hewett v Court* (1983) 149 CLR 639 at 650, 664.

59 *Rose v Watson* (1864) 33 LJ Ch (NS) 385 at 389-390.

60 Harpum, "Relief Against Forfeiture and the Purchaser of Land", (1984) *Cambridge Law Journal* 134 at 139.

53 At all events, the analogies drawn over a century ago in *Lysaght*[61] with the trust and the mortgage are no longer accepted. Jacobs J observed in *Chang v Registrar of Titles*[62] that:

> "[w]here there are rights outstanding on both sides, the description of the vendor as a trustee tends to conceal the essentially contractual relationship which, rather than the relationship of trustee and beneficiary, governs the rights and duties of the respective parties."

Subsequently, in *Kern Corporation Ltd v Walter Reid Trading Pty Ltd*, Deane J said[63]:

> "[I]t is both inaccurate and misleading to speak of the unpaid vendor under an uncompleted contract as a trustee for the purchaser".

In *Stern*, Gaudron J points out[64], consistently with authority in this Court[65], that the "interest" of the purchaser is commensurate with the availability of specific performance. That availability is the very question in issue where there has been a termination by the vendor for failure to complete as required by the essential stipulation. Reliance upon the "interest" therefore does not assist; it is bedevilled by circularity.

54 There is the further point subsequently made by Lord Hoffmann in *Union Eagle* concerning the adaptation here of the principles respecting penalty and forfeiture, even allowing the existence of a pre-completion equitable interest in

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61 (1876) 2 Ch D 499 at 506.

62 (1976) 137 CLR 177 at 190.

63 (1987) 163 CLR 164 at 192.

64 (1988) 165 CLR 489 at 537.

65 *Brown v Heffer* (1967) 116 CLR 344 at 349; *Legione v Hateley* (1983) 152 CLR 406 at 456-457; *Bahr v Nicolay [No 2]* (1988) 164 CLR 604 at 612, 645-646. See also the warning by Stamp LJ in *Berkley v Poulett* [1977] 1 Estates Gazette Law Reports 86 at 93 against error caused by putting "the cart before the horse", to which Austin J referred in *Chief Commissioner of Stamp Duties v Paliflex Pty Ltd* (1999) 47 NSWLR 382 at 390.

the land. His Lordship distinguished[66] the well established[67] jurisdiction in equity to relieve against forfeiture of part-payments and amounts in excess of a "reasonable deposit", matters not involved in Tanwar's appeal to this Court. He then proceeded[68]:

> "But the right to rescind the contract, though it involves termination of the purchaser's equitable interest, stands upon a rather different footing. Its purpose is, upon breach of an essential term, to restore to the vendor his freedom to deal with his land as he pleases. In a rising market, such a right may be valuable but volatile. Their Lordships think that in such circumstances a vendor should be able to know with reasonable certainty whether he may resell the land or not."

55 The five "subsidiary questions" stated by Mason and Deane JJ in *Legione*[69], and set out above, reflect the treatment by Lord Wilberforce in *Shiloh Spinners Ltd v Harding*[70] (a lease case) of the "appropriate" considerations guiding the exercise of equity's jurisdiction to relieve against forfeiture for breach of covenants added by way of security for the production of a stated result. His Lordship said[71]:

> "The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach."

56 However, the end sought to be protected, on the analysis by Mason and Deane JJ in *Legione*, was the interest of the purchaser in the land. That

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66 [1997] AC 514 at 520.

67 *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457; *Pitt v Curotta* (1931) 31 SR (NSW) 477.

68 [1997] AC 514 at 520.

69 (1983) 152 CLR 406 at 449.

70 [1973] AC 691.

71 [1973] AC 691 at 723-724.

"interest", being for its existence dependent upon the administration of the very remedy in issue, does not suffice. Perhaps aware of the difficulty involved, Mason and Deane JJ went on in *Legione*[72], as later did Deane and Dawson JJ in *Stern*[73], to say there was much to commend what they said was a competing view of Sir Frederick Jordan. In Ch V of his *Chapters on Equity in New South Wales*, and in the course of dealing with equitable assignments for valuable consideration, and the transfer of the equitable title to the assignee, Sir Frederick Jordan said[74]:

> "This result is to be ascribed to the maxim that equity considers that done which ought to be done; and the principle is effective only in so far as the Court of Equity would, in all the circumstances of the case, grant specific performance of the agreement".

He added, somewhat obscurely, in a footnote[75]:

> "Specific performance in this sense means not merely specific performance in the primary sense of the enforcing of an executory contract by compelling the execution of an assurance to complete it, but also the protection by injunction or otherwise of *rights acquired under a contract which defines the rights of the parties*". (emphasis added)

57 In the New South Wales Court of Appeal[76], doubt since has been cast upon the support for any such general principle by the authorities cited by Sir Frederick Jordan, beginning with *Tailby v Official Receiver*[77]. It is sufficient for present purposes to observe that, where the issue, as in Tanwar's appeal,

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72 (1983) 152 CLR 406 at 446.

73 (1988) 165 CLR 489 at 522. See also *Hewett v Court* (1983) 149 CLR 639 at 665; *KLDE Pty Ltd v Commissioner of Stamp Duties (Q)* (1984) 155 CLR 288 at 297; *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 253.

74 6th ed (1947) at 52 (footnote omitted).

75 6th ed (1947) at 52, fn (e).

76 *Chief Commissioner of Stamp Duties v ISPT Pty Ltd* (1998) 45 NSWLR 639 at 654-655.

77 (1888) 13 App Cas 523 at 547-549.

concerns alleged unconscientious reliance by vendors upon their contractual right to terminate, it does not assist to found the equity of the purchaser upon the protection of rights to injunctive relief acquired under a contract the termination of which has taken place. Whilst the contracts here were on foot, breach thereof by the vendors would have been restrained. But there was no relevant breach of contract by the vendors, and the contracts were terminated in exercise of a contractual right to do so.

The present appeal

58 What Lord Wilberforce in *Shiloh Spinners* called "the special heads of fraud, accident, mistake or surprise"[78] identify in a broad sense the circumstances making it inequitable for the vendors to rely upon their termination of Tanwar's contracts as an answer to its claim for specific performance. No doubt the decided cases in which the operation of these "special heads" is considered do not disclose exhaustively the circumstances which merit this equitable intervention. But, at least where accident and mistake are not involved, it will be necessary to point to the conduct of the vendor as having in some significant respect caused or contributed to the breach of the essential time stipulation. Tanwar's situation falls beyond that pale. The statement by Mason CJ in *Stern*[79] respecting the insignificance of subsequent events for which the vendors were in no way responsible is fatal to the main thrust of Tanwar's case.

59 It should be made clear that what is said above does not support any proposition that the circumstances must be "exceptional" before equity intervenes. In their joint judgment in *Stern*[80], Deane and Dawson JJ, with reference to what had been said by Mason and Deane JJ in *Legione*[81], said, in a passage which puts the point of present significance:

> "Mason and Deane JJ were not saying that there must be unconscionable conduct of an exceptional kind before a case for relief can be made out. Rather, what was being said was that a court will be reluctant to interfere with the contractual rights of parties who have chosen to make time of the

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78 [1973] AC 691 at 723.

79 (1988) 165 CLR 489 at 502-503.

80 (1988) 165 CLR 489 at 526.

81 (1983) 152 CLR 406 at 449.

essence of the contract. The circumstances must be such as to make it plain that it is necessary to intervene to avoid injustice or, what is the same thing, to relieve against unconscionable – or, more accurately, unconscientious – conduct."

60 Thus, it remains for Tanwar to show that it is against conscience for the vendors to set up the termination of the contracts. In the present appeal, as already has been indicated, there was no representation by the vendors which could found any estoppel. Nor has Tanwar asserted that there was any mistake in any relevant sense.

61 In *Ciavarella*[82], the order for remittal made in *Legione* was seen to have been made on the footing that there were already in the evidence indications that the vendors in *Legione* had helped to lull the purchasers into the belief that they would accept completion provided it occurred within a few days. To relieve in those circumstances would be an exercise of the jurisdiction with respect to "surprise". That, as remarked earlier in these reasons, cannot be asserted in the present case.

62 The second matter which Mason and Deane JJ emphasised in *Legione* was the possibility that a case might be made out in the Supreme Court that the vendors were seeking to reap the benefits of the very valuable improvements to the property which the purchasers had effected whilst in possession under the contract[83]. It is not clear from their Honours' remarks whether the reaping of the benefit of the improvements as a consequence of termination of itself would be sufficient to deny insistence by the vendors upon their rescission. It is not readily apparent how that circumstance alone could be sufficient. The contract in *Legione* had permitted the purchasers to enter into possession and any improvements they then made were at risk of the operation of the contractual provisions for termination.

Accident

63 In its extremity, Tanwar then founds upon the jurisdiction to relieve against the consequences of "accident".

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82 (1983) 153 CLR 438 at 453.

83 (1983) 152 CLR 406 at 449; *Ciavarella v Balmer* (1983) 153 CLR 438 at 453.

64 In *Legione*[84], Mason and Deane JJ referred to authorities disputing the treatment of cases of relief against penalties and forfeitures as instances of relief against accident. The jurisdiction with respect to accident was recognised at a time before the development of any settled body of equitable principles. The point is well made by Professors Keeton and Sheridan[85]:

> "'Accident' was a vague term which covered many situations, in their nature unforeseen, and it could, in particular situations, shade off into fraud. The law of mistake, particularly in relation to contracts and conveyances, is included under this head, and it led in turn to the development of the equitable rules governing the rectification of contracts and other instruments, and the rescission of documents of all kinds."

65 What then remains as the subject-matter of accident in modern equity? In *Baird v BCE Holdings Pty Ltd*[86], Young J referred to various writings on the subject which distinguish mistake as supposing an operation of the will of the agent in producing the event, albeit by reason of erroneous impressions on the mind. Spence, writing in 1846, said that the kinds of accidents or cases of extremity which might be relieved against were only to be ascertained from an examination of the cases[87]. He instanced forfeiture and penalties. Other instances include the accidental diminution of assets in the hands of an executor, lost evidence and the defective execution of powers of appointment[88], all far from the present case.

66 However, the learned writers on the subject emphasise and put to one side those situations where the event which has come to pass is one for which an express exculpatory provision might have been made, but was not sought or was not agreed to, and where to relieve against its consequences after it has occurred would deprive the other party to the contract of an essential right[89]. In particular,

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84 (1983) 152 CLR 406 at 444.

85 *Equity*, 3rd ed (1987) at 38.

86 (1996) 40 NSWLR 374 at 385-386.

87 *The Equitable Jurisdiction of the Court of Chancery*, (1846), vol 1 at 628.

88 *Snell's Equity*, 30th ed (2000) at 603-606.

89 Bispham, *The Principles of Equity*, 6th ed (1903), §§175, 176; Merwin, *The Principles of Equity and Equity Pleading*, (1895), §419.

equity will not relieve where "the possibility of the accident may fairly be considered to have been within the contemplation of the contracting parties"[90]. Story wrote[91]:

> "And this leads us naturally to the consideration of those cases of accident in which no relief will be granted by Courts of Equity. In the first place, in matters of positive contract and obligation created by the party (for it is different in obligations or duties created by law), it is no ground for the interference of equity that the party has been prevented from fulfilling them by accident, or that he has been in no default, or that he has been prevented by accident from deriving the full benefit of the contract on his own side. ... The reason is, that he might have provided for such contingencies by his contract if he had so chosen; and the law will presume an intentional general liability where he has made no exception." (footnotes omitted)

67 It is here that the circumstances leading up to, and the terms of, the 2001 Deeds are of critical importance. The vendors withdrew the earlier notices of termination in return for the assumption by Tanwar of obligations to complete couched in unqualified terms. The obligation in the 2001 Deeds to settle by the stipulated time was not made subject to the availability of Tanwar's finance on that day. That there might be a failure by a third party to provide the finance was reasonably within the contemplation of Tanwar. The failure by Tanwar to avail itself of the advantages it obtained by negotiating the 2001 Deeds and by keeping the contracts on foot had the effect of exposing Tanwar again to the exercise by the vendors of their rights to terminate the contracts[92]. Equity does not intervene to prevent the effective exercise of those rights. The claim by Tanwar for relief against the consequences of the failure in the timely provision of the second mortgage does not succeed.

Result

68 The appeal should be dismissed with costs.

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90 Smith, *Principles of Equity*, 4th ed (1908) at 243-244.

91 *Commentaries on Equity Jurisprudence*, 13th ed (1886), vol 1, §101.

92 cf *Cameron v UBS AG* (2000) 2 VR 108 at 115-116.

69 KIRBY J. This appeal is one of two[93] from the Court of Appeal of the Supreme Court of New South Wales in which this Court must review decisions concerning the provision of equitable remedies for what is alleged to have been an unconscientious use of a legal right to terminate a contract for the sale of land. The equitable remedies invoked are those of relief against forfeiture and specific performance.

70 In each of the two cases, the same primary judge was involved[94]. The Court of Appeal was differently constituted in each. It reached opposite conclusions concerning the availability of equitable relief against the respective vendors' insistence upon their legal rights. In each case, the Court of Appeal approached its task as one of applying a trilogy of recent decisions of this Court[95]. In each case at trial the primary judge observed that it was "extraordinarily difficult to obtain from these decisions some common basis upon which this question must be decided"[96].

71 The differences of conclusion in the Court of Appeal may reflect the fact (illustrated also by decisions of this Court[97]) that judges often disagree upon such matters, reflecting as they do (to some extent) "ideological differences about the limits of equitable intervention to modify strict legal rights"[98] as well as the peculiarities of complex factual circumstances and individual judicial reactions to them. If all that the two appeals demonstrated was that such questions are difficult, allowing for differing opinions, their utility would have been lost.

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93 The other is *Romanos v Pentagold Investments Pty Ltd* [2003] HCA 58.

94 Windeyer J sitting in each case in the Equity Division of the Supreme Court of New South Wales.

95 *Legione v Hateley* (1983) 152 CLR 406; *Ciavarella v Balmer* (1983) 153 CLR 438; *Stern v McArthur* (1988) 165 CLR 489.

96 Windeyer J in *Tanwar Enterprises Pty Ltd v Cauchi* (2002) NSW Conv R ¶55-994 at 58,188 [12] citing his reasons in *Pentagold Investments Pty Ltd v Romanos* (2001) 10 BPR [97911] at 19,039-19,040 [10]; (2001) NSW Conv R ¶55-987 at 58,113.

97 eg in *Legione* (1983) 152 CLR 406, Brennan J dissented. In *Stern* (1988) 165 CLR 489, Mason CJ and Brennan J dissented.

98 Parkinson, "The Conscience of Equity", in Parkinson (ed), *The Principles of Equity*, 2nd ed (2003) 29 at 33.

72 The decision of the Privy Council in *Union Eagle Ltd v Golden Achievement Ltd*[99], given after the trio of decisions in this Court, evidences a distinct approach involving a rather different emphasis. In a sense, that decision challenges the approach of this Court both as to its interpretation of past legal authority and in its application of legal policy. Accordingly, this and the companion appeal provide this Court with an occasion to clarify the applicable equitable doctrines. In this appeal doing so necessitates an examination not only of the general approach expressed in the three decisions of this Court dealing with relief for unconscientious conduct but also (if this is not sufficient to sustain relief) a separate consideration of the rules governing "accident" as that consideration is separately propounded to justify the grant of equitable relief.

The facts

73 The basic facts are set out in other reasons[100]. Those essential to the resolution of this case were within a short compass. Members of the Cauchi family and Mr Dalley ("the vendors") owned three adjoining parcels of land at Glenwood, near Sydney. In October 1999 they entered into separate contracts to sell the land to Tanwar Enterprises Pty Ltd ("the purchaser") for a combined price of approximately $4.5 million. The original date for completion of the contracts was 28 February 2000. This was later extended to August 2000. That date was not adhered to. On 20 August 2000 the vendors issued notices of termination of each contract. However, the parties eventually negotiated deeds dated 5 June 2001, each to the same effect and each containing a new completion date of 4 pm on Monday 25 June 2001. There had been a dispute concerning the final date for completion – the vendors wishing to give two weeks from the date of the deeds, the purchaser seeking four weeks. The parties compromised on three weeks and so stipulated in each deed.

74 Time was stated to be of the essence. Each deed contained a stipulation whereby the purchaser acknowledged the terms as "a final arrangement to complete the sale of the Property", with stated consequences of forfeiture of all moneys paid in the event of non-completion of the sale in accordance with the deed and affording each vendor the right to terminate by serving a notice on the purchaser.

75 In accordance with the deeds, arrangements were made for settlement to take place on 25 June 2001. The funds for a second mortgage over the combined land were to come from a source in Singapore. In the event, those funds did not

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99 [1997] AC 514.

100 Reasons of Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ at [7]-[18]; reasons of Callinan J at [126]-[131].

arrive on the due date. The delay was supposedly the result of added requirements imposed by Singapore exchange control authorities in consequence of a money laundering scandal in that country. The funds arrived in the trust account of the solicitors for the second mortgagees on 26 June 2001. Settlement could have taken place that afternoon. However, the vendors, by their solicitors, served notice of termination of each contract. It appears the vendors issued instructions to terminate on 26 June 2001 prior to being notified that all the funds were available. They then confirmed their instructions upon receiving information that the purchaser was ready, willing and able to settle. The purchaser commenced proceedings in the Supreme Court of New South Wales. Ultimately, its claim was for relief against forfeiture and for specific performance of each contract or alternatively for return of each deposit[101].

The history of the proceedings

76 *Decision at first instance*: The primary judge rejected the claim to relief against forfeiture. He dismissed the contention that the delay in the transfer of funds from Singapore constituted an "accident" within the power of a court of equity to grant relief for non-compliance with the terms of a contract that was the result of "fraud, *accident*, mistake or surprise"[102]. So far as the primary judge was concerned, the cause of the purchaser's failure to comply with the contract was the unavailability of the funds. This was "always a risk if funds were to be transferred from overseas on the final day"[103]. In judging whether the failure to complete the contract had occurred in circumstances that made it unconscionable for the vendors "to exercise clear contractual rights of termination and forfeiture" the primary judge looked to the history of the parties' entire dealings. He accepted that there had been a probable increase in the value of the land in consequence of the development consents obtained by the purchaser. He pointed out that there was no specific evidence either of this increase or of the costs of development that the purchaser had incurred[104]. He therefore concluded that it was not unconscionable for the vendors to insist on their rights. He also rejected the purchaser's claim for the return of the deposits.

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101 Pursuant to the *Conveyancing Act* 1919 (NSW), s 55(2A).

102 *Tanwar Enterprises Pty Ltd v Cauchi* (2002) NSW Conv R ¶55-994 at 58,188 [11] (emphasis added).

103 *Tanwar Enterprises Pty Ltd v Cauchi* (2002) NSW Conv R ¶55-994 at 58,189 [14].

104 *Tanwar Enterprises Pty Ltd v Cauchi* (2002) NSW Conv R ¶55-994 at 58,189 [17].

77 *Decision of the Court of Appeal*: Handley JA[105], who gave the reasons of the Court of Appeal[106], dismissed the purchaser's appeal. A challenge to the rejection of evidence expressed in terms of approximate costs incurred by the purchaser was dismissed. Understandably, that issue has not been pressed upon this Court. Handley JA addressed unconscionability in terms of the five questions posed by Mason and Deane JJ in *Legione v Hateley*[107].

78 At trial, the vendors had acknowledged the purchaser's entitlement to relief against forfeiture of sums paid to the vendors in addition to the deposits but excluding the consideration paid by the purchaser for extensions of time granted by the vendors. That differentiation was upheld by Handley JA[108]. By application of what was described as the "clearest guidance for lower courts" expressed in the joint reasons of five members of this Court in *Ciavarella v Balmer*[109], Handley JA referred to the "absence of precipitate conduct on the part of the vendor" and "the need to prove unconscionable conduct … and … exceptional circumstances before relief against forfeiture can be granted after an otherwise valid rescission"[110]. His Honour then decided in favour of the vendors.

79 Whilst Handley JA was prepared to accept an "unearned increase" in the value of the land, he declined to treat this as an "exceptional circumstance" in respect of land values in and around Sydney in cases in which settlement of a sale was deferred. He could see no analogy to the factual circumstances that this Court had held to be "exceptional" in *Legione* and in *Stern v McArthur*[111]. The only "exceptional circumstances", in Handley JA's opinion, were the earlier extensions of time for completion and the agreement expressed in the supplementary deeds, in what he described as contracts of a "commercial

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105 With whom Beazley JA and Mathews AJA agreed.

106 *Tanwar Enterprises Pty Ltd v Cauchi* (2002) 10 BPR [97921]; (2003) NSW Conv R ¶56-048.

107 (1983) 152 CLR 406 at 449.

108 *Tanwar Enterprises Pty Ltd v Cauchi* (2002) 10 BPR [97921] at 19,110 [19]; (2003) NSW Conv R ¶56-048 at 58,660-58,661.

109 (1983) 153 CLR 438.

110 *Tanwar Enterprises Pty Ltd v Cauchi* (2002) 10 BPR [97921] at 19,113 [35]; (2003) NSW Conv R ¶56-048 at 58,663 referring to *Ciavarella* (1983) 153 CLR 438 at 452-454.

111 (1988) 165 CLR 489.

nature"[112], to make the final time essential. However, these were exceptional considerations favouring the vendors rather than the purchaser.

80 *Appeal to this Court*: In this Court the purchaser's alternative argument in relation to the return of the deposits was not pressed. There was no challenge by any party to the law as laid down in *Legione*, *Ciavarella* and *Stern*. The purchaser complained both about the approach of the Court of Appeal to the authority binding on it concerning relief against forfeiture and consequential orders where unconscionable conduct was shown and about its failure to regard the default that occasioned the rescission as having been the result of an "accident".

Legal principle and policy

81 *Proportionality in the law's operation*: As in many other areas of legal authority, the law applicable to this case is striving to achieve proportionality in its operation. By this I mean a proper adjustment between the enforcement of the legal rights of the parties, derived from the terms of the contract in which those parties have agreed upon their respective rights and duties, and the perceived substantial merits of the respective positions of the parties, including in respect of the response to the established breach.

82 On many occasions the law recoils from absolute outcomes, to which logic or the strict letter of the law might seem to point[113]. There are countless illustrations of this tendency within the broadly stated exceptions to general rules acknowledged by statute and the common law. And where the common law was thought to result in consequences considered extreme and disproportionate, equity would sometimes come to the rescue.

83 The difficulty of such exceptions is that they introduce potential causes of uncertainty in the identification and enforcement of the legal rights of the parties. Particularly where that uncertainty affects commercial interests or interests in real property, the law inclines to prefer the certainty of rules over the uncertainty of exceptions. This is especially so where the exceptions are expressed in discretionary language or in open textured criteria such as "unconscionable or unconscientious behaviour of an exceptional kind"[114]. What is "unconscionable"

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112 *Tanwar Enterprises Pty Ltd v Cauchi* (2002) 10 BPR [97921] at 19,113 [37]; (2003) NSW Conv R ¶56-048 at 58,663-58,664.

113 cf *State Rail Authority (NSW) v Earthline Constructions Pty Ltd (In Liq)* (1999) 73 ALJR 306 at 332 [93], fn 131; 160 ALR 588 at 621-622.

114 *Stern* (1988) 165 CLR 489 at 527-528.

or "exceptional" in the opinion of one decision-maker may not be so regarded by another. Inescapably, such language invites differing evaluations by different people depending upon each person's reaction to the evidence, readings of earlier cases and response to the factors there stated that tend to weigh in such matters.

84 *Arguments supporting equitable relief*: Take, for example, the present case. A number of salient elements in the evidence tended, in a general way, to favour the provision of relief to the purchaser. These were: (1) the extremely short interval involved in the ultimate default, being less than one day; (2) the long history of negotiations which included past tolerance by the vendors of earlier defaults; (3) the unexpected and largely unpredictable events in Singapore that held up the arrival of the second mortgage funds for reasons over which the purchaser had no control; (4) the growing tendency of the Australian money market to rely upon investment funds moved across national borders with only rare impediments of the kind that happened in this case and the undesirability of adopting rules that would unreasonably impede access to such funds; (5) the inference, readily drawn (even if not formally proved), that substantial costs would have been incurred by the purchaser to obtain development consents and to set up the development of the consolidated land; (6) the inference (even if not formally proved) that with the development consents and the general increase in property values, the termination of the contracts for sale would result in a significant windfall advantage to the vendors; and (7) the fact that the purchaser was not claiming for unjust enrichment of the vendors but only for specific performance to complete the sale, subject to the payment of any provable losses suffered by the vendors in consequence of the delay[115].

85 *Arguments denying equitable relief*: As against these considerations a number of salient elements in the evidence tended to weigh in favour of the vendors. These were: (1) the background in the dealing between the parties which produced the deeds indicating that, after earlier delays, "a final arrangement" was agreed to; (2) the clear and emphatic terms of those deeds and the agreement of all parties that the time stated in them should be treated as being of the essence; (3) the attempt by the solicitors for the purchaser to secure a longer interval of four weeks within which to settle the transfer but the insistence of the vendors on a shorter period to which the purchaser eventually agreed; (4) the commercial character of the transaction and the law's reluctance to interfere with fairly negotiated commercial transactions; (5) the relatively large sums at stake; (6) the fact that the parties were legally represented and therefore able to obtain accurate and independent advice, if they sought it, about their respective entitlements and obligations under the deeds; (7) the accepted fact that the vendors had played absolutely no part in the purchaser's default; (8) the fact that each contract had been validly terminated following the breach so that any

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115 cf *Legione* (1983) 152 CLR 406 at 429, 450-451.

latitude would necessitate enforcement of a different contract, effectively in different terms; (9) the fact that the purchaser had omitted to prove actual losses and had left these (and any windfall gains made by the vendors) to inference and speculation; (10) the inherent risk of difficulties in settling the sale on time where funds were procured from overseas and the argument that this necessitated, in the circumstances, arrangements to ensure the availability of the funds on the day before settlement; (11) the fact that upholding clear rules where time is made essential facilitates the certain and efficient conduct of land title conveyancing in a context in which the existence of clear rules is at a premium[116]; and (12) the danger of too readily superimposing upon such transactions the open textured principles of equity which commonly necessitate litigation, increased uncertainty as to rights and a burden upon the parties and the marketplace consequent on delay and argument whilst the respective entitlements are being determined.

86 *Objectification and equitable categories*: The resolution of this appeal does not depend, as such, upon simply weighing and evaluating the foregoing and other arguments of the merits to ascertain where the balance lies: whether that balance be described as a balance of justice, of fairness or of conscience. The purchaser accepted that "unconscionability" in this context was not synonymous with a generalised sense of fairness as between the parties or with undefined notions of justice[117]. In order to tame the elements of unpredictability introduced into legal relationships by the imposition of equitable principles, controls upon what might otherwise become a purely discretionary assessment are accepted. They include respect for the particular categories that have emerged in equitable jurisdiction, such that it is not taken to be at large[118]. They also emphasise that the conscience that is in question is not that of the judicial decision-maker but that of the party against whom equitable relief is sought[119], in this case the vendors.

87 However, such controls, whilst useful, have their own limitations. Verbalising the tests and elaborating their content can only take the mind of the

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116 Butt, "Recovery of deposit", (2002) 76 *Australian Law Journal* 151 at 152; Butt, "Purchasers relieved against loss of contract", (2002) 76 *Australian Law Journal* 347 at 350.

117 *Stern* (1988) 165 CLR 489 at 514 per Brennan J (diss) citing *Muschinski v Dodds* (1985) 160 CLR 583 at 616.

118 *Muschinski v Dodds* (1985) 160 CLR 583 at 616; *Breen v Williams* (1996) 186 CLR 71 at 113, 134; cf *Austotel Pty Ltd v Franklins Selfserve Pty Ltd* (1989) 16 NSWLR 582 at 585.

119 *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 438; *Breen v Williams* (1996) 186 CLR 71 at 82.

decision-maker so far in evaluating the conclusion that equitable remedies are or are not required in the particular case. As in the common law, equity develops by analogy. Relief against forfeiture was traditionally available in equity to lessees, with respect to their interest in the reversion, and mortgagors, with respect to their interest in the equity of redemption[120]. Whilst it is true that the exact nature of the equitable interest of a purchaser in an executory contract for the sale of land is controversial[121], it is now too late to suggest that such cases are excluded from relief against forfeiture or that the categories of relief are limited to cases of leasehold and mortgage interests where there has been a time default. The equitable principle has developed by analogy to embrace the interests of a purchaser under a contract for the sale of land[122]. It follows that the categories are not closed. They may develop to meet new cases so long as such cases are perceived as sufficiently similar to the established ones. Whether in the common law or in the rules of equity, "excessive subtlety and refinement" should be avoided[123].

88 Furthermore, whilst the reference to the vendor's conscience has the important function of attempting to objectify the potentially nebulous consideration of unconscionable conduct (and to focus primary attention upon the acts and omissions of the person against whom relief is claimed), ultimately someone must evaluate the equitable claim. In these cases, this responsibility rests with the judge. He or she is obliged to consider the question in terms of the burden on the conscience, as here, of the vendors. But the sharp differences of opinion evident in the cases illustrates the inescapable truth that the judicial decision-maker's views about the alleged unconscientious conduct of the vendor are necessarily influenced by that person's own conscientious reaction to the facts disclosed by the evidence.

89 *Looking behind the categories*: Every now and then, in dealing with the application of established law, it becomes necessary "to look behind the authorities to the reasons which have been put forward to sustain"[124] the principles that they establish. In my view, in cases of this kind, those principles

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120 *Stern* (1988) 165 CLR 489 at 529.

121 Gummow, "Forfeiture and Certainty: The High Court and the House of Lords", in Finn (ed), *Essays in Equity* (1985) 30 at 35-36.

122 As in *Legione* (1983) 152 CLR 406; *Ciavarella* (1983) 153 CLR 438; and *Stern* (1988) 165 CLR 489.

123 cf *Weininger v The Queen* (2003) 77 ALJR 872 at 877 [24]; 196 ALR 451 at 457-458 citing *R v Storey* [1998] 1 VR 359 at 372.

124 *Legione* (1983) 152 CLR 406 at 446 per Mason and Deane JJ.

are striving to apply an equitable rule that affords a proportionate resolution in particular circumstances of the clash between the entitlements to legal rights and the apparent demands of justice and good conscience[125]. Where "[t]o enforce the legal rights of the vendors … would be to exact a harsh and excessive penalty for a comparatively trivial breach"[126], this Court has upheld the intervention of equity. However, it has insisted that such intervention will only be allowed in an "exceptional case". The task of the courts in individual cases, and the role of judges in responding to them, is to attempt to impose on the imprecision of the applicable criteria identified categories and a specific judicial approach. Such categories and approach are expressed in words. Those words are designed to promote consistency and to reduce unpredictability in the application of what are, ultimately, very broadly stated powers of intervention.

90 Before turning to the applicable principles as they stand in Australia, it is useful to notice the way in which the principles have developed and how, lately, their formulae have diverged in this country from those stated by English judges, addressing the same problem.

The course of authority

91 *The nineteenth century English cases*: The traditional strictness of the common law's approach to contractual provisions as to time was nowhere more rigorously enforced than in time stipulations for the completion of contracts for the sale of land[127]. Where, by law, the contract was required to be evidenced in writing, it was not thought possible for a time in writing to be substituted by parol evidence which was different from the time stipulated in writing. For many years it was considered impossible for the stipulated time to be waived by parol[128]. Originally, the distinction between "essential" and "non-essential" conditions did not exist at common law in respect of stipulations as to the time for completion of a contract for the sale of land. This was because all such stipulations, where they were found, were regarded as essential.

92 Courts of equity, however, adopted a distinct approach to stipulations as to time. In the application of that approach, such courts, at least by the early

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125 cf *Legione* (1983) 152 CLR 406 at 429 per Gibbs CJ and Murphy J.

126 *Legione* (1983) 152 CLR 406 at 429.

127 Lindgren, *Time in the Performance of Contracts*, 2nd ed (1982) at 9 [203] citing *Wilde v Fort* (1812) 4 Taunt 334 [128 ER 359].

128 Lindgren, *Time in the Performance of Contracts*, 2nd ed (1982) at 9-10 [203] citing *Stowell v Robinson* (1837) 3 Bing NC 928 [132 ER 668]; *Stead v Dawber* (1839) 10 Ad & E 57 [113 ER 22]; *Marshall v Lynn* (1840) 6 M & W 109 [151 ER 342].

nineteenth century, would intervene to grant equitable remedies, including the remedy of relief against forfeiture and specific performance, against the legal consequence following a party's inability to enforce its interests because of a breach of a contractual stipulation as to time[129]. In early cases, regard was had by equity to such considerations as the length of the defaulting party's delay, the extent of any affirmation of the contract despite the delay, whether the delay was "not sufficiently apologised for"[130] and whether there was waiver or acquiescence.

93 By the beginning of the nineteenth century, within the Court of Chancery in England, differences emerged concerning this subject[131]. In effect, such differences remain to this day in the conflicts of opinion that may be found in the case books concerning the occasions for equitable intervention and the verbal formulation of the principles that will permit it. By the time of Lord Eldon LC, equity came to give relief to protect lessees against forfeiture of the lease and mortgagors in respect of their rights of redemption as well as relief against penalty interest clauses. However, these categories of relief were to come, in time, to be seen as but instances of cases where the defaulting party could demonstrate such an interest in the subject matter of the property as to render the enforcement of legal rights on some occasions offensive to conscience.

94 It was in this context, and as an adjunct to the exercise of its powers to afford relief, that equity drew a distinction between "essential" and "non-essential" conditions as to time. It imposed upon the party who set up the provision as to time the onus of establishing the essentiality of the stipulation[132]. This distinction was drawn in deference to equity's search for the "real contract" between the parties and its willingness to intervene where their conduct was deemed inconsistent with the "real contract".

95 Unsurprisingly, the response of common lawyers in retaliation against these developments was to draft contracts that contained express provisions stipulating that time was of the essence of the agreement between the parties.

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129 Lindgren, *Time in the Performance of Contracts*, 2nd ed (1982) at 11-12 [210]-[211] citing *Lennon v Napper* (1802) 2 Sch & Lef 682 at 683-684; *Gregson v Riddle* (1784) cited in *Seton v Slade* (1802) 7 Ves Jun 265 [32 ER 108].

130 Lindgren, *Time in the Performance of Contracts*, 2nd ed (1982) at 12 [212] citing *Mackreth v Marlar* (1786) 1 Cox 259 [29 ER 1156].

131 Lindgren, *Time in the Performance of Contracts*, 2nd ed (1982) at 13 [213]-[214].

132 Lindgren, *Time in the Performance of Contracts*, 2nd ed (1982) at 14 [216] citing *Hearne v Tenant* (1807) 13 Ves Jun 287 [33 ER 301]; *Tilley v Thomas* (1867) LR 3 Ch App 61 at 67 per Lord Cairns LJ.

Such stipulations were included in the obvious hope of repelling equitable intervention by providing a foothold for the argument that it would be unjust, and indeed unconscionable, for equity to intervene to defeat the expressly agreed legal rights and obligations of the parties.

96 Notwithstanding such express terms, a series of decisions in England, after the coming into effect of the *Supreme Court of Judicature Act* 1873 (UK)[133], maintained the opinion that equity could relieve a defaulting purchaser against forfeiture of an interest in land, even when that party had failed to comply with the condition of the contract stipulating that time was of the essence. The cases to this effect stretch back to *Vernon v Stephens*[134]. They include *In re Dagenham (Thames) Dock Co; Ex parte Hulse*[135] and, upon one interpretation, the decision of the Privy Council in *Kilmer v British Columbia Orchard Lands Ltd*[136]. These decisions were sometimes viewed in Australia as having preserved the right of equity to give relief which remained available notwithstanding the express contractual stipulation as to time[137]. This understanding of the continuing availability of equitable relief in such cases was central to the decision of the majority of this Court in *Legione*[138].

97 *The Privy Council in Steedman and Brickles*: This view of equity's continuing entitlement to grant relief against forfeiture of an interest in a legal estate in land for default of an essential stipulation as to time, was seemingly confirmed by the House of Lords as late as 1914 in *Stickney v Keeble*[139]. However, there then intruded two decisions of the Privy Council in *Steedman v*

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133 Which by s 25(7) made specific provision as to time. The sub-section has counterparts in Australia: *Conveyancing Act* 1919 (NSW), s 13; *Property Law Act* 1958 (Vic), s 41; *Property Law Act* 1974 (Q), s 62; *Law of Property Act* 1936 (SA), s 16; *Property Law Act* 1969 (WA), s 21.

134 (1722) 2 P Wms 66 [24 ER 642].

135 (1873) LR 8 Ch App 1022.

136 [1913] AC 319.

137 See *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 478.

138 (1983) 152 CLR 406 at 425-428 per Gibbs CJ and Murphy J; 441-443 per Mason and Deane JJ.

139 [1915] AC 386.

Drinkle[140] and *Brickles v Snell*[141]. Those decisions appeared to stand for the proposition that specific performance by way of equitable relief against forfeiture is never ordered by equity where a stipulation as to time, expressed by the contract to be essential, has not been observed. In *Steedman*, Viscount Haldane could not have been clearer[142]:

> "Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. *But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply* by providing that time is to be of the essence of their bargain."

98 Against the background of the decisions in *Re Dagenham* and *Kilmer* it is difficult to accept what Viscount Haldane said as an accurate statement of the law to that time. For this reason, *Steedman* (and *Brickles* which quickly followed) were subject to much academic criticism, charging that they amounted to the rewriting of legal history[143]. Nevertheless, as decisions of the Privy Council, they bound Australian State courts. They enjoyed the deference of this Court until, in *Legione*, the issue of their correctness as a matter of authority was subjected to explicit examination.

99 *The Australian and English resolution*: In *Legione*, the majority in this Court returned to what they saw as the position that had prevailed before *Steedman* was "thought to hold the field"[144]. They embraced "an expansive view of the equitable jurisdiction to relieve against forfeiture"[145]. Such a view was considered not only more in keeping with English legal theory, until interrupted by *Steedman*, but also with the development of the law in the United States[146] and with basic equitable principle. In *Legione*, Brennan J alone was unconvinced. He would have adhered to the law as propounded in *Steedman*, *Brickles* and the

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140 [1916] 1 AC 275.

141 [1916] 2 AC 599.

142 [1916] 1 AC 275 at 279 (emphasis added).

143 cf *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514 at 521.

144 *Legione* (1983) 152 CLR 406 at 443 per Mason and Deane JJ.

145 *Legione* (1983) 152 CLR 406 at 444.

146 *Legione* (1983) 152 CLR 406 at 448 citing *Cheney v Libby* 134 US 68 at 78 (1890).

Australian cases, including in this Court, that had followed them[147]. His Honour was also later in dissent in *Stern*. Whilst acknowledging there that he was bound by the holding in *Legione*, he continued to protest his "difficulties in accepting [its] proposition"[148].

100 Meantime, in England, in *Shiloh Spinners Ltd v Harding*[149], Lord Wilberforce had set out two heads of the jurisdiction to relieve against forfeiture of property. His speech appeared to reflect something of a return to the large view of intervention that equity had asserted before the Privy Council decisions in *Steedman* and *Brickles*. Thus, Lord Wilberforce acknowledged the existence of the jurisdiction to relieve against forfeiture:

> "First, where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs … Secondly, there were the heads of fraud, accident, mistake or surprise, always a ground for equity's intervention, the inclusion of which entailed the exclusion of mere inadvertence and a fortiori of wilful defaults."

101 This restatement of equity's beneficent role was influential in the shift in doctrine in the trio of Australian cases that followed *Shiloh Spinners*. It was a shift consciously made, repeatedly upheld and applied since in countless decisions. It was not challenged in this appeal.

102 *The Privy Council's decision in Union Eagle*: I trust that this exordium of authority will be judged venial[150]. It leads to the last piece of the legal mosaic that appears in the reconsideration of the issue in the judgment of the Privy Council in *Union Eagle*[151]. That was a case where a purchaser had failed to complete by a time that was stipulated in the contract to be of the essence. A courier arrived ten minutes late with the balance of the settlement moneys. The vendor rescinded the contract and forfeited the deposit.

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147 *Legione* (1983) 152 CLR 406 at 458.

148 (1988) 165 CLR 489 at 511.

149 [1973] AC 691 at 722.

150 cf *Forestal Land, Timber and Railways Co v Rickards* [1941] 1 KB 225 at 247 per MacKinnon LJ.

151 [1997] AC 514.

103 The purchaser lost at trial, in the Hong Kong Court of Appeal and before the Privy Council. Lord Hoffmann, delivering the judgment of the Board, cited and applied the dictum of Viscount Haldane in *Steedman*. He noted the criticism of those reasons in academic writings and in the Australian cases. He referred to *Legione* and *Stern*, laying emphasis upon the dissenting opinions of Mason CJ and Brennan J in the latter. He distinguished the case before him from those cases on the factual footing that the purchaser had not been subjected to a penalty nor the vendor unjustly enriched by obliging compliance with the strict terms of the agreement that the parties had made. The Privy Council left any relaxation of the principle stated in *Steedman* to a future case where the facts might be more propitious.

104 Then, as if to answer the question that justice or conscience might suggest (viz that a ten minute default was trivial rendering the vendor's rescission of the contract for sale adventitious and unconscionable), Lord Hoffmann went on[152]:

> "The present case seems … to be one to which the full force of the general rule [in *Steedman*] applies. The fact is that the purchaser was late. Any suggestion that relief can be obtained on the ground that he was only slightly late is bound to lead to arguments over how late is too late, which can be resolved only by litigation. For five years the vendor has not known whether he is entitled to resell the flat or not. It has been sterilised by a caution pending a final decision in this case. In his dissenting judgment [in the Court of Appeal of Hong Kong], Godfrey JA said that the case 'cries out for the intervention of equity.' Their Lordships think that, on the contrary, it shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene."

105 In this appeal the vendors did not invite this Court to reconsider the correctness of *Legione*, *Ciavarella* and *Stern*. However, they naturally drew attention to the approach adopted by the Privy Council in *Union Eagle*. Since that decision was given, commentary has divided along the fault lines that are evident in judicial opinions since Lord Eldon's time. There are those who, for reasons of legal authority and policy, support the exceptional intervention of equity acknowledged by this Court in its three decisions and suggest that such intervention might have been appropriate in the Hong Kong case[153]. There are

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152 [1997] AC 514 at 523.

153 eg Thompson, "Time runs out in Hong Kong", (1997) *The Conveyancer* 382; Abedian and Furmston, "Relief Against Forfeiture after Breach of an Essential Time Stipulation in the Light of Union Eagle Ltd v Golden Achievements Ltd", (1998) 12 *Journal of Contract Law* 189.

others who are more favourable to the general approach preferred by the Privy Council. They lay emphasis, where time is expressly made essential, upon holding parties to their obligations in the particular case so as to avoid or discourage protracted litigation about such matters in the generality of cases[154].

The applicable principles

106 It is now necessary to state the principles applicable to cases such as the present that I take to emerge from legal authority applicable in Australia:

1. The basic principle is that, subject to statute, a party of full capacity is bound by legal obligations assumed in a valid agreement with another. Equity, it is said, mends no man's bargain[155]. This rule is founded not only upon ancient authority of the common law that is normally respected by equity. Legal policy reinforces the rule. It represents an important attribute of economic freedom[156]. Certainty in contractual obligations, freely assumed, is an economically valuable feature of a modern market economy. It is made the more important by the growth of international trade conducted sometimes between parties of differing linguistic, cultural and legal traditions. If parties agree to be contractually bound by a provision that stipulates that time is essential to their contractual dealings, prima facie they should be held to that agreement. On one view, it will ordinarily be offensive to conscience to do otherwise.

2. Nevertheless, in Australia, equitable relief may be granted against forfeiture of property in established cases. The mere fact that the agreement between the parties makes time essential does not exclude equity's jurisdiction to afford relief. However, such jurisdiction is reserved to cases in which "exceptional circumstances" are shown[157]. In judging whether the circumstances are "exceptional", regard must be had

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154 cf Butt, "Recovery of deposit", (2002) 76 *Australian Law Journal* 151 at 152; cf Heydon, "Equitable Aid to Purchasers in Breach of Time-Essential Conditions", (1997) 113 *Law Quarterly Review* 385; Butt, "Purchasers relieved against loss of contract", (2002) 76 *Australian Law Journal* 347.

155 *Shiloh Spinners Ltd v Harding* [1973] AC 691 at 723; *Legione* (1983) 152 CLR 406 at 447.

156 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 77 ALJR 926 at 942 [85]; 197 ALR 153 at 176.

157 The source of this expression appears to be *Shiloh Spinners* [1973] AC 691 at 725; cf *Legione* (1983) 152 CLR 406 at 429, 449; *Ciavarella* (1983) 153 CLR 438 at 454.

to the entire relationship between the parties, the concern of equity being with substance, not form. The entire circumstances must be judged as exceptional. It is not enough to prove exceptional unconscionability on the part of the party insisting on its legal rights[158].

3. Whatever may be the precise content of the "equitable interest" of a purchaser under a contract for the sale of land, it is now accepted that, in a proper case, it is sufficient to sustain equitable jurisdiction to relieve that party against forfeiture of such an interest for time default, even in respect of a time provision agreed to be essential[159]. The equitable interest has developed to relieve from forfeiture a party with a substantial stake in the property in consequence of an exercise of legal rights that is shown to be the result of fraud, mistake, accident or surprise or otherwise unconscionable in all the circumstances[160].

4. In deciding whether it would be unconscientious conduct for a party to take advantage of the forfeiture consequent on a breach of an essential time stipulation leading to a termination of the contract, various factual considerations, typical of such cases, have often been taken into account. The five mentioned in *Legione*[161] are not exhaustive. They are merely cited as "[t]he more important" of those that normally have to be considered. Other factual considerations that may be taken into account in judging the existence or absence of unconscionable conduct for this purpose include (a) the character of the contract in which the time stipulation appears (ie whether it is of a commercial, domestic or personal kind); (b) the relevant background facts explaining any special significance of the stipulation as to time; (c) whether the parties have access to appropriate independent legal advice; and (d) any degree to which the party in default may be regarded as disadvantaged, vulnerable or in need of equity's protection from the insistence on its rights of a party in a superior economic or other position[162]. Generally speaking, equity is more solicitous for the plight of the vulnerable. In this regard a parallel

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158 cf *Stern* (1988) 165 CLR 489 at 526, 527-528.

159 *Union Eagle* [1997] AC 514 at 520.

160 *Stern* (1988) 165 CLR 489 at 527.

161 (1983) 152 CLR 406 at 449.

162 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 77 ALJR 926 at 945 [99]; 197 ALR 153 at 180; cf *Commercial Bank of Australia Ltd v Amadio* (1983) 151 CLR 447 at 461; *Halsbury's Laws of England*, 4th ed, vol 16 (1992 reissue) at [677].

development in the law of torts in recent years mimics the traditional concern of equity[163].

5. In deciding whether relief should be offered, it is proper to expect the moving party, seeking the exceptional intervention of equity, to establish by admissible evidence any fact said to be relevant to that intervention. Where, for example, it is claimed that a consideration relevant to the provision of relief against forfeiture is that, otherwise, the party relying on its legal rights will gain a windfall and the party seeking relief will lose significant expenditure that it has paid on the assumption of settlement, proof of such considerations should be tendered. They should not normally be left to inference, speculation or suggested common knowledge. Otherwise, for losses of such a kind, the party unable to prove them will be left to any remedies it may have, such as a claim for unjust enrichment[164] or (as sought here) a statutory claim for a return of the deposit.

6. In deciding whether relief against forfeiture (and associated remedies) should be granted in the particular case, due consideration should be given, in evaluating the exceptional character of the circumstances, to the disadvantages suffered by the contesting party which, earlier and during any ensuing litigation, is typically (as in this case) kept out of the exercise of its legal rights in its property. In some cases, the exceptional circumstances and the assessment of the requirements of good conscience will be seen to warrant the claim for relief and resulting uncertainties[165]. But the deprivation of rights and the delays and costs incurred reinforce the obligation to demonstrate that the circumstances are exceptional and that unconscionable conduct has been proved.

7. Where a primary judge has determined the issues presented by a claim for relief against forfeiture, an appellate court should exercise restraint in disturbing that assessment. It should not intervene merely because, on the facts, the appellate judges would themselves have reached a different conclusion. Error is required to justify appellate disturbance of such decisions. They are not discretionary, as such, inviting the appellate restraint appropriate to cases involving the exercise of discretion.

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163 cf *Perre v Apand Pty Ltd* (1999) 198 CLR 180 at 227-230 [123]-[129], 289 [296].

164 *Legione* (1983) 152 CLR 406 at 459.

165 *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516 at 573-574 [155]; cf Dunn, "Equity is Dead. Long Live Equity!", (1999) 62 *Modern Law Review* 140 at 144.

However, they are evaluative[166]. They involve judgment by reference to criteria stated in very broad language. The same appellate restraint applies to this Court in performing its functions of reviewing the conclusions of an appellate court made by reference to such considerations[167].

107 I turn to apply these principles to the present appeal.

Unconscionable conduct is not demonstrated

108 *Consideration of the parties' dealings*: To the extent that the evidence permitted, the primary judge and the Court of Appeal were correct to take into account the history of the dealings between the parties that led to the execution of the deeds of 5 June 2001. Sometimes, perhaps often, an express stipulation in a contract for the sale of land, to the effect that time is of the essence, will be included as a standard provision in a printed form. But the terms of the deeds of 5 June 2001 applicable in this case deny that character to the special conditions upon which the parties agreed. The opening clause of each deed acknowledged a withdrawal by the vendors of a notice of termination that they had given to the purchaser on 20 August 2000. The vendors were therefore surrendering any rights that they may have had under that notice to bring previous defaults in timely settlement to a head and to be returned to a position where they once again had unrestricted control over the disposition of their property. The language of the deeds is emphatic. It is clear and specific. The circumstance of the negotiation, and rejection, of the four week period for settlement sought by the purchaser adds evidentiary emphasis to the vendors' insistence on adherence to the "final arrangement" as it was described in cl 6 of the deeds.

109 The purchaser has a minor criticism of the reasons of Handley JA. It complained that it was inconsistent with the approach of considering the entire history of the dealings between the parties as he did, for his Honour to restrict the relevant accretion in the value of the property to the period between the deeds and the date of settlement or termination. I accept that criticism. It is fairly made. If substance and not form are to govern the assessment, it is necessary to examine the losses and gains over the entire period of the parties' dealings. However, the error is insubstantial, indeed trivial.

110 *Terms of the deeds and exceptional circumstances*: The language of the deeds, reinforced by the evidence as to their origin, sustains the conclusion that

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166 *Australian Competition and Consumer Commission v C G Berbatis Holdings Pty Ltd* (2003) 77 ALJR 926 at 942 [82]; 197 ALR 153 at 175.

167 *Liftronic Pty Ltd v Unver* (2001) 75 ALJR 867 at 877-880 [64]-[65]; 179 ALR 321 at 334-338.

this was a time stipulation that both sides consciously entered into to govern their future dealings. Having bound themselves to conform to such a clear stipulation, the vendors had the legal right, in the default that occurred, to exercise the powers conferred on them by cl 9 of the contracts to terminate the sale. That right the vendors exercised. The complaint that the one vendor who gave oral evidence did no more than to refer to the time default in explanation of the vendors' conduct is unavailing. He had no need to say more. Correctly, the purchaser accepted that the vendors had not caused, or contributed to, the default which was wholly its own.

111 To obtain relief from equity, it was therefore the obligation of the purchaser to show, relevantly, exceptional circumstances and that it would be unconscientious for the vendors to terminate the sale and to take advantage of the forfeiture. This was not a case where the breach was inadvertent. True, it was unintended. But knowing as it did the strict provisions of the deeds and the earlier refusal of the vendors to agree to a four week interval for settlement, it was extremely perilous for the purchaser to proceed on the footing that strict conformity as to time would be waived if the funds were not available for the settlement on the date "finally arranged". In some circumstances, it might conceivably be safe to draw down funds on a second mortgage at the last possible minute. But this was not such a case. At least it was open to the judges below to so conclude. No error is shown in the conclusions that they reached.

112 *Absence of special vulnerability*: Nor can it be said that the purchaser was specially disadvantaged, vulnerable or in need of the protection of equity from the vendors' misuse of a superior position. The purchaser is a development company with access to good legal advice. No doubt in relying upon Singapore-based funds it did so for good commercial reasons. A different source, locally, might have reduced the risks of delay or permitted alternative funds to be found in the event of delay. Although it is true that the international flow of investment funds is a feature of contemporary financial transactions, it is also true that foreign countries have exchange controls. At least in circumstances such as the present, prudence dictated arrangements to safeguard against any last-minute interruptions. None were made.

113 The transaction between the parties was a commercial one. It did not involve the sale of a single lot of land of relatively modest value (as was the case in *Legione* and *Stern*). Instead, it contemplated the sale of consolidated properties for more than $4.5 million with a view to a substantial investment development by the purchaser. The considerations that called for the intervention of equity in *Legione* and *Stern* were missing in this case as the judges of the Supreme Court correctly held. I remain of the view that I expressed in *Austotel Pty Ltd v Franklins Selfserve Pty Ltd*[168]:

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168 (1989) 16 NSWLR 582 at 585-586.

> "At least in circumstances such as the present, courts should be careful to conserve relief so that they do not, in commercial matters, substitute lawyerly conscience for the hard-headed decisions of business people: cf *State Rail Authority of New South Wales v Heath Outdoor Pty Ltd*[169] and *Geftakis v Maritime Services Board of New South Wales*[170]. If courts do not show caution here they will effectively force on commercial parties terms which the court [decides] … [T]he contract then enforced will not be that which the parties have concurred in but a different one, determined by the court."[171]

114 These observations were addressed to the *exercise* of equitable jurisdiction. They were not intended to deny or cast doubt upon the *existence* of that jurisdiction; nor could they in the state of Australian authority[172]. The same is true in the present case. In the absence of a direct challenge to the principles established in *Legione, Ciavarella* and *Stern,* it must be accepted that equity may intervene in this country notwithstanding an express stipulation as to time in the parties' agreement. That principle, and not the reaffirmation of *Steedman* by the Privy Council's judgment in *Union Eagle*, still rules in Australia.

115 *The utility of clear rules as to time*: However, in judging all of the circumstances of the case, and in eliciting the conclusion as to whether it exceptionally called for the intervention of equity on the ground of the existence of unconscionable conduct, it was proper to take into account the price that must typically be paid where equity's intervention is sought to prevent the application of the legal rights of the parties according to the terms of their agreement. As between vulnerable small property holders of the kind involved in *Legione* and *Stern*, the protection of one party from another taking unconscientious advantage of a default will sometimes be justified. In the case of a substantial commercial

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169 (1986) 7 NSWLR 170 at 177.

170 (1988) NSW Conv R ¶55-378 at 57,476.

171 cf *Whitlock v Brew* (1968) 118 CLR 445 at 457.

172 Mason, "The Place of Equity and Equitable Remedies in the Contemporary Common Law World", (1994) 110 *Law Quarterly Review* 238; Priestley, "Influences on Judicial Law-Making", in Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 99; Reynolds, "Maritime and other influences on the common law", (2002) *Lloyd's Maritime and Commercial Law Quarterly* 182 at 195 cited by Gummow, "Equity: too successful?", (2003) 77 *Australian Law Journal* 30 at 34; Zines, "Judicial Activism and the Rule of Law in Australia", in Campbell and Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (2000) 391 at 392.

transaction, as in the present appeal, it can only be said that such a proceeding, as with the apartment purchased by a corporation in Hong Kong at stake in *Union Eagle*, ties up valuable property rights in a way that should not happen without a clear and substantial ("exceptional") case. To the extent that the purchaser relied in its case on costs to itself and windfall gains to the vendors, remarkably it failed to prove these items properly at trial. It could therefore expect only the limited allowance for them that was acknowledged by the judges below.

116 The challenges to the judgment of the Court of Appeal in the terms in which it was explained therefore fail. No error was demonstrated in the approach of that Court to the arguments based on unconscionable conduct. Particularly when it is remembered that equity would only intervene to protect the purchaser from unconscionable conduct on the part of the vendors in rescinding the contracts for sale, the decisions of the primary judge and of the Court of Appeal were correct. To that extent, the appeal should be rejected.

Accident is not established

117 *Meaning of accident in this context*: In numerous passages in the reasons of judges of this Court, it is acknowledged that equity will intervene to protect a party to a contract for the sale of land from forfeiture where it is shown that, by reason of "fraud, mistake, *accident*, surprise or some other element"[173], it would be "unconscionable or inequitable to insist on forfeiture of the purchaser's interest under the contract because he has not performed in strict accordance with its terms [and] there is no injustice to the innocent party in granting relief against forfeiture by means of specific performance with or without compensation"[174].

118 It is to be noted that "accident" in this context, as one of the stated grounds for equity's intervention, is not expressed as a free-standing foundation for a new and so far unelaborated development of equitable principle. Instead, as hypothesised, it remains for the party relying on the relevant "accident" to render it applicable, as a source of equitable relief, by showing that, although the accident was not occasioned by the "innocent party", it is sufficient of itself to render it unconscionable or inequitable for that party to insist upon its legal rights.

119 This formulation makes it clear that, in the end, the provision of equitable relief comes back to a consideration of whether, in the light of an accident caused by a stranger, it is unconscionable or inequitable for the innocent party to the contract to proceed as otherwise in law it is entitled to do. Self-evidently, where

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173 eg *Legione* (1983) 152 CLR 406 at 447 (emphasis added).

174 *Legione* (1983) 152 CLR 406 at 447.

the vendor in a contract of sale with a strict time stipulation is entitled under the contract to enforce its legal rights, it takes an exceptional "accident" to burden the innocent vendor with obligations of conscience derived from an event over which it had no control and for which it was not responsible.

120 Various hypotheses were mentioned in the authorities cited by the purchaser in support of this ground for relief. They include the case of a party robbed on the way to discharging an obligation to pay money at a specified day and place[175]; cases involving the prevention of payment caused by a flood or by the intervention of the Plague; accident caused by the effect of the weather[176]; or a lessee delayed in the payment of rent because called away to active service during the English Civil War[177]. Instances more apt for today were also suggested, including an unforeseen "crash" in the computer network at the Land Titles Office[178] or delay to a courier in a traffic accident or through heart attack of the purchaser's agent whilst on the way to deliver a payment that would otherwise have arrived on time.

121 *Requirement of a burden upon conscience*: There are defects in the arguments and authorities relied upon by the purchaser under this heading. As the vendors pointed out, all of the cases nominated are, in law or substance, mortgage or lease cases in which the applicants for relief have explained the circumstances that led them to being in default and have negatived wilful default. At least in such cases, it is unnecessary, in order to obtain relief against forfeiture, to prove the concurrent existence of unconscionable conduct. The nature of the property interest is itself sufficient to attract the relief of equity. As was explained in *Stern*[179], in such cases "no proof of fraud, mistake, accident or surprise is required to establish the equity because the very nature of the transaction is such that the court, acting upon conscience, will grant relief".

122 However, that leaves the question whether, acting by analogy, equity would intervene for "accident" in a case of time default by a purchaser in a contract for the sale of land where time had been made of the essence. I am prepared to assume that it might. But it is still necessary, in such a case, to establish that the accident is such as to render it unconscionable or inequitable for the vendor to rely on its legal rights. In the present instance, for the reasons

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175 *Anonymous* Cary 1 [21 ER 1].

176 *Hill v Barclay* (1811) 18 Ves Jun 56 at 62 [34 ER 238 at 240].

177 *Cocker v Bevis* (1665) 2 Freeman 129 [22 ER 1105].

178 cf the facts in *Re Ronim Pty Ltd* [1999] 2 Qd R 172.

179 (1988) 165 CLR 489 at 527; cf *Legione* (1983) 152 CLR 406 at 445.

already sufficiently explained, there is no such burden on the vendors' conscience. Given the nature of the transaction and of the parties, the background of the earlier defaults, the language of the strict stipulation as to time and its obvious purpose, the arrangement of the purchaser, providing for the second mortgage funds from overseas to be made available at the last minute, was one that carried inherent risks of delay resulting in breach of the essential stipulation. When those risks eventuated, they did not constitute an accident.

123 *Conclusion: no accident*: The failure to settle on the stipulated day and time was unintended and undesired. But it was not an accident in the sense of an "unforeseen event which occasioned loss where neither the event nor the loss was attributable to any misconduct, negligence or culpable inadvertence on the part of the person concerned"[180]. It follows that the separate claim for equitable relief on the ground of accident also fails. There was no separate basis to warrant disturbance of the primary judge's decision refusing an order for the return of the deposits paid as an assurance for compliance with the legal obligations accepted by the deeds.

Orders

124 The appeal should be dismissed with costs.

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180 *Snell's Equity*, 30th ed (2000) at 603.

125 CALLINAN J. This case raises the same questions as *Romanos v Pentagold Investments Pty Ltd*[181] which was argued with it: in what circumstances and according to which principles may a defaulting purchaser under a contract of sale of land which makes time of the essence, obtain relief against forfeiture and a decree of specific performance?

The facts

126 The appellant entered into separate contracts with each of the respondents for the purchase of three adjoining lots of land dated 19 October 1999 for completion on 28 February 2000. It was a term of two of them that a parcel of land would be excised from the lot the subject of it for retention by the vendor. The appellant would also be obliged to arrange, but at a cost to the respondents concerned, services to the excised parcels. The total purchase price was $4,502,526.90. The date for completion of each contract was extended until a date in August 2000 by a deed dated 5 November 1999. Settlement did not take place on this date, and the respondents terminated the contracts by giving notices of termination of each of them on 20 August 2000.

127 Notwithstanding the termination, the parties continued to negotiate, and, on 5 June 2001, separate but similar deeds again extending the date of completion, this time until 4pm Monday 25 June 2001, were executed. The deeds stated time to be of the essence and the consequences of a failure by the appellant to complete in emphatic language which I will set out later. The deeds also provided that the appellant should pay various additional amounts to the respondents, including on settlement, of $110,000.

128 In the meantime, the three properties were consolidated into one title to enable the appellant to obtain, at some cost, development approvals which were granted on 18 February 2000.

129 The appellant paid to the respondents a total of $225,126.32 on 19 October 1999, and a further $225,126.32 on 30 May 2000 by way of deposits. The appellant also made part payment of the prices between 30 June 2000 and 20 July 2000, and an additional payment of $80,000 on 20 July 2000 in consideration of an extension of time. Although no offer was earlier made to repay any of the money received by the respondents, it was conceded before the primary judge that the appellant was entitled to be relieved against forfeiture of the sum of $397,473.40 paid by way of part payment of the purchase price.

130 The parties arranged to settle at the Office of State Revenue on the last day available to them under the deeds, Monday 25 June 2001. The finance upon

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181 [2003] HCA 58.

which the appellant depended included money to be secured on second mortgage. The appellant was unable to settle at the appointed time because of a delay in the transfer of funds on behalf of the proposed second mortgagees from Singapore. The parties were informed of this on 25 June 2001. The stated reason for it was the occurrence of an international money laundering scandal in Singapore. In consequence, the government of that nation was conducting additional, and therefore apparently delaying checks on some international transfers of money. The solicitor for the second mortgagees also informed the parties that the funds should be available the next day, and that he had only become aware of the problem earlier that day.

131 The money did in fact come to hand from Singapore on 26 June 2001. The appellant's solicitor immediately told the solicitor for the respondents that the funds were available and that settlement could proceed. On the afternoon of the same day, the solicitor, on instructions from the respondents, and after their solicitor became aware that funds were available, served notices of termination upon the appellant. The respondents had however given instructions to terminate before they personally knew that the funds were available. When this came to their notice they nevertheless confirmed their instructions. It was accepted that a tender of the full balance of the price was made and rejected on 26 June 2001.

At first instance

132 The appellant applied to the Supreme Court of New South Wales for declarations that the contracts remained on foot and had not been validly terminated, and that they be specifically performed. The applications which came on for hearing before Windeyer J were dismissed[182]. It was his Honour's opinion that the unqualified terms of the contracts and deeds, and the failure of the appellant to complete on time, made the respondents' position almost unassailable: it was not unconscionable for them to exercise their clear contractual rights of termination and forfeiture. His Honour's opinion was unaffected by the possibility of any increase in the value of the lots (a matter which he was apparently prepared to assume) and that the appellant may have incurred costs in securing the development approvals, as to which there was no evidence. Had there been such evidence, he would, his Honour said, have needed to balance it against the passage of time between execution of the contracts and termination, and the aggregation of the parcels in one title, which, if there were to be a resale in separate titles, would require subdivision. His Honour also upheld the respondents' forfeiture of the deposits, because it had not been shown that the respondents had enjoyed a windfall as a result of the termination.

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182 (2002) NSW Conv R ¶55-994.

The Court of Appeal

133 The appellant unsuccessfully appealed to the Court of Appeal of New South Wales[183]. Handley JA, with whom Beazley JA and Mathews AJA agreed, after reciting the facts and rejecting some currently non-relevant arguments of the appellant's, said that the conduct of the parties had to be evaluated in the light of the complete history of the transaction and the whole of the circumstances[184]. His Honour went on to say[185]:

> "The purchaser's breach on 25 June, evaluated in this light, cannot be characterised as trivial. On 5 June the parties, by deed, fixed 25 June as the date for completion, with time to be of the essence. The date for completion was not fixed unilaterally by a notice to complete, but consensually. The date was fixed and agreed in circumstances where some 10 months earlier the purchaser had failed to complete in breach of contract and the vendors had purported to rescind. The validity of that rescission was disputed and the Court knows nothing of the merits. That dispute was compromised by the deeds of 5 June to give the purchaser a last chance ('final arrangement') to complete on a time of the essence basis. The purchaser failed to do so on the day, and in that respect its failure was complete. There was a substantial shortfall in the funds required for completion. The breach was not inadvertent because the purchaser did not have all its funding in place on 5 June when it agreed to settle on 25 June on a time of the essence basis and it took a risk."

134 His Honour distinguished *Legione v Hateley*[186] and *Stern v McArthur*[187] on their facts. It was appropriate for his Honour to look at the facts of those cases not only because they disclosed no want of good faith on the part of the purchasers, that hardship would descend on them, and a likely windfall to the vendors would eventuate, if the purchasers were to fail, but also because those facts were influential in shaping the principles which were to emerge from them. In *Ciavarella v Balmer*[188] also this Court looked closely at the facts there to distinguish them from those of *Legione*. In *Legione*, the purchasers had entered

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183 (2003) NSW Conv R ¶56-048.

184 (2003) NSW Conv R ¶56-048 at 58,661 [22].

185 (2003) NSW Conv R ¶56-048 at 58,661 [23].

186 (1983) 152 CLR 406.

187 (1988) 165 CLR 489.

188 (1983) 153 CLR 438 at 453-454.

into possession and built a house on the land, which, in its improved state, were it to revert to the vendor, would confer an undeserved windfall[189]. *Stern*, although again involving an entry into possession and construction of a house on the land by the purchasers, had its own peculiar features. Both cases however, Handley JA said, lacked a clear ratio binding on the Court of Appeal. His Honour accepted nonetheless that relief against forfeiture could be granted in Australia in circumstances in which it might be refused in England[190]. He thought most assistance was to be derived from the joint judgment of Gibbs CJ, Mason, Wilson, Deane and Dawson JJ in *Ciavarella*. His Honour said[191]:

> "The joint judgment of Gibbs CJ, Mason, Wilson, Deane and Dawson JJ in *Ciavarella v Balmer*[192] provides the clearest guidance for lower courts in factual situations removed from those in *Legione* and *Stern*. The Court referred to the absence of precipitate conduct on the part of the vendor[193], the need to prove unconscionable conduct[194], and the need to show exceptional circumstances before relief against forfeiture can be granted after an otherwise valid rescission[195].
>
> These vendors cannot be accused of precipitate conduct, and in my judgment exceptional circumstances have not been shown. The unearned increase in the value of the land is not an exceptional circumstance. As far as land in and around Sydney is concerned it is the normal result of a deferred settlement. The actual increase in value due to the development consents is not known and, for the reasons given, uncertain. The circumstances which were held to be exceptional in *Legione* and *Stern* are not present here."

The appeal to this Court

135 Before I come to the appellant's submissions, I should state the principles which in my opinion govern this case.

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189 (2003) NSW Conv R ¶56-048 at 58,661-58,662 [24]-[26].

190 (2003) NSW Conv R ¶56-048 at 58,663 [32].

191 (2003) NSW Conv R ¶56-048 at 58,663 [35]-[36].

192 (1983) 153 CLR 438.

193 (1983) 153 CLR 438 at 453.

194 (1983) 153 CLR 438 at 452-453.

195 (1983) 153 CLR 438 at 454.

136 I do not understand it to be the position in this country that non-compliance with a term making time of the essence by a party to a contract for the sale of land is to be equated with, and to be treated with the same tolerance in equity as a like non-compliance by a lessee or mortgagor. Tolerance towards lessees and mortgagors historically owes its existence in part at least to the assumption, and in past times, probably generally correct assumption, that a lessor or mortgagee was in an especially powerful and superior position to a lessee or mortgagor, and was therefore more able, and likely, to act unconscionably in exploiting that position. Whether in modern times in which corporations may find it more efficient and less expensive to utilize borrowed funds than to seek further invested funds from shareholders, and banks, national retailers and others may prefer for their own reasons to be tenants instead of owner-occupiers, that assumption is universally valid, is not a matter that requires exploration here. It is right to point out however that no such assumption could safely be made in respect of vendors and purchasers of land today.

137 Nor do I think that the outcome of a case of this kind depends upon an exact characterization of the parties' rights or interests under the contract: that is, for example, whether the vendor's retention of the title should be regarded as a mere security for the balance of the price; or, whether the purchaser's interest, certainly when the contract is, or has become unconditional, amounts to an equity in the land[196].

138 It does not follow that if a vendor receives the price and compensation to cover the cost of the purchaser's breach, the latter is automatically entitled to specific performance and the court should make a decree accordingly. If that were the law, terms imposing time limits would become, if not meaningless, of little or no utility, and purchasers would come to enjoy an undeserved advantage over vendors. It would also lead to legal and commercial uncertainty. It is not for the courts to impose upon the parties after one of them has defaulted, a different contract from the one for which they bargained and which they concluded. A grant of relief to a purchaser does not depend upon whether a court might think an aspect of the contract was unfair or unreasonable, or that circumstances have changed to the disadvantage of a purchaser.

139 The law which I would distil from the cases is that a court may relieve a defaulting purchaser against forfeiture even in cases in which time is of the essence. When however time is of the essence, there are six conditions for a grant of relief: the purchaser must be able to explain the default; the purchaser

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196 See *KLDE Pty Ltd v Commissioner of Stamp Duties (Q)* (1984) 155 CLR 288 at 296-297 per Gibbs CJ, Mason, Wilson and Dawson JJ, 300 per Brennan J.

must show that it occurred as a result of an event for which he is not responsible, or by accident; the purchaser must produce evidence of real hardship if relief were not to be granted; and the purchaser must be prepared and able to compensate the vendor for any loss that may have been caused. The fifth is that there must be something in or about the vendor's conduct which goes beyond reliance on contractual rights and involves an element of oppression or imposition, such that it can be described as unconscionable. And the sixth condition, as five Justices of this Court held in *Ciavarella*[197], is that the purchaser must show that the circumstances are exceptional.

140 Two of the cases in which relief has been granted in this Court were ones clearly of hardship to the purchaser. In each of *Legione* and *Stern* the purchasers had been allowed to take possession of the land and had built a house on it. It is easy to see how a defaulting purchaser could suffer undue hardship, and a vendor entering into possession, could enjoy a windfall in such a situation. Even so, the Justices who decided in favour of the purchasers in those cases were not unanimous in their reasons for their decisions. In *Ciavarella*, the other of the cases in which relief was sought by the purchaser, the facts were quite different and the purchaser failed[198].

141 The appellant submitted in this Court that the Court of Appeal erred by taking into account the whole history of the transaction, and drawing, in at least one respect, an erroneous conclusion about it, that the appellant was responsible for the delay that had occurred before the execution of the deeds. Furthermore, the appellant submitted, it had, in effect paid in part at least for the delays: by paying $80,000 on 20 July 2000; and agreeing to pay a further sum of $110,000 on settlement. Properly viewed, as the courts below should have, the appellant's failure to settle was, in the circumstances, slight and trivial. It is convenient to dispose of this submission immediately because of the absence of a good factual foundation for it. By the time of the payment of $80,000 and the promise to pay more on settlement, the respondents had already been out of their money for some time and were to be out of it for a further period. There is no reason to believe that the payment, and the promise to pay more, were other than for the restoration, to the extent that this could be achieved, of the respondents' initial position. The deeds were especially emphatic as to the essentiality of time. Clause 6 provided:

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197 (1983) 153 CLR 438 at 454 per Gibbs CJ, Mason, Wilson, Deane and Dawson JJ; see also *Legione v Hateley* (1983) 152 CLR 406 at 429 per Gibbs CJ and Murphy J and *Stern v McArthur* (1988) 165 CLR 489 at 502-503 per Mason CJ.

198 (1983) 153 CLR 438 at 453-454.

"6. The Purchaser acknowledges that the contents of this Deed are a final arrangement to complete the sale of the Property. If the Purchaser does not complete the sale in accordance with the provisions of this Deed the Purchaser will:

(a) forfeit all moneys paid pursuant to the Contract for Sale and acknowledges the Vendor's rights under clause 9 of the Contract for Sale;

(b) withdraw any caveat against the property;

(c) not commence any Court proceedings to dispute the Vendor's termination of the Contract for Sale."

142 A failure to observe an avowedly essential, express term of the contracts (the deeds) in circumstances in which there had been admitted cost to the respondents, and for which compensation in part already had had to be provided, cannot be accurately described as slight or trivial.

143 The appellant contended that its breach was inadvertent or accidental. Factually, the submission is not made out. The appellant knew of the relevant matters: that the money would be required as a matter of essentiality on the due date. The provision of that money was its responsibility. If "accident" there was, it was of choosing as one of its lenders a financier who needed to import funds from overseas at the eleventh hour to enable it to fulfil its contractual obligations with all such risks of non-arrival as that might involve. This is not an accident which can avail the appellant in seeking equitable relief.

144 The appellant submitted that the respondents suffered either no, or minimal losses only by reason of the appellant's failure to complete on time. Indeed, it is put, the respondents probably gained from an enhancement in value of the land, a matter which is open to doubt, and which may have occurred in any event well before the date of settlement. But against that, if it were so, had to be set, the appellant argued, the costs and losses to the appellant incurred in seeking development approval, the money paid by way of deposit, and the loss of its bargain. The submission is one that goes to the relativity of prejudice, or, hardship suffered on each side. Again I would reject it on the facts. A way, and I think, not an unfair one, of viewing the facts is that, for a sum of money, the deposits, the appellant has had very considerable benefits: the right to seek development approval over the land, to resell it, albeit conditionally, and to prevent its sale to anyone else for a long time, 20 months between the execution of the first contracts on 19 October 1999 and 25 June 2001, the date of settlement. There is no reason why this Court should decide, in weighing the losses and gains on each side, that the nett result is of hardship in any, let alone a substantial degree, to the appellant. Nor is there any reason why the Court, especially in the absence of evidence, not only of changes in values of the land at the material times, but also the reasons for those changes, should not equate what

the appellant has had, with an option over the land for the period that elapsed. There is no reason at all to infer that what the appellant has had was not at least as valuable as an option, or that the nett result of what occurred constituted a windfall to the respondents. I have not taken into account, because it was not a matter that was explored before the primary judge, the possibility that the appellant may have had a remedy against the second mortgagees, but it may be that such a possibility would be relevant in an appropriate case.

145 I would similarly disregard the possibility that increases in value of the land, if any, might in part at least be more apparent than real because of inflation, another matter not explored at first instance. Even if the land had increased in real value during the elapsed time, it would not be right for the benefit of the increase to be described as unmerited. The possibility of an increase, as well as of a decrease in value of land subject to contract not to be performed in a short time, is always open. The parties must have been aware of this, and, with it in mind freely to have agreed to enter into contracts (the deeds), a term of which was that time should be of the essence.

146 The appellant criticized the proposition that relief should only be granted in exceptional circumstances. This was why, except to the extent that the alleged hardship, accident or windfall, or a combination of these might be characterized as an exceptional matter, the appellant did not submit that there was anything exceptional about what occurred here. Nor could it have. This was simply a case in which a financier failed to provide the funds it was expected to provide, and the appellant was bound to have available by a certain time. The true, indeed the only test, the appellant submitted, was not whether the circumstances were exceptional, but rather whether the vendors acted unconscionably. I would reject that submission. The authorities to which I have referred require exceptional circumstances. The facts of the particular case are important. This Court is obliged to look at the totality of them as Handley JA did. And it is only on the basis of the exceptional nature of the case so viewed that relief may be granted.

147 This was not an exceptional case in any relevant respect. It may not be the terminus, but an important starting point for a consideration of its exceptional nature or otherwise, is that time was agreed as being of the essence. A second point is that the appellant had already effectively been given time. The third is, as the appellant conceded, that the respondents in no way contributed to the appellant's default. The fourth is that neither hardship nor a windfall on either side has been established. The fifth is that there was no relevant accident or inadvertence. A breach of an essential term can rarely be, and is not here, characterizable as trivial. The respondents did not act in any oppressive or imposing way towards the appellant. This was a case in which the conditions for a grant of relief were absent.

148 I would dismiss the appeal with costs.