

THE ESSENCE OF PUNCTUALITY: TERMINATION OF CONTRACTS FOR THE SALE OF LAND FOR LATE PERFORMANCE AND RELIEF IN EQUITY

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As regards the construction put by Mr Watson upon the words 'punctually paid', I confess to your Lordships that I have a difficulty in understanding what the point is. He pled, and pled briefly but strenuously, in favour of a principle of elasticity – elasticity, that is to say, in the construction of a contract which provides for punctuality.

My Lords, my mind cannot comprehend the elasticity of punctuality. I know of no method of construction of a contract by way of contradiction of it.¹

I INTRODUCTION

Parties to a contract for the sale of land have appointed a date and time for settlement and time is of the essence. The time may have been made essential by agreement or by notice to complete. One of the parties is late for the settlement. Perhaps 5 minutes late, 10 minutes late, 20 minutes late or longer. There may be no excuse for the lateness. On the other hand, there may have been traffic congestion or transport problems preventing punctual attendance at the settlement, computer problems at the Land Titles Office precluding the making of a final search or any number of reasons for the lateness. The 'innocent' party terminates the contract for breach of an essential obligation by the other. Is the termination valid at law? If so, is there any jurisdiction in equity to undo the termination? The answer to what may appear, at first blush, elementary questions raises a number of interesting legal issues which have been recently canvassed before some State superior courts in Australia and before the Privy Council. Whatever the answer is, in the final analysis, the resolution of the issues may be influenced by whether the contract is one for the sale of residential property or commercial property.

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¹ *Maclaine v Gatty* [1921] 1 AC 376, 393 (Lord Shaw).

II THE RECENT AUTHORITIES

The facts of the recent authorities all bear close resemblance and lie within a narrow compass. The first was the decision of the Judicial Committee of the Privy Council on appeal from Hong Kong in *Union Eagle Ltd v Golden Achievement Ltd* ('*Union Eagle*').² In accordance with a provision in a contract for the sale of land, completion was to take place on or before 5pm on a specified date and time was expressed to be of the essence. The purchaser tendered performance 10 minutes after 5pm. The vendor refused the tender and rescinded. The purchaser submitted that time for the settlement had not been made effectively of the essence and that, in any case, the purchaser was deserving of equitable relief in the nature of relief against forfeiture of the contract. The purchaser's submissions were rejected by the Judicial Committee. The Board held that a specified time as well as a date for settlement could be made of the essence and had in fact been made of the essence in the instant case. The Board went on to conclude that the contract, being an ordinary one for the sale of land, was not susceptible to equitable relief:

Their Lordships think that [the case] ... 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.³

The Australian authorities of *Legione v Hateley* ('*Legione*')⁴ and *Stern v McArthur* ('*Stern*')⁵ were discussed, but the Board put off, for some future occasion, a consideration of English law, whether by adoption of the Australian approach or by development of restitution and estoppel, to take account of the peculiar problems arising in those cases.

In *Smilie Pty Ltd v Bruce* ('*Smilie*'),⁶ the second relevant decision, the vendor served upon the purchaser a notice to complete which expired at 3pm. Settlement had been arranged for 2pm at the Law Society settlement rooms and the vendor's solicitor and the representative of the incoming mortgagee were both in attendance at the appointed time. (The mortgagee left at about 2:45pm to attend to other business.) When, at about 2:55pm, the purchaser's representative arrived at the settlement rooms, far from being willing and able to complete, this person delivered a letter to the vendor's solicitor complaining about various matters pertaining to the vendor's obligation to deliver vacant possession. In the event, Bryson J in the New South Wales Supreme Court held that the vendor was not in breach of this obligation, but that the letter was consistent with an intimation by the purchaser not to complete at 3pm. At about 5 minutes after 3pm, the vendor's solicitor left the settlement rooms after telling the purchaser's representative that he would not settle. The mortgagee returned at about 3:20pm but by then, all the other parties had left. Although the purchaser later expressed a desire to complete, Bryson J held that there was no evidence in substance that the

2 [1997] AC 514; [1997] 2 All ER 215.

3 Ibid 523; 222 (Lord Hoffmann).

4 (1983) 152 CLR 406.

5 (1988) 165 CLR 489.

6 (1998) 8 BPR 15893 (Bryson J); aff'd (1998) 9 BPR 16723 (Court of Appeal).

purchaser was able to complete at 3pm and that the vendor's termination was therefore valid. The judgment of Bryson J was challenged in the New South Wales Court of Appeal, but the appeal was dismissed.⁷

The third case, *Imperial Brothers Pty Ltd v Ronim Pty Ltd* ('*Imperial Brothers*'),⁸ is a decision of the Queensland Court of Appeal. The contract in the case specified a date for completion and the time for completion was stipulated as being between the hours of 9am and 5pm. Time was agreed to be of the essence. The parties agreed on a 3:30pm settlement at premises on the Gold Coast. Earlier on the day specified for completion, the purchaser had been unable to obtain a final title search due to a departmental computer malfunction at the Land Titles Office. The purchaser's solicitor advised that the settlement would be postponed to 5pm and the solicitor's clerk left Brisbane for the settlement at about 3pm. Her journey was delayed by severe thunderstorms and resultant traffic disruption but she did confirm with the vendor's solicitor that the settlement would proceed, after apprising him of the circumstances occasioning delay, at between 5pm and 5:15pm. She duly arrived a few minutes after 5pm, ready, willing and able to complete, but the vendor's solicitor refused to proceed and rescinded the contract in writing the following day. On these facts, the Queensland Court of Appeal held that the purchaser had breached an essential obligation by arriving a few minutes late for the settlement. However, the Court also held that the contract contained an implied term⁹ to the effect that the obligation to settle was suspended pending receipt of the final search. In other words, the purchaser's obligation to complete was conditional upon the rectification of the computer malfunction at the Land Titles Office. This conclusion made it unnecessary for the Court to consider equitable relief against forfeiture of the contract.

III THE VALIDITY OF THE TERMINATION AT LAW

Time for completion of a contract for the sale of land may be made of the essence by agreement or by service of a valid notice to complete.¹⁰ There is now little doubt that a time for settlement as well as the date for settlement may be made of the essence. Submissions by counsel in recent cases to the effect that

7 (1998) 9 BPR 16723.

8 [1999] 2 Qd R 172.

9 In accordance with the principle applied in *Codelfa Construction Pty Ltd v State Rail Authority of New South Wales* (1982) 149 CLR 337.

10 If the parties have stipulated a time for settlement which has not been expressed to be of the essence, the subject matter of the sale may indicate that the parties intended that time was to be treated as of the essence. The sale of livestock or the sale of some businesses as a going concern, such as a hotel, provide common illustrations: *Harrington v Browne* (1917) 23 CLR 297; *Tadcaster Tower Brewery Co v Wilson* [1897] 1 Ch 705; *Aldridge v Miller* [1931] 31 SR (NSW) 520.

only the day of settlement may be made of the essence, and that the parties have until the end of the business day so appointed to complete, have been rejected.¹¹

What is the precise legal effect of making time for performance of a contractual obligation of the essence? Seen in the light of late performance being measured in minutes rather than hours, this is not an entirely academic question.

In *Smilie*, Bryson J discussed the legal nature of 'essentiality' in contractual performance and noted that an essential term may require either strict or substantial performance notwithstanding its label as 'essential'. His Honour referred to Chief Justice Jordan's well known words on this question in *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* ('*Tramways*').¹² In *Tramways*, Jordan CJ identified two limbs of essentiality, the first limb postulating strict performance of the promise and the second requiring only substantial performance.¹³ Thus, the vendor's obligation as to title was once construed in the sense of a condition strictly so called.¹⁴ In other words, the vendor was required to perform the promise as to title strictly, in accordance with the first sense of essentiality identified by Jordan CJ in *Tramways*.¹⁵ It followed that any defect in the vendor's title, however trivial but not otherwise disclosed in the contract for sale, entitled the purchaser to terminate. In Australia, the common law now favours treatment of the vendor's obligation as to title in the second sense referred to by Jordan CJ.¹⁶ Thus, in *Lohar Corp Pty Ltd v Dibu Pty Ltd* ('*Lohar*'),¹⁷ the vendor's attendance at settlement without lease documents and bond money amounted to substantial tender of performance of the essential obligation to complete, an essential obligation which was held to require only substantial, not strict performance.

11 *Union Eagle* [1997] AC 514; [1997] 2 All ER 215; *Smilie* (1998) 8 BPR 15893, 15898 (Bryson J); aff'd (1998) 9 BPR 16723 (Court of Appeal). It is submitted that the reasoning of the Queensland Court of Appeal in *Imperial Brothers* [1999] 2 Qd R 172 is consistent with these authorities on this point.

12 (1938) 38 SR (NSW) 632, 642.

13 The test of essentiality in the second sense described by Jordan CJ is similar if not identical in import to Diplock LJ's later critique in *Hong Kong Fir Shipping Co Ltd v Kawasaki Kisen Kaisha Ltd* [1962] 2 QB 26 – terms which have been classified by the parties as neither conditions in the strict sense nor warranties but described in language, now generally accepted, as intermediate or innominate, will operate, in effect, as conditions or warranties depending upon the gravity and consequences of breach. Carter and Harland argue that terms falling into Chief Justice Jordan's second category of essential terms should now be described as intermediate or innominate terms: J W Carter and D J Harland, *Contract Law in Australia* (3rd ed, 1996) 649. In *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423, 436, Murphy J preferred the gravity of breach approach, opining that Chief Justice Jordan's 'test' is so vague that I would not describe it as a test. It diverts attention from the real question which is whether the non-performance means substantial failure to perform the contractual obligations. The inquiry into the motivation for entry into the contract is not the real point.

14 *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423.

15 Against the background of the nature of this obligation, the evolution and application of the equitable doctrine of compensation may be appreciated. In the case of minor errors in the vendor's title, the vendor was permitted to seek specific performance of the contract against the purchaser, provided that the vendor was prepared to give compensation.

16 *Lohar Corp Pty Ltd v Dibu Pty Ltd* (1976) 1 BPR 9177, 9186; *Liverpool v Lynton* [1978] Qd R 279; *Borthwick v Walsh* (1980) 1 BPR 9259; *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423.

17 (1976) 1 BPR 9177.

Granted that some essential contractual obligations require strict performance while others require only substantial performance, the relationship between the substantive obligation and the time for performance of the obligation is a difficult one and not easily understood. In *Smilie*, Bryson J was of the view that it was possible to construe essential time stipulations in the second sense of essentiality understood by Jordan CJ in *Tramways*, that is to say, as requiring only substantial and not strict performance. His Honour drew support for this view from the judgment of the Court of Appeal in *Lohar*. However, it may be respectfully suggested that the decision in *Lohar* only went so far as to find that the mechanical aspects of the obligation to complete or settle a contract for sale of land (for example, the obligation to hand over a stamped copy of any lease on title or to provide vacant possession) required substantial but not strict performance. The decision is not necessarily compatible with the notion that the time appointed for settlement requires only substantial and not strict compliance.

Writing extra-judicially, Young J of the Supreme Court of New South Wales was clearly of the view that Justice Bryson's analysis of essential time stipulations in contracts for the sale of land was correct,¹⁸ and at least one academic commentator has agreed with Bryson J.¹⁹

A countervailing view is that whether a time stipulation has been made essential or not, the time stipulation is susceptible to treatment in only one way, and that is strictly. As Lord Wilberforce put it in *Bunge Corporation New York v Tradax Export SA Panama*,²⁰ in the case of a time provision, there is only one kind of breach and that is to be late. This view accords with equity's traditional regard of time stipulations. It is now beyond controversy that the common law and equity never differed in their approach to the construction of time stipulations. In equity, time stipulations were and are construed in the same way as at law. Equity did not comprehend an extended period of reasonableness.²¹ Where the common law and equity did differ in respect of their approach to time stipulations was in their treatment of the consequences of breach.²² As Mason J put it in *Louinder v Leis*:

The true position is that equity and common law differed not so much in the construction of the contract as in the consequences which they assigned to a breach of it. ... Equity departed from the common law in insisting that a breach of a stipulation as to time only entitled the innocent party to rescind where time was of the essence of the contract. It was otherwise at common law. ... Thus the time stipulation is not read as if it called for performance by the stipulated date or 'within a reasonable time' or 'within a reasonable time thereafter'.²³

18 P W Young, 'Conveyancers that still use coffee spoons' (1997) 71 *Australian Law Journal* 580.

19 Peter Butt, 'Strict Compliance with Time for Completion' (1997) 71 *Australian Law Journal* 410.

20 [1981] 1 WLR 711; [1981] 2 All ER 513.

21 *Louinder v Leis* (1982) 149 CLR 509; *Raineri v Miles* [1981] AC 1050; *G R Mailman & Associates Pty Ltd v Wormald (Aust) Pty Ltd* (1991) 24 NSWLR 80, 97 (Samuels JA), 98-100 (Meagher JA); *Tilley v Thomas* (1867) 3 LR Ch App 61; *Stickney v Keeble* [1915] AC 386; K E Lindgren, *Time in the Performance of Contracts: Especially for the Sale of Land* (2nd ed, 1982) 14, 16-17.

22 *G R Mailman & Associates Pty Ltd v Wormald (Aust) Pty Ltd* (1991) 24 NSWLR 80, 97 (Samuels JA), 98 (Meagher JA).

23 (1982) 149 CLR 509, 524-5.

This view of the construction of time stipulations goes some way towards explaining why courts traditionally (and almost inevitably) construe the substantive obligation separately from the time for performance of the obligation. The substantive obligation, if essential, may require strict or substantial performance, but the time for performance of the obligation is strictly construed.²⁴

None of this is to suggest that there may not be some small 'elasticity' in the notion of punctuality and this is for two reasons. First, there must exist some leeway beyond the appointed time as a result of the *de minimis* rule, to allow, for example, for the lack of synchronism of timepieces. Secondly, there may be room for an argument that when the parties appoint a specified time for completion and time is made of the essence, the parties themselves intend to make the time so appointed a time that includes an additional 5 or 10 minutes. Any such implication would have to take account of the circumstances of the case but, in the ordinary case of the sale of residential property, such an implication may well be made in the light of conveyancing custom, professional courtesy and the recognition of the operation of external factors such as traffic delays and difficulties in leaving an earlier settlement. The making of time of the essence, on this view, does not necessarily negate such an implication. However, the 'elasticity' referred to here is a product of the agreement of the parties and is not derived from any legal notion of substantial as opposed to strict compliance with the time stipulation. It is less likely that, in commercial transactions, there would be room for any such implication, given the probability of tighter time schedules.²⁵

In summary, the decision of the Privy Council in *Union Eagle* is correct in so far as the construction of the time stipulation is concerned, and so far as the Board found that the contract had been validly discharged at law for breach of an essential term. There is nothing in the reasons for judgment of the Queensland Court of Appeal in *Imperial Brothers* which would appear to contradict this view.

24 Some leading texts, while accepting the traditional approach of the courts in treating time stipulations separately from the substantive obligation, argue that, in principle, such an approach is logically flawed. Instead, the preferable course, it is suggested, is to pose one comprehensive test to discriminate between breaches which justify termination from those which do not and to inquire in respect of the former whether the promisee would have entered into the contract unless assured of performance of the promise in question within the time stipulated: Lindgren, above n 21, 7; Carter and Harland, above n 13, 678. Carter and Harland suggest an additional reason, namely, that where a promisor breaches a time stipulation, the breach amounts to no more and no less than defective performance of the substantive obligation. Whether the traditional or textbook approach be preferred, nonetheless, as Lindgren has put it, 'to say that "time is of the essence" is an elliptical way of indicating that fulfilment or performance of the substantive term strictly within the time stipulated is to be regarded as of the essence of the contract as a whole so that upon non-fulfilment or breach a party benefited is immediately entitled to regard the contract as at an end': Lindgren, above n 21, 6-7.

25 In some large commercial transactions, it is not unheard of for the parties to stage a 'dress rehearsal' for a complicated settlement one or two days before the date appointed for settlement, particularly where time is or has been made of the essence. This is presumably designed to remove any potential impediments to completion within the time scales appointed by the parties. The adoption of such a practice highlights the significance of essential time stipulations in the minds of the parties.

IV RELIEF IN EQUITY

The general grounds of the law of England heed more what is good for many, than what is good for one singular person only. ... [The law] setteth a general rule which is good and necessary to all the people, that every man may well keep, without it be through his own default. And if such default happen in any person, whereby he is without remedy at the common law, yet he may be holpen by a subpoena, and so hee may in many other cases where conscience serveth for him. ... Equity is a right wisenes that considereth all the particular circumstances of the deed, the which also is tempered with the sweetness of mercie. And such an equity must always be observed in every law of man, in every general rule thereof: that knew he well, that said thus, Laws covet to be ruled by equitie.²⁶

If the vendor's termination of a contract for a minor infraction of an essential time stipulation is sustainable at law, the purchaser may be entitled to equitable relief against forfeiture of the contract in exceptional circumstances. Those exceptional circumstances have been most recently identified and expounded for the law of Australia by the High Court in the cases of *Legione* and *Stern*. The import of the carefully reasoned judgments in these decisions, and the boundaries of the equitable jurisdiction so recognised, remain matters of some nice interpretation. However, even at their most narrow construction, it seems that the decisions acknowledge a jurisdiction wider in reach than that recognised by the House of Lords for the law of England.²⁷ The decision of the Privy Council in *Union Eagle* has done little to attenuate the gap between the Australian and English views on this subject.²⁸

While variances exist between Australian and English jurisprudence in this field, there is some common ground. First, the jurisdiction will only be exercised in exceptional circumstances.²⁹ Secondly, a court will be less inclined to order relief in the case of a commercial contract than with a domestic or consumer contract. The need to preserve the legal rules and foster certainty in commercial dealings is a powerful inducement to refuse relief. Thirdly, the jurisdiction, whatever its compass, is limited to relief against forfeiture of proprietary interests, although not necessarily proprietary interests in land.³⁰

The *locus classicus* of the modern Australian law is the 1983 decision of the High Court in *Legione*. Subsequent judicial and academic comment revealed two views as having emerged from that decision respecting the nature of the

26 Christopher Saint Germain, *The Dialogue in English between a Doctor of Divinity and a Student in the Laws of England* (1638 reprint) 22-3, 27.

27 See, eg, *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694; *Sport Internationaal Bussum BV v Inter-Footwear Ltd* [1984] 1 WLR 776; [1984] 1 All ER 376.

28 It seems that there is also some disharmony in the views of the Australian and New Zealand courts on this issue. In *Location Properties Ltd v GH Lincoln Properties Ltd* [1988] 1 NZLR 307, Greig J, 'with respectful temerity', preferred the approach of the English courts. See Young, above n 18.

29 *Ciavarella v Balmer* (1983) 153 CLR 438; *Shiloh Spinners Ltd v Harding* [1973] AC 691.

30 *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694; *BICC Plc v Burndy Corp* [1985] 1 Ch 232. See generally C J Rossiter, *Penalties and Forfeiture* (1992) ch 9, especially 196-203.

jurisdiction – a broad and a narrow one.³¹ The former was encapsulated in the joint judgment of Gibbs CJ and Murphy J. The authors of this joint judgment were influenced by the speech of Lord Wilberforce in *Shiloh Spinners Ltd v Harding* ('*Shiloh*').³² In *Shiloh*, his Lordship had spoken of three instances where equity would relieve against forfeiture. First, where the forfeiture provision was inserted to secure the payment of money and, therefore, could be said to be collateral to the main object of the contract or arrangement. Secondly, where the forfeiture was exacted as a result of accident, surprise or mistake. These first two heads were said to be not controversial. The third instance was described in this way:

[W]e should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result.³³

An unqualified application of Lord Wilberforce's words to contracts for the sale of land would equip courts of equity with a very wide power indeed to grant specific performance of contracts which had been validly terminated by the vendor at law.³⁴ The exercise with alacrity of the jurisdiction so identified might, as Brennan J put it, give rise to a new maxim: 'once a purchaser, always a purchaser'.³⁵ However, this has not happened and the reason is not hard to find. In *Legione* and the other major authority, the High Court decision in *Stern*, decided five years later, the contracts in question were instalment contracts where part of the purchase price had been paid and where the purchasers had taken possession. In other words, the 'broad' approach to the exercise of the jurisdiction has been set against the background of instalment contracts, which are not dissimilar to mortgages.³⁶ The equity to relieve against forfeiture in this instance has a parallel with the recognition of the equity of redemption.³⁷

31 See *Stern* (1988) 165 CLR 489, 539 (Gaudron J); *Dillon v Bepuri* (1989) 4 BPR 9362, 9368 (Cohen J); Rossiter, above n 30, 174. However, it is interesting to note that Deane and Dawson JJ in *Stern* did not detect the emergence of divergent views.

32 [1973] AC 691.

33 *Ibid* 723.

34 Although, to be fair, Wilberforce LJ did go on to say in the passage cited that '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 breach, and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach': *ibid*.

35 *Stern* (1988) 165 CLR 489, 518.

36 A similarity emphasised in the joint judgment of Deane and Dawson JJ in *Stern*, but cf the dissenting judgment of Brennan J in the same case. See also Rossiter, above n 30, 179 ff; Kevin Nicholson, '*Stern v McArthur* – The Jurisdiction To Relieve Against Forfeiture and Instalment Contracts' (1989) 2 *Journal of Contract Law* 148; Anthony J Lennon, 'Relief Against Forfeiture of Interests in Real Property in Australia and the United Kingdom' (1990) 10 *The Queensland Lawyer* 179, 183 ff.

37 In *Location Properties Ltd v GH Lincoln Properties Ltd* [1988] 1 NZLR 307, 316, Greig J expressed the view that the jurisdiction should be confined to instalment contracts where the purchaser has been let into possession: 'then any forfeiture and the right to relief against it is to be considered on the direct analogy of the right of the mortgagor and of the equity of redemption and of the lessee to relief from forfeiture of possession and ownership of the property in question'. His Honour was of the view that the principle of relief should not be accorded to contracts which remained largely executory.

In contracts for the sale of land which are not instalment contracts, the 'narrow' jurisdiction identified in the joint judgment of Mason and Deane JJ in *Legione* becomes more relevant. The narrow jurisdiction is grounded upon the existence of unconscionability which, although difficult to define, includes the case where the vendor has 'effectively caused or contributed to the purchaser's breach of contract',³⁸ but may not be confined to such circumstances.

In *Stern*, the authors of one of the joint judgments in *Legione*, Mason CJ and Deane J, found themselves somewhat at variance in their views. While the facts in *Stern* involved a conventional instalment contract, the vendor did not contribute in any way to the purchasers' breach in failing to pay one or more instalments. In such a case, Mason CJ and Brennan J were strongly of the view that a case for relief had not been made. The unconscionability necessary to enliven the jurisdiction had to be of an exceptional kind.

[T]o extend relief against forfeiture to instances in which no exceptional circumstances are established would be to eviscerate unconscionability of its meaning. The doctrine is a limited one that operates only where the vendor has, by his conduct, caused or contributed to a situation in which it would be unconscionable on the vendor's part to insist on the forfeiture of the purchaser's interest.³⁹

However, Mason CJ and Brennan J formed the minority in *Stern*. The majority consisted of Deane and Dawson JJ, who delivered a joint judgment, and Gaudron J. Justices Deane and Dawson were of the view that an instalment contract for the sale of land bore many resemblances to a mortgage, and that relief against forfeiture of such a contract should ordinarily follow in sympathy with Lord Wilberforce's first head of jurisdiction. Their Honours also favoured an additional ground of relief. If the forfeiture went unrelieved, a large windfall in the form of a substantial increase in the value of the land would have benefited the vendor in circumstances where the parties reasonably believed that such a windfall would have accrued to the purchasers.

Justice Gaudron reasoned that the question of relief against the forfeiture of the contract could be answered without consideration of the issue whether the termination of the contract and the forfeiture were penal. Her Honour concluded that the exercise by the vendor of the right of rescission conferred by the contract was unconscionable given that the contract had been on foot for ten years, a house had been erected on the land which had become the home of one of the purchasers, and the land had increased significantly in value. On balance, rescission would cause considerably greater hardship to the purchasers than specific performance would cause to the vendor. In summary, relief was given on the basis that to refuse relief would lead to a harsh or unconscionable result, rather than upon any specific unconscionable behaviour on the part of the vendor.⁴⁰

The thrust of the reasoning of the majority in *Stern* points to relief against forfeiture being granted in order to avoid a harsh or unconscionable result. The

38 *Legione* (1983) 152 CLR 406, 445.

39 *Ibid* 503.

40 For a general overview of the decision in *Stern*, see Rossiter, above n 30, 179-86.

exercise of the legal right to terminate will be restrained as unconscionable if exercise of the right leads to a harsh or unfair outcome, such as the receipt by the vendor of an unmerited windfall.

In New South Wales ('NSW'), relief against forfeiture has been granted in two cases where the vendor neither caused nor contributed to the purchaser's breach. In both cases, the value of the land had risen significantly, and both decisions reflect the view that it was unconscionable for the vendor to reap a windfall profit at the expense of the purchaser, where the breach by the purchaser was not wilful and the delay in completion slight. Both of these decisions, which perhaps represent the high water mark of the jurisdiction to relieve against forfeiture of contracts for the sale of land, illustrate the extent of the reach of equity in the light of the decisions in *Legione* and *Stern*. The result in *Dillon v Bepuri*⁴¹ is a particularly dramatic one, given that the purchaser was a land developer and, thus, the contract was a commercial one from the perspective of the party seeking relief, and the vendor had given no less than three extensions to the time for completion specified in the vendor's notice to complete. The result in *Tang v Chong*,⁴² while less striking, followed notwithstanding the fact that time for completion had been made of the essence by the purchaser's own notice to complete and the purchaser failed to complete on the day appointed by the purchaser's notice.⁴³

The Supreme Court of Victoria signalled the prospect of relief in accordance with the decisions in *Legione* and *Stern* in *TM Burke Estates Pty Ltd v PJ Constructions (Victoria) Pty Ltd (In liquidation)*.⁴⁴ The vendor had terminated an instalment contract for the sale of land following default in payment in circumstances where the purchaser was in possession and had built a display home upon the land. As the vendor had resold the property to a third party and the purchaser was only seeking compensation for the value of the improvements, the Court did not need to consider an order for relief against forfeiture of the contract.⁴⁵

In the Australian Capital Territory, NSW, Victoria and Western Australia, courts have relieved against forfeiture of an option to purchase and options to renew a lease in circumstances where the grantee had failed to exercise the option within time. In most of these cases, the grantor was found to have acted

41 (1988) 4 BPR 9362.

42 (1989) NSW Conv R ¶55-449.

43 The evidence revealed that the purchaser did not attend settlement because of the illness of his solicitor.

44 [1991] 1 VR 610.

45 Mason and Carter take the view that unconscionability in relation to the improvements was not an issue since the 'forfeiture' was simply a consequence of discharge, there being no forfeiture clause: Keith Mason and John W Carter, *Restitution Law in Australia* (1995) 447-8. The contract did not deal with title to the improvements. As to the relationship between unconscionability and the vendor's offer to provide compensation for improvements erected upon the land by the purchaser, see Rossiter, above n 30, 184-5. The most recent word on the subject of a purchaser's entitlement to compensation for improvements erected upon the land by the purchaser comes from an unreported decision of the New South Wales Court of Appeal. In *Clancy v Salienta Pty Ltd* [2000] NSWCA 248 (Unreported, Beazley, Stein and Giles JJA, 23 October 2000), Stein and Giles JJA (Beazley JA dissenting) held that a purchaser had no automatic entitlement to compensation. Any entitlement flowed from the vendor's unconscionable behaviour or, perhaps, was a consequence of the vendor's unjust enrichment.

unconscionably in circumstances where the grantor was estopped from taking the point that the option had not been properly exercised by the grantee.⁴⁶ However, there have been decisions where the courts have indicated that relief in terms of the wider *Legione* decision might, in principle, be granted.⁴⁷

In NSW, the courts have expressed the view that relief against forfeiture under the *Legione* principle is available where a contractual licence over land has been validly terminated at law by the grantor.⁴⁸

While the results of the High Court decisions may have caused some surprise in the legal and academic professions, applauded by some and criticised by others, it must be remembered that the lineage of these decisions goes back to at least 1873 with the decision of the Court of Appeal in *Re Dagenham (Thames) Dock; Ex parte Hulse*.⁴⁹ In that case, although the purchaser did not seek specific performance, it appeared that the Court of Appeal in Chancery was prepared to order re-instatement of an instalment contract for the sale of land following the vendor's termination for the purchaser's failure to pay the final instalment.⁵⁰ Lord Justice James declared the forfeiture 'a penalty from which the company are [sic] entitled to be relieved on payment of the residue of the purchase money with interest'.⁵¹ Some years later, in 1913, the Privy Council in *Kilmer v British Columbia Orchard Lands Ltd* ('*Kilmer*')⁵² granted relief against forfeiture of an instalment contract in circumstances where the vendor had terminated for breach of an essential time stipulation. It is important to note that the terms of relief extended beyond return of the purchase moneys paid to include re-instatement of

46 *Photo Art & Sound (Cremorne) Pty Ltd v Cremorne Centre Pty Ltd (In Liquidation)* (1987) 4 BPR 9436; *Samios v Petersilka* [1994] ACTSC 39 (Unreported, Higgins J, 22 April 1994); *S & E Promotions Pty Ltd v Tobin Brothers Pty Ltd* (1994) 122 ALR 637; *Metro Hotels Pty Ltd v Vicotel Pty Ltd* (Unreported, Supreme Court of Victoria, Tadgell J, 21 December 1989); *Forrest Chase Medical Services Pty Ltd v Toliver Pty Ltd* (Unreported, Supreme Court of Western Australia, Anderson J, 5 September 1997). See also Michael Redfern, 'Relief Against Failure to Exercise Option to Renew Lease in Time' (1994) 2 *Australian Property Law Journal* 286; Michael Redfern, 'Relief Against Failure to Exercise Option to Renew Lease in Time' (1995) 3 *Australian Property Law Journal* 156; Michael Redfern, 'Relief Against Failure to Exercise Option to Renew Lease in Time' (1996) 4 *Australian Property Law Journal* 161; Michael Redfern, 'Right to Renew Lease Out of Time' (1998) 6 *Australian Property Law Journal* 195.

47 *Malding v Metcalfe* (1989) NSW Conv R ¶55-495; *Hillier v Goodfellow* (1988) V Conv R ¶54-310; *Melacare Industries of Australia Pty Ltd v Daley Investments Pty Ltd* (1995) 9 BPR 17079; *Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd* (2000) 10 BPR 18085; Rossiter, above n 30, 195-6; Michael Redfern, 'Relief against Loss of Option to Purchase or Renew Lease' (1993) 1 *Australian Property Law Journal* 195.

48 *Milton v Proctor* (1989) NSW Conv R ¶55-450; *Chaka Holdings Pty Ltd v Sunsim Pty Ltd* (1987) 10 BPR 18171.

49 (1873) 8 Ch App 1022.

50 It is not entirely clear whether the contract had been discharged at law for breach in this case but it seems that it must have been. For academic discussion of this matter, see Rossiter, above n 30, 171-2; Charles Harpum, 'Relief Against Forfeiture and the Purchaser of Land' [1984] *Cambridge Law Journal* 134; Kevin Nicholson, 'Breach of an Essential Time Stipulation and Relief Against Forfeiture' (1983) 57 *Australian Law Journal* 632; Hossein Abedian and Michael P 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.

51 (1873) 8 Ch App 1022, 1025.

52 [1913] AC 319.

the contract by an order of specific performance. However, subsequent to the decision in *Kilmer*, two decisions of the Privy Council in 1916 on appeal from Canada, *Steedman v Drinkle*⁵³ and *Brickles v Snell*,⁵⁴ provided clear authority that specific performance of a contract for the sale of land was not possible after the contract had been validly terminated at law for breach. In *Steedman v Drinkle*, the result in *Kilmer* was explained on the basis that the vendor had waived the essentiality of time.⁵⁵

Those favouring the principle of certainty of contract, especially in commercial transactions, and who are heard to insist that the settled rules of contract should not be disturbed by equitable intrusion, prospective or actual, support the results of the decisions and the sentiments underlying the reasoning of the Judicial Committee in *Steedman v Drinkle* and *Brickles v Snell*. One such supporter is Lord Diplock who, in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* ('*Scandinavian Trading*'),⁵⁶ spoke in the following clear and forceful terms:

It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The court should so far as possible desist from placing obstacles in the way of either party ascertaining his legal position ... because it may be commercially desirable for action to be taken without delay ... It is for this reason, of course, that the English courts have time and time again asserted the need for certainty in commercial transactions – for the simple reason that the parties to such transactions are entitled to know where they stand, and to act accordingly.⁵⁷

In *Scandinavian Trading*, the charterer of a ship held under a time charter sought relief against forfeiture of the charterparty, which had been terminated by the owners for late payment. (The charterparty was a time charter and not a charterparty by demise.) In refusing relief on the ground that an order for relief against forfeiture would be tantamount to ordering specific performance of a contract for personal services, the House of Lords took the opportunity to confirm the importance of certainty in commercial contracts and to confine the ambit of the jurisdiction to contracts involving the transfer of proprietary and possessory rights. Lord Wilberforce's review of the equitable jurisdiction over forfeitures in *Shiloh* was described as mainly historical.⁵⁸

A year after the decision in *Scandinavian Trading*, the House of Lords in *Sport Internationaal Bussum BV v Inter-Footwear Ltd*⁵⁹ evinced the same reserve. A licence to use certain intellectual property rights, which had been granted to resolve commercial litigation between the parties, had been terminated by the respondent. Lord Templeman, in delivering the decision of the

53 [1916] 1 AC 275.

54 [1916] 2 AC 599.

55 This explanation mostly went unchallenged although, it should be noted, it was questioned by Dixon J in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457.

56 [1983] 2 AC 694.

57 *Ibid* 704.

58 *Ibid* 702.

59 [1984] 1 WLR 776.

House, presumed that the boundaries of equitable relief did not extend to comprehend forfeiture of mere contractual licences.⁶⁰

With some exceptions,⁶¹ it is generally fair to describe the English view of the equitable jurisdiction over forfeiture as one that should be exercised with considerable caution and one which is subordinate to the principle of commercial certainty. It has already been seen that, in a recent word on this subject, Lord Hoffmann in *Union Eagle* took the opportunity on behalf of the Judicial Committee to demonstrate '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'.⁶² To date, there has been no decision of the English courts granting relief against forfeiture in the form of an order for specific performance of a contract for the sale of land where the contract has been validly terminated at law, at least where the contract was not an instalment contract or the transaction was not in the nature of a mortgage. As Lord Hoffmann put it in *Union Eagle*, it remains to be seen whether developments in English law may adopt the Australian approach and allow for specific performance of the contract in limited cases, or whether development may proceed more in accord with the law of restitution.⁶³ If the latter should be the approach, the purchaser's remedy may be limited to recovery of money paid under the contract and/or money expended upon improvements to the land in circumstances where the vendor has acted unconscionably or has been unjustly enriched at the expense of the purchaser.⁶⁴

60 For criticism of the reasoning (if not the result of this case), see Charles Harpum, 'Relief Against Forfeiture in Commercial Cases – A Decision Too Far' (1984) 100 *Law Quarterly Review* 369; Rossiter, above n 30, 198-9.

61 In *BICC Plc v Burndy Corporation* [1985] Ch 232, the Court of Appeal ordered relief against forfeiture of certain intellectual property rights, notwithstanding that the rights concerned were rights over personality, and notwithstanding that the forfeiture occurred in the context of a commercial relationship between international corporations. More recently, there has been the decision of the Court of Appeal in *On Demand Information plc v Michael Gerson (Finance) plc* [2000] 4 All ER 734 ('*On Demand*'). In that case, the lessee sought relief against forfeiture of a chattel lease of certain video and editing equipment. The lease took the form of a finance lease, not an operating or bailment lease. The lessor submitted that the equitable jurisdiction of relief against forfeiture did not extend to finance leases which generated only contractual rights. The lessor further submitted that, as the chattels the subject of the lease were of a wasting and precarious nature, there was no room for the intervention of equity. These submissions were rejected by the Court. The Court was firmly of the view that contractual rights entitling hirers to possession of chattels generated property rights in the hirer and not just purely contractual rights. Proprietary rights in chattels were susceptible to equitable protection, provided that the forfeiture in question came within the first or third head of jurisdiction referred to by Lord Wilberforce in *Shiloh*. On the facts in *On Demand*, relief was refused. This was because in the eyes of the majority on this point (Robert Walker and Pill LJJ; Sir Murray Stuart-Smith dissenting), the claimants for relief had consented to an order for judicial sale of the goods in question and relief against forfeiture, after the disposal of the subject matter of the claim for relief, was impossible. It should be mentioned that some years before the decision in *On Demand*, the High Court of Australia had foreshadowed the prospect of equitable relief in the case of termination of a finance lease. In *Esanda Finance Corp Ltd v Plessnig* (1989) 166 CLR 131, 151, Brennan J noted that relief against forfeiture may be given in principle if the chattel lease were in the form of a finance lease and were, in substance, a chattel mortgage.

62 [1997] AC 514, 523; [1997] 2 All ER 215, 222.

63 *Ibid.*

64 *Clancy v Salienta Pty Ltd* [2000] NSWCA 248 (Unreported, Beazley, Stein and Giles JJA, 23 October 2000).

V CONCLUSION

However much respect should be paid to the need for certainty, particularly in commercial transactions, there will always remain the need for equitable intervention in exceptional circumstances to prevent an unjust and unconscionable result. It is difficult to imagine a case more deserving of equitable assistance than a forfeiture consequent upon the late arrival by a few minutes of a purchaser to a settlement where time has been made of the essence and the lateness was the result of the purchaser's accident, sickness or misadventure. Indeed, equity's jurisdiction to relieve against forfeiture in the case of fraud, accident, mistake, surprise or misadventure was described by Lord Wilberforce in *Shiloh* as one without 'much difficulty' and one 'always a ground for equity's intervention, the inclusion of which entailed the exclusion of mere inadvertence and a fortiori of wilful defaults'.⁶⁵ Pomeroy has defined accident as

an unforeseen and unexpected event, occurring external to the party affected by it, and of which his own agency is not the proximate cause, whereby, contrary to his own intention and wish, he loses some legal right or becomes subjected to some legal liability, and another person acquires a corresponding legal right, which it would be a violation of good conscience for the latter person, under the circumstances, to retain.⁶⁶

The modern equitable jurisdiction to relieve against forfeiture and to relieve against penal bonds was derived from equity's jurisdiction in cases of accident. The shift from a narrow ground of relief based on accident to a broader ground of relief encompassing relief against forfeiture and penal bonds where the forfeiture and penalty were exacted to secure a sum of money occurred in the first half of the 17th century.⁶⁷ The point to note is that the equitable jurisdiction to relieve in cases of accident and misadventure is very old and well established.

In all three of the recent cases discussed in this article, the termination by the vendor for late performance was valid at law. In any of the cases, was the purchaser deserving of equitable relief? It was common ground in all three cases that the vendor did not cause or contribute to the purchaser's breach.

The result in *Smilie* was clearly correct. The purchaser was almost an hour late for the appointed settlement and, when he did arrive,⁶⁸ he was not in funds. Further, he did not tender performance but remonstrated about the alleged failure of the vendor to deliver vacant possession, a claim made without any foundation.

65 [1973] AC 691, 722. Later in his speech, his Lordship noted that 'no decision in the present case involves the establishment or recognition directly or by implication of any general power – that is to say, apart from the special heads of fraud, accident, mistake or surprise – in courts exercising equitable jurisdiction to relieve against men's bargains': 723 (emphasis added). In *Leads Plus Pty Ltd v Kowho Intercontinental Pty Ltd* (2000) 10 BPR 18085, Young J noted that: 'The cases on relief against forfeiture generally have been far more sympathetic to a plaintiff whose misfortune has come about as a result of accident or surprise rather than one that has come about through negligence': 18088.

66 John Norton Pomeroy, *A Treatise on Equity Jurisprudence* (5th ed, 1941) vol 3, pt 2, [823], n 1; cf Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* (1st ed, 1884) ch IV, especially s 78 and s 89.

67 The history and development of the jurisdiction are traced in Rossiter, above n 30, ch 1.

68 The purchaser did arrive before the time expressed in the notice to complete expired but was not ready, willing and able to settle.

This was not a case for equitable intervention. The case of *Imperial Brothers*, however, is quite another matter. Were it not for the recognition by the Queensland Court of Appeal of an implied term to the effect that the obligation to complete was conditional upon the availability of a final search, this would have been a case crying out for equitable relief against forfeiture. The purchaser's representative was only a few minutes late for the settlement, the delay was caused by accident and misadventure, not foreseen, for which neither the purchaser nor the purchaser's representative was responsible.⁶⁹ The computer malfunction was also an accident for which the purchaser was not responsible, and it could not be said the failure to settle without a final computer search was a wilful breach of contract.

The Hong Kong case of *Union Eagle* is the most difficult of the three. The purchaser was 10 minutes late for the settlement. This was a breach of an essential time obligation and, no doubt, outside the *de minimis* principle. There was no evidence before the court as to the reason, if any, for the lateness, so far as one is able to tell from a reading of the advice of the Privy Council and the judgment of the Court of Appeal.⁷⁰ In this absence, one must assume that there was no excuse. In these circumstances, should there have been relief? Probably not. It must be for the purchaser to establish the grounds for equitable intervention and to show unconscionability. The 10 minute lateness alone, in the absence of fraud, accident or misadventure, or in the absence of some other factor, such as the reaping by the vendor of an unmerited and unexpected windfall, is not enough to justify relief against forfeiture. In the Court of Appeal, Godfrey JA, who dissented in finding that the purchaser was entitled to relief, noted that 'it is unconscionable for you to take an unfair advantage of him, because, for example, of some slight or trivial breach of contract on his part, not going to the substance of the bargain. This latter sort of case is the exemplar for the intervention of equity'.⁷¹ With respect, a 10 minute delay in completion where time has been made of the essence is, *in the absence of some evidence to the contrary*, neither slight nor trivial.

The prospect of equitable relief is troubling to some. However, it should be observed that the efficient operation of the market place, with its perceived need for certainty in land contracts, is not threatened by the existence of the equitable jurisdiction. It will be a relatively rare occasion that triggers equitable intervention on the ground of accident, misadventure, surprise or mistake for late performance. Equally, it has become quite clear that relief under the wider *Legione* principle is even more restricted, and is confined to the exceptional case. It may be remarked that the jurisdiction to relieve against forfeiture of leases, which applies to both commercial and residential leases, is well understood and has operated for many years without undermining the confidence

69 A severe thunderstorm and consequent traffic disruption.

70 See [1996] 1 HKC 349.

71 *Ibid* 361.

of the market. And, as Young J has commented extra-judicially, protestations from commercial lawyers cut little ice in Australia where the legislatures have enacted legislation allowing the courts to undo solemn commercial transactions.⁷²

72 Young, above n 18. His Honour mentioned the *Trade Practices Act 1974* (Cth), the *Fair Trading Act 1987* (NSW) and the *Industrial Relations Act 1996* (NSW). See also Abedian and Furmston, above n 50, 215.