

THE CHANCELLOR'S NEW SHOE

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I. INTRODUCTION

Lord Eldon once confessed that during the long time in which he held the great seal, he most feared being charged with applying equity in the manner of Selden's aphorism, the principles varying in accordance with the length of the Chancellor's foot.¹ The great Chancellor need not have entertained any fear of such a reproach being levelled at him. As to the principles of equity, he himself said:

[t]he doctrines of this Court ought to be as well settled and as uniform, almost, as those of the common law, laying down fixed principles, but taking care that they are to be applied according to the circumstances of each case. I cannot agree that the doctrines of this Court are to be changed by every succeeding judge.²

Lord Eldon did much to ensure that the principles of equity became as settled or as rigid as those of the common law. It is generally thought that this refinement has made a positive and valuable contribution to our jurisprudence. Certainly, it is difficult to overestimate the impact of his extraordinary intellect upon equity jurisprudence and it is churlish not to admire the craft of his judgments and to reflect upon the meticulous care and thought that went into producing them. The judgments of Lord Eldon fill thirty two volumes. He held the great seal for 25 years, from 1801 to 1806 and then again from 1807 to 1827 and the respect accorded to the learning in his judgments by his contemporaries could not have failed to influence his successors. It is not easy to exaggerate the extent of this influence. At the time of the passage of the Judicature Acts, many of the principles of equity

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1 *Gee v. Pritchard* 2 Swan 414.

2 *Ibid.*

existing at that time had been distilled from the judgments of Lord Eldon. Those who feel compelled to view equity as the system of rules and principles practised in the Court of Chancery prior to 1873, almost invariably turn to the writings and judgments of Lord Eldon with reverent and nostalgic affection.

Despite, however, the great learning which Lord Eldon brought to bear on the discharge of his office, it must be acknowledged that he presided over the decline of the Court of Chancery. The Court of Conscience, to which the litigant, denied justice by the rigidity of the common law, had once turned in hope frequently requited, fell into a decay at the end of the eighteenth century from which it never really recovered. The Court, which had once aided the oppressed and the weak, became an instrument of oppression through whose doors only the strong and wealthy would dare to enter.

The administrative difficulties that plagued the Chancery during the time of Lord Eldon are well known. Lord Eldon inherited a backlog of cases with which his dilatory disposition was ill equipped to deal.³ The list of cases awaiting trial dramatically increased during his term of office. It must not be forgotten that the pressure of business upon the court was burdensome indeed despite the number of bills filed falling to about 1225 in 1801 compared with about 2150 in the time of Lord Hardwicke.⁴ Until 1813, when a Vice Chancellor was appointed to the Court,⁵ the Court of Chancery had but one judge, the Lord Chancellor. Even if the Chancellor's energies had been exclusively directed towards discharging his judicial duties in Chancery, the task before him must have proved too great. But Lord Eldon was unable to devote all of his time to Chancery business. The Chancellor was an officer of State and his political duties demanded much of his time. As if this were not enough, he was obliged to sit in Bankruptcy and, as President of the House of Lords, to hear appeals.⁶ The sheer volume of business must inevitably have produced intolerable delays for no one man could have been expected alone to have disposed of the list of accumulating cases. Yet the situation in practice was far worse than could have been foreseen due in no

3 Several attempts were made by Chancellors during the course of the eighteenth century to reduce the backlog of cases with mixed results. However, the list of cases awaiting judgment during the time that Lord Hardwicke held the seal grew to such an extent that his successors never really succeeded in overcoming the problem.

4 Sir Duncan M. Kerly, *Historical Sketch of Jurisprudence of the Court of Chancery* (1890), 271. By 1824, following the appointment of a Vice Chancellor in 1813, the number had again rise to about 2000.

5 Sir Samuel Romilly opposed the appointment of a Vice Chancellor on the ground that his decisions would be frequently reversed on appeal to the Chancellor. The Chancery was still very much the Chancellor's court. Romilly's concern proved to be prophetic on the appointment of Sir John Leach as Vice Chancellor. Leach's decrees were frequently overturned, perhaps due to some want of care in their writing. It was said that Sir John Leach's decrees were '*terminer sans oyer*' while that of the Chancellor's were '*oyer sans terminer*'.

6 The Master of the Rolls did not sit when the Chancellor was sitting as he was supposed to be the Chancellor's deputy. Not until 1833 did the Master of the Rolls attend to general court business.

small measure to Lord Eldon's vice of perpetual vacillation and insufferable dithering. Cargoes rotted while the great man cogitated.

Quite apart from the endless delays in Chancery, the cost of the court process to the litigant was considerable. This was in no small part due to unnecessary administrative duplication and the need to employ and pay officials whose true functions had long since become redundant. For example, the six clerks of Chancery, the 'harpies of office', rendered no appreciable service to the litigants or to the court and yet resisted strenuously any attempt at reform. Their original function had, by the end of the eighteenth century, been entirely overtaken by solicitors but yet they remained sufficiently influential enough to sabotage progress of a suit. Suitors felt obliged to pay for unnecessary copying of documents in order to ensure that their case retained its place in the list.⁷ The form of pleading in Chancery and the method of examining witnesses by commission also contributed to a suit's tardy progress towards a hearing date.

The great landholders of England had become accustomed to delays in Chancery and were resigned to suffering their estates to pass through that court on average once every thirty years. The attitude of the rising and increasingly prosperous middle classes was, however, far less benign. Those who rode to prosperity and influence on the rising tide of the industrial revolution, then changing the old economic order of England forever, were quite voluble in their criticisms of the interminable and pernicious delays in Chancery. The wealth of the country increased in proportion to the proliferation of factories and mills and the trade which they produced but the capacity of the Chancery to deal with the inevitable flowering of commercial disputes remained hopelessly inadequate. If the money in court at the middle of the eighteenth century were one and three quarter million pounds, by the end of the first quarter of the succeeding century it had grown to over thirty nine million pounds.⁸ The cry for change was becoming louder and the movement towards reform, if slow, was inexorable.

The agitation for reform elicited a positive response. The appointment of a Vice Chancellor in 1813 has already been mentioned. There followed the appointments of two further Vice Chancellors in 1841 and in 1851, two judges were appointed to hear appeals from the Master of the Rolls and the Vice Chancellors. The jurisdiction in bankruptcy was remitted to a new court. By 1873, the Court consisted of seven judges. The Master of the Rolls or one of the three Vice Chancellors heard cases at first instance. Appeals to the appeal court were heard by the Chancellor and the two lord justices. The administrative reforms of the Court of Chancery were thus in place by the time of the Judicature Acts but by then equity had been in decline for almost a century.⁹

⁷ Note 4 *supra* 268.

⁸ *Id.*, 271.

⁹ P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979) 393.

The decline of equity in this period has traditionally been viewed against the background of administrative chaos and machinery obsolescence and degradation which pervaded the working of the court. Litigants were deterred from bringing suits in Chancery by the knowledge of the long delays and the cost of the proceedings. Yet when proceedings were eventually brought to trial, the relief afforded to the plaintiff was formulated upon a more systematized and rigid basis than had hitherto been the case. The equity once applied by the Chancellor had served to mitigate the common law where the strict application of legal rule would have produced a harsh and unfair result. Equity, in developing its principles, was once less concerned with the effect of the decision on the body of precedent than with the suppression of injustice in the individual case but a change in direction became discernible in Lord Eldon's time. This is not to say that equitable doctrines and principles had not been developing prior to the chancellorship of Lord Eldon. It is well known that even before Lord Nottingham's time, attempts had been made to apply some principles of relief in accordance with what had been decided before. The absence of any institutionalized form of law reporting, however, made the conscious development of a body of precedent a formidable task. But long before Lord Eldon held the great seal, the Chancellor in adjudicating upon a claim for relief, paid some regard to precedent. From the seventeenth century, there was some resistance to proceedings being conducted on an entirely ad hoc basis. Thus, Lord Nottingham, at the beginning of his judicial career, wrote for his own edification what he oft referred to as 'my little book' or 'my little treatise on Chancery learning'. In these works, the *Manual of Chancery Practice* and *Prolegomena of Chancery and Equity*,¹⁰ the author wrote of the practice and rules of the court existing at that time. It can only be supposed that the father of modern equity was attempting to gather an overview of the system as a prelude to applying equity in a more ordered fashion. Before Lord Nottingham took up the seal, Lord Ellesmere had seen the virtue of conducting proceedings in Chancery in accordance with some kind of order. Lord Ellesmere is reputed to have been the first Chancellor to recognize the force of precedent in equity and the value of turning to earlier decisions for guidance. But the Chancellor did not espouse blind adherence to precedent and unequivocally reserved the right to declare new principle.

The Chancellor is by his place under his Majesty to supply that power¹¹ until it may be had in all matters of meum and tuum between party and party . . . the cause why there is a Chancery is for that men's actions are so divers and infinite that it is impossible to make any general law, which may aptly meet every particular act, and not fail in some circumstances.¹²

10 Only recently published in 1965, by Cambridge University Press as the works were intended for private study.

11 That is, the power of the legislature.

12 *Leading Cases*, White and Tudor 2, 644.

If from at least the time of Lord Nottingham, the Chancellor was conscious of precedent, if precedent could be found,¹³ the principles of equity continued to develop and flourish during the greater part of the eighteenth century. Many of the concepts developed by Lord Nottingham, such as the equity of redemption and the principles pertaining to relief against penalties and forfeitures, were further settled and refined by some of his more able successors, such as Lord Hardwicke and Lord Thurlow. There were important decisions concerning the equitable doctrine of undue influence and the landmark decision, *Earl of Chesterfield v. Jannsen*¹⁴ expounding the operation of equitable fraud. This vigorous growth of equity jurisprudence, if not actually halted, was subjected to a perceptible retardation towards the end of the eighteenth century. Some equitable doctrines, such as the relief against forfeiture of the lessee's estate in land, if not repudiated, were allowed to wither on the vine with new development positively discouraged. It is difficult to estimate how much the decline of equity at this time resulted from the combination of administrative ineptitude in Chancery and the procrastination of Lord Eldon. A large part no doubt. The emerging resistance to change, the spirit of non-intervention and the reluctance to continue confrontation with the common law, all owed something, however, to the influence of the free market philosophy of Doctor Smith and the rise of formalism. The age of laissez faire had dawned and the emphasis which came to be placed on the unquestioned virtue of freedom of contract affected the manner of applying equity. Judges of the courts of law were becoming increasingly conscious of the effect of their decisions upon the body of judicial precedent and believed, in a way a modern judge would find a little incomprehensible, that their decisions would influence future behaviour. It was not to the point that a judgment might produce a harsh or oppressive result in the individual case, if the decision were otherwise 'good' and produced a result that responded to the economic spirit of the times.¹⁵ In an age when the courts of law upheld the intention of the parties as a goal in itself without taking note of the circumstances in which that intention had been formed, it might have been expected that there existed a greater need than ever before for a court of conscience to oversee and review the more extreme decisions. In fact, Chancery abdicated its traditional role and became as obsessed as the courts of law with upholding the expressed intention of the parties. Rigid adherence to precedent and resistance to any growth of even existing doctrine became the hallmark of the court of Lord Eldon. The adoption of formalism suited Lord Eldon's conservative nature and his successors were disinclined to follow a different path.

It has been said that at the time of the passage of the Judicature Acts, the common law and equity had been making increasingly friendly overtures

13 Given the dearth of reports, it is not surprising that precedent was often found lacking.

14 (1751) 2 Ves Sen 125; 28 ER 82.

15 Note 9 *supra* 390-91.

towards each other.¹⁶ This statement ought come as no surprise. Many of equity's principles had become ossified during Lord Eldon's hold on the great seal and fared no better at the hands of his successors. Equity had lost its vigour. Peculiarly equitable interests, such as the express trust and the equity of redemption, had become as institutionalized as the legal estate. The 'friendly overtures' reflected and were a product of a decay in the equitable process. Perhaps the Judicature Acts did little more than complete a fusion in form which had already occurred in spirit.

II. THE TRADITIONAL ROLE OF EQUITY

The equity of the nineteenth century Court of Chancery and High Court of Justice was an equity of circumspection. Such an interpretation of equity would normally have excited no more than historical interest. But the limitations placed upon the exercise of the equitable jurisdiction by the nineteenth century judges continued to influence twentieth century developments. This says something of the respect accorded to the judgments of Lord Eldon and his successors. Yet, it is a mistake to see the nineteenth century interpretation of equity as representative of the apogee of its development. As the twentieth century draws to a close, it is possible to discern a movement by equity towards more traditional values and methodology. There appears to be a turn away from precedent towards a renewed eclecticism. This new vitality is making some influence on commercial as well as domestic transactions as equity feels less constraints about imposing notions of justice and fairness on business dealings and contracts.

The traditional role of equity, if it may be so called, became settled during the course of the fifteenth century when the jurisdiction encompassed three broad heads: (a) cases where there was a common law remedy but where the remedy could not be obtained; (b) cases where the common law remedy was being used oppressively; (c) cases where there was no common law remedy at all.¹⁷ The first head of jurisdiction concerned cases where the petitioner could not expect to obtain justice at law because of the status of the defendant and the influence he could expect to bring upon the jury and perhaps the judge.¹⁸ This jurisdiction ceased to be of much significance after Tudor times. Many petitions to the Chancellor straddled heads (b) and (c) and it is under these two heads of jurisdiction that, in the course of three centuries of development, equity flourished.

¹⁶ *Rainieri v. Miles* [1981] AC 1050.

¹⁷ Note 4 *supra*, 70 lists five heads: (a) where the common law remedy could not be obtained; (b) where common law process was being used oppressively or fraudulently; (c) where forgery or duress formed the ground of complaint; (d) where no remedy was contemplated by the common law; and (e) cases specially within the jurisdiction of the Chancellor. Head (e) is of no importance to this paper and head (c) can conveniently be seen as forming part of head (b) or (d) as the case may be.

¹⁸ An interesting and colourful example of this kind of petition is reproduced in 10 *Selden Society*, petition 31, 34.

III. EQUITABLE RELIEF AGAINST PENALTIES AND FORFEITURES

To study the principles of relief developed by equity from the end of the fifteenth century to the time of Lord Eldon to aid mortgagors, lessees and obligors under penal bonds, is to be rewarded by an appreciation of equity seen in its most vigorous and interventionist role. Over a period of three hundred years, the Court of Chancery evolved a doctrine designed to strike at penalties and forfeitures, legal devices which the Court of Conscience found obnoxious.

A. RELIEF AFFORDED TO OBLIGORS UNDER PENAL BONDS

The penal bond with conditional defeasance was probably introduced into England by Italian bankers in the fourteenth century and proved to be enduringly popular, particularly amongst the merchant class.¹⁹ The bond was rarely challenged on the ground of being usurious and for a while, the penalty went unchallenged on any other ground. However, during the course of the fifteenth century, petitions to the Chancellor, mainly from obligors praying relief, evoked a measure of response. The most numerous petitions came from obligors who had paid the amount due under the bond but had either failed to take a sealed acquittance²⁰ or having got one, had then lost it. Chancery granted an injunction staying proceedings at law to enforce the bond pending an examination of the evidence produced by the parties' oral testimony.²¹ The conditional bond was popular in the fifteenth century but there were many cases where the obligor failed to obtain a written endorsement of the conditions and the bond appeared on its face as single.

A like case was where the written conditions were later varied by parol. In both situations, in response to many petitions from obligors, the Chancellor was emboldened to grant relief to see that justice was done in the face of a clear legal rule to the contrary.²² There were even cases where the Chancellor

19 It filled and served a commercial need not wholly explained by the procedural and substantive deficiencies of the action of covenant. The obligee brought an action of debt for the whole penalty in the event that the obligor failed to fulfil the terms of the condition of defeasance. See A.W.B. Simpson, "The Penal Bond with Conditional Defeasance" (1966) 82 *LQR* 392.

20 In a court of law, a defence of payment could only be pleaded in an action of debt on the bond by production of a release or acquittance under the seal of the obligee.

21 The Chancery possessed machinery advantages over the courts of law in the taking of evidence and examination of witnesses. See, for example, W.J. Jones, *The Elizabethan Court of Chancery* (1967) 446.

22 The common law justification for the rule given by the student in St Germain's Dialogue has a familiar ring. It seems that nothing has changed over the centuries. "He [the obligor] can in no wise discharge himself in that action [*ie.* in debt on the bond] but he have an acquittance or some other writing sufficient in the law, or some other thing like, witnessing that he hath paid the money; that is ordained by the law to avoid a great inconvenience . . . that every man by a nude parol and by a bare averment should avoid an obligation . . . And yet . . . intendeth not, nor commandeth not, that the money of right ought to be paid again; but setteth a general rule, which is good and necessary to all the people, and that every man may well keep . . ." *Doctor and Student*, i, 12.

would look behind the seal of an instrument to inquire into the adequacy of the consideration in cases in which, in today's parlance, there had been a total failure of consideration.²³ Obligees also sought relief in Chancery when the bond was lost or destroyed. In law, the bond was dispositive and without it, the obligee had no legal cause of action.

In the sixteenth century, the jurisdiction to relieve against penalties and forfeitures broadened to include cases arising out of accident, mistake and hardship. For example, if the obligor were late with payment through accident or if the greater part of the debt had been paid on or before the due date, the Chancellor assumed jurisdiction to grant relief against enforcement of the penalty in the bond. Yet another ground for relief was where the obligor paid the full amount due under the condition of defeasance to the obligee's servant or agent in a situation where such persons had no authority to receive.²⁴ Where tender of performance by the obligor was impossible, either because of actions on the part of the obligee or because of supervening events, relief in Chancery might be afforded.²⁵ There are several instances of the Elizabethan Court of Chancery relieving obligors against the infliction of a penalty in a bond where the inability to pay on time was due to some unforeseen event, such as flood or plague.²⁶

Advances in the development of equitable principles to relieve against penalties and forfeitures continued to be made in the seventeenth century, particularly during the time in which Lord Nottingham held the great seal. By the Restoration, relief was being regularly given in the case of money bonds where the principal sum and interest had been paid and, in the case of performance bonds, where compensation could be ascertained on a *quantum damnificatus*.²⁷

B. FURTHER REFINEMENT OF EQUITABLE RELIEF AGAINST PENALTIES

The equitable doctrine developed to aid obligors from infliction of the

23 Barbour, "The History of Contract in Early English Equity", *Oxford Studies in Social and Legal History Vol IV* (1974) 96. Barbour gives an example of this kind of petition. ECP ix, no. 405 reprinted at 183-4.

24 See the introduction by Sir George Cary to his reports of Chancery Proceedings between 1557 and 1602. Reprinted in English Reports, Vol. 21, 1.

25 *Bradripe v. Blunte* (1579) — Obligor prevented from carrying timber across a meadow as covenanted due to the long grass. The obligee was enjoined from seeking to recover the full amount due under the bond. In an action for forfeiture of a lease for non-payment of rent, the demised premises were demolished by the commissioners for the erection of St Paul's. Chancery granted an injunction against the action for rent — 4 & 5 Eliz. fo.233 cited by G. Spence, *The Equitable Jurisdiction of the Court of Chancery* (1856) Vol 1, 629.

26 *Id.*, n(e).

27 Lord Nottingham wrote in his Prolegomena: "Bond of 1,000l. For performance of covenants is forfeitable at law for any breach, though the damages of that breach be not 10l. Yet equity will not suffer any advantage to be taken of this bond beyond the true damnification, and therefore usually awards an injunction till a trial at law be had either upon an action of covenant or upon a special issue quantum damnificatus. So that a penal bond to secure the performance of covenants is not much better security than a mere covenant as equity now awards the matter." C.xx s.5.

penalty in a penal bond was applied to penalties in other instruments and by the time of Lord Thurlow, the true ground for equitable intervention in all such cases had been established. In *Sloman v. Walter*²⁸ the plaintiff and defendant entered into partnership of a coffee house and it was agreed that the plaintiff should run the business but the defendant should have the use of a room. To enforce the agreement, the plaintiff gave the defendant a bond in the sum of 5001. The defendant demanded the room and upon being refused, brought an action at law on the bond. The plaintiff obtained an injunction and upon a cause as to why the injunction should not be dissolved, the only issue before the court was whether the penalty of the bond was intended as security for the enjoyment of the room or in the nature of assessed damages between the parties. Lord Thurlow spoke thus:

[t]he only question was, whether this was to be considered as a penalty, or as assessed damages. The rule, that where a penalty is inserted merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional, and, therefore, only to secure the damage really incurred, is too strongly established in equity to be shaken.²⁹

The injunction was continued until the hearing and an issue *quantum damnificatus* directed as to the damages suffered. The true ground for equitable intervention spoken of by Lord Thurlow had long before this judgment been applied as received doctrine in the courts of law following the enactment of two statutes in the time of William III and Queen Anne.³⁰ Thus, by the end of the eighteenth century, the equitable principle of relieving against penalties had evolved to encompass penalties in money and performance bonds, indentures and covenants in other instruments. But this evolution came to a halt during the period of decline in Chancery under Lord Eldon and his successors.

C. NINETEENTH CENTURY DEVELOPMENTS

In the best hands-off, laissez-faire tradition, the Court over which Lord Eldon presided resisted attempts to further extend the penalty doctrine. Lord

28 (1783) 1 Bro CC 418; 28 ER 1213.

29 *Id.*, 419 and 1214 respectively.

30 8 & 9 Gul III c.11 which provided by section 8 that the plaintiff suing on a bond or on any penal sum for breach of a covenant in an indenture, deed or writing, could recover judgment at law in the usual way. Upon the plaintiff assigning as many breaches as he pleased, the jury was to assess the damages suffered. If the defendant paid into court, at any time before execution, the amount of the damages plus costs, stay of judgment was entered in the court record. By the terms of the second statute, 4 & 5 Anne, c.16, it was provided by sections 12 and 13, that in an action on a conditioned money bond, payment, albeit late payment, of the amount referred to in the condition of defeasance, together with interest and costs, could be pleaded in bar of any such action. Payment into court of principal, interest and costs was deemed to be in full satisfaction and discharge of the bond. The Statue of William appeared, on occasions, to be ignored. G.A. Muir, "Stipulations for the Payment of Agreed Sums" (1985) 10 *Syd LR* 503 suggests that in order to avoid the Statute, the obligee had only to sue in assumpsit. If this be true, it was certainly held later in the eighteenth century that to proceed under the Statute was mandatory whether the action were brought in debt or assumpsit. *Roles v. Rosewell* (1794) 5 TR 538; 101 ER 302; *Hardy v. Bern* 5 TR 636; 101 ER 355; *Astley v. Weldon* 2 Bos 7 Pul 346; 126 ER 1318 *per* Chambre J.

Eldon even regretted the length to which the doctrine had been extended thus far. The decisions reflecting the archetypal nineteenth century view mainly concerned the distinction between penalties and liquidated damages. It had previously been held that liquidated damages could be recovered as a debt and for the loss suffered and not merely as a security for damages assessed on a *quantum damnificatus*.³¹ But no clear principle exemplifying the distinction had emerged. In *Astley v. Weldon*³² Lord Eldon, as Chief Justice of the Common Pleas, was not troubled in finding a principle that could be relied upon to differentiate between penalties and liquidated damages. The Court gave recognition to what the parties had said and enforced the expressed intention accordingly. It did not matter that the sum reserved was excessive and enormous compared with the loss suffered.³³ His Lordship lamented those decisions which did not accord with this view. The other judges of the court, with the exception of Heath J., understood the law in similar terms to Lord Eldon.

Not all cases decided in the last century endorse the Eldon test but it is probably true to say that it is the test in most sympathy with the times.³⁴ That other great equity mind of the last century, Sir George Jessel, espoused the intention test with some alacrity in *Wallis v. Smith*.³⁵ There, the Master of the Rolls extolled the integrity of the intention test and preached the rectitude of freedom of contract.

What distinguishes these nineteenth century cases from preceding ones is the barrenness in approach and the sterility of the rhetoric. By leaving the parties to choose between penalty and assessed damages in accordance with their expressed intention, equity had lost sight of the traditional ground of relief against penalties. The marked reticence to interfere with the terms of the contract ensured that the unconscionable and absurd result went unchallenged.

D. EQUITABLE RELIEF AGAINST FORFEITURE — MORTGAGES AND LEASES

The principles devised by equity to relieve against forfeiture of interests in land were developed in sympathy with those which struck down penalties.

31 *Woodward v. Gyles* (1690) 2 Vern 119; 23 ER 686; *Lowe v. Peers* 4 Burr 2225; 98 ER 160; *Hardy v. Martin* 1 Cox 26; 29 ER 1046.

32 (1801) 2 Bos & Pul 346; 126 ER 1318.

33 This view of the law of penalties is not so different to that embraced by the modern American economic analysts who argue that judicial interference with agreed damages clauses leads to an economically inefficient result. See, for example, C.J. Goetz and R.E. Scott, "Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach" (1977) 77 *Col L Rev* 554; P.H. Rubin, "Unenforceable Contracts: Penalty Clauses and Specific Performance" (1981) 10 *J Leg Stud* 237; S.A. Rea, "Efficiency Implications of Penalties and Liquidated Damages" (1984) 13 *J Leg Stud* 147.

34 *Kemble v. Farren* 6 Bing 141; 130 ER 1234 especially *per Tindal C.J.*; *Atkins v. Kinnier* (1850) 4 Ex 775; 154 ER 1429; *Thompson v. Hudson* (1869) LR 4 HL 1; *Reynolds v. Bridge* 6 El & Bl 528; 119 ER 961.

35 (1882) 21 ChD 243.

This is not surprising since the origins of the principles of relief were the same. The dichotomy between relief against penalties and the relief against forfeiture did not emerge until later. The relief given to mortgagors who had repaid the principal sum together with interest and costs, closely paralleled the relief given to obligors under bonds and, in fact, the common money bond was similar in form in many respects to the mortgage. Frequently, the borrower gave both a mortgage and a bond to the creditor. The principles pertaining to relief against forfeiture evolved primarily to protect the mortgagor and later, the lessee.

1. *Mortgages — The Evolution of the Equity of Redemption*

Sometime in the reigns of Henry VI and Edward IV, the Chancellor decreed reconveyance of the mortgaged estate at the suit of the mortgagor when the principal sum and other costs had been paid on or before the due date. The jurisdiction was exercised whether the mortgage took the form of a conditional conveyance to the mortgagee, thus giving the mortgagor a legal right of re-entry, or whether it took the form of an absolute conveyance with a covenant for reconveyance.³⁶ In Elizabethan times, the jurisdiction was extended to include cases where the mortgagor did not pay within time but where the late payment was due to fraud, accident or hardship.³⁷ From these modest beginnings, the jurisdiction flourished and, in the course of the seventeenth and eighteenth centuries, the equity of redemption became fully established. The recognition of the equity of redemption is an extraordinary example of the innovative capacity of equity³⁸ and it is all the more remarkable when it is remembered that much of the development was made in the face of fierce opposition from the common law.³⁹

The incidents and nature of the equity of redemption were formulated by Lord Nottingham and refined by Lord Hardwicke in a series of judgments in which many old heresies and anomalies were overturned. In settling the terms of the equity of redemption, the courts consistently recognised the substantive nature of the mortgage as a security transaction. The court, in giving relief to the mortgagor by decreeing a reconveyance, did not deny justice to the

36 The earliest known case of the Chancellor decreeing reconveyance to the mortgagor is the 1456 case of *Bodenham v. Halle* ECP, xxv, no. 131; 10 *Selden Society* 137.

37 Yale, Introduction to Lord Nottingham's Chancery Cases, Vol II, *Selden Society*, Vol. 79, p.32; R.W. Turner, *The Equity of Redemption* (1931) 23.

38 Although one might be forgiven for thinking Chancellor Kent was guilty of a little hyperbole when he wrote: "the case of mortgages is one of the most splendid instances, in the history of our jurisprudence, of the triumph of equitable principles over technical rules, and of the homage which those principles have received by their adoption in the courts of law. Without any prophetic anticipation, we may well say, that 'returning Justice lifts aloft her scale.'" 4 *Kent, Comm. Lect* 58, (4th ed) 158.

39 See, for example, the judgment of Sir Matthew Hale in *Roscarrick v. Barton* (1672) 1 Chan Cas 219; 22 ER 769. Neither was the equity of redemption always looked upon with favour by those in government. Cromwell endeavoured to restrict the right of the mortgagor to seek redemption to a period within 12 months of the mortgagee's re-entry. The Commissioners in Chancery largely ignored this ordinance and it was overturned at the Restoration.

mortgagee since, the mortgagee, by being paid the principal sum, interest and costs, received in substance that for which he had bargained.

In *Casborne v. Scarfe*⁴⁰ Lord Hardwicke finally recognised the equity of redemption as a full equitable proprietary interest in land. The judgment is a landmark decision, all the more for the express rejection of the plaintiff's submission that the mortgagor had only a mere or bare right to an order in Chancery for reconveyance. A consequence of the court's finding on this point was that the mortgagor received a special favour in Chancery which was only rivalled by the protection extended by equity to its foremost protegee, the beneficiary under an express trust. The equity of redemption did not suffer at the hands of the nineteenth century jurists owing, perhaps, to its firm establishment long before the century began.⁴¹

2. Leases

Chancery's insistence on recognising a security transaction for what in truth it was, led it to grant relief at the suit of a lessee against forfeiture of the lessee's leasehold estate for failure to pay rent. The court perceived the lessor's right of re-entry as security for payment of rent and performance of other covenants by the lessee. The jurisdiction to grant relief to lessees against forfeiture of their estate in land was developed after that devised to relieve mortgagors and obligors under penal bonds but appears to have been in place by the latter part of the seventeenth century. It is clear that the jurisdiction was not confined to the grant of relief against forfeiture for breach of the covenant to pay rent⁴² although that part of the jurisdiction was in 1731 recognized and regularized by Statute.⁴³ The enactment of this legislation gave Lord Eldon in due course the opportunity to vent his view that Parliament, by passing over the question of relief against forfeiture for breach of non-rent covenants, had by implication assumed Chancery had no such jurisdiction.⁴⁴ Lord Erskine later embraced a more liberal view⁴⁵ but Lord Eldon's understanding of the narrowness of the jurisdiction came to prevail, a not altogether unexpected development. Parliament finally did intervene in 1881 to confer jurisdiction upon the High Court of Justice to order relief against forfeiture consequent upon breach of non-rent covenants.⁴⁶

40 (1738) 1 Atk. 603; 26 ER 377.

41 Indeed, the high water mark of the clog doctrine occurred in the latter part of the nineteenth century, providing a remarkable contrast with the decay of the penalty doctrine.

42 *Bowen v. Whitmore* (1693) 2 Freeman 193; 22 ER 1155; *Webber v. Smith* (1689) 2 Vern 103; 23 ER 676.

43 4 Geo II, c.28.

44 *Hill v. Barclay* 16 Ves Jun 402; 33 ER 1037; 18 Ves 56; 34 ER 238.

45 *Sanders v. Pope* (1806) 12 Ves Jun 282; 33 ER 108.

46 Conveyancing Act, section 14. Cf. Conveyancing Act 1919, (N.S.W.) section 129.

IV. EQUITY IN THE LATE TWENTIETH CENTURY — A RENEWED VIGOUR

There seems little doubt that, at least in Australia, equity is displaying a renewed vigour. The formalistic approach has once again yielded to increasing concern that substantive justice may only be achieved if the principles applied allow considerable discretion. This concern influences jurisdictions beyond equity but the tradition of equity is peculiarly suited to respond. Using the analysis of Professors Kamenka and Tay, equity is moving from the *Gesellschaft* approach of Lord Eldon and his successors to a latter-day *Gemeinschaft*. The terms refer to competing legal-administrative traditions that:

may and do co-exist within any one society and any one body of law, but which pull in different directions and which display themselves at different periods and in different places in varying strengths.⁴⁷

Central to the *Gesellschaft* approach to social regulation is "the precise definition of the rights and duties of the individual through a sharpening of the point at issue".⁴⁸ The emphasis is on "formal procedure, impartiality, adjudicative justice, precise legal provisions and definitions and the rationality and predictability of legal administration".⁴⁹ In the *Gemeinschaft* approach the emphasis is on law and regulation as:

expressing the will, the internalised norms and traditions of an organic community . . . Justice is thus substantive directed to a particular case in a particular social context and not to the establishing of a general rule or precedent.⁵⁰

While the usefulness of extreme models in so complex an institution as a legal system may be limited:

it is at the extremes of any spectrum that we see most clearly the values and tensions which compete on the centre ground, but whose struggle may be less discernible exactly because the centre ground is more familiar and more apt to be taken for granted.⁵¹

The movement in equity to the less formal *Gemeinschaft* approach indicates an increasing recognition by the courts that the traditional role of equitable intervention, relief from the effects of unconscionability, can be distilled into specific rules only at the cost of a rigidity which inevitably leaves pockets of injustice. The rule of law becomes the tyranny of law.⁵² In some measure this trend to *Gemeinschaft* evidences the judiciary's, and the society's, confidence, not only in its judges' integrity but also in the

47 E. Kamenka and A. E-S Tay, "Beyond Bourgeois Individualism: the Contemporary Crisis in Law and Legal Ideology" in E. Kamenka and R.S. Neale (eds) *Feudalism Capitalism and Beyond* (1975), 127, 135. See also E. Kamenka and A. E-S. Tay, "Beyond the French Revolution: Communist Socialism and the Concept of Law" (1971) 21 *U. Tor LJ* 109.

48 Kamenka and Tay (1975), *id.*, 137.

49 *Ibid.*

50 *Id.*, 136

51 B.S. Jackson, "On the Tyranny of the Law" (1983) 18 *Is. L.R.* 327.

52 This is not to say that the extreme of flexibility may not wield its own tyranny. For a spirited discussion of this problem see *ibid.*

community of their values. The attraction of formalism, of the *Gesellschaft* approach, is perhaps greatest in times of turbulence, when the values within a community are disparate and disputed both in content and in intensity. It is in such times that we place the greatest value on decisions that are impartial and predictable. In this way the personal values of the decision-maker are subservient to the 'rule' which, embodying objective justice, has an independent operation. But when we can rely, not only on a judge's integrity, but also on our substantial common ground on fundamental principles of behaviour, then we are prepared to accept decisions that flow from the exercise of individual discretion and to allow the subjective judgment which would be excluded by precise rules.⁵³

Certainly there is some element of this confidence in our courts today. There is a marked increase in the cases in which courts resort to the notion of unconscionability as the basis for the decision rather than to specific rules. In addition to this concern for substantive rather than formal justice there also seems to be greater judicial candour. Inevitably discretion and candour risk the appearance, and perhaps the substance, of pragmatism. When does resort to basic principles become a pragmatic response? Could unconscionability be identified through a process of principled legal reasoning which would recognise common values and avoid "idiosyncratic notions of fairness and justice".⁵⁴ Is the movement one "from principles to pragmatism"⁵⁵ or "from principles to principles"?⁵⁶ Are "neutral principles" possible?⁵⁷ Are neutral principles merely those which are largely shared by the community?

The palimpsest metaphor has been used to illuminate the influence of past language practices on the practices of the present; and it could equally be applied to the language of judicial decisions.⁵⁸ The decisions of today are seen as the most recent text on a parchment on which several texts have been written. As each has been removed to make way for the new text it is never completely erased so that the most recent has to be deciphered on the background of layers of old inscriptions. Barth quotes Bertrand Russell's observation, "ordinary language is shot through with the fading hues of past philosophic theories".⁵⁹ Similarly legal decisions are informed by past decisions and past values nowhere more than in the application of discretionary concepts such as reasonableness and unconscionability.

53 Perhaps the measure is that we are not surprised by the decision. Though it may have legal novelty the result does not offend us.

54 *Muschinski v. Dodds* (1985) 62 ALR 429,451 *per* Deane J.

55 P.S. Atiyah, *From Principles to Pragmatism: Changes in the Function of the Judicial Process of the Law* (1978).

56 J. Stone, "From Principles to Principles" (1981) 97 *LQR* 224.

57 H. Wechsler, "Towards Neutral Principles of Constitutional Law" (1959) 73 *HLR* 1.

58 E.M. Barth, "Perspectives on Analytic Philosophy" (1979) 42 *Nieuwe Reeks Deel* 35.

59 B. Russell, *Wisdom of the West* (1959), 309 quoted in *ibid*.

In view of these considerations the spate of activity in equity is bound to be controversial. There are expressions of concern even from the Bench that these innovations should neither be, nor be seen to be, unprincipled, undisciplined or idiosyncratic. One such comment is that of Gibbs C.J.:

the view that the court can disregard legal and equitable rights and simply do what is fair is not supported in England . . . and it is contrary to established doctrine in Australia.⁶⁰

Often, as was the case with this comment, the concern has been a reaction to imprudent assertions such as the claim of Lord Denning that constructive trusts could be "imposed by law whenever justice and good conscience require it".⁶¹ The implication that the remedy should be limited only by the individual judicial conscience inevitably raised the spectre of the Chancellor's foot and prompted responses such as that of Deane J. in *Muschinski v. Dodds*:

[u]nder the law of this country . . . proprietary rights fall to be governed by principles of law and not by some mix of judicial discretion, . . . subjective views about which party "ought to win" . . . and "the formless void of individual moral opinion".⁶²

The development of equity, it is said, should be by:

the legitimate processes of legal reasoning, by analogy, induction and deduction, from the starting point of a proper understanding or the conceptual foundation of such principles.⁶³

So, if unconscionability is to be the "universal talisman"⁶⁴ but is not to be "a medium for the indulgence of idiosyncratic notions of fairness and justice"⁶⁵ how is it to be confined? Are the limitations we seek to impose limitations of fact or of value?

We would argue that all the categories of equitable relief are based on unconscionability, whatever synonym is used; the influence is 'undue', the enrichment is 'unjust', the circumstances of the detriment in equitable estoppel⁶⁶ suggest that it would be unfair for the plaintiff not to be relieved. However, although these categories could be viewed as no more than instances of unconscionability these classifications do serve a useful purpose, labelling situations where experience tells us that unconscionability is particularly likely to be found. We know that where a defendant who has been in a position of influence over the plaintiff has obtained some benefit, that influence may well have been undue.⁶⁷ Indeed in some situations courts are prepared to presume it to be undue. We know that when the defendant

⁶⁰ Note 54 *supra*, 436.

⁶¹ *Hussey v. Palmer* [1972] 1 WLR 1286, 1290; [1972] 3 All ER 744, 747.

⁶² Note 54 *supra* 452.

⁶³ *Ibid.*

⁶⁴ Sir Anthony Mason, "Themes and Prospects", *Essays in Equity*, P.D. Finn (ed) (1985), 244.

⁶⁵ Note 54 *supra* 451.

⁶⁶ That is the detriment is the result of the plaintiff's reasonable reliance on representations made by the defendant.

⁶⁷ *Johnson v. Buttress* (1936) 56 CLR 113; *Lloyds Bank v. Bundy* [1975] QB 326.

has enriched himself at the expense of the plaintiff it is worth a look to see if the enrichment is unjust. Similarly relationships are classified, fiduciary where, whether because of reliance, confidence, inequality of bargaining power or some position of special expertise or advantage, the risk of unconscionable behaviour is so great that equity has developed the principle that the fiduciary:

may not use that position to gain a profit or advantage for himself, nor may he obtain a benefit by entering into a transaction in conflict with his fiduciary duty, without the informed consent of the person to whom he owes the duty.⁶⁸

This is not to deny that ultimately unconscionability is a matter of opinion. The question is 'Whose opinion?'. Certainly not that of any one individual whether plaintiff, defendant or judge. Certainly not an objective opinion in the sense that an action can be empirically or logically shown to be unconscionable. Rather it is an opinion which has been formed and informed by considered decisions in similar but not identical cases, by the values of the community, that is by the palimpsest of past legal and community traditions. We encapsulate this experience in the categories of equitable relief that we define and as the tradition develops and values change we may create further categories, delete others or expand those we have presently.

These developing standards emphasise the wisdom of what might be called the residual category of unconscionability to which a court might refer when faced with a situation which seems clearly unconscionable but does not fall into any established category. The rigid equity of Lord Eldon may have precluded relief in such cases but, in these more flexible times, the courts are more likely to say that the categories of unconscionability are not closed. Sir Anthony Mason wrote of this stage:

[t]here is a difficulty — illustrated by the invocation of that universal talisman in many fields of equity, unconscionable conduct — of articulating a reasonably precise and instructive principle from the general concept, with the risk that in the early stages of elaboration, the principle lacks definition and sharpness of focus, leading to some degree of uncertainty. There are some who, placing a lower value on certainty, see no fault in this because they lament the rigidity that is associated with sharp definition. What is happening is but one stage in a course of continuous cyclical development in the search for greater certainty. Eventually the search yields a principle more fixed in its application until a time is reached when dissatisfactions with the inflexibility of the principle in its application to new situations results in its giving way to another re-working of doctrine.⁶⁹

The residual category of unconscionability was recognised by Deane J. in *Hospital Products Ltd. v. United States Surgical Corporation*,⁷⁰ where his Honour (in a dissenting judgment) was prepared to impose a constructive trust, although he did not find a fiduciary relationship. The constructive trust, he said, should be seen as "equitable relief appropriate to the particular

68 *Hospital Products Ltd. v. United States Surgical Corporation* [1984] 58 ALJR 587, 596 per Gibbs C.J.

69 Note 64 *supra*.

70 Note 68 *supra*.

circumstances of the case rather than as arising from a breach of some fiduciary duty".⁷¹ It is in this residual area that the most trenchant differences of opinion are likely to occur; surely a desirable result in an area of evolving standards.⁷² It is also in this area that confusion among the categories can occur. A judge who is not entirely satisfied to rely on the residual category of unconscionability may endeavour to fit the situation at hand into an established category. The result may be to diminish or destroy the value of the established category without any corresponding advantage.⁷³

The value of change can be assessed not only by the provision of just relief but also by a principle of conservation. Change for its own sake is to be avoided. It may be difficult to characterise the situations in which it is justified but change is clearly not justified unless it provides relief that was not available using a conventional analysis or substitutes simplicity and clarity for the complication and confusion, usually by eliminating a superfluous category. Occam's razor is no less valuable here than in theories about the natural world.

Although in some cases the emphasis on unconscionability has resulted in quite radical changes to the law it would be incorrect to suggest that this is always the result. The temptation to replace formal rules with discretionary concepts, using the residual category of unconscionability, is often resisted particularly when this would interfere with established rights. As Deane and Dawson JJ. stated "[t]he circumstances must be such as to make it plain that it is necessary to intervene to avoid injustice or . . . to relieve against unconscionable . . . conduct".⁷⁴ However, in some cases reliance on unconscionability protects an established category by allowing the court another avenue for relief. An examination of developments in specific areas will illustrate the development here described, both its strength and weakness.

V. PENALTIES AND FORFEITURES

A. RELIEF AGAINST FORFEITURE

The development of equity's jurisdiction to relieve against forfeiture has been in the forefront of the movement to a *Gemeinschaft*, reminiscent of the era which closed with the decline of Chancery in the late eighteenth century.

⁷¹ *Id.*, 620.

⁷² Note for instance the strong dissenting opinions of Mason C.J. and Brennan J. in *Stern v. McArthur* (1988) 62 ALJR 588, discussed *infra*.

⁷³ Lord Denning's attempt to regard a licence as a proprietary interest in cases such as *Errington v. Errington* [1952] 1 KB 290; [1952] 1 All ER 149 and *DHN Food Distributors v. Tower Hamlets London Borough* [1976] 3 All ER 462, [1976] 1 WLR 852 is an example particularly unfortunate because in both cases the same result could have reached using more conventional analyses. The confusion here was eventually sorted out in *Street v. Mountford* [1985] 2 All ER 289, [1985] AC 809. See also *Ashburn Anstalt v. Arnold* [1988] 2 All ER 147.

⁷⁴ Note 72 *supra*, 603.

The statutory jurisdiction with its elements of *Gesellschaft* has been found wanting and, as a result, there has been a recognition of and a return to the inherent and traditional jurisdiction. This nostalgic pilgrimage first occurred in 1973 with the decision of the House of Lords in *Shiloh Spinners Ltd. v. Harding*⁷⁵ where a leaseholder assigned part of the lease to the assignee reserving a right of re-entry for breach of covenants in an indenture made between them. Upon re-entry by the assignor for breach, the assignee applied for relief against forfeiture. None of the various statutory provisions applied since they all addressed the situation where the lessee or the lessee's assigns or underlessees were applying for relief against the lessor.⁷⁶ Two speeches were delivered, one by Lord Wilberforce and the other by Lord Simon of Glaisdale. Viscount Dilhorne and Lord Pearson agreed with the speech of Lord Wilberforce.

Lord Wilberforce referred to the accepted jurisdiction to grant relief where the object of the transaction and of the insertion of the right to forfeit was essentially to secure the payment of money. He cited a well known case concerning penalties⁷⁷ in support of this statement. He also noted another head of jurisdiction which was unlikely to give rise to any difficulty, namely, cases arising out of hardship, accident or surprise. Apart from cases coming within this latter category, his Lordship repudiated any notion of a general equitable power to rewrite contracts and, in this respect, Lord Eldon's admonitions in *Hill v. Barclay*⁷⁸ were confirmed. Nonetheless, Lord Wilberforce reaffirmed equity's general jurisdiction to relieve against forfeiture for breach of covenant where the primary object of the contract was to secure a stated result which could be achieved when the matter came before the court and where the forfeiture clause was by way of securing that result. The jurisdiction was to be exercised appropriately, in such a way as involved consideration of the conduct of the applicant for relief, the gravity of the breaches, including whether the breaches were wilful, and the loss suffered by the promisee compared with the value of the property. *Hill v. Barclay* was not overruled but there can be little doubt that the speech reflected a broader approach to the exercise of the jurisdiction. If the speech of Lord Wilberforce is at least equivocal in its treatment of *Hill v. Barclay*, the speech of Lord Simon condemns the approach of Lord Eldon in the clearest terms as leading to a "juristic desert" and as demonstrating an "abnegation of equity". Lord Simon declared grandly that equity had an unfettered and unlimited jurisdiction to relieve against contractual penalties and forfeitures.

75 [1973] AC 691.

76 The relevant statutory provisions in New South Wales are: Landlord and Tenant Act, 1899, sections 8, 9 & 10; Conveyancing Act 1919 sections 129 & 130. The sections closely resemble their English counterparts.

77 *Peachy v. The Duke of Somerset* (1721) 1 Stra 447.

78 Note 44 *supra*.

The decision in *Shiloh* opened the way for further cases testing the inherent jurisdiction of the Court. Thus, in *Abbey National Building Society v. Maybeech Ltd.*⁷⁹ Nicholls J. gave relief against forfeiture of a lease at the suit of the mortgagee of the lease. The mortgagee had no standing under the statutory jurisdiction since judgment for possession had been entered in favour of the lessor and the lessor had re-entered for non-payment of rent and for non-payment of maintenance. Relief under the English equivalent of section 130 Conveyancing Act 1900 (N.S.W.) was only available where the lessor was proceeding and not where a judgment had been obtained. Neither was the English equivalent to section 8(4) Landlord and Tenant Act 1899 (N.S.W.) available since the lessor had re-entered for a breach additional to the breach of the covenant to pay rent. The Court rejected a submission for the lessor that in codifying certain aspects of equity's jurisdiction, Parliament had intended to cover the field. Having found the inherent jurisdiction of equity existed, the court did not hesitate to apply it, since the mortgagee was unaware of the default and the lessor's proceedings for possession. The lessor's termination had been for non-payment of money and the lessor could properly be compensated by payment of money, interest and costs. In *Ladup Ltd. v. Williams and Glyn's Bank*,⁸⁰ Warner J. took the same broad approach to the existence of the inherent jurisdiction as that taken by Nicholls J. An equitable chargee sought relief against forfeiture of a lease for non-payment of rent. It was submitted for the lessor that as an equitable chargee had no right to possession, the legislation corresponding to section 8(4) Landlord and as, in effect, accepted but the further submission that Parliament never intended that a equitable chargee should ever apply for relief against forfeiture was rejected. The Court, in finding an inherent jurisdiction existed to order relief in favour of an equitable chargee, applied, in the spirit of *Shiloh*, a broad equitable jurisdiction to relieve against forfeitures. Although the question of exercise of the jurisdiction posed difficulties in *Ladup*, the Court thought the case was one deserving of relief.

This liberal trend noted above was not followed by Lord Templeman when delivering the major speech in *Sport International Bussum v. Inter-Footwear*.⁸¹ Consequent upon litigation, the parties settled their differences under terms of settlement which formed the basis of a consent order disposing of the litigation. Pursuant to the settlement, the respondent gave an exclusive licence to the appellant to use the respondent's names and marks in certain countries, including the United Kingdom, upon payment of certain moneys. A failure to pay entitled the respondent to revoke the licence. Upon forfeiture of the licence, the appellants sought equitable relief to no avail. The House of Lords found no jurisdiction existed to relieve against forfeiture of

79 [1984] 3 WLR 793.

80 [1985] 2 All ER 577.

81 [1984] 1 WLR 776.

contractual licences. On the facts of this case, the decision to refuse relief was inevitable. It is suggested, however, that the House erred in denying the existence of the equity. It may be that the reasoning of Lord Templeman led him to think that the licence in question did not confer any proprietary right upon the licensee and, therefore, there existed no equity to relieve. The better view is that the licence did involve a transfer of proprietary interests since it was exclusive. It would be most unfortunate, indeed, however, if Lord Templeman meant to deny the existence of the equitable jurisdiction simply because the forfeiture concerned a forfeiture of personal property and not real property. There is no reason in principle to confine equity's jurisdiction to the forfeiture of proprietary interests in land and the Court of Appeal so held in *BICC Plc v. Burndy Corporation*.⁸² In disentangling a twenty year old joint venture, two corporations provided that upon failure of one corporation to pay its share of the fees for renewal of certain patent and trade mark rights, the defaulter would assign its interest in such rights to the other party to the agreement. The appellant did fail to pay but the failure was due to an accident or oversight and the Court gave relief against the forfeiture, the case for relief being clearly made out. Dillon L.J. was of the view that the jurisdiction was not confined to relief against forfeiture of interests in land.

The rediscovery of the inherent jurisdiction in *Shiloh* has already led to the provision of equitable remedies outside the field of landlord and tenant. The limits of the jurisdiction are yet to be defined but it is conceivable that traditional contractual rights and remedies could be influenced by the refund doctrine. The House of Lords, however, has already issued warnings against an over exuberant application of the equity so as to overturn established contract law. In *Scandinavian Trading Tanker Co A.B. v. Flota Petrolera Ecuatoriana (The Scaptrade)*,⁸³ a charterparty, which had not taken effect as a demise, was terminated by the shipowner as a result of non-payment. Relief was sought by the charterers against the forfeiture of their rights under the contract. The relief was unequivocally refused and the House declined the invitation to extend the equitable doctrine of relief against forfeiture to contractual rights not involving the transfer of proprietary interests. The efficacy of time of the essence clauses was re-affirmed and the consequences of breach of such a clause as leading to an election on the part of the promisee to put an end to all primary obligations under the contract acknowledged. The House approved and cited the judgment of Robert Goff L.J. in the Court of Appeal which had laid emphasis on the equality of bargaining power between the parties and the need to maintain certainty in commercial transactions.

82 [1985] 2 WLR 132.

83 [1983] 2 All ER 763.

For the law of England, the House of Lords has, for the time being, closed the door on any suggestion of reviewing the valid legal termination of a contract by the application of a revitalized equitable doctrine of relief against forfeiture. For Australia, the question may remain open.

The decision of the High Court of Australia in *Legione v. Hateley*⁸⁴ is, on any view, quite extraordinary. The Court remitted the case to the Supreme Court of Victoria for the determination, in accordance with the evidence, of the respondent's claim for relief against forfeiture of her equitable interest under a contract for the sale of land. The High Court judgments were unanimous in their agreement that, in an appropriate case, specific performance of a contract for the sale of land could be ordered notwithstanding the valid termination of the contract at law for breach by the plaintiff of an essential term. The two joint judgments delivered have been interpreted as laying down divergent doctrine.

The contract the subject of the action in *Legione* was, in effect, an instalment contract for the purchase of land. On exchange, a down payment of about 20% of the purchase price was paid with the balance payable with interest within about twelve months. The contract contained a time of the essence clause and upon default having occurred in the payment of the balance, the vendors terminated pursuant to written notice. The purchaser had been in possession and had built a house.

The joint judgment of Gibbs C.J. and Murphy J. emphasize that part of the speech of Lord Wilberforce in *Shiloh* dealing with relief against forfeitures exacted as security for money payments. Their Honours concluded that relief against forfeiture of the purchaser's interest under the contract occasioned by the failure to pay the purchase price may be given, provided, in the circumstances, it would be just to give relief. It would have been unjust in the circumstances in *Legione* to have refused relief, chief amongst which was the fact that the purchaser had built a house of considerable value. It was noted that by granting relief against forfeiture, the obstacle to decreeing specific performance was thereby removed.

Instalment contracts for the sale of land are akin to mortgages. The object of such a contract is essentially to put money to work and the lender may usually be compensated adequately if repaid principal, with appropriate interest and costs. The general remarks contained in the joint judgment of Gibbs C.J. and Murphy J. do not seriously hint at circumscribing the jurisdiction to relieve against forfeitures, at least where the essential object of the transaction is to secure the payment of money. Of more pertinence, however, is to consider whether the judgment applies to contracts for the sale of land which are not instalment contracts. Whilst the judgment is not clear

84 (1983) 46 ALR 1.

on this point, it is tolerably plain that its general tenor is not suggestive of inhibition.⁸⁵

The joint judgment of Mason and Deane JJ. could be both narrower and broader than that delivered by Gibbs C.J. and Murphy J. Whilst appearing to concede that the purchaser's equitable estate under a contract for the sale of land is commensurate with an ability to obtain specific performance, Mason and Deane JJ. acknowledged an application of the jurisdiction to relieve against forfeiture where the termination of the contract was unconscionable. The unconscionability might be produced by fraud, accident, mistake, surprise or some other element. Where it is unconscionable or inequitable for the vendor to insist on the forfeiture, equity relieves against the forfeiture by means of specific performance.

The joint judgment of Mason and Deane JJ. contains a useful list of five factors which would be relevant in an assessment of entitlement to relief. The first of these is whether the conduct of the vendor contributed to the purchaser's breach. In *Legione*, it seemed that it did although the conduct of the vendor fell short of an estoppel. However, it is suggested that although the vendor's conduct in contributing to the purchaser's breach is an example of unconscionable behaviour, it is not an essential factor to the exercise of discretion to grant relief against forfeiture.⁸⁶ There may well be cases where the unconscionability lies in the result produced by termination in a situation where the vendor at all times acted perfectly reasonably. The extent of the jurisdiction in such a case was acknowledged by Priestley J.A. in *McArthur v. Stern*⁸⁷ and Gaudron J. in *Stern v. McArthur*.⁸⁸ In that case, the vendors' contribution towards the purchasers' breach was far more tenuous than in *Legione* and they did act reasonably in offering to compensate the purchasers for the value of the improvements made by them. Relief was granted on the ground that the termination produced an unconscionable result. As in *Legione*, the contract was an instalment contract and the purchaser had built a house to the knowledge of the vendor. In the Court of Appeal, Priestley and Hope JJ.A. found that the contractual right to terminate was inserted for the production of a given result, namely completion, and that relief against forfeiture could be given for the reasons outlined in the speech of Lord Wilberforce in *Shiloh*. An appeal to the High Court was dismissed by the narrow majority of three to two. The division of learned opinion in the High Court reflects an uncertainty in the application of the *Legione* doctrine

85 Gibbs C.J. and Murphy J. cited the following remarks of Lord Wilberforce from his speech in *Shiloh* with approval: "But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant and 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." *id.*, 12.

86 Contrary to the view forcefully expressed by Mason C.J. in *Stern v. McArthur*.

87 [1986] 5 NSWLR 538.

88 Note 72 *supra*.

and some concern as to the extent of its reach. It is interesting to note that the authors of one of the joint judgments in *Legione*, Mason and Deane JJ., found themselves on an opposite course in *Stern v. McArthur*. The dissenting judgments of Mason C.J. and Brennan J. demand a measure of constraint in the application of equitable doctrine that would rewrite contracts to produce a fair result. Mason C.J. was clearly of the view that the Court had no jurisdiction to relieve against forfeiture of a contract in the absence of unconscionable conduct on the part of the vendor. "To do otherwise would be to eviscerate unconscionability of its meaning".⁸⁹ Brennan J. also emphasized unconscionable conduct on the part of the vendor as essential to the exercise of the jurisdiction, at least in cases where the contract had been terminated under the general law following repudiation by the person seeking relief.⁹⁰ Further, his Honour refused an invitation to treat an instalment contract as a mortgage and noted pertinent differences between the two. However, the joint judgment of Deane and Dawson JJ. delineates a wider approach to the issue of unconscionability. After noting that the joint judgment of Mason and Deane JJ. in *Legione* was not suggestive of restricting equitable relief to cases where there had been unconscionability of an exceptional kind, their Honours noted that the Court will not lightly order specific performance of a contract which has been terminated for breach of an essential time stipulation recognized as such at both law and in equity. Nonetheless, their Honours asserted equity's traditional jurisdiction to grant relief against unconscientious conduct in cases where a person ought not be permitted to exploit another's special vulnerability for the unjust enrichment of himself. One such situation is where the provision for forfeiture has been made to to pay with compensation. It is of significant interest that Deane and Dawson JJ. refer to the development of the equity of redemption and the habit of granting relief in equity in cases where the mortgagor paid up principal, interest and costs. The relief was and continues to be given in cases where there was no unconscionable behaviour on the part of the mortgagee other than the insistence upon the legal forfeiture.⁹¹ Had the case before the court concerned a mortgage rather than an instalment contract, the entitlement to relief would have been unquestionable. Their Honours concluded there was no reason why relief should be refused in so similar circumstances and, accordingly, dismissed the appeal. Gaudron J. too thought that the appeal should be dismissed. After opining that the differences between the joint judgments of Gibbs C.J. and Murphy J. and Mason and Deane JJ. in *Legione* were manifest, her Honour concluded that

⁸⁹ *Id.*, 593.

⁹⁰ It might be otherwise where the vendor relies on a contractual right to terminate, which clause has been inserted as security for the production of a stated result. According to Brennan J., that was not the substance of the case in *Stern v. McArthur*.

⁹¹ Note 88 *supra*, 604.

the vendor's action in insisting upon activating a contractual termination clause was unconscionable in the circumstances prevailing at the time of action. It is the insistence on the exercise of legal rights that is unconscionable in her Honour's view notwithstanding the absence of equitable fraud, acquiescence or estoppel. The assertion of those rights are unconscionable because of the serious effect produced on the interest of the purchaser in circumstances where the alternative remedy of specific performance would result in the vendors receiving all that for which they had bargained.

The decision in *Legione* is illustrative of a lively, changing and innovative equity. It is also a remarkably bold decision in so far as it can be interpreted as permitting equity to resurrect a contract, validly discharged at law for breach of a term regarded as essential at both law and in equity,⁹² by an order for specific performance.⁹³ In specific instances it may be found that the jurisdiction is exercised with caution but its existence is testimony to an expanding equity. The interpretation and application of the jurisdiction, as exemplified by the majority view in *Stern v. McArthur*, provides cogent evidence of a return to traditional equity jurisprudence.

B. PENALTIES

In marked contrast to its vigilant and expansionary role in the field of forfeitures, equity has eschewed a complementary broadening of its jurisdiction over contractual penalties. There may even be doubt as to whether equity has retained any jurisdiction at all given the opinion of Mason and Wilson JJ. that the equitable jurisdiction over penalties "withered on the vine" after the passage of the Judicature Acts.⁹⁴ Yet it should never be forgotten that the equitable jurisdiction to relieve against penalties developed at the same time as the jurisdiction to relieve against forfeitures. It is no coincidence that the doctrines share a common ancestry and, until recently, a common evolution, since they address the same evil. Indeed, some of the early authorities use the terms 'penalty' and 'forfeiture' interchangeably. The similarity between the relief afforded to the obligor under a penal money bond and the mortgagor of land has already been noted.⁹⁵

92 The peculiar attitude of equity towards the essentiality of time stipulations has a long history. The equitable view has now received legislative recognition — section 13 Conveyancing Act 1919 (N.S.W.). Even where the parties have observed the equitable requirements for making time essential, equity may undo a valid rescission by ordering specific performance. This aspect of the equitable jurisdiction to relieve against forfeiture of a contract for the sale of land somewhat troubled Brennan J. in his dissenting judgment in *Stern v. McArthur*, note 88 *supra*.

93 Hodgson J. interpreted the decision in *Legione* as providing for a very wide jurisdiction. In *Proctor v. Milton* (1987) NSW ConvR 55-321, his Honour considered an application for relief against forfeiture of a contractual licence in circumstances where the licensee had impugned the licensor's title by bringing a possessory application under the Real Property Act 1900. Such action would generally have been fatal to a claim for relief but Hodgson J thought that *Legione* gave the court a wider discretion. The licence was irrevocable because of the existence of an equity of acquiescence giving rise to an interest in land. In the event, the application was refused since the licensor had offered to compensate the licensee.

94 *AMEV-UDC Finance Ltd. v. Austin* (1986) 60 ALJR 741, 749.

95 See *supra*, 17.

The enactment of the Statute of William⁹⁶ had the effect of transposing many of the equitable principles concerning penalties to the common law but this did not result in equity deserting the field. Many of the important eighteenth century decisions concerning penalties were delivered in the Court of Chancery. It will come as no surprise, however, to learn that in the ensuing age of laissez-faire, the general passive role of equity during its period of decline ensured an abandonment of any attempt to distil new doctrine. In the golden age of freedom of contract, the emphasis was on the intention of the parties and a penalty as such was likely to escape judicial censure if described in the contract as 'agreed' or 'liquidated' damages.

In the early part of the twentieth century, the modern rule for distinguishing between penalties and liquidated damages was established. The guidelines formulated by Lord Dunedin in *Dunlop Pneumatic Tyre Co. Ltd. v. New Garage and Motor Car Co. Ltd.*⁹⁷ are well known and need not be repeated. The expressed intention of the parties became subsidiary to the principle which tied the validity of an agreed damages clause to a reasonable and bona fide pre-estimate of the likely loss suffered.⁹⁸ The question of reasonable pre-estimate is to be judged having regard to the circumstances existing at the time of the contract, not at the time of the breach.

If the Dunedin test discredited some of the more dogmatic statements of the nineteenth century jurists about the supposed virtues of leaving the parties free to agree on the quantum of damages, it is still a test which suffers from an extraordinary lack of flexibility. In judging the penal nature or otherwise of the agreed sum by circumstances prevailing at the time of contract, the court has deprived itself of taking into account changed circumstances since the time of contract, circumstances which may not possibly have been foreseen and for which the parties may have in no way been responsible. It is a test which is antithetical to a traditional equitable appraisal and devoid of the characteristic discretionary considerations of equity.

The absence of equitable discretion in the field of penalties has pleased some. The economic analysts of law who propound the theory of the efficient breach argue that an agreed damages clause serves an 'efficient' purpose and ought not be disturbed by a court in the absence of some fraudulent or unconscionable conduct at the time of formation.⁹⁹ To these theorists, the principle of certainty in commercial dealings is elevated to a dominant policy consideration. For the law in Australia, the decision of the High Court in *AMEV UDC Finance Ltd v. Austin*¹⁰⁰ has likewise laid considerable emphasis

96 8 & 9 Gul III c. 11. Note 30 *supra*.

97 [1915] AC 79.

98 The principle was first clearly referred to in *Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda* [1905] AC 6.

99 See, for example, Rea note 33 *supra*, 160 *et seq.*

100 Note 94 *supra*.

on the need to promote certainty in commercial transactions. The joint judgment of Mason and Wilson JJ. stressed the utility of agreed damages clauses in commercial contracts and the role they play in the avoidance of protracted and expensive litigation. The joint judgment noted that the courts should give the parties greater latitude in settlement of the terms of their contract. The tendency discernible in several decisions since *Dunlop* to declare agreed damage clauses penal if the stipulated amount in fact exceeds the actual loss was deprecated by Mason and Wilson JJ. Their Honours warned against an examination of the agreed damages clause with the wisdom of hindsight.

In *AMEV-UDC Finance Ltd. v. Austin* the lessor terminated a chattel lease for the breach of the lessee in failing to pay rent. The agreed damages clause provided for an acceleration of all future rental instalments without any rebate and without taking account of the fact that the lessor had repossessed the goods. The clause was clearly penal in the light of the High Court decision in *O'Dea v. Allstates Leasing System Pty. Ltd.*¹⁰¹ but at first instance, Rogers J. was of the view that in seeking the court's assistance in resisting enforcement of the penal clause, the lessee was seeking equity. That being so, the lessee could be put upon terms which included payment of compensation for the lessor's actual loss consequent upon termination. In view of the evidence that the lessee's breach was not repudiatory, the decision of Rogers J. resulted in an award of compensation in the face of the High Court decision in *Shevill v. The Builders' Licensing Board*¹⁰² and was as such, untenable. Mason and Wilson JJ. were at pains to point out that the court would not stay to hear a submission that equitable compensation or damages could be calculated on a basis fundamentally different to that at law. It is a matter for considerable regret, however, that, in their enthusiasm to overturn any reasoning running counter to *Shevill*, the court repudiated any present link between the doctrine of penalties and equitable discretion despite the historical roots of the doctrine. In speaking of the difficulties in 'exhuming' a dead jurisdiction, Mason and Wilson JJ. used a most unfortunate metaphor and one which contrasted sharply with a reference to equity's jurisdiction to relieve forfeitures as a 'flower' surviving in Lord Simon's "juristic desert".¹⁰³

101 (1983) 45 ALR 632.

102 (1982) 149 CLR 620.

103 Note 79 *supra*.

The present contrast between penalties and forfeitures could not be more irrational.¹⁰⁴ In judging whether an agreed damages clause is penal, the court is supposed to only look at the circumstances prevailing at the time of contract. When considering the merits of a case for relief against forfeiture, however, the court is very conscious of the discretionary nature of the jurisdiction and looks at all the circumstances, before, at and after the time of breach. The time is long past for the doctrine of penalties in appropriate cases to be reinfused with equitable considerations. The courts have had no difficulties in refinding the old equitable jurisdiction dealing with relief against forfeiture where the legislative response was found wanting. Lord Eldon's fears about extending the parameters of this jurisdiction in *Hill v. Barclay* were firmly, if politely, put to one side. The renewed vigour of equity is making its mark in many fields of jurisprudence and there is no compelling reason why the law pertaining to penalties should not feel its impact. This is not to suggest that equity should ever assess the loss suffered by the promisee on a different basis to that at law.

The rationale underlying the decision in *Shevill* should not be disturbed on discretionary grounds. But the principle in *Shevill* provides that the promisee should only recover the actual or true loss produced by the promisor's breach and the contractual termination clause in that case was recognised as an artificial device and an aberration. There is room for equitable intervention in circumstances when an agreed damages clause likewise produces an artificial result and gives the promisee a windfall out of all proportion to the true loss suffered. This is not to denigrate the principle of certainty in commercial transactions. There is much to be said for the view of Mason and Wilson JJ. expressed in their joint judgment in *AMEV-UDC Finance* that agreed damages clauses should not be struck down as penalties merely because the stipulated amount ex post facto exceeds the provable loss. But in cases where the agreed damages clause, although a genuine pre-estimate of the likely loss suffered, provides for the payment of an amount out of all proportion to the true loss suffered, there exists a role for equitable discretion. This discretion will be exercised where the result produced would otherwise be unconscionable.

104 The writers have resisted the temptation to explore the principles applicable to the grant of relief against 'forfeiture' of a deposit. The authorities are in a complete state of confusion. Some authorities assume the Dunedin test applies to deposits: *Smyth v. Jessep* [1965] VLR 230; *Re Hoobin* [1957] VR 341; *Coates v. Sarich* [1964] WAR 2 but are unclear at what time the test is to be applied. Some authorities fail to make clear a distinction between deposits and instalments of purchase price: *Stockloser v. Johnson* [1954] 1 QB 476. It is not clear whether relief will be given against forfeiture of a deposit if it is penal or whether, in addition, the forfeiture must be unconscionable: *Stockloser v. Johnson*; *Saunders v. Leonardi* (1976) 1 BPR 9409. If the question of penalty is to be judged solely by reference to the Dunedin test, it is difficult to understand how the usual 10% deposit paid in land contracts could ever be other than penal in a market such as that prevailing in Sydney at the time of writing. The difficulties and inconsistencies in this area of the law are noted by the English Law Reform Commission in Working Paper No 61 on Penalty Clauses and Forfeiture of Monies Paid — Part V (1977) Professional Books.

VI. EQUITY AND CONTRACT

In 1988 there were two landmark decisions in the law of contract, *Waltons Stores v. Maher*¹⁰⁵ and *Trident General Insurance Co. v. McNiece Bros Pty. Ltd.*¹⁰⁶, both of which involved significant discussions of issues relevant here. In the *Trident* case an attempt to restrict the doctrine of privity of contract could not command a majority. Four members of the High Court¹⁰⁷ decided that despite valid criticism of the inconvenience and injustice that could result from the application of the doctrine of privity of contract, the settled rule should not be altered. However, the decision was more a vote of confidence in equity than in privity of contract. Their Honours were all of the opinion that there were equitable grounds of relief available to persons unfairly affected by the doctrine, though views as to the adequacy of the equitable principles in the particular case varied.

The issue of privity of contract was raised by the fact that McNiece, a principal contractor with Blue Circle, claimed indemnity for damages paid to one of its workers under an insurance policy taken out with Trident by Blue Circle. The policy included contractors of Blue Circle among the assured. The Court of Appeal held that at common law a beneficiary under a policy of insurance can sue on the policy even though it is not a party to the policy and provides no consideration.¹⁰⁸ When the matter came before the High Court it was argued that the doctrine of privity of contract precluded McNiece from relief under the contract. Among the grounds which might support McNiece's claim the most obvious were first, the exception to the doctrine of privity favoured by the Court of Appeal and secondly, that the benefit of the contract was held on trust for McNiece. Unfortunately this latter ground had not been argued initially and the Court of Appeal had refused leave to amend the pleadings to base its case on the existence of a trust. All members of the Court agreed that the privity rule might sometimes be unjust, however, views as to how that injustice might be coped with varied. Two judges, Brennan and Dawson JJ. (in separate judgments), declined to make any change to the doctrine of privity. In their views the injustices wrought by the rule could be avoided by the equitable devices of trust and estoppel. As these had not been pleaded in this case the appeal was upheld and McNiece refused relief. Three judges, Mason C.J. and Wilson J. in a joint judgment and Toohey J., held that at least in relation to contracts of insurance, the doctrine of privity no longer applied and that therefore McNiece was entitled to sue on the contract which Trident had made with Blue Circle. Their Honours did not agree that the problems of the privity

105 [1988] 62 ALJR 110.

106 [1988] 62 ALJR 508.

107 Brennan, Deane, Dawson and Gaudron JJ.

108 [1987] 8 NSWLR 270.

doctrine could be overcome by the concept of a trust of a promise which after considerable discussion they rejected as too uncertain and too rigid.

The judgment of the other member of the majority, Gaudron J., had perhaps more in common in the approaches of Brennan and Dawson JJ. in that her Honour also declined to make an exception to the privity doctrine. Gaudron J. held that the McNiece's entitlement to sue was independent of the contract although "ordinarily corresponding in content and duration with the obligation owed under the contract by the promisor to the promisee".¹⁰⁹ Her Honour saw the obligation as grounded on restitutionary principles, in particular on unjust enrichment and in support quoted the opinion expressed by Deane J. in a different case, that unjust enrichment:

constitutes a unifying legal concept which explains why the law recognises, in a variety of distinct categories of case, an obligation on the part of a defendant to make fair and just restitution for a benefit derived at the expense of a plaintiff and which assists in the determination, by the ordinary processes of legal reasoning, of the question whether the law should, in justice, recognise such an obligation in a new or developing category of case.¹¹⁰

According to Gaudron J.:

a promisor who has accepted agreed consideration for a promise to benefit a third party is unjustly enriched at the expense of the third party to the extent that the promise is unfulfilled and the non-fulfilment does not attract proportional legal consequences.¹¹¹

With respect, this formulation is not consistent with the formulation of Deane J. in *Pavey & Matthews* which her Honour quoted. The presumption that the enrichment is at the expense of the third party merely because the legal consequences are unsatisfactory is to dispense with an important factual distinction and to collapse the two requirements. The injustice and the enrichment are both established with reference to the one criterion, *i.e.* whether the appropriate legal consequences have been attracted. This is really the 'unconscionability' test under another name and is not unjust enrichment as is usually understood.¹¹²

The judgment of Deane J. is interesting in that it occupies the middle ground between these two approaches. Like Brennan and Dawson JJ., Deane J. declined to say that privity of contract did not apply holding that there was not any "acceptable justification for the alteration of that established legal position."¹¹³ However, his Honour did express the view that a person in the position of McNiece would ordinarily be entitled to maintain proceedings, though unlike McHugh J. in the Court of Appeal, Deane J. was not prepared to hold that a trust would be invariably imputed. Accordingly Deane J. proposed orders that would enable Trident to be joined and the existence of a trust to be argued.

109 Note 106 *supra* 537.

110 *Pavey & Matthews Pty Ltd v. Paul* (1987) 162 CLR 221, 256-7.

111 Note 106 *supra*, 538.

112 See discussion of unjust enrichment *supra*.

113 Note 106 *supra*, 528.

The *Trident* case, in its disparate judgments, shows the possibilities that exist for a court in a situation that is basically unfair. A judge may alter the legal rule, use an independent, established equitable approach or rely on the inherent right of equity to relieve against unconscionability. Section 48 of the Insurance Contracts Act 1984 (Cth.) probably contributed to the readiness of Mason C.J., Wilson and Toohey JJ. to make an exception to privity of contract. The section gives a person who is not a party to a contract of general insurance, a statutory right to recover his loss from the insured if he was mentioned in the contract as among the assured. Thus the exception could be expected to die a natural death before too long. However, the provision is not retrospective so McNiece could not rely on it. Certainly the special nature of contracts of insurance seems an arbitrary basis for the distinction accorded. As Brennan J. asked:

what makes a 'non-party assured' who had furnished no consideration for a policy of loss insurance different from any other third party mentioned in a contract between promisor and promisee as a party who is to have the benefit of a promise?¹¹⁴

In the Court of Appeal, McHugh J. emphasised commercial practice and necessity, an approach which as Brennan J. remarked, would be more supportable if no other avenue of relief was available.

The other landmark decision, *Waltons Stores v. Maher*¹¹⁵, was one in which another aspect of the doctrine of privity came under attack. This doctrine is pivotal for both freedom *of* contract and freedom *from* contract. Just as important as the notion that one should be able to make what contracts one wishes and with whom, is the notion that one ought never be placed in a contractual relationship unless one has freely agreed and intended to be so bound. One may not be able to reap the benefit of a contract to which one is not a party but neither can the burden of such a contract be imposed upon one.

Waltons Stores v. Maher is a complicated case made more so because of the disagreement between the judges concerning the facts. Maher had been negotiating with Walton Stores with a view to Waltons leasing his land upon which Maher was to build suitable premises. On 21 October 1983, Waltons' solicitors sent to Maher's solicitors a form of Deed of Agreement for Lease to which was annexed a form of lease. The right to make amendments was reserved in the covering letter. Amendments were agreed to and fresh documentation was sent from Waltons' solicitors. On 11 November 1983 Maher's solicitors returned these documents, executed by Maher "by way of exchange". It was essential that building should proceed forthwith in order to meet the agreed deadline for completion and work was commenced. There was no further communication from Waltons or their solicitors until 19 January when Maher was notified that Waltons, because of a change in its retailing policy, did not intend to proceed with the matter. At this time the

114 *Id.*, 516.

115 Note 104 *supra*.

building was 40% complete. The trial judge, Kearney J. found that Maher believed there was an agreement and had a reasonable belief induced by Waltons, that a contract by way of exchange had been concluded. This was also the view of the Court of Appeal and two members of the High Court, Deane and Gaudron JJ. On this view Waltons was under a duty to inform the respondents that their assumption that contracts had been exchanged or that there was a binding contract was incorrect. Thus there was a common law estoppel by representation constituted by the appellant's silence when it should have spoken.

The other members of the High Court, Mason C.J., Wilson (in a joint judgment) and Brennan JJ., could not sustain the finding that Maher believed contracts had been exchanged when building began. However Maher had assumed and in the circumstances it was reasonable for him to assume that the amendments were acceptable to Waltons and that the exchange of contracts was only a matter of formality which would occur in due course. This view of the facts excluded reliance on common law estoppel by representation which must involve representation as to an existing fact; a promise or representation as to future conduct is insufficient.¹¹⁶ Thus Mason C.J. and Wilson J. had to consider the equitable doctrine of promissory estoppel and the novelties involved in its application in such a case. First, promissory estoppel was traditionally a defensive equity, that is it could be relied on as a shield but not a sword. Secondly, and more importantly, the doctrine had hitherto been restricted to the enforcement of promises to vary an existing contract and not to enforce promises made in the absence of contract. The implications of the latter course for the doctrine of consideration were profound and many authorities rejecting such a course were cited.¹¹⁷ Nevertheless their Honours took that step using examples of proprietary estoppel such as *Crabb v. Arun District Council*¹¹⁸ as a stepping stone from *Ramsden v. Dyson*¹¹⁹ to the principle enunciated by Sir Owen Dixon, that equity will come to the relief of a plaintiff who has relied to his detriment on an assumption where the other party to the transaction has "played such a part in the adoption of the assumption that it would be unfair or unjust if he were left free to ignore it".¹²⁰ The result is that promissory estoppel and proprietary estoppel (estoppel by acquiescence) must be regarded "as mere facets of the same general principle"¹²¹. The justification for such a step was explicit:

[e]quity comes to the relief of such a plaintiff on the footing that it would be unconscionable conduct on the part of the other party to ignore the assumption.¹²²

116 Note 84 *supra*, 432.

117 Note 104 *supra*, 114.

118 [1976] Ch 179.

119 (1866) LR 1 HL 129.

120 *Grundt v. Great Boulder Pty. Gold Mines Ltd.* (1937) 59 CLR 641, 675.

121 Note 105 *supra* 116. As Mason C.J. and Wilson J. noted this position also appears to have been sanctioned by the Privy Council in *Attorney-General of Hong Kong v. Humphreys Estate Ltd.* [1987] 1 AC 114, 123-24.

122 *Ibid.*

Their Honours emphasised mere failure to fulfil a promise is not unconscionable; the reliance to one's detriment on an assumption created or encouraged by the other party is essential.¹²³

The views of the other member of the majority, Brennan J. were essentially the same as those of Mason C.J. and Wilson J. His Honour emphasised that an equitable estoppel, unlike *estoppel in pais*, does not depend on an assumed state of affairs but is "a source of a legal obligation arising on an actual state of affairs".¹²⁴ Brennan J. went on to say that "[p]erhaps equitable estoppel is more accurately described as an equity created by estoppel".¹²⁵ This comment confirms the merger of proprietary and promissory estoppel although the nature of the equity created may well be very different. The basis of both is the unconscionability inherent in failure to fulfil a promise whether the benefit promised is or is not proprietary. This characterisation was also the basis of the distinction between a contractual obligation and that imposed by estoppel; the former arising from the agreement of the parties and the latter being imposed irrespective of agreement.

Although, because of the different considerations involved in equitable estoppel, the doctrine of consideration was said to be unaffected by this decision, it is arguable that the doctrine of part performance, grievously wounded by cases such as *Ogilvie v. Ryan*,¹²⁶ has received a further body blow in *Waltons v. Maher*. It is difficult to imagine many situations which meet the requirements of the Australian courts for establishing part performance, in which relief under the principles of this case would be unavailable. Perhaps the exception is the rare case where the person who relies on the unenforceability of a contract neither knew nor ought to have known that the other party was performing their obligations under the oral contract.¹²⁷

VII. EQUITY AND THE TORRENS SYSTEM

One area in which equity has long adopted a 'hands-off' approach has been the fraud exception to the indefeasibility of title accorded to the registered proprietor of Torrens Title land. However, the tendency to focus on unconscionability has penetrated even this area raising the question whether this portends a fundamental change to the Torrens system or is merely a rationalisation of existing practice. The relation between the statutory fraud exception to indefeasibility¹²⁸ and the judicially created in *personam*

123 *Id.*, 117.

124 *Id.*, 121.

125 *Ibid.*

126 [1976] 2 NSWLR 504.

127 *McBride v. Sandland* (1918) 25 CLR 69; *Thwaites v. Ryan* [1984] VR 274.

128 Real Property Act 1900 (N.S.W.) section 42.

exception,¹²⁹ although not mutually exclusive,¹³⁰ had seemed reasonably clear. In order to take advantage of the statutory fraud exception one had to show something "in the nature of 'personal dishonesty or moral turpitude'".¹³¹ This approach was commonly thought to exclude equitable fraud. In the words of the Privy Council:

[t]he mere fact that [the registered proprietor] might have found out fraud if he had been more vigilant, and had made further inquiries which he omitted to make, does not of itself prove fraud on his part.¹³²

However, in a recent decision, *Bahr v. Nicolay*,¹³³ at least some members of the High Court cast doubt on this distinction. According to Mason C.J. and Dawson J. comments such as those quoted above "do not mean all species of equitable fraud stand outside the statutory concept of fraud. Far from it."¹³⁴

Mr. & Mrs. Bahr entered into a contract to sell land to Nicolay and lease it back for three years. It was a term of this contract that the Bahrs would have the right to re-purchase the land upon expiration of the lease. Nicolay agreed to sell the land to the Thompsons. By clause 4 of this agreement the Thompsons "acknowledged" the existence of the right to re-purchase created by the earlier contract. After registration the Thompsons refused to sell to the Bahrs.

In the words of Mason C.J. and Dawson J. the characterisation of clause 4 was at the heart of the Thompsons case. Earlier cases would suggest one of two possible characterisations: (1) the clause amounted to no more than a bare admission that the Thompsons knew of the arrangement made between the Bahrs and Nicolay and did not imply any undertaking to extend a similar opportunity to re-purchase; or (2) the clause contained not only an acknowledgement of what had gone before but also an implicit undertaking, given in order to induce Nicolay to sell, to abide by the arrangement and to permit the Bahrs to repurchase at the expiration of the lease should they so desire. The first characterisation, indicating mere notice of a prior unregistered interest would not amount to fraud within the meaning of the statute.¹³⁵ However, on the alternative characterisation the undertaking, if dishonestly given, would be fraud within the meaning of the statute.¹³⁶ If it

¹²⁹ *Frazer v. Walker and Radomski* [1967] 1 AC 569; [1967] 1 All ER 649.

¹³⁰ For instance in *Loke Yew v. Port Swettenham Rubber Co. Ltd.* [1913] AC 491 the verbal assurances of the respondent company's agent that the unregistered interest of the appellant, Loke Yew, would be respected was held to be fraudulent because it was made falsely and fraudulently, with the intention of inducing the vendor to execute a transfer. Clearly if such assurances were to be given bona fide but subsequently resiled from, the *in personam* exception would bind the purchaser even after registration.

¹³¹ *Wicks v. Bennett* (1921) 30 CLR 80,94.

¹³² *Assets Co Ltd v. Mere Roihi* [1905] AC 176,210.

¹³³ (1988) 78 ALR 1.

¹³⁴ *Id.*, 6.

¹³⁵ *R.M. Hosking Properties Pty. Ltd. v. Barnes* [1971] SASR 100.

¹³⁶ Note 129 *supra*.

had been made in good faith but the Thompsons had subsequently changed their minds then the *in personam* exception would apply. This is a situation which invites the *Trident* analysis. The Thompsons made a contract with Nicolay which was to benefit the Bahrs. Since Nicolay, through his solicitor, had insisted on the insertion of the clause, it is reasonable to assume that there was to be a trust of the benefit of the clause.

In fact Mason C.J. and Dawson J. concluded that although dishonesty was required it was not confined to fraud in the obtaining of the transfer or in securing registration but included:

the dishonest repudiation of a prior interest which the registered proprietor had acknowledged or has agreed to recognise as a basis for obtaining title as well as fraudulent conduct which enables him to obtain title or registration.¹³⁷

The other three members of the Court, Wilson, Brennan and Toohey JJ. held that because the Thompsons did not have a fraudulent intent when they became registered they were not subject to the fraud exception. However by taking a transfer on the basis of clause 4 they became subject to a constructive trust which was binding on them even after registration.

This analysis raises the question whether there is any need for a distinction between these two exceptions. In *Bahr v. Nicolay* all members of the High Court accepted the proposition that mere knowledge of the existence of a prior interest is not fraud.¹³⁸ However, once beyond 'mere knowledge' it would seem that the notion of unconscionability is crucial. If the representations of the now registered proprietor, either by inducing the vendor to sell or inducing the unregistered proprietor to refrain from action that would protect the interest, have brought about the position that he or she is able to defeat the unregistered interest then it is unconscionable that it should be defeated. In this situation the result is the same whether the basis of relief is statutory fraud or the *in personam* exception. Viewed in this way it would seem that a registered proprietor is vulnerable to equitable fraud if by this is meant a situation which includes the requisite unconscionability. However, there is no suggestion in *Bahr v. Nicolay* that this will be so where there is mere notice of a prior interest. It would seem then that, just as in *Trident* it was unnecessary and undesirable to modify the doctrine of privity of contract, so also in *Bahr v. Nicolay* it served no useful purpose to disturb the well settled understanding of the nature of the fraud exception in the Torrens system.

VIII. UNJUST ENRICHMENT AND UNCONSCIONABILITY

In the discussion of the judgment of Gaudron J. in *Trident*,¹³⁹ her Honour's use of the concept of unjust enrichment was outlined. In relying on

¹³⁷ Note 132 *supra*, 7.

¹³⁸ This is hardly surprising in view of the explicit statement to this effect in the Real Property Act 1900 section 43.

¹³⁹ Note 106 *supra*.

unjust enrichment Gaudron J. was adopting an increasingly common analysis. Not only did the notion find prominence in the *Trident* case and in *Pavey & Matthews Pty. Ltd. v. Paul*¹⁴⁰ from which her Honour quoted but also the concept was discussed at some length in *Baumgartner v. Baumgartner*¹⁴¹ by Toohey J. Again in *Stern v. McArthur*¹⁴² Deane and Dawson JJ. stated that much of equity's traditional jurisdiction was directed to the relief from unjust enrichment.

With the popularity of unconscionability as a criterion of relief the question arises whether we are dealing with two separate concepts or merely two terms for the one concept. If they are separate then it is important to distinguish the ambit of each and the different situations in which they might be invoked. In *Pavey & Matthews* Deane J. referred to unjust enrichment as a unifying legal concept, a phrase picked up by Gaudron J. in *Trident*. The situations subsumed in this unity have in common that the defendant has derived a benefit at the expense of the plaintiff in circumstances in which the retention of the benefit by the defendant would be unconscionable. Put in this way unjust enrichment appears to be a sub-category of unconscionability and would apply where the facts do not fall within other sub-categories. The classic situation is to be found in *Chase Manhattan Bank NA v. Israel-British Bank (London) Ltd.*¹⁴³ There the plaintiff bank made two payments on the same day to the defendant. The second payment was made in error. The question whether the second payment should be refunded was only controversial because in the meantime the defendant had gone into liquidation. The competition was really between the plaintiff and the creditors of the defendant. Although much of the discussion centred on whether there was a constructive trust and whether a fiduciary relationship was necessary in order for there to be such a trust, the underlying issue was clearly whether the defendants, undoubtedly enriched by the plaintiff's mistake, were unjustly enriched. In his judgment Gouling J. concentrated on the issue of whether there was a right to trace the money arising from a constructive trust. There was no discussion of unjust enrichment as such. However, the decision that the defendant held the money on trust for the plaintiff despite the absence of a pre-existing fiduciary relationship originating in a consensual transaction was clear recognition that its retention would be unconscionable. *Baumgartner v. Baumgartner* was another decision which could have rested on either constructive trust or unjust enrichment. Certainly Toohey J. was of this opinion.¹⁴⁴

140 Note 110 *supra*.

141 (1987) 62 ALJR 29.

142 Note 72 *supra*.

143 [1979] 3 All ER 1025.

144 Note 141 *supra*, 36.

The influence of the analysis Deane J. in *Muschinski v. Dodds*¹⁴⁵ is evident here and indeed it was referred to by Toohey J. If, as Deane J. suggests, a constructive trust is a remedy granted to relieve the innocent from the effects of unconscionability rather, then an essentialist analysis is no longer necessary for relief. This prompts the conclusion that relief can be given on the basis either of unconscionability or unjust enrichment raising the problem noted above, whether unjust enrichment and unconscionability should be treated as separate categories.

As discussed earlier the judgment of Gaudron J. in *Trident* removes the only feature which distinguishes unjust enrichment from unconscionability, that is that the enrichment of the defendant should have been at the expense of the plaintiff. Unjust enrichment becomes a category more seemingly specific than that of unconscionability without any distinguishing factual requirement. But if unjust enrichment is merely one form of unconscionability then logically we could do without it. If it is unconscionable for the defendant to keep the property at issue then in one sense it is irrelevant whether it came from the plaintiff or not. This seems to be the explanation for the readiness of Gaudron J. to accept the unjust enrichment category in *Trident*. However, the distinguishing features can be used to focus attention on a common aspect of unconscionability, directing the court to those decisions most similar on the facts, with which useful comparisons can be made. The category is as a useful way of drawing on the experience of the past and the absence logical independence ceases to be a problem.

IX. CONCLUSION

The revitalisation of equity which we have described is a sign of a healthy progress to a more just society. We agree with Julius Stone that the trend is from existing principles to more refined principles albeit by way of the inherent and residual discretion to relieve from unconscionability. One can only speculate why this should be so. Arguably the work of Stone and others¹⁴⁶ which so demystified and illuminated the nature and techniques of the judicial process has resulted in a the legal profession which is less reluctant openly to develop principles more consonant with substantive justice.

145 Note 54 *supra*; See also M. Stone, "The Reification of Legal Concepts: *Muschinski v. Dodds*", (1986) 9 *UNSWLJ* 63.

146 J. Stone, *Legal System and Lawyers' Reasonings* (1964); J. Stone, *Precedent and Law* (1985); K. Llewellyn, *The Common Law Tradition* (1960); R. Dworkin, *Taking Rights Seriously* (1978); R. Dworkin, *Law's Empire* (1986).

Whatever the cause the development is welcome. It is necessary nonetheless, to sound again a note of caution. Change for change sake ought to be avoided. The traditions of the Anglo-Australian legal system have relied heavily and successfully on precedent. While the absence of a logical connection between a decision and the precedent on which it relies is not a cause for concern, the failure to take the advantage of the accumulated wisdom of the law is a prescription for injustice.