UNIVERSITY OF HONG KONG
FACULTY OF LAW

INTERNATIONAL WORKSHOP ON THE NEW EQUITY
10TH to 12TH SEPTEMBER 1998
CONVOCATION ROOM

Thursday 10th September 1998

Session 1: **Introductory**
Session 2: **Equity and Remedies**
Session 3: **Undue influence: guarantees: unconscionability**

Friday 11th September 1998

Session 4: **Equity and commercial law**
Session 5: **Equity as a court of conscience**

Saturday 12th September 1998

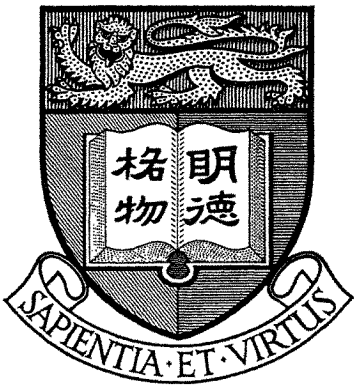
Session 6: **Is there a New Equity?**

In association with the Workshop

The **ROWDGETT YOUNG FELLOWSHIP LECTURE** given by Mr Justice Gopal Sri Ram of the Malaysian Court of Appeal, the Rowdgett Young Fellow, on Saturday 12th September 1998 at 11.30 am

and

A day-long seminar for the profession on **EQUITY DEVELOPMENTS IN THE COMMERCIAL LAW** sponsored by Butterworths Asia and the Faculty of Law on Monday 14th September 1998



Session 1: INTRODUCTORY

Thursday 10th September 1998
9.30 - 10.30

1. WELCOME AND INTRODUCTION

Judith Sihombing
Univeristy of Hong Kong

2. *UNION EAGLE*: OR, THE BEGUILING HERESY OF THE COURT'S UNFETTERED JURISDICTION TO GRANT RELIEF AGAINST FORFEITURE

Mr Justice Henry Litton,
PJ of the Court of Final Appeal, Hong Kong

Union Eagle: Or, The beguiling heresy of the court's unfettered jurisdiction to grant relief against forfeiture

Mr Justice Litton, Permanent Judge, CFA
10 September 1998 Hong Kong University

Introduction

On the facts, *Union Eagle Ltd. v. Golden Achievement Ltd.* [1997] AC 514 could not have been simpler.

The appellant (purchaser) entered into an agreement to buy a flat, paying a 10% deposit. The agreement made provision for the respondent (vendor) to forfeit the deposit and resell the flat if the purchaser failed to tender the balance of the purchase price on time. Time was of the essence of the contract, and expired at 5 pm on 30 September 1991. The purchaser was late. So the vendor rescinded the agreement and forfeited the deposit. How could the vendor be prevented from exercising its undoubted contractual rights? On what principles could equity intervene to adjust the bargain between the parties?

The 'equities' of the situation

In the Court of Appeal Godfrey JA, dissenting, thought that equity should intervene because to allow the vendor to 'take advantage' of its contractual rights was 'unconscionable': The purchaser was only 10 minutes late; the consequences of this 'slight' breach were disproportionate: Not only would the purchaser lose the 10% deposit, but also its equitable interest in the flat.

But, as the Privy Council at p 523 points out, the 'equities' were not all one way: The assertion of the purchaser's right to relief meant that the flat was sterilized for 5 years: In a volatile market this could have serious consequences for the vendor. What if, in the meanwhile, the flat should have *fallen* in value?

'Overly tender consciences of judges'

> [The] actions typically [of commercial people] depend on self-interest and profit-making, not conscience or fairness. In particular circumstances protection from unconscionable conduct will be entirely appropriate. But courts should ¡K be wary lest they distort the relations of substantial, well-advised corporations in commercial transactions by subjecting them to the overly tender consciences of judges: per Kirby P in *Austotel Pty Ltd v. Franklin Selfserve Pty Ltd* [1989] 16 NSWLR 582 at 586.

The notion that a breach of contract is only 'slight' and therefore might be overlooked by the court is a beguiling one: and is a heresy. It creeps into cases from time to time. For example, the so-called 'de minimis rule'. In *World Ford Development Ltd v. Ip Ming Wai* [1993] 1 HKC 98, in circumstances almost identical to *Union Eagle,* the purchaser was 24 minutes late. The trial judge held that this was 'trifling and of a negligible nature' and found for the purchaser. Was this simply 'unconscionability' by another name? The product of an 'overly tender conscience'?

The trial judge in *World Ford Development* was reversed on appeal. The points emerging from the case are:-

(i) It is a matter for the parties themselves whether punctuality is required. The courts have no dispensing powers. Where the parties have said that acts are to be performed 'at or before 5pm' it does not mean 'at *about* 5pm'. Contrast a case like *Louis Dreyfus & Cie v. Parnaso Cia Mavieva SA* [1960] 2 QB 49 where, in the written agreement, the use of the word 'approximative' in relation to a cargo of 10,400 tons of wheat gave scope for a 3.18% shortfall: A shortfall which the English Court of Appeal held would *not* have been excused under the 'de minimis' rule: *Note*: The trial judge (Diplock J.) had erred because he held (see [1959] 1 QB 498 at 512) that the word 'approximative' should be construed as 'referring to those limits of tolerance which the *de minimis* rule imports into

contracts of this kind' and found for the buyer because a 3.18% shortfall was *not excusable* under the *de minimis* rule. Diplock J. did not have an 'overly tender conscience', but he nevertheless erred by failing to give effect to the parties' intent, by not giving full scope to the word 'approximative' in their written contract.

(ii) In a *practical* sense, there are limits to the accuracy of measurement beyond which the courts will not go. This depends upon the context of the case. For instance, in *Margaronis Navigation Agency v. Henry W Peabody & Co* [1965] 2 QB 430, the contractual obligation was to load 12,600 tons of maize in bulk at Cape Town. The equipment for loading the ship measured the maize as it went into the hold: Only 12,588 tons 4 cwts went into the hold: A shortfall of 0.093%. Was the ship 'fully loaded' in accordance with the requirements of the charter-party? Was the shortfall 'de minimis'? The answer was NO. If, in the contractual context, it was *practicable* to measure down to 0.093%, the failure to deliver this shortfall was breach of contract.

(iii) A court does not construe a contract by contradicting it. As Lord Atkin said in *Arcos v. Ronaasen & Son* [1933] AC 470 at 479:

> If the written contract specifies conditions of weight, measurement and the like, those conditions must be complied with. A ton does not mean about a ton, or a yard about a yard ¡K. If the seller wants a margin he must, and in my experience does, stipulate for it.

(iv) Clarity in commercial transactions are of paramount importance:

> The ideal to be ascertained is a situation where:
>
> "both parties seeking legal advice as to their rights and obligations can expect the same clear and confident answer from their advisers and neither will be tempted to embark on long and expensive litigation in the belief that victory depends on winning the sympathy of the court": per Lord Bridge in *The Chikuma* [1981] 1 WLR 314 at 322.

Stipulation as to time

The principle applied in *Union Eagle* is that stated in *Steedman v. Drinkle* [1916] 1 AC 275 at 279 by Viscount Haldane:-

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

Accepting that a broad and discretionary jurisdiction vested in Equity, nevertheless the majority of the Court of Appeal in *Union Eagle* found that, on the facts, there simply was no room for Equity to intervene. The Privy Council agreed.

Where the harsh edges of the contract might be softened

Where argument for equitable remedies might legitimately arise, and relief might be given to the purchaser, the court would tend to focus first on the conduct of the vendor: Has the vendor, by his acts or declarations (or those of his agents) done something to make the purchaser believe that the strict legal rights under the contract would not be enforced, and the

purchaser relying upon this has acted to his own detriment?

This was one of the main issues in *Legione v. Hateley* [1983] 152 CLR 406. There, the contract was for the purchase of vacant land. On payment of the deposit the purchasers entered into possession and built a house on the land. The contract provided for the balance of the purchase price to be paid on 1 July 1979; time was of the essence, but the contract went on to say (in Condition 5) that a party could not enforce his rights under the contract unless he gave written notice of default, giving not less than 14 days to remedy the default; only then could the contract be rescinded. The purchaser did not settle on the due date. On 26 July 1979 the vendor served a notice of default and claimed the right to rescind unless the defaults were remedied within 15 days (that is, by 10 August). On 9 August the purchaser's solicitors phoned the vendor's solicitors and spoke to a clerk; she was told that the purchaser had arranged bank finance and would be ready to settle on 17 August: in effect asking for an extension of time by eight days. The clerk said: 'I think that'll be all right but I have to get instructions'. Five days later, on 14 August, the vendor claimed that the contract had been rescinded by the earlier notice. The purchaser's tender of the purchase price was rejected.

The judgments in the High Court of Australia were by no means unanimous. At the risk of over-simplification, it can be said that the judgments focussed on two issues: (i) promissory estoppel and (ii) unconscionability as a basis for relief against forfeiture. Did the conversation with the vendor's solicitor's clerk have the effect of estopping the vendors from relying on the completion date - at least, until a definite refusal to extend time had been given and a reasonable time had then elapsed? Or was this a case where relief against forfeiture might be given because (a) whilst the clerk's equivocal statement (she thought settlement on 17 August would be all right but had to get instructions) could not amount to an *estoppel*, it nevertheless *contributed* to the purchaser's breach (b) the consequences of late payment were negligible as far as the vendors were concerned and were

so disproportionate to the loss suffered by the purchasers (forfeiture of their interest in the land and loss of the house they had built) and (c) the windfall gain arising to the vendors on forfeiture, so that the doctrine of *unconscionability* might apply?

The flexible remedies of equity

It is beyond the scope of this paper to discuss the whole range of remedies available in Equity. But a point of note is this: As Lord Hoffman indicated (p 522) in *Union Eagle*, in a situation like *Legione v. Hateley*, the result is not necessarily black and white: That is, either the purchaser gets the extension of time he wants *gratis* (at the expense of the vendor) or the vendor forfeits the deposit and recovers the land with the house upon it (thereby obtaining a windfall gain): There is the *possibility*, as Lord Hoffman suggests, of *restitutionary relief* (which in fact was never claimed in *Legione v. Hateley*. This posed a real problem in the High Court of Australia: One of the questions relevant to relief against forfeiture was this: Was specific performance *with compensation* an adequate safeguard for the vendor?) Lord Hoffman did not elaborate on this possibility. But one thing is sure: The consideration of this issue would have required evidence, adding to the expense of the litigation.

The remedy of restitution - tied closely to the concept of unjust enrichment - is not well-developed in the law. Such remedy, described as 'unjust enrichment or unjust benefit' by Lord Wright in *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32 at 61, is said to:

> "prevent a man from retaining the ¡K benefit derived from another which it is against conscience that he should keep. Such remedies ... are generally different from remedies in contract and tort and are recognised to fall within a third category of common law which is called quasi-contract or restitution."

If such remedy were available in the *Legione v. Hateley* type of case, it might mean this: The purchaser's

equitable interest in the land reverts to the vendor when the contract is rescinded, on condition that the vendor pays to the purchasers the value of the house: That is to say, specific performance *with compensation*.

Specific performance with compensation

This was, in effect, what the vendor actually offered in *Stern v. McArthur* [1988] 165 CLR 489 which also concerned the sale and purchase of vacant land. There the contract, signed in 1969, provided for the payment of a deposit and the balance of the purchase price by monthly instalments (together with interest) over a very long period. The purchaser entered into possession and built a house on the land, then (much later) defaulted on the monthly instalments. By that time the land had risen greatly in value. Mason CJ and Brennan J refused to accept that a purchaser, in breach of a term in the contract which expressly entitled the vendor to rescind, could claim to retain the benefit of the bargain by tendering (late) the purchase price and seeking specific performance, thereby retaining the benefit of the bargain. They held that no aspect of the vendors' conduct could be described as unconscionable: The vendors gave the purchasers ample time to come up with the balance of the purchase price, and offered the purchasers the value of the improvements to the land. Note Mason CJ's remarks at p503 concerning the doctrine of unconscionability:

> "The doctrine is a limited one that operates only where the vendor has, by his conduct, caused or contributed to a situation in which it would be unconscionable on the *vendor's* part to insist on the forfeiture of the purchaser's interest."

Conclusion

The message given by the Privy Council in *Union Eagle* - a valuable one for Hong Kong - is clear: In the case of an ordinary contract for the sale of a flat, to allow vague doctrines of equity to intervene, thereby adjusting the parties' bargain, is to introduce uncertainty in the law and to provoke litigation. Far from the case 'crying

out for the intervention of equity' (as Godfrey JA claimed it did) the Privy Council said:

> "....on the contrary, it shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene".

In concluding, it would be appropriate to give the last word to Lord Radcliffe in *Campbell Discount Co. Ltd. v. Bridge* [1962] AC 600 at 626:

> "*Unconscionable* must not be taken to be a panacea for adjusting any contract between competent persons when it shows a rough edge to one side or the other, and equity lawyers are, I notice, sometimes both surprised and discomfited by the plenitude of jurisdiction, and the imprecision of rules that are attributed to 'equity' by their more enthusiastic colleagues. Since the courts of equity never undertook to serve as a general adjuster of men's bargains, it was inevitable that they should in course of time evolve definite rules as to the circumstances in which, and the conditions under which, relief would be given, and I do not think that it would be at all an easy task, and I am not certain that it would be a desirable achievement to try to reconcile all the rules under some simple general formula. Even such masters of equity as Lord Eldon and Sir George Jessel, it must be remembered, were highly sceptical of the court's duty to apply the epithet 'unconscionable' or its consequences to contracts made between persons of full age in circumstances that did not fall within the familiar categories of fraud, surprise, accident, etc., even though such contracts involved the payment of a larger sum of money on breach of an obligation to pay a smaller sum (see the latter's judgment in *Wallis v. Smith*).

NOTES ON THE SYSTEM OF CONVEYANCING IN HONG KONG

Tenure in Hong Kong, apart from the land on which St John's Cathedral is built, is held by way of leasehold. Under the Basic Law, terms will end on 30 June 2047. Despite the fact that most leaseholds are held as tenants in common in multi-storey buildings, used for residential, commercial or industrial purposes, there is no strata titles legislation in Hong Kong.

The contract for the sale of land or of an interest in land must comply with the essential features of an enforceable agreement, namely offer, acceptance, consideration, and intention to effect legal relations; further the contract must be in writing to comply with the terms of section 3 (1) of the *Conveyancing and Property Ordinance* (cap 219), or illustrate sufficient acts of part performance so that the compliance with section 3 (2) will take the agreement outside section 3 (1).

In many cases of secondary sales in Hong Kong

a. an estate agent prepares a Provisional Agreement **[PA]** which is frequently poorly drafted, confusing, and contradictory. The estate agent usually acts as agent for both the purchaser and the vendor, and signs the PA to ensure his commission which is paid by both vendor and purchaser. Generally the **PA** is a binding, enforceable agreement: *Fong Yee Lan v Yiu* [1992] 2 HKLR 1991 167; and *Chan v L & D Associates* [1992] 2 HKDCLR 1: *Wong Lai Fan v Lee Ha* [1992] 1 HKLR 128.

b. a deposit of 1% is paid on signing of the PA:

c. under section 29A to 29I of the *Stamp Ordinance*, ad valorem stamp duty must be paid either within 30 days of entry into a contract [the **PA]** for residential property, or where a **SPA** is executed within 14 days of entry into the **PA**, then within 30 days from the execution of that formal **SPA**.

d. at this point of time, the vendor and purchaser then consult a solicitor. The **PA** is replaced by a Sale and Purchase Agreement **[SPA]** drafted by the vendor's solicitor with some input from the purchaser''s solicitor.

e. the **PA** and the **SPA** are registrable under the *Land Registration Ordinance* (cap 128): *Hua Chiao Commercial Bank Ltd v Chiaphua Industries Ltd* [1987] 1 AC 99. Section 4 of that ordinance abrogates the doctrine of notice!

f. the terms of the **PA** are usually pro-vendor allowing him to renege on the payment of 1% of the purchase price. However, if the purchaser defaults, he will lose the deposit and may be liable for other damages. Generally the purchaser will have abrogated his right to specific performance.

g. the **PA** and the **SPA** will provide that time is of the essence: *Health Link Investment Ltd v Pacific Hawk Investment Ltd* [1995] 1 HKC 249: *Chong Kai Tai v Lee Gee*

Kee [1997] 1 HKC 359 [PC]. see *Union Eagle* and *Pacific South*.

Where units in multi-storey buildings are sold prior to completion, the Consent Scheme operated by the Lands Department regulates the transaction.

Frequently the purchaser will sell on prior to completion with the result that many transactions are complicated by confirmations or nominations: *Wellfit Investments Ltd v Poly Commence Ltd* [1997] 2 HKC 236: *Chong Kai Tai v Lee Gee Kee* [1997] 1 HLC 359.

Subject to the terms of the contract, completion is by undertaking under which the purchaser pays the balance of the purchase money on the due date, and the due time on that day; the vendor hands over an executed Assignment and gives the purchaser vacant possession. Title deeds are not handed to the purchaser for a further 21 or 30 days pursuant to the vendor's solicitor's undertaking to do so. The Privy Council in one of the last appeals to that court, namely in *Chong Kai Tai v Lee Gee Kee* [1997] 1 HKC 359, said under the 'Hong Kong style completion' the payment of money and the perfection of title are simultaneous transactions subject always to the terms of the contract; see also comments in *Wellfit Investments Ltd v Poly Commence Ltd* [1997] 2 HKC 236: *Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 HKC 173: Law Society Circular No 188/90. If the purchaser is obtaining finance, the funds should be ready and available either for the solicitor of the purchaser or, where the mortgagee's solicitor is to complete, with that solicitor: *Edward Wong Ltd v Johnston Stokes & Master* [1984] 2 WLR 1.

The use of the Letters of Undertaking, in a form drafted by the Law Society, is not mandatory but their use is now almost universal. On the nature of an undertaking see *Lau Mui Fun & Anor v K C Chan & Co: Liu Tai Cheong & Anor (as applicants)* [1993] 2 HKLR 90.

Under the *Land Registration Ordinance* a registered instrument receives priority as against a subsequent bona fide **purchaser or mortgagee for value**: *Chu Kit Yuk v Country Wide Industrial Ltd* [1995] 1 HKC 363. Actual or constructive notice of a prior interest is able to be ignored because of the terms of section 4 which provides:

> No notice whatsoever, either actual or constructive, of any prior unregistered deed, conveyance, or other instrument in writing, or judgment, shall affect the priority of any such instrument as aforesaid as is duly registered.

The registering party is however subject to two provisos:

(1) he must be a 'bona fide purchaser or mortgagee'. Actual or constructive notice of a prior unregistered interest has no effect on his bona fides. Section 3 (2) makes clear that

the prior unregistered interest is in danger only from 'a bona fide purchaser or mortgagee for valuable consideration: see *Kai Sun Investments Ltd v Dah Sing Bank Ltd* [1983] 2 HKC 554: *Wong Chim-ying v Cheng Kam-wing* [1991] 2 HKLR 253: *Chu Kit Yuk v Country Wide Industrial Ltd* [1995] 1 HKC 363. On consideration see *FISA v Baik Wha International Trading Co Ltd* [1985] HKLR 108.

and

(2) the interest claimed must be a registrable interest in that it is in writing and it affects land: section 2 (1). An unregistrable interest, namely one which is not in writing even though it might be claimed to affect land, formerly would not affect the registered interest holder. However, the decision of *Wong Chim-ying v Cheng Kam-wing* [1991] 2 HKLR 253 resulted in the priority of unregistrable interests being tested by reference to common law priorities so that the registered interest holder might well find himself at risk from the unregistrable interest, not through the operation of the *Land Registration Ordinance* but through the operation of common law priorities. The result of intermingling of these two priority systems is unclear.

1 September 1998
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WORKSHOP ON THE NEW EQUITY [10th to 12th September 1998]
ROWDGETT YOUNG LECTURE [12th September 1998]
Convocation Room, Main Building, Univeristy of Hong Kong,

organised by the Faculty of Law
University of Hong Kong

WORKSHOP ON THE NEW EQUITY

Rapporteur: *Lord Justice Mummery*

10th September
9.30 to 5.30

SESSION 1: **BACKGROUND TO THE WORKSHOP**
SESSION 2: **EQUITY AND REMEDIES**
SESSION 3: **UNDUE INFLUENCE: GUARANTEES: MORTGAGES: CONSCIENCE**

Thursday 10th September 1998

Registration 9.00 - 9.30

9.30 - 10.30

1. Welcome by Professor Albert Chen, Dean, Faculty of Law

2. Introductory remarks on Hong Kong conveyancing: js

3. ***Union Eagle*: Or, The Beguiling heresy of the court's unfettered jurisdiction to grant relief against forfeiture**
   Mr Justice Litton, PJ, CFA [HK]

tea/coffee - 10.30 - 10.50
10.50 - 12.30

4. **The defaulting purchaser and equity's protection:**
   Professor Ted Tyler [HK]

5. **Part performance and restitution:**
   Mr David Humphries [HK]

6. **Overcoming a Lack of Formalities-- Equity's role**
   Ms Sarah Nield [Southhampton]

7. Discussion

lunch 12.30 - 2.00
2.00 - 3.00

8. **The role of New equity - Making Contractual role for Conscionability in Ireland**

Ms Oonagh Breen [Ireland]

9. ***Att Gen v Reid*: restitution? compensation? criminal? civil?**
Mr Michael Jackson [HK]

10. Discussion

tea/coffee 3.00 - 3.20
3.20 - 5.30

11. **Bare trusts: the new proprietary interest?**
Judith Sihombing [HK]

12. **Property rights and conscience:**
Dr William Swadling [Oxford]

13. Discussion

Friday
11th September 1998
9.30 to 5.30

SESSION 4: **EQUITY AND COMMERCIAL LAW**
SESSION 5: **EQUITY AS A COURT OF CONSCIENCE:THE NEW EQUITY**

9.30 - 10.30

1. **Romalpa and Quistclose: Ambivalence and Contradiction:**
   Ms Lusina Ho [HK]
   Mr Philip Smart [HK]

tea/coffee 10.30 -10.50
10.50 - 12.30

Chair: Anne Carver

2. **Liabiliity of Solicitors to lenders: An equitable perspective**
   Mr Alan Sprince [Liverpool]

3. **Fiduciaries**
   Ms Sarah Worthington [LSE]

4. **Tracing and Commercial Law**
   Dr Lionel Smith [Oxford]

lunch 12.30 - 2.00

2.00 - 3.00
Chair: Ramy Bulan

5. Malaysia: *Union Eagle:* **from the Islamic perspective**
   Puan Noor Inayah Yaakob [Malaysia]

6. Singapore: **Pragmatism in Equity in Singapore**
   Dr Hans Tjio [Singapore]

tea/coffee 3.00 - 3.20

3.20 - 5.30

7. Indonesia: **Good faith and equity in the civil law system**
   Professor Dr LM Gandhi-Lapian [Indonesia]

8. New Zealand: **The obligations of fiduciaries: recent developments in New Zealand**
   Professor Julie Maxton [NZ]

9. Hong Kong: **Equity in action**
   js

10. Discussion

Saturday
12th September
SESSION 6
9.30 to 11am

IS THERE A NEW EQUITY?
SHOULD CAUTION BE EXERCISED WHEN USING THE NEW EQUITY?

The Rapporteur
Panel: all speakers

Is there a New Equity?
Does the New Equity follow the High Court of Australia/ Supreme Court of Canada?
Has the 'chancellor's foot' been revised?
Does the New Equity destroy certainity?
Is there a role for equity in commercial law?
What is the overall effect of the New Equity on

a. traditional and nominate remedies:
b. remedial devices:
c. creation of proprietary interests:
d. principles of law, for example contract, tort, and property?

Does criminal compensation mirror civil restitution in appropriate cases?
Is there still a role for the discretionary bars, especially in relation to contracts for the sale and purchase of land?

Tea/coffee 11.00 - 11.30

11.30 - 12.30

THE ROWDGETT YOUNG LECTURE

Mr Justice Gopal Sri Ram JCA of the Court of Appeal, Malaysia

9 September 1998
js

Session 2: EQUITY AND REMEDIES

Thursday 10th September 1998
10.50 - 12.30
2.00 - 3. 00

1. **THE DEFAULTING PURCHASER AND EQUITY'S PROTECTION**

   Professor EGL Tyler
   City University of Hong Kong

2. **PART PERFORMANCE AND RESTITUTION**

   Mr David Humphries
   Australian Consulate-General, Hong Kong

3. **OVERCOMING A LACK OF FORMALITIES -- EQUITY'S ROLE**

   Ms Sarah Nield
   University of Southhampton [UK]

4. **BARE TRUSTS: A NEW PROPRIETARY INTEREST?**

   Judith Sihombing
   University of Hong Kong

The defaulting purchaser and
Equity's protection - relief against rescission
by
Professor Ted Tyler, City University of Hong Kong

Union Eagle Ltd v Golden Achievement Ltd [1997] AC 514, PC Slight delay in completion in contract for sale of land - 10% deposit - time of the essence - no other relevant factors besides delay - vendor rescinds - no jurisdiction to grant relief to purchaser by way of specific performance.

The principle of Steedman v Drinkle [1916] 1 AC 275, PC (instalment contract - deposit of 6.25% of Can $16,000 - 160 acres of virgin land - default on first instalment - no specific performance for purchaser).

Rejection of the broad equity principle found in Australia and other jurisdictions: see eg Legione v Hateley (1982) 152 CLR 406 17.14% deposit - balance due nearly one year later - time of the essence - purchaser expected to pay from proceeds of sale of other property - purchaser entered into possession and built house of same value as subject plot - purchaser's sale fell through - purchaser defaulted on contract - Majority of High Court held jurisdiction to grant relief by way of specific performance or otherwise - case remitted to Supreme Court of Victoria.
Unconscionability test.

Compare Australian approach to O'Brien type cases: Commercial Bank of Australia Ltd v Amadio (1983) 153 CLR 447.

New South Wales and the High Court justices from NSW the fons of true Equity in the Common Law world.

Should Hong Kong in the future follow the liberal Australian approach or the restrictive Union Eagle approach?

One reason for a more liberal approach in Hong Kong is the absence of an equivalent of LPA 192S s49(2) (which allows the court to order repayment of the deposit to the purchaser where it refuses him specific performance).

Does it matter what approach is followed so long as justice achieved?

Comments on Union Eagle -

- the outcome of Union Eagle, ie no relief for the purchaser, was correct on the facts, absent any factors besides the slight delay in completion.

- it is accepted that there is no "unlimited and unfettered" jurisdiction to grant relief ("the beguiling heresy").

- the older English authorities (and those in other Common Law jurisdictions) indicate that Equity will grant relief by way of an order for specific performance to a purchaser in breach of a time of the essence provision, provided sufficient mitigating factors are present (These factors indicated below). Kilmer v British Columbia Orchid Lands Ltd [1913] AC 3 19 PC is an example.

- a limited jurisdiction based on a broad Unconscionability ground is an acceptable way to accommodate the various factors that will lead to relief being granted.

- Lord Hoffmann in Union Eagle referred to "uncouscionability" as undefined and that it would create uncertainty. But it is no more uncertain than other equitable grounds, such as "undue influence" or "equitable fraud"

- Equitable intervention in a commercial transaction necessarily involves an interference in contractual expectations.

- pace the Privy Council, land is different from other commodities, such as perishable cargoes, and is often treated as different by the law.

- Union Eagle itself recognised some of the mitigating factors - penalties, improvements, vendor's conduct, estoppel - but preferred that these be dealt with by appropriate restitutionary relief rather than

by specific performance against the vendor. Re Dagenham (Thames) Dock Co ex parte Hulse (1873) 8 Ch App 1022 where specific performance was granted to the purchaser (which had taken possession and began construction of a dock) is explained in Union Eagle on the basis that the then state of English law did not allow of an adequate restitutionary remedy.

- Steedman v Drinkle assumes that relief by way of specific performance was the appropriate form of relief an appropriate cases.

- The Privy Council in Union Eagle left open the possibility, in appropriate cases where mitigating factors were present, of a relaxation of the principle in Steedman v Drinkle and a court granting relief by going the Australian route or by a development of the law of restitution and estoppel.

- So the strict rule in Steedman v Drinkle and Union Eagle only applies absent other factors.

Some of the relevant factors -

Financial

- Hardship to the purchaser: Vernon v Stephens (1722) 24 ER 642 Lord Maulesfield LC (76.62% of purchase price excluding deposit paid - South Sea Bubble stockmarket crash 1720 - great hardship on the purchaser if no relief - possible waiver or election to affirm contract by vendor - possible security)

  Cornwall v Henson [1900] 2 Ch 298 CA (93% of price paid - default on last instalment - vendor not justified in treating contract at end - damages of £125 (more than value of land)).

- Penalty clauses, but specific performance not inevitable. Re Dagenham (50% down payment - penalty - specific performance to purchaser ordered); Kilmer v British Columbia Orchard Lands Ltd [1913] AC 319 PC (instalment contract - purchase price Can $75,000 - purchasers entered into possession and incurred expenditure - default on second instalment - SP ordered).

- Transaction really a security - instalment sales: Stern v McArthur (1988) 165 CLR 489

Vendor's conduct

- Fraud or sharp practice, oppression Stockloser v Johnson [1954] 1QB 476 CA "The claimant invariably, like Shylock, relies on the letter of the contract ... but the courts decline to give him their aid because they will not assist him in an act of oppression" per Lord Denning.

- windfall: wide Unconscionability principle in Legione v Hateley knowledge of rising market and resale at increased price subject to original purchaser not getting relief: Dillon v Bepuri Pty Ltd [1989] NSW Con v R 55-436
  Tang v Chong [1988] NSW Con v R 55-449
  (Purchaser's solicitor ill-unable to complete on due date - tender 3 days later - windfall of 48% - specific performance ordered)
  Rising/falling market - date of avoidance of contract the relevant date

- waiver of time - essentiality not necessarily abandoned

- affirmation of contract: Miller v Barrellan (Holdings) Pty Ltd [1981] ANZ Conv R 196

- estoppel, eg secretary's answer in Legione v Hateley (Gibbs CJ and Murphy J)

- delay in voiding the contract

Entry onto subject land

- more significant where not instalment contract

Expenditure on the land

- relevance of vendor's knowledge
  Stern v McArthur (1988) 165 CLR 489

  Tender shortly after completion date
  Solvency or otherwise of purchaser
  Accident (Fraud, Accident and Breach of Confidence. These three give place in court of conscience: Maitland, Equity, P7)

  eg Acts of God, landslide, typhoon, flood
  Quaere robbery, car crash
  Serious illness, Cf minor illness in Brickles v Snell [1913] AC 319, PC; Tang v Chong

  Wilful or non-wilful default

  The need for the court to get the full background.
  Excuse, if any, for delay. Market conditions.

  What if the messenger's delay in Union Eagle had been because he had dropped dead in the street at 4:55 pm en route to the appellant's solicitors' office?

  [This paper is based on research conducted by Rodney Griffith, Barrister-at-Law, while a Consultant at the Faculty of Law, City university of Hong Kong. Many thanks to him for his permission to use his material]

INTERNATIONAL WORKSHOP ON THE ROLE OF THE NEW EQUITY

HONG KONG, 10TH - 12 SEPTEMBER 1998

PART PERFORMANCE AND RESTITUTION

David Humphreys

PART PERFORMANCE AND RESTITUTION

Introduction

Merrett Syndicates[1] shows that concurrent pleadings, logically inconsistent one with the other, may be advanced without the risk of them being struck down as 'embarrassing'. There seems no bar to advacing an action for restitution with concurrent pleadings for a remedy based on one or all of the following an action for compensatory damages for reliance loss on a discharged contract, an action for a quantum meruit, an action for return of an unjust enrichment on the basis of a total failure of consideration of the bargained-for or agreed return, and actions at equity for an equitable lien on the basis of promissory estoppel arising from a frustrated contract or collatoral promises,[2] or an action for compensation or punishment for a wrong For this reason alone 'restitution' is probably still a descriptive rather than a normative term. Many of the above pleadings are complicated by part-performance. The common law pleadings, in particular, will be problematical if there has been part performance of an agreed benefit in an entire contract because part performance may rule out the necessary unjust factor for restitution, and deny an action in quasi-contract. At equity, part-performance may mean a contract persists complicating an action on equitable estoppel. Some of the questions we need to address include is an action for restitution for unjust enrichment or in quasi-contract dependant on finding that there is no contract? If there have been acts of part performance can the contract be by-passed? If there is discharge of a part-performed contract, and restitution sought by way of compensatory damages, does the part performance constitute a subjective benefit requiring the plaintiff to make 'counter-restution'?

General

Until about 65 years ago, a contract was not enforceable if there was total failure of consideration, on the basis that a contract was rendered either void, or one rescinded ab initio (for instance, for misrepresentation), or was a contract discharged by frustration. But in more recent times, to these grounds was added discharge in futuro on termination of a partially performed contract [3] Where a contract is discharged in futuro there can be an election to sue on the contract for damages, or seek restitution for the unjust enrichment of the defendant [4] And even if there is a discharge in futuro of a contract, restitutio in integrum of a *partially* performed contract (for the purposes of this paper we will use the term *part* performance to describe performance in part of a bargained-for benefit, rather than *partial* performance which could involve performance

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[1] *Henderson v Merrett Syndicates Ltd [1995] 2 AC 145*

[2] *as was advanced in Re Goldcorp [1994] 3 WLR 199 where an application for an equitable lien appears not to have pleaded but where the court noted that this would have been available on the basis of dicta in Re Diplock [1948] Ch 465 at 521*

[3] *McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457 at 477; Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd [1943] AC 32 at 47; Loran v Wight (1989) 168 CLR 353; and Johnson v Agnew [1980] AC 367.*

[4] *Lang v Capacious Investments [1996] 1 AC 514.*

of a portion of the agreement which does not go to the agreed return) is not a requirement for that discharge [5] In discharge, a benefit received only rules out restitution if it was part of the agreed return or exchange for the payment[6] and there is no general rule of a requirement for counter-restitution. Where no part of the agreed return has been delivered, that is there has been no part performance, there is a total failure of consideration, an 'unjust factor' triggering a right to restitution.

Quasi-Contract/Unjust Enrichment

Quasi-contract analysis has it that if there has been a part receipt of the identified agreed return, and no discharge of contract, there is only a partial failure of consideration, and no right to restitution [7] Resitutionary analysis which seeks to leave behind quasi-contract would say that restitution lies for unjust enrichment with total failure for consideration constituting one of the several possible and necessary prerequisite unjust factors would say the enrichment of the defendant is not unjust where the contract at issue is neither conditional nor divisible and the plaintiff has received a part of the agreed return. On either basis the payer has obtained benefits which were part of an agreed return for performance - and a restitutionary claim on the basis of a total failure of consideration cannot be made. These contrasting analyses were deployed in the various judgements of the Australian High Court in The Mikhail Lermontov. The Chief Justice, Sir Anthony Mason, framed his analysis in quasi-contract, but Deane and Dawson JJ argued the same outcome should be arrived at by characterising the issue as being one where the key question was whether the defendant had been unjustly enriched at the plaintiff's expense. Mason CJ said[8] the "receipt and retention by the plaintiff of any part of the bargained-for benefit will preclude recovery, unless the contract otherwise provides or the circumstances give rise to a fresh contract." Mason CJ's judgement, with which Brennan and Toohey JJ agreed, resurrected quasi-contract analysis on the Planché v Colburn[9] line of cases. Mason CJ analysed total failure of consideration as a central leg of a claim in quasi-contract. He found that the contract was entire, or there were entire obligations and, drawing on Viscount Simon LC's wording in Fibrosa,[10] there was a failure to perform the agreed return. There was, accordingly, Mason CJ said, a common indebitatus count for money had and received by the defendant to the use of the plaintiff on a consideration which totally failed. Mason CJ. did not directly analyse unjust enrichment and, in Carter and Tolhurst's view, his analysis could equally have been framed in the language of contract to say that a failure of a 'condition' is a failure to provide the agreed benefit. They see this as a retrograde step preferring the earlier unjust enrichment authority [11] Pavey[12] in

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[5] *Keith Mason and J.W. Carter, Restitution Law in Australia, Butterworths p. 289.*

[6] *Ibid., p.290*

[7] *Baltic Shipping Co v Dillon (The Mikhail Lermontov) (1993) 176 CLR 344 at 350, 375, 389.*

[8] *Idem*, at 351

[9] *(1831) 131 ER 305, and see generally Carter, J.W., 'Discharged Contracts: Claims for Restitution' (1996-97) JCL Vol 11 130 at 140*

[10] *[1943] AC 32 at 48*

[11] *see Carter, J. and Tolhurst, G., "Restitution: Payments Made Prior to Discharge of Contract," (1994) JCL Vol 7 273 at 274*

[12] *Pavey & Matthews Pty Ltd v Paul (1986) 162 CLR 21[7]; (1987) 162 CLR 221*

Australia, and Karpnale[13] in England But even in those cases, at least in Pavey, the contract needed to be proved[14] and, in the Australian High Court's view, unjust enrichment did not constitute a normative cause of action and was merely a 'unifying legal concept' [15]

In contradistinction, the judgement of Deane and Dawson JJ in The Mikhail Lermontov says that ineffectiveness of contract, the absence of a valid obligation, is a necessary but not sufficient pre-condition for a claim for restitution. It is not sufficient because there must also be unjust enrichment. They argued that where there has been a part performance, it is no longer possible to establish that an enrichment has been unjust, ruling out an action based in restitution. Deane and Dawson JJ avoided recourse to construction of the contract and said that the action should lie due to the unjust receipt of a benefit rather than its retention [16]

The significance of this divide between quasi-contract analysis, and unjust enrichment analysis, is that if one has only to identify an 'unjust factor' sufficient for a claim to restitution, then decrees granting provision of the agreed benefit are less important, and it becomes as Lord Goff put it: "easier to escape from the unfortunate effects of the so-called rule that money is only recoverable at common law on the ground of total failure of consideration where the failure is total".[17]

Pavey said restitution was a unifying legal concept: an initial breach of an agreement, including contractual or equitable agreement, which leads to action of a tortious character for breaches of obligations of forbearance. The liability then becomes one which flows not from the breach, but acceptance of the benefit without paying an agreed or reasonable sum. In Pavey, Deane J. said the purpose of a claim in quantum meruit was to recover a debt arising under an implied or express contract. But when it was not based on quantum meruit there was no requirement for an action on a genuine agreement, and the claim proceeds as one analogous to that made in the context of the Statute of Frauds, with proprietary remedies coming into play. In the latter form of pleading there is no requirement to find an implied contract. From Karpnale comes the view that an action for restitution is one which is overarching in the sense that the action is not pleaded as a pure principle; it arises from the pleadings through a demonstrated failure of other legal options. In Karpnale the plaintiff pleaded the general concept of restitution and then proceeded to particularize the elements, first looking to contract to determine it was no longer at large - either discharged by deed or denied by an estoppel on convention. When it could be established no contract persisted, unjust enrichment could be pleaded and established by demonstrated enhancement of the defendant's assets at the expense of the plaintiff. If the pleading was that enrichment came through services performed, the plaintiff needs to show enhancement of the defendant's assets, a request by the plaintiff for the defendant to perform an agreement, a demonstrated benefit accruing to the defendant by his decision not to perform, conduct by the defendant which amounts to acceptance of the benefit and, finally, that it is unjust that the defendant be allowed to retain the benefit.

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[13] *Lipkin Gorman v Karpnale Ltd [1987] 1 WLR 987; [1991] 2 AC 548*
[14] *(1987) 162 CLR 221 at 228*
[15] *n. 12 (1987) 162 CLR 221 at 256 - 257*
[16] *n. 7 at 376*
[17] *Westdeutsche Landesbank Girozentrale v Islington London Borough Council [1996] 2 WLR 802 at 807*

Compensatory Damages in futuro for Termination on Breach

Mason and Carter[18] point out that where there has been discharge in futuro of the contract and restitution is sought, the partial performance is the basis for the restitutionary claim to recover reasonable remuneration. But where the plaitiff has earned the contract price the plaintiff will sue in restitution when he cannot recover the price due to frustration or where the breach prevents recovery of the price. Thus in Hoenig v Isaacs,[19] a case involving partial performance of a frustrated contract, where the frustration did not affect the conferred benefit, the question of reasonable remuneration is not the value of the partial performance, but of restitution of reasonable remuneration for performance of the part of an entire stage of a severable contract. In this case it resulted in the party in breach recovering the contract price, subject to a counter-claim for damages for breach of contract (In Heyman v Darwins Ltd,[20] however, there was found to be a right to restitution notwithstanding full performance)

Where there is an undischarged contract in existence, and the failure of consideration is less than total because there has been part performance, there is no unjust enrichment action for restitution at common law. (Where, however, the consideration is manifestly inadequate this is described as no consideration.) Similarly, from Sumpter v Hedges,[21] if a contract subsists with express clauses covering the question of payment, there is an *implied* promise to pay for benefits, an implied condition precedent based on inference from the 'entire' nature of the contract,[22] ruling out recourse to an action in restitution. The principle underlying Sumpter (that where there is a breach or repudiation by the plaintiff which leads to termination - the plaintiff cannot recover the value of the part performance) is reiterated in Surrey County Council v. Bredero Homes Ltd where the remedy for breach of contract was reaffirmed as lying in compensation, ruling out restitutionary damages and, accordingly, in that case, because the council had suffered no loss, it was entitled only to nominal damages.

Where a contract is void for incompleteness, and a payment is advanced in the belief that a contract persists, the courts have viewed this as an instance where there is a total failure of consideration, and not mistake of fact or law, and declare the contract void ab initio.[23] While total failure of consideration renders a contract void ab initio and is the 'unjust' factor allowing a court to by-pass a contract and go straight to the action for restitution, similar facts which give rise to a mutual mistake of fact render a contract voidable rather than void. Carter points out the result is that if the cause of action is characterised as lying in mistake rather than total failure of consideration, 'acceptance' of a benefit would be sufficient to obtain relief without regard to part performance, and that mistake affecting the validity of a contract, would be a more logical basis for restitution.[24] At present, the requirement for total failure of consideration as a basis for an

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[18] *n. 5, pp. 429,431*
[19] *[1952] 2 All ER 176 at 181*
[20] *[1942] AC 396 at 397*
[21] *[1898] 1 QB 673.*
[22] *Carter, J.W. and Harland, D.J., Contract Law in Australia, 3rd edtn, Butterworhs, 1996, at paragraphs 1822 - 1826*
[23] *David Securities Pty Ltd v. Commonwealth Bank of Australia (1992) 175 CLR 353 at 382, 388*
[24] *Carter, J., "Restitution and Contract Risk" in McInnes, M., Restitution: Developments in*

action means that if a contract is not void, rescinded ab initio, discharged by frustration or discharged in futuro, and therefore persists, it is not possible to by-pass it unless the action is brought at equity [25] An action for restitution at common law where an enforceable contract subsists is therefore not possible Carter and Harland[26] say that, in Australia, Pavey and Foran are authority for the proposition that while there is an enforceable contract existing between the parties, no action for restitution of a benefit conferred in discharge of an obligation to confer it can be brought.

Enforcing Promissory Obligations Even if this Results in Double Recovery

Burrows[27] argues that a 'bargained-for benefit', even if no contract results, is accepted to be, subjectively, beneficial, and there is ipso facto an enrichment Garner[28] says, it seems to me correctly, this is fallacious reasoning - the defendant may have valued full performance, but a job part done may be of no benefit at all. Contract or no contract, generally, part performance of an 'entire obligation' can hardly ever give rise to an unjust enrichment, and this is the view taken by the High Court of Australia in The Mikhail Lermontov - where there was a contract - where the court found there was a benefit, and no failure of consideration, because a contract for passage on liner could not be divided up into severable parts relating to length of passage and to other aspects, and consequently a foreshortening of the sea voyage was held not to be a total failure of the agreed benefit. It follows that once there has been part performance there cannot be a total failure of consideration. For this reason also, where there has *not* been a *total* failure of consideration this cannot constitute the 'unjust factor' which triggers an action in restitution. If acts of performance do not go to the identified agreed return (partial performance but not part performance), and there is discharge of a severable contract in futuro on termination, then there is a partial failure of consideration - although there is no gainsaying that it unjustly enriches the defendant. In this circumstance in the United States, but not yet in the Commonwealth, it would be possible to bring an action for both restitution and for compensatory damages, with the court ensuring set-offs to ensure there was no double recovery.

Some academic commentators[29] see merit in the common law world following in the footsteps of the United States[30] and urge removal of the bar on restitution at common law for part performing the agreed return of an entire and indivisible contract. There seems to be no reason why it should not be possible to recover damages for breach of contract and restitution if counter-restitution can be made or, indeed, even without regard to double recovery One decision reflecting this view is

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Unjust Enrichment, LBC, 1996, p. 151

[25] *n. 5, pp. 286, 289 (citing Gompertz v Denton (1832) 1 C & M 207 at 209).*

[26] *Carter and Harland, n. 22 p.351*

[27] *Burrows, A., 'Free Acceptance and the Law of Restitution' (1988) LQR 576 at 582-3*

[28] *Garner, M., 'The Role of Subjective Benefit in the Law of Unjust Enrichment' (1990) 10 OJLS 42.*

[29] *see for instance Kit Barker, 'Restitution of Passenger Fare: The Mikhail Lermontov' [1993] LMCLQ 291 at 293 - 294*

[30] *U.S. Uniform Commercial Code, s. 2-718(1)*

to be found in Commonwealth of Australia v Amann Aviation Pty Ltd[31] where a security deposit recoverable for total failure of of the agreed return was paid to the plaintiff as 'damages for repudiation' without regard to counter-restitution. In an English decision Dies v British and International Mining and Finance Corp Ltd[32] Stable J suggested that where a contract was discharged for the plaintiff's breach "there was no failure of consideration, total or partial," it is 'not the consideration that [fails] but the party to the contract'. Stable J said that since the contract did not apportion risk, the purchaser in default (who had made part payment of 100,000*l* for unascertained goods never delivered) should be able to recover despite total failure of consideration being ruled out. This view seems to suggest a refocussing of restitution on promissory obligations, and a shift away from the current emphasis on unjust receipt of benefits.[33] Mason CJ's judgement in The Mikhail Lermontov gives some prospect of such a refocussing because of its emphasis on the reasoning in Dennys Lascelles. In that latter case Sir Owen Dixon said:[34]

> "When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected."

Jackman[35] points out that it follows 'unconditionally acquired' benefits under a discharged contract may be retained, and a full restitution of the contract price can be secured provided the unconditionally acquired benefits do not constitute part performance, and the plaintiff will not be limited to a 'ceiling' determined by the contract price. He points to a number of well-known cases which illustrate there is no fundamental requirement for counter-restitution. One of these is Bush v Canfield, a decision of the Supreme Court of Errors of the State of Connecticut, the plaintiff paid a deposit for delivery of flour. The defendant was unable to complete and the plaintiff was saved from having to pay the contract price on goods which substantially fell in value prior to discharge of the contract on termination. Nevertheless, the plaintiff obtained full recovery of his deposit permitting him to make a substantial profit. This was despite the contract being said to be entire, and there being a total failure of consideration. In Wilkinson v Lloyd, a plaintiff escaped from a bad bargain on the basis of a total failure of consideration, effectively reversing the contractual allocation of risk, similarly obtaining more than the agreed benefit. In the more recent cases involving the proposition that purchasers of motor vehicles intend purchase of title, such as Rowland v Divall,[36] where the Court of Appeal said the purchaser 'of title' to a car who

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[31] *(1991) 174 CLR 64 at 117*

[32] *[1939] 1 KB 724 at 744*

[33] *see Jackman, I.M., 'Promissory Obligations in the Law of Restitution' (1995) ALJ 614*

[34] *McDonald v Dennys Lascelles Ltd (1933) 48 CLR 457 at 476 - 477, quoted with approval by Wilberforce LJ in Johnson v Agnew [1980] AC 367 at 396*

[35] *see Jackman, n. 33, at 622, citing Wilkinson v Lloyd (1845) 7 QB 27 and Bush v Canfield 2 Conn 485 (1818)*

[36] *[1923] 2 KB 500*

discovered after using the car for four months that he had not received the 'agreed' benefit, was permitted to have full restitution of the purchase price, and was not required to make off-set for benefits obtained under the contract

In this regard, also, David Securities[37] and Goss v Chilcott[38] can be seen as instances of courts permitting recovery even where there had been part performance of the agreed benefit, and therefore only a partial failure of consideration. But these are cases where severable agreements could be discovered and apportionment, 'counter-restitution' or 'restitutio in integrum' carried out without difficulty, and this may constitute the basis for distinguishing them. In David Securities, provisional tax was paid by the appellant on the strength of a clause subsequently held to be void. The respondent bank, as its defence, argued that, in addition to detrimental change of position, loans advanced to the appellant, David Securities, were made for good consideration, i.e that the respondent had part performed the agreed benefit and, accordingly, a contract still existed ruling out an action for restitution. The High Court of Australia found that on construction of the contract there was no part performance because the liability for payment of the tax fell upon the lender, and the appellant borrower only agreed to pay the tax because of the respondent's misrepresentation that the tax was payable by the appellant. However, the court then added. "In cases where consideration can be apportioned or where counter-restitution is relatively simple, insistence on total failure of consideration can be misleading or confusing." By counter-restitution, the court was limiting assessment only to a *severable* part of a contract.

> "the bank must prove that the appellants are not entitled to restitution because they have received consideration for the *payments which they seek to recover*... . Indeed, the severability of the loan agreement into its relevant parts would seem to be accepted...[by the respondent]... . In circumstances where both parties have impliedly acknowledged that the consideration can be 'broken up' or apportioned in this way, any rationale for adhering to the traditional rule requiring *total* failure of consideration disappears."

In The Mikhail Lermontov the High Court of Australia said the contract was an 'entire' one, with the result it did not readdress the issue. In Goss v Chilcott, the Privy Council was able to find that consideration for a loan could be broken up into severable contracts - one for payment of interest on a loan, and one for repayment of principal. So, payment of interest was not considered part performance of a severable portion of the contract to repay the principal. These cases turned on construction of the contracts: the contract remains significant despite restitution being said to lie in simple acceptance of a benefit.

If unjust enrichment is to continue to develop as a pure principle, there is still ground for arguing that part performance of an entire contract should not rule out an action for restitution for unjust enrichment.

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[37] *(1992) 175 CLR 353 at 383*

[38] *[1996] AC 788, Privy Council*

Actions at Equity for Restitution and Part Performance

'Good conscience', although founding pleadings in equity, gives rise to nothing more than an action in personam. Although in recent times there have been proprietary interests founded in De Mattos equities which run with property, and commercial vehicles such as the Quistclose trust, Browne-Wilkinson LJ said in the key Westdeutsche judgement[39] that equitable remedies were not to be freely pleaded in an action in personam. This is especially so, he said, when there is no identifiable property involved, and Lord Mansfield's famous dictum in Moses v Macferlan that unjust enrichment requires the recipient of money to repay it when the circumstances are such that it is contrary to 'the ties of natural justice and equity', refers to unassignable personal equities. These equities are not proprietary[40] and relate only to identifiable property. This analysis was also advanced in the judgement of Mason and Deane JJ in the Australian High Court in Legione v Hateley - to the effect that the unconscionable retention of an unjust enrichment did not of necessity give rise to the availability of in rem remedies to grant relief.[41] This was too supported by the Privy Council in Union Eagle.[42]

It is argued above that where there is an enforceable non-severable contract existing between parties, no action for restitution of a benefit conferred in discharge of an obligation, can be brought. In Westdeutsche,[43] Browne-Wilkinson LJ noted that an action for total failure of consideration is a personal action and not an action to protect an equitable proprietary interest, and a lack of part performance of an entire contract does not mean the money paid automatically results back to the donor as trust property. After Browne-Wilkinson LJ's emphatic reassertion of traditional separation of pleadings at equity and law, are actions in equity - as suggested in Union Eagle - on the basis of promissory estoppel - nonetheless available to permit restitution notwithstanding there has been part performance? If a subsisting entire contract rules out an action in restitution at common law, the contract can still be by-passed at equity. In Australia, unconscientious conduct on the part of the defendant, even where there is an underlying contract, may give rise to use of proprietary remedies in an action in personam which effectively provide restitutionary damages, by-passing the contract. Pavey can be read as authority for the proposition that the total failure of consideration which is the basis for restitution is analogous to a claim made under the context of the Statute of Frauds and the recovery of moneys paid is not based on an implied contract and, as elaborated in Foran, the unjust enrichment concept is instead founded "in the equitable notions of fair dealings and good conscience". On this basis, in Gilbert & Partners v Knight,[44] a precontractual deposit was recoverable if paid other than on the basis of contract.

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[39] *n. 16, at 836 - 837*

[40] *Meagher, R.P., Gummow, W.M.C. and Lehane, J.R.F., Equity, Doctrines & Remedies, 3rd edn, Butterworths, 1992, p. 121*

[41] *[1997] 1 HKC 173 at 177*

[42] *Union Eagle Ltd v Golden Achievement Ltd [1997] 1 HKC 173*

[43] *Westdeutsche, n. 16 at 840F*

[44] *[1968] 2 All ER 248*

. Restitution on the Basis of Promissory Estoppel

The Judicial Committee of the Privy Council in Union Eagle urged consideration be given to "development of the law of restitution and estoppel" to found relief in situations where the common law denied an action, especially in situations where there is unconscionability. It would appear that an action pleaded at equity has the beauty of completely bypassing problems created by part performance, as well as providing access to proprietary remedies. Because of the significance of a right to avoid the restrictions which arise from part performance in actions at law, it is worth digressing into the labyrinth which is estoppel to consider whether the above recourse to equity is to be freely available. First, it needs to be emphasised that any resort to the use of equity to circumvent contract is available in limited circumstances. One such application of equity is in equitable estoppel for restitution *after a contract no longer is in effect* In order to seek restitution where there has been part performance, by way of equitable estoppel, the plaintiff must first totally annul the contract by rescission for misrepresentation or, as in Union Eagle, the defendant himself rescinds the contract, perhaps preliminary to forfeiture of a deposit. If the plaintiff is to rescind for misrepresentation the event giving rise to rescission may itself be characterised as an equitable wrong. Or vice versa. In Foran v Wight,[45] the High Court of Australia held the plaintiff could use an equitable wrong to rescind a contract and seek recovery of a deposit. Brennan J. said.

> The basis on which a party is dispensed from tendering performance is that an equity is raised against the party giving the intimation which is satisfied by treating him as though he had prevented the innocent party from tendering the performance: see *Waltons Stores*... Such an equity endures for the benefit of the party who has acted on the intimation, but it does not impair the contractual obligation of the party giving the intimation.

This statement has received support in the Hong Kong decision Tin Shui Wah.[46]

In the High Court of Australia in Verwayen[47] Mason J. described the doctrine of promissory estoppel as:

> ...one doctrine of estoppel, which provides that a court of common law or equity can do what is required, but no more, to prevent a person who has relied upon an assumption as to a present, past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness.[48]

On this basis to establish an estoppel following rescission of a contract the plaintiff must show that he held an assumption of fact or law on the basis of a clear and unequivocal promise[49] and acted in reliance on that assumption to his detriment. The plaintiff needs to demonstrate that he is

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[45] *(1989) 88 ALR 413*

[46] *Tin Shui Wai Development Ltd v AG (1991) Constr List No 5 87*

[47] *Commonwealth of Australia v Verwayen (1990) 170 CLR 394*

[48] *Idem, at 413*

[49] *Legione v Hateley (1983) 152 CLR 406 at 435 - 437 per Mason and Deane JJ*

in a worse position because the assumption upon which he has relied has proved unjustified than he would have been had he never held it The plaintiff needs to demonstrate that the defendant induced the relevant assumption and it would be unconscionable for the defendant not to remedy the detriment that the plaintiff has suffered by relying on the assumption. The court is free to order any remedy sufficient to reverse the detriment. The defendant may, however, rely on any of the general defences to a suit at equity

First, the plaintiff will need to establish unconscionability Deane J in Verwayen[50] said the necessity for unconscionability could be established if the defendant.

(a) induced the assumption by express or implied representation,

(b) entered into contractual or other material relations with the other party on the conventional basis of the assumption,

(c) exercised against the other party rights which would exist only if the assumption were correct,

(d) knew that the other party laboured under the assumption and refrained from correcting him when it was his duty in conscience to do so.

Deane J. added that ultimately unconscionability must be resolved "by reference to all the circumstances of the case... ."[51]

The court provides relief to effect a reversal of detriment, rather than to fulfill expectations[52] and because of this commentators have seen equitable estoppel developing as a part of the law of wrongs/detrimental reliance rather than one which reacts to unconscionability.[53]

Is unconscionability to be measured objectively or subjectively? If objectively, part performance may provide evidence there is no unconscionability Nicholas Bamforth[54] points out that, in both England and Australia, unjust factors in the improper retention of a benefit amounting to constructive fraud permitting restitution at equity, are measured subjectively. In Australia, the High Court in Louth v Diprose[55] said a gift procured by 'unconscionable conduct' - i.e. where it could be established by the donee having knowledge of the donor's special disadvantage, combined with exploitation of the disadvantage - could be restored to the donor. In England, Multiservice Bookbinding Ltd v Marden[56] found the 'objectionable terms' in a contract, if imposed in a morally reprehensible manner affecting the stronger party's conscience, would vitiate the

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[50] *Idem, at 444*

[51] *see also Brennan J's comments in Waltons Stores (Interstate) v Maher (1988) 164 CLR 387*

[52] *Verwayen (1990) 170 CLR 394 at 413, 429 -430, 454 and 501*

[53] *Robertson, A., 'Situating Equitable Estoppel Within the Law of Obligations' (1997) Syd LR Vol 19, p. 32*

[54] *Bamforth, N., "Unconscionability as a Vitiating Factor," (1996) LMCLQ 538 at 542-3*

[55] *(1992) 175 CLR 621*

[56] *[1979] Ch 84*

contract and permit restitution Unfortunately, the Privy Council has blurred the issue by saying, in Hart v O'Connor[57] - a case on appeal from New Zealand, that taking unconscientious advantage of a weaker party's circumstances requires an objective test of disadvantage although 'taking advantage' involves a subjective assessment

Unlike the position in the United States where equitable estoppel acts to reverse unjust enrichments as an adjunct to contract law [58] and is not designed to give effect to promissory obligations, the position in Australia is generally that equitable estoppel compensates for reliance loss by awarding damages in the inherint jurisdiction of equity (rather than damages in expectation relief under Lord Cairns Act) [59] Thus recent Australian decisions reject the U S position [60] Raffaele v Raffaele,[61] for instance, said a 'notional contract' arose through promissory estoppel, and damages were awarded at equity on a restitution basis In England the position on equitable estoppel is still in a state of flux the U S position is adopted in Johnson v Agnew[62] and in Target Holdings Ltd v Redferns,[63] where equitable damages were awarded as 'compensation' rather than to make restitution, but in Baker v Baker[64] the remedy was designed to reverse the plaintiff's detriment rather than give effect to his expectation. The decision in Baker is still the position which holds clear sway in Australia because the majority in Verwayen supported the view that equity should award damages which reverse detriment, provided this is the minimum equity in the circumstances.[65]

Equitable Lien as a Remedy Permitting Restitution in an Action on the Basis of Estoppel

The equity from estoppel may give rise to a proprietary right which would permit tracing. A 1901 NSW Supreme Court decision Hamilton v Geraghty[66] supported the English position in Ramsden v Dyson[67] where Lord Cranworth said the equity involved would not be limited to some charge or lien for a deposit, but neither case on the facts was required to consider whether there could be a constructive trust permitting tracing into profits Meagher, Gummow and Lehane[68] say that the equity in these cases was one to strip any profit made by the defendant, and a lien was sufficient for this purpose. They add that English courts in Inwards v Baker, E R Ives Investment and Ward v Kirkland have treated the equities involved as enforceable against a third party who took

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[57] *[1985] AC 1000*
[58] *see Verwayen (1990) 170 CLR 394 at 439 - 40, 453 and 501*
[59] *Meagher, Gummow and Lehane, n. 40 at pp. 636 - 637*
[60] *see generally Robertson, A., 'Satisying the Minimum Equity: Equitable Estoppel Remedies After Verwayen', [1996] MULR Vol 20 805*
[61] *[1962] WAR 29 at 33*
[62] *[1980] AC 367 at 400 (per Lord Wilberforce)*
[63] *[1995] 3 All ER 785 at 793 - 5*
[64] *(1993) 25 HLR 408*
[65] *Verwayen (1990) 170 CLR 394 at 409 - 410, 415 - 416, 423 and 501*
[66] *(1901) 1 SR (NSW) Eq 81*
[67] *(1866) LR 1 HL 129*
[68] *n. 40 supra, at pp. 432 - 433*

the legal title with notice of the circumstances giving rise to the equitable interest of the plaintiff to the property concerned

Meagher, Gummow and Lehane add that English and Australian courts have confused the dividing lines between remedies arising in the exclusive jurisdiction of equity on the basis of promissory estoppel, fraud, and constructive trust. They write of a general 'muddiness' of thought, and suggest that Viscount Dilhorne's decision in the 1965 Privy Council case Inwards v Baker, where he said estoppel protected a lease occupation, and the 1987 English decision Re Basham (dec'd), where proprietary estoppel was described as a form of constructive trust, are indicative of confused judicial analysis. They prefer the judgement in Dillwyn v Llewelyn, a 1862 decision where fraud was at the heart of the action and the basis for the remedy and which was the authority relied on for Brennan J.'s judgement in the High Court of Australia decision Waltons Stores v Maher. In these decisions compensation was given for loss of an equitable interest by way of a charge or lien over the property concerned - especially where the original fraudster no longer possessed the property concerned. Lord Cranworth in the 1866 decision Ramsden v Dyson, and Scarman LJ in the 1976 decision Crabb v Arun District Council, were both prepared to grant relief other than a lien or charge, but Meagher, Gummow and Lehane see this as 'palm-tree justice'.

Gummow points out[69] English analysis has it that, on the basis of the 1883 case said to be the fount of restitution law, Phillips v. Homfray, no quasi-contractual action could lie where the defendant had merely gained a negative benefit without the plaintiff suffering any corresponding loss. Gummow says that this analysis of Phillips v. Homfray is plainly wrong, and that Lord Goff and others have oversimplified the case when saying that it rules out inquiries in equity for tortious acts. His argument is, in effect, implemented in Royal Brunei.[70]

. Restitution on the Basis of Compensation for Wrongs/Punishment for Wrongs

Let us consider compensation for wrongs first. This course of action will be available even if there is no question of fault on the defendant's part, let alone dishonesty. The wrongs include torts, breach of contract and breach of fiduciary duty, and it is irrelevant whether the defendant's gain correlates to the plaintiff's loss. The question is that the defendant has made a gain by committing a wrong against the plaintiff and is bound to make restitution of that gain to the plaintiff. This is a relatively new development in the law identified by academics and not an established modern pleading, and there is little judicial discussion as yet of the question. In Surrey County Council v Bredero Homes Ltd[71] the defendant committed a wrong which did not diminish the value of the plaintiff's interest. The Court of Appeal said there was no remedy save nominal damages But in Jaggard v Sawyer,[72] where breach of a restrictive covenant did not diminish the value of the plaintiff's property, the Court of Appeal granted a money award "on pure

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[69] *Gummow, W.M.C. in P.D. Finn (ed.) Essays on Restitution, 60 -7*

[70] *Royal Brunei Airlines Sdn Bhd v Tan [1995] 2 AC 378*

[71] *[1993] 1 WLR 1361*

[72] *[1995] 1 WLR 269*

compensatory principles" [73] The compensation arose at equity, a money sum paid in lieu of injunction under Lord Cairn's Act It would seem the decision rests on a plaintiff retaining a proprietary interest in the subject matter of the contract, with the contract, if it persists, being by-passed at equity Thus, even where there has been part performance, restitution is nonetheless available Burrows[74] says a proprietary interest may not be essential for compensation for a wrong, with the relevant unjust factor generally only being a cause of the defendant's gain. It does not have to be the sole cause An example is Edgington v Fitzmaurice[75] where the plaintiff was induced to lend money to the defendant company on the basis of fraudulent misrepresentations as to the purpose of the loan and on the lender's mistaken belief that he was to receive a charge over the defendant company's assets The plaintiff received damages for deceit on the basis of his non-induced mistake which, together with the defendant's misrepresentation, gave him a cause of action even though the misrepresentation of itself would not have been sufficient

The remedy in this type of action will depend on the extent of the unjustness of the enrichment of the defendant, and the tort 'but for' test underpins the decision as to the amount of profits to be disgorged where the defendant is required to account for profits made from the wrong. Burrows[76] sees an analogy with actual undue influence cases such as the BCCI SA v Aboody[77] decision. The dividing line between fraudulent misrepresentation and restitution as a compensation for wrong is readily apparent in these circumstances, he says, because courts of equity do not have a general power to award compensation, but where there is rescission for misrepresentation, orders for payment may be made, and such orders, by their nature, are orders for restitution, and ultimately based on the rationale that they are reversing unjust enrichment.

In a sense remedies for fraudulent misrepresentation and compensation for wrongs are both reflections of the remedies available for deliberate breach of contract where the breach is both wilful and cynical. In such cases, Deane J. in U.S Surgical Corporation[78] said he was in favour of finding liability for profits derived directly from a deliberate breach of contract. In such cases - and the 1974 decision Lake v Bayliss[79] is apposite - where it is too late for specific performance, an award of gains or profits is generally available as a substitute.[80]

The other face of the coin is punishment for wrongs, 'trickiness' and mala fides. It is settled law that a deposit is recoverable in restitution notwithstanding the lack of contract: Gilbert & Partners v Knight. Generally, if the payor of the deposit is not 'ready, willing and able' the payee's right of forfeiture of deposit in the event of this default on a contract for purchase of land is implied unless there are express terms to the contrary Shiloh Spinners[81] and Legione v Hateley say that a court

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[73] *Idem, at 283*
[74] *Burrows, A., 'No Restitutionary Damages for Breach of Contract, [1993] LMCLQ 453*
[75] *(1885) 29 Ch D 459*
[76] *n. 52, at 194*
[77] *(1990) 1 QB 923*
[78] *Hospital Products Ltd v US Surgical Corporation (1984) 156 CLR 41 at 122 - 125*
[79] *[1974] 1 WLR 1073*
[80] *see Beatson, J., 'The Use and Abuse of Unjust Enrichment' (1991), 17*
[81] *Shiloh Spinners Ltd v Harding [1973] AC 691*

exercising its ancillary equitable jurisdiction may grant relief to a promisor against forfeiture of a deposit in "appropriate and limited cases." The vendor's conduct may be scrutinizable at equity for an unconscientious dealing with another's proprietary interest. The vendor will remain trustee of a bare trust in the deposit, although there is no equitable proprietary interest in a deposit. There is, however, an equitable lien.

The House of Lords in Linden Gardens[82] held that a plaintiff did not have to suffer loss to obtain substantial damages, and the decision is seen as being one where the court 'punished' a defendant for his mala fides. NSW Appeal Court Justice Keith Mason points to a series of Australian cases where accounts of profit were awarded to punish the wrongdoer and prevent unjust enrichment. Sabemo[83] is one such. In that case, Sheppard J stressed the 'fault' element. The failure of the contract to materialise was due to the defendant creating an anticipation in the mind of the plaintiff that a contract would materialise. Sabemo can also be read as a case of promissory estoppel. In Sabemo, no actual benefit was conferred on the defendant. The council had made a request that detailed work be performed by Sabemo, the successful tenderer, prior to contract. There was a request and subsequent reliance, not unjust enrichment, served as the underlying basis for the action. Carter and Harland[84] say that 'punishment' appears to inform the decision in Sabemo where restitution was awarded on the basis that there was 'no contract' because there had been a breach of good faith by the payee during negotiations prior to formation of the agreement. Mason notes that in Dart Industries, a 1993 decision of the Australian High Court, the bench denied its aim in giving an account of profits was to punish: this remedy was only provided where there was a fiduciary relationship to permit the equitable remedy on 'strict liability' grounds. Other decisions of that court, Mason says, reinforce the position that where there is a fiduciary relationship, punishment remains a determining factor. And if there is no fiduciary relationship? Mason's view is that the tendency of Australian courts, correctly, is to see unconscionability and punishment as grounds for restitution not only when there has been injustice in the receipt of a benefit, but where there is supervening injustice (that is, there is no fiduciary relationships based on situational expectation of trust and confidence) and it would be invidious to allow the payee to retain the benefit. Accordingly, Mason sees the likelihood that Toohey J.'s judgement in Baumgartner,[85] which permits punishment for unconscionability as "a long-stop where existing legal doctrine fails", in future, being limited to effect restitution where there has been a not unjust receipt of a benefit, but where retention of that benefit is unjust and there is no fiduciary relationship to permit an account of profits.

In England, Westdeutsche[86] did not directly canvass the subject. Browne-Wilkinson LJ thought a constructive trust may be available in certain circumstances to permit restitution, saying retention of identifiable property which is the agreed return after the defendant learned there had been an unjust passing of the interest may give rise to a constructive trust.

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[82] *Linden Gardens Trust Ltd v Lenestra Sludge Disposal Ltd [1994] 1 AC 45*

[83] *Sabemo Ltd v North Sydney Municipal Council [1977] 2 NSWLR 880*

[84] *n. 21. p. 861*

[85] *Baumgartner v Baumgartner (1987) 164 CLR 137 at 153*

[86] *n.16 at 838A and 839C-F*

Conclusion

Consideration of the effects which acts of part performance have in denying an action for restitution pleaded in unjust enrichment, quasi-contract, or compensation following discharge of contract on termination, made in the isolation of the common law, is all very well. For if the limitations on common law actions - imposed by, among other things, necessary consideration of part performance - can be readily by-passed at equity on the basis there has been misrepresentation amounting to unconscionability, as the Privy Council in Union Eagle has urged, restitution remedies are widely expanded, and it will become increasingly more difficult to talk about restitution being normative rather than merely discriptive of 'restitutionary' outcomes

PAPER IN PREPARATION * FIRST DRAFT * PAPER IN PREPARARTION

I leave you my estate if you . . .

by
Sarah Nield
Lecturer in Laws, Southampton University

Introduction

Dealings with land have been marked by a delicate balancing act between the need for certainty and the pursuit of fairness. On the one hand, legal rules - usually in statutory form - have laid down formalities that must be followed to create or transfer an interest in land, whether inter vivos or on death, while on the other hand, equity has developed doctrines which give effect to attempted dispositions which have failed to follow the legal formalities. The legal formalities have been driven by a need, particularly in commercial dealings, for certain and simple conveyancing procedures based upon clear and incontrovertible evidence. While at its root, the equitable intervention in this area has been the avoidance of fraud where a party has sought to 'use the statute as an engine for fraud'.

Equity has displayed a flexible and inventive role in the avoidance of fraud. The major players are the rule in Walsh v Lonsdale, the doctrine of part performance, estoppel in a number of its forms, implied trusts both constructive and resulting, donatio mortis causa and the rule in Strong v Bird. The contribution of restitution should also not be forgotten.

The contexts in which this balancing act has been evident are many and various. The sale of land, the deposit of title deeds as an informal security are two examples from the commercial world but it is in perhaps in the context of family relationships that equity has played such an effective role in recent years. The ownership of matrimonial or quasi-matrimonial property has over the past 30 years developed in the face of legal formalities only with the assistance of equity and the implied trust. But the context in which I wish to examine the role of equity is the promised testamentary reward or the situation where property has been promised to be left by will in return for the provision of voluntary services. In this paper I intend to confine my analysis to a series of English cases: from the leading case of *Maddison v Alderson*[2] through to the cases of *Wakeham v Mackenzie* [3] to *Re Gonin dec'd*[4] and *Re Basham dec'd* [5] to the recent decision of *Taylor v Dickens* [6]. There are no doubt similar examples from other parts of the common law world and it would be interesting to hear of the approach in other jurisdictions.

The success rate for claimants has not been high[7]. Perhaps because the context raises significant legal issues as well as moral dilemmas. The freedom of testamentary disposition

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[1] For instance the requirements found in various forms across the common law world that a contract for the sale of an interest in land be evidenced by or in writing signed by the parties - see the 4th section of the Statute of Frauds 1677, s2 of the Law of Property (Miscellaneous Provisions) Act 1989, s3 Conveyancing & Property Ordinance Cap219, that a deed is required to transfer an legal estate in land - see s52 Law of Properly Act 1925, s4 Conveyancing & Properly Ordinance Cap 219, or that writing is required to create a trust of land or dispose of an equitable interest in property - see s53 Law of Property Act 1925, s5 Conveyancing & Property Ordinance Cap 219 or that a testamentary disposition be in writing signed by the testator and attested by two witnesses - see Wills Act 1837, Wills Ordinance Cap 40.

[2] (1883) 8 App Cas 467

[3] [1968] 1 WLR 1175

[4] [1979] 1 Ch 16

[5] [1986] 1 WLR 1498

[6] (1998) 1 FLR 806

[7] In England the two notable successes have been Wakeman v Mackenzie [196X] 1 WLR 1175 based

is pitted against the recognition of care of the elderly and infirmed while the goal of certainty is never more difficult to evince than in the context of family or other close relationships.

Part Performance

Maddison v Alderson[8] is almost synonymous with part performance[9]. Passages from the leading judgement of Lord Selborne are quoted almost as a matter of course in any case in which part performance is an issue. The facts are also well known - Mrs Maddison claimed that she was served Mr Alderson as an unpaid housekeeper for 27 years because of an oral agreement that he would make a will leaving her his farm[10]. She also gave evidence of aborted plans for an independent life. But the House of Lords refused to uphold a claim to the farm based upon part performance - why?

The first point of difficulty is the contract. The remedy for part performance is specific performance of the contract[11]. It is thus fundamental to establish an agreement. There are a number of difficulties arising at this junction. So far a testamentary promises are concerned, one is often confined to the claimant's oral evidence which the court is obviously going to treat with great caution. In *Maddison v Alderson* there was the unattested will and in *Taylor v Dickens* there was evidence of a number of friends of the deceased to support the claimant's version of events. The consensual nature of the agreement must be established and that may not be easy where there are close relationships. Offer and acceptance, certainty of terms, an intention to create legal relations do not fit into the usual way in which family members deal with their affairs or even, on occasions, people providing domestic and personal services where care and trust are needed. This difficulty has been recognised in other areas for instance in the context of matrimonial property or occupational licences where the courts have moved away from a strict contractual approach to the flexibility offered by estoppel[12]. The concept of a common intention or understanding provides a much more apt description to the arrangements under discussion.

In *Maddison v Alderson* the lower courts had found that there was a contract and this was not a matter with which the House of Lords felt inclined to disagree although the respondents counsel had raised the issue. In *Wakeman v Mackenzie* [13]Stamp J was adamant of the existence of a contract, perhaps assisted by the fact that the parties appeared from the report to be acted more at arms length. However, the difficulty of establishing a contract has proved an obstacle in other cases[14]. It has been suggested that the arrangement is no more than a promise or statement of intention, which is not, intended to create legal relations. Or at most a unilateral contract and that no action would lie if the claimant did not perform or continue to perform the services or did so inadequately. Stamp J in *Wakeman v Mackenzie* rejected these arguments[15]. He construed the entering into service as the acceptance of the unilateral offer and saw no reason why damages should not lie for the withdrawal or poor

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upon part performance and Re Basham 119861 1 WLR 149 based upon estoppel.

[8] (1883) 8 App Cas 467

[9] The doctrine developed soon after the passing of the Statute of Frauds 1677. Earlier examples include Hollis v Edwards (1863) 1 Vern 159, Butcher v Stapley (1685) 1 Vern 363 and Lester v Foxcroft (1701) Colles Par Cas 108.

[10] He did in fact make a will to that effect but it was not adequately attested.

[11] It may be that other equitable remedies might be available eg an injunction, equitable damages see Meagher Gummow & Lehane (3ed) Butterworths 2044. Furthermore, ones wonders if the equities raised by part performance might fall within the the discretion of the court to satisfy in a similar way to estoppel.

[12] Compare Tanner v Tanner [1975] 1 WLR 1346 and Greasley v Cooke [1980] 1 WLR 1306

[13] [1968] 2 All ER 783

[14] see Re Gonin dec'd 11979] 1 Ch 16 and Taylor v Dickens [1998] 1 FLR 806

[15] Even the most skeptical judges have accepted that a contract of this nature may exist - see Weeks J in Taylor v Dickens [1998]1 FLR at

performance of services, although accepted that specific performance would be inappropriate for such a personal contract. Timing may also present difficulties.. The terms of the arrangement may only be enumerated over a period of time since a feature of these cases is that the relationship between the claimant and deceased is often a long one. The exact nature of the promise may be woolly although there may be a clear intention that the claimant should be benefited for their services. For instance in *Re Gonin dec'd* [16] questions arose as to whether the agreement was to transfer the house inter vivos or leave it by will. All in all, the context is one in which strict notions of contract formation and formulation are inappropriate[17].

The oral contract must be supported by acceptable acts of part performance which point to the existence of a contract between the parties and which are consistent with a contract to leave property by will. The exact nature of the link between the acts of part performance and the contract is still uncertain despite the efforts of the House of Lords in *Steadman v Steadman*[18]. What is certain is that the need for the acts to point to the contract has led to an"uneasy oscillation betwen regarding the doctrinc as a principle vindciating conscientious dealings and as a rule of evidence"[19]. Giving up an independent life and going to care for a relative or friend without payment are acts, which lie at the edge of acceptability and therein lies the second difficulty. The irony may be that the more altruistic the acts the more unlikely they are to point to a contract. In all the unsuccessful cases the court has expressed sympathy for the claimant. They have recognised the detriment the claimant has suffered but have attributed this to the love of a child for their parent or the loyalty of a housekeeper for their master rather than to a hard nosed economic exchange.

Last but not least in England statutory changes have cast in doubt the very existence of the doctrine of part performance. Section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989 renders void, not merely unenforceable, all contracts which do not comply with the section. If may be possible to argue, where the promised benefit is an interest in the estate of the deceased, that the contract does not fall within the ambit of the section[20]. But where the promised benefit is land it seems an insurmountable difficulty to seek performance of a void agreement. A number of decisions agreed[21] but in *Singh v Beggs*[22] Neill LJ doubted that the statute had abolished the doctrine of part performance. Some hope may lie in the early cases on part performance before it was settled *Leroux v Brown*[23], that the effect of the Statute of Frauds 1677 was render to the contract unenforceable rather than void and the fact that the invalidity of the contract has not barred the equitable remedy of rectification[24]. Furthermore, there are helpful statements of the House of Lords in *Maddison v Alderson*[25] that the doctrine arises out of the claimant's acts which are done on the faith of the contract (albeit now a void contract) and that the defendant is not charged on the contract but on the fraud that would arise if the contract was ignored.

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[16] [1979] 1 Ch 16
[17] see Walton J in Re Gonin 119791 1 Ch 16 at 33H-34A
[18] [1976] AC 536
[19] per Lord Simon in Steadman v Steadman [1976] AC 536 at 560
[20] see Talyor v Dickens [1998] 1 FLR 806
[21] See Firstpost Homes Lid v Johnson [1995] 1 WLR 1567 and United Bank of Kuwait Plc v Sahib [1996] 3 WLR 372
[22] (1996) 71 P&CR 32
[23] 12 CB 824
[24] Wright v Robert Leonard (Developments) Ltd [1994] NPC 49 and Joscelyne v Nissan [1970] 2 QB 86
[25] See Lord Selborne (1883) 8 App Cas 467 at 475-476

Estoppel

The Law Reform Commission in their report on Formalities for Contracts for Sale of Land[26] saw estoppel as the successor to the doctrine of part performance to ensure the avoidance of fraud where the statutory formalities had not been followed. Proprietary estoppel certainly proved successful in *Re Basham dec 'd*[27] but was rejected in *Taylor v Dickens*[28], where the width of the doctrine as applied in *Re Basham dec 'd* was also doubted. So what role can estoppel play?

Proprietary estoppel :The doctrine of proprietary estoppel, as developed through the early cases of *Dillwyn v Llewellyan*[29], *Ramsden v Dyson*[30]and *Plimmer v Mayor of Wellington*[31]and enumerated in the more recent case of *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd*,[32] would appear at first sight to have much to offer. It may be applied where there is an imperfect gift upon which the claimant has relied on to their detriment or where the claimant has acted to their detriment upon reliance of a common intention or mistaken belief encouraged either by defendant's representations or acquiescence. But what are the pitfalls? Weeks J's rejection of estoppel in *Taylor v Dickens* is instructive.

The promise to make a will containing a testamentary gift was, he felt an inadequate representation, upon which the claimant was entitled to rely where they knew that the testator was entitled to revoke the will. But surely this is the whole point of estoppel. Where the claimant has acted to their detriment in reliance of the testator's promise the testator, or their estate, is estopped from retracting that promise. The fraud or unjust enrichment would seem to be all the more obvious where the testator has accepted the benefit of unpaid care or services which also constitute the claimant's detriment eg Mrs Maddison's unpaid housekeeping or Mr Taylor's unpaid gardening. It also seems to be splitting hairs if there is a distinction made between representations of making a will in favour of the claimant and leaving property to the claimant, particularly where ordinary people are involved who may not be well versed in the law governing testamentary dispositions. The representations however must be clear and accurate enough to justify reliance on a common intention or mistaken belief . Vague promises of being looked after which do not related to any particular property or future entitlement are thus unlikely to succeed.

There can be little doubt that non-monetary detriment is sufficient to support an estoppel whether that be giving up advantageous changes in lifestyle, the provision of voluntary services or both. Although this type of detriment does pose the dilemma, particularly in the family context, of what tips the care that would normally be expected of a child for their parent into detriment - a moral judgement if ever there was one! What does remain in doubt is the link between the detriment suffered and the representations made. The same doubts mist the link between common intention and detriment to support a constructive trust in the context of the matrimonial or quasi-matrimonial home[33]. Here it seems that the more mercenary the claimant the better. The less the provision of services is based upon love and affection, rather than the promise of monetary reward on the defendant's death, the better. Indeed in *Re Basham dec 'd* weight was placed upon the fact that the stepdaughter did not particularly 'get on' with her step father. This would not seem to be the moral tone that the law, and in particular equity, should be seen to be promoting. Lord Denning's approach to

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[26] Law Com No 164
[27] [1986] 1 WLR 1498
[28] [1998] 1 FLR 806
[29] (1862) 4 De GF & J 517
[30] (1866) LR 1 HL 129
[31] (1884) 9 App Cas 699
[32] [1982] QB 133
[33] see Grant v Edwards 119861 Ch 638

the burden of proof in *Greasley v Cooke* [34] ie that it is the defendant who needs to prove that the detriment was not suffered as a result of their encouragement, provides some escape. But this approach has been criticised and against it lies the views of the Privy Council in *AG for Hong Kong v Humphrevs Estate (Queens Garden) Ltd*[35].
But perhaps the whole crux of the matter is whether the courts are prepared to accept the wide approach to proprietary etsoppel advocated by Oliver J (as he then was) in *Taylor Fashions*. Those judges that do not seem comfortable with this approach cry 'palm tree' justice and resort to strict compliance with the *Wilmott v Barber* propanda[36]. Until there is some authoritative pronouncement from the higher courts on this issue claimants will indeed be subject to palm tree justice depending on the particular judge's estoppel spectacles!

Of equal concern to a claim based upon proprietary estoppel are the issues raised in *Re Basham dec 'd* concerning the identity of the property. Traditional expositions of the doctrine have been made in the context that the property over which equity is raised is presently subsisting and within the capacity of the defendant to grant. Nugee brushed these concerns aside. He saw no reason why proprietary estoppel should not also apply to cases in which the claimant believed that he should obtain an interest in the future or where that property in which he was to obtain an interest is not yet clearly identified. But was he right to do so? The answer to that question may depend on the nature of the equity raised by the estoppel. It has been described as an inchoate equity arising when the owner unconscionably sets up his rights against the claimant, it is only when the court satisfies the equity by the award of a remedy that claimant's interest can be identified with certainty[37]. Indeed prior to that time its nature may fluctuate[38]. In the context of the promised testamentary reward these issues become sharply focussed. The promised interest is usually not to be granted until the death of the defendant and it may well be that the property in which the interest is to be enjoyed is the residuary estate as opposed to specific property. If indeed the equity arises when the testator unconscionably sets up his rights against the claimant then this will not be until death when the disposition of the testator property is found, following legal rules, to benefit others than the claimant. The fears about recognising rights over future or uncertain property then fall away for on death the nature and extent of the deceased estate is ascertainable.

Estoppel by Representation and Promissory Estoppel: If the uncertain nature of the property is an insummountable problem for proprietory estoppel then alternative forms of estoppel may provide some help. In *Maddison v Alderson*[39] issues of estoppel by representation were led but rejected by the court. The influence of *Jordan v Money* [40]and the rejection of estoppel based upon representations of future intention, as opposed to existing fact, were too strong. Furthermore there has been the restricted evidentiary role of estoppel by representation imposed by *Lowe v Bouverie* [41]. Both these factors render useless the potential of estoppel by representation to the promised testamentary reward which are all about future intention and asserting a claim in the face of the result of legal rules. The doctrine of promissory estoppel, perhaps in an attempt to avoid these limitations, looked to other roots than estoppel by representation but its classic formulation is of little help either to the promised testamentary reward. In the English jurisdiction, it too has been restricted to

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[34] [1980] 1 WLR 1306
[35] [1987] AC 114 but see the acknowledgement of the 'inevitable inference' of reliance made in Lim Teng Huan v Ang Swee Chuan [19921 1 WLR 113 at 118D per Lord Browne-WiLkinson.
[36] see for instance Coombe v Smith 119861 1 WLR 808 and Taylor v Dickens 119981 FLR
[37] See Gray Elements of Land Law Butterworths (2ed) at 361.
[38] see for instance Dodsworth v Dodsworth (1973) 228 Est Gaz 1115
[39] (1883) 8 App Cas 467
[40] (1852) 5 HLC 185
[41] [1891] 3 Ch 82

the role of a shield and not a sword and has been applied only to subsisting contractual relations. But the High Court of Australia, under the influence of academic writers[42], have, in a series of decision starting with *Legoine v Hartley*[43] and continuing with *Walton Stores (Interstate) Ltd v Maher*[44] and *Commonwealth v Verwayen*[45], turned these limitations on their head and formulated estoppel as a cause of action where:

· The plaintiff assumed that a particular legal relationship then existed between the plaintiff and defendant or expected that a particular legal relationship would exist between them and that the defendant would not be free to withdraw from that relationship
· The defendant induced the plaintiffto adopt that assumption or expectation The plaintiff acts or abstains from acting in reliance on the assumption or expectation
· The defendant knew or intended him to do so
· The plaintiff's action or inaction will occasion detriment if the assumption or expectation is not fulfilled
· The defendant failed to act to avoid the detriment[46]

It is as yet unclear whether the English courts will tread as boldly but these requirements would appear to fit neatly the promised testamentary reward scenario, even though they were formulated in the context of a legally ineffective contract for the sale of land.

Other Courses of Action: Part performance and estoppel have been the courses of action with which the courts have been concerned in the cases under discussion. But do other possibilities exist? It is conceivable that the discreet doctrines of donatio mortis causa or the Rule in Strong v Bird might be applicable given appropriate facts but are these doctrines would not be of general application to the promised testamentary reward. Could not the scenario lead to a constructive trust in the *Gissingv Gissing*[47] mould? Here we have an express common intention based upon the representations of the testator that the claimant is to have an interest in their property on their death upon which the claimant may have relied to their detriment by providing unrenumerated care. It is less likely that an inferred common intention could be established, both because of the weak evidentiary link between the detriment and intention, that is also evident in part performance, and the generally non-financial nature of the detriment[48]. Difficulties may arise over the subject matter of the trust however if it is to effect future or uncertain property eg a residuary estate.

Restitution, for instance a quantum meruit claim for services, may prevent the unjust enrichment accruing to the testator's estate where unpaid care is provided. The possibility has been infrequently used before the English courts but examples are found in Canada *Delgman v Guarantee Trust Co of Canada*[49] and in New Zealand[50]. Canada has also led the way in recognising the remedial function of the constructive trust to avoid unjust enrichment where unpaid domestic services have been provided with the result that family assets have been enhanced[51]. Australia and New Zealand have not been far behind[52].

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[42] See Sheridan 11952) 15 Mod LR 325, Allen (1963) 79 LQR 246 and Jackson (1965) 81 LQR 84 & 223.
[43] (1983) 152 CLR 406
[44] (1988) 164 CLR 387
[45] (1990) 170 CLR 394
[46] see Walton Stores (Interstate) Ltd v Maher (1988) 164 CLR 387 per Brennan J at 428-9
[47] [1971] AC 886
[48] see Llyods Bank Plc v Rossett [1991] 1 AC 107
[49] see Delgman v Guarantee Trust Co of Canada (1954) 3 DLR (2d) 785. The monetary claim may be given a proprietory face by the award of a lien over the estate to secure the claim - see Lensen v Lensen (1984) 14 DLR (4d) 611
[50] Van den Berg v Giles [1979] 2 NZLR 111 and Stratulatos v Stratulatos [1988] 2 NZLR 424
[51] Rathwell v Rathwell (1978) 83 DLR (3d) 289, Sorochan v Sorochan (1986) 29 DLR (4–) 1 and

Although developed in the context of the matrimonial home the analogy to promised testamentary reward is obvious.

Statutory claims of relatives and dependents under legislation similar to the Inheritance (Provision for Family and Dependants) Act 1975 may also redress the equitable balance of disappointed caters but only where the cater can claim to fall within the objects of the legislation[53].

Conclusion: The tools are there to repair the promised testamentary reward but, at least in England, they remain in a mess. Is the doctrine of part performance alive and well? What are the boundaries of proprietory estoppel, estoppel by representation and promissory estoppel and is a uniform doctrine of estoppel emerging and , if so, what are its elements? What is the relationship between these equitable doctrines? Where does the constructive trust and restitution fit into the picture? The list of questions goes on. The House of Lords have not yet had the opportunity to re-examine estoppel, since the developments made by the High Court of Australia, nor have they had an opportunity to consider the status of part performance after the Law of Property (Miscellaneous Provisions) Act 1989. Few claims appear to stagger beyond first instance - the tenancity of Mrs Maddison was an exception!

But the issue is of growing social importance[54]. The care of the elderly and the growing recognition of the role of unpaid caters in a society with an ageing population and declining social welfare highlights the issue. On the other side of the equation is the freedom of testamentary disposition that from strictures of feudal days has been hard fought and won. But already the question of whether the elderly should be forced to sell their homes to pay for care has made headlines. The issue is also emotive - a test of a civilised society is said to be how they treat their elderly perhaps that should include how they treat those who look after the elderly. But the reality of the situation in many societies is that those of employable age work to support themselves and their children. They cannot afford to stay at home to look after elderly relatives even if they should want to. Those that do whether motivated by the promise of future benefit and/or love and duty, should not be penalised by an ignorance of legal rules or the withdrawal of equity's assistance.

Pettkus v Beecker (1980) 117 DLR (3d) 257

[52] Gilles v Keogh [1989] NZLR 327, Baumgartner v Baumgartner (1987) 164 CLR 137 and Muschinski v Dodds (1985) 160 CLR 583

[53] see for instance Graham v Murphy (1997) 1 FLR 860

[54] It is also of vital importance in other contexts for instance in the sale of land see Bently & Coughlan (1990) LS 325

DOES THE NEW EQUITY ELEVATE THE BARE TRUSTEE INTO A FIDUCIARY?

Introduction

On entry into a valid contract for the sale of land, the parties to the contract are treated as having a variety of persona; the effect of this diversity of status and identity is reflected in the different types of remedies available.

The **first** interest is **contractual.** On the exchange of contracts there is a diminution in the rights of the vendor in respect of the land, with a corresponding enhancement in those of the purchaser. Because the subject matter of the contract is land specific performance is considered to be the proper remedy because the purchaser has an equitable interest in the land, a proprietary interest, which has its own inherent power and rights to relief.

In *Rayner v Preston* **[Rayner]** (1881) 18 Ch D 1 Brett LJ observed:

> I doubt whether it is a true description of the relationship between the parties to say that tfrom the time of making of the contract, or at any time, one was ever the trustee for the other. They are only parties to a contract of sale and purchase of which a court of Equity will under certain circumstances decree specific performance. [at 5]

See Jacobs J in *Chang v Registrar of Titles* (1976) 137 CLR 177 **[Chang].**

In Hong Kong the contract, so long as it is in writing and not merely evidenced by part performance, is registrable under the *Land Registration Ordinance* **[LRO]**; failure to register will enable a subsequent purchaser to deal with the land ignoring the presence of the prior contract: see s4 which abrogates the doctrine of notice, and s3 (2) which refers to part performance.

On completion,

> in return for the price to obtain (as under an old style English completion) a transfer of the property freed from charges. Under a Hong Kong style completion the purchaser's only right is to receive personal undertaking from the vendor's solicitors to procure in the future the delivery of a valid transfer, the discharge of the existing mortgages and possession. [*Wellfit Investments Ltd v Poly Commence Ltd* [1997] 2 HKC 236 [PC] Lord Browne-Wilkinson at 242].

Must there be a traditional contract? What if the interest is one which has developed from an equity to which the court is prepared to grant equitable relief; eg the 'double equity' referred to in *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 **[Latec]**. See also *Jones v Padavatton* [1969] 1 WLR 328: *Polorace Investments Ltd v Director of Lands* [1997] 1 HKC 373: *Citilife Properties Ltd v Innovative Development Co Ltd* [1997] 2 HKC 74.

What if the contract is conditional? Does it matter if the condition is to be observed only by the pruchaser? See *Clarke v Ramuz* [1891] 2 QB 456 **[Clarke]**. Will the bare trust

not arise if there are doubts on the consideration which supports the contract? See the question of 'undervalue' in section 59 of the *Conveyancing and Property Ordinance* **[CPO]:** *Skink Ltd (In Liquidation) v Comtowell Ltd* [1994] 1 HKC 286.

The **second** interest is that of an **equitable lien**, either one in favour of the vendor where he has Assigned the property but has not yet been paid in full, or one in favour of the purchaser as soon as he pays any money under the contract. The lien probably requires the presence of a specifically performable contract.

The **third** interest is that of a qualified, **bare trust** where the vendor holds as trustee for the benefit of the purchaser, whose remedies and liabilities rest in Equity: *Rayner*: *Lysaght v Edwards* (1876) 2 Ch D 499 **[Lysaght]**: *Howard v Miller* [1915] AC 318 **[Howard]**.

THE BARE TRUST

The one and only obligation of a bare trustee is to assign property to the purchaser on payment of the full purchase price. This bare trust is a passive trust [*Herdegen v FCT* (1988) 84 ALR 271] which can arise 'in a number of different contexts': *Target Holdings Ltd v Redferns* [1995] 3 All ER 786.

The trust requires the presence of a specifically enforceable contract which remains so throughout the transaction: *Howard* (at 326): *Central Trust & Safe Deposit Co v Snider* [1916] 1 AC 269 **[Snider]**: *Warmington v Miller* [1973] 1 QB 877 **[Warmington]**: *Inter-Continental Mining Co Sdn Bhdv v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145. In *Warmington*, Stamp LJ at 887 observed, in the context of the operation of the maxim, that 'equity looks on that as done that which ought to be done', that

> the ... equitable rights do not in general arise when that which is agreed to be done would not be ordered to be done.

What exactly does this mean? Presumably the contract will be one to which specific performance would normally be granted as it involves land. Does the rule also require that **not only** there be a right to specific performance **but also** that there be no discretionary factors preventing such relief? And what of exclusion clauses: *Armitage v Nurse* [1997] 2 All ER 705?

What is a 'bare trust' for these purposes? There are two lines of inquiry.

First: what is the jurisprudential basis of the trust, or perhaps more aptly for the devotee of equity, the question should be: what equitable principles give rise to classifying the relationship of purchaser as one of trust? The second inquiry is: what is the purpose behind the trust? In particular, the second inquiry is considered in the context that the underlying contract really does give adequate relief, bearing in mind that one of the prerequisites for identifying the trust is that the contract gives a right to specific performance.

The real basis of the bare trust is said to be merely the operation of the maxim: 'equity looks on that as done that which ought to be done'. In *Shaw v Foster* (1872) 5 HL 321, at 257 **[Shaw]**, Lord Hatherley LC said

> Equity looks upon the vendor to be a trustee, and looks upon the purchaser to be a cestui que trust, solely upon the hypothesis that it considers all things to be done which ought to have been done.

What is to be done on the part of the parties depends on the point of time at which the trust arises. Assuming it does so when the purchaser has paid the purchase price in full and awaits an executed Assignment, the title deeds and perhaps vacant possession, then the purchaser would be treated as having done all he had to do. On the part of the vendor, if he has handed over an executed Assignment, given vacant possession and -- at least in the Hong Kong context, given an undertaking to deliver -- the title deeds, then not only has he done all which he ought to do **but** at law the title has passed to the purchaser. If all this **has** been done, then under the deeds system is there a need for the bare trust at that point of time? Under the registration of titles system, of course, the position **is** different because title passes only on registration; and registration is the act of the Registrar not of the parties.

But is there a need for the bare trust at that point of time under the deeds system? Does this put the emphasis of the trust on the protection of the purchaser? Or does this merely point to the difficulty in analysis of the point of time at which the bare trust arises, especially when considering the purpose of the bare trust?

Under a registration of titles system, the question of the presence of a bare trust often arises in the context of whether the purchaser has a right to caveat. Sometimes the question is more remote: does a sub-purchaser have a right to caveat the head vendor's title?

A SUBSTANTIVE INSTITUTION OR A REMEDIAL DEVICE OR A MISNOMER?

Is the bare trust a substantive institution, or a remedial device? A substantive-institution trust requires the presence of trustee, beneficiary, and trust property for which the trustee has a personal obligation to hold for the benefit of the beneficiary; broad equitable relief is available on default of the trustee: *Walsh v Lonsdale* (1882) 21 Ch D 9 [**Walsh**]: *Lo Tai Yam v Hu Mu Simon* [1997] 3 HKC 23: *Chang*. By contrast, the simple formula of the bare trust on the sale of land merely converts land into money for the purposes of identifying the **vendor's** interest once the contract has been entered into: *Lysaght*, or once the purchaser has paid the purchase money in full. In *Lysaght* the question was relevant in classifying the land for the purposes of imposing obligations on the appropriate personal representatives where the vendor died prior to execution of the Conveyance.

The bare trust will also become important in identifying assets to which creditors of the vendor are entitled if the vendor becomes bankrupt after entry into the contract. Thus classification of the vendor's interest is the **raison d'etre** for the bare trust; anything which takes this trustee's one duty, namely execution of the Assignment on payment of the purchase price, beyond this simple task would need to be justified on the ground that available relief is inadequate. Once the presence of the bare trust converts the contractual relationship into a trust of a substantive nature, the bare trust is swept through the 'gateway' of restitution/ estoppel/ fidicuary relationships into the world of 'in rem' relief? Such relief has **nothing** to do with the contract for the sale of land. Specific performance should be adequate relief for breach of the the contract, bearing in mind that the ultimate effect of that relief will be that the purchaser ends up with the legal estate. Instead the bare trust focuses on the actions of the vendor, and by granting abundant equitable relief will allow, at the least, tracing and the

taking of account.

When does the vendor lose his status as a qualified trustee? - **once** he steps over the line and makes a profit with the land by selling on? - **or** when he deliberately damages the property prior to completion? - **or** if the contract has denied the purchaser the right to specific performance, regardless of the default of the vendor or of the unconscionable nature of his behaviour? Still yet another instance: if it is accepted that the bare trust arises **only** when the purchaser has paid the purchase price in full and is awaiting the Assignment executed by the vendor, then what is the position where the vendor becomes bankrupt after the purchaser has merely paid the deposit? Does the contractual relationship convert into a bare trust to ensure that the property passes to the purchaser [on his payment of the purchase price]? This last example of conversion may be unnecessary because the purchaser's rights might well be protected, so long as he has not given undervalue.

What does push the bare trust over the edge? Obviously, the availability of lush equity in its new make-over, has not hindered the process. But does not the enhancement of the beneficiary's somewhat sterile rights under a 'pure' bare trust require something more? Perhaps the behaviour of the vendor is the trigger: *Lake v Bayliss* [1974] 2 All ER 1114 **[Lake]** following comments in *Daniels v Davison* [1803-13] All ER Rep 432, or perhaps unconscionability, the presence of contractual vitiating factors, the breach of a fiduciary obligation [this is of course itself perpetually circular], and so on. The bare trust does **not** interfere with the purchaser's rights under the contract, or as the holder of an equitable lien. But the presence of the New Equity transforms the drab remedies already available into something irresistible from Aladdin's Cave. What purchaser can resist the temptation?

The New Equity has done this without regard to the fact that the underlying interest, now sought to be amply protected in Equity, is often already protected by the law. How has this occurred? And at what expense? Presumably the change-over requires

a. the vendor to act dishonourably, or maybe this is not necessary:
b. for the court to pounce on the fact that a trustee **must** be a fiduciary because of course trusts and fiduciary obligations go together like the 'horse and carriage, love and marriage' of the old song: and
c. for the court to treat the defaulting bare trustee in the same way as a defaulting fiduciary.

Restitution, unconscionability, unjust enrichment, are just some of the appellations for the remedies available on the trustee's default: see *Lake*. Restitution involves

a. enrichment to the defendant:
b. gained at the plaintiff's expense:
c. where it would be unjust for the defendant to retain the benefit: and
d. where there are no recognized defences, nor any ground of public policy to deny relief.

Generally see *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221: *Pong Wing-Shu v Alhambra Investment Co Ltd* [1965] HKLR 163 **[Pong]**: *Phipps v Boardman* [1964] 2 All ER 187 **[Phipps]**: cf the comments in *Maguire v Makaronis* (1997) 44 ALR 729 and *ANZ v*

Petrick [1997] VR 562 where action against the fiduciary required the beneficiary to also 'do equity'; and cf also *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 All ER 961: *Kelly v Cooper* [1993] AC 205.

In Hong Kong the words of the Court of Appeal in *Pong* would not have be out of place in considering a defaulting fiduciary. The purchase price was to be paid in instalments. A mortgage to which the property was subject at the time of sale was later discharged, and the vendors re-financed on favourable terms. This mortgage was discharged before assignment. However, the purchaser took issue with the vendors using the property for security [especially as the quantum of the second mortgage was higher than the prior mortgage], and sought account of the vendor's 'profits' on the second mortgage. The purchaser succeeded because

> The vendors were trustees, subject to certain limitations. The limitations in question would not, we think, in the ordinary way relieve them from the liability to account for the profit, if any, made out of the trust property by discharging one mortgage and entering into another for a larger sum ...
>
> The rights of a *cestui que trust* against a trustee are not confined to the reparation of damage done to him. If a trustee uses the trust property and thereby makes a profit, he must account for that profit to the beneficiary even though the beneficiary has not suffered any damage from such use. (Hogan CJ at 181)

The court relied on *Phipps*. Was this the appropriate authority? Or should it have been *Lysaght*? If so, there would have been no question of tracing or account, and the decision would have been more in conformity with orthodox interpretation: see *Ho King-yim v Lau Kong-mo* [1980] HKLR 42. The decision in *In Re Hong Kong Home Building and Investment Co Ltd* [1966] HKLR 293 depends on the particular terms of the contract which allowed the purchaser to obtain any profit made by the vendor on resale, even where the purchaser defaulted afer paying only the deposit.

THE AMBIT OF THE INQUIRY

With apologies for breaching the page limit, the following points are made:

Timing

When does the bare trust arise? The timing is entwined with the purpose of the trust. Some say that 'the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser': *Lysaght*, Jessel MR at 506: *Ho King-yim v Lau King-mo* [1980] HKLR 42: *Paine v Meller* (1801) 31 ER 1088. Others say that it is only when the vendor has done everything he must do to divest himself of the legal estate: *Shaw*, even though he then still has a 'paramount right to protect his interest as vendor': *Rayner*.

As the bare trust has seemingly been accepted where the registration of titles system applies, then there must be an inquiry as to whether the nature of the relevant deeds or title registration system play a role in the bare trust: *Temenggong Securities Ltd v Registrar of Titles, Johore* [1974] 2 MLJ 45: *Ong Chat Pang v Valliappa Chettiar* [1971] 1 MLJ 224:

Macon Engineers Sdn Bhd v Goh Hooi Yin [1996] 2 MLJ 53: *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116.

Vendor's actions pending completion

Can the vendor deal with the land pending completion or does his status as bare trustee mean that the vendor no longer has any disposing power for his own benefit in the land: *Lake*? In some cases, the vendor will sell onto a second purchaser whilst the first contract remains valid. Obviously this will constitute a breach of the contract of sale and appropriate relief will be available to the purchaser dependent on the terms of the first contract of sale, and on the point of time at which the first purchaser takes action.

In Hong Kong there are two complicating factors. First: section 4 of the *LRO* abrogates the doctrine of notice so that if the vendor having sold to one purchaser then sells onto to a second purchaser, and the first purchaser had failed to register the contract, the second purchaser will be able to be treated as bona fide even if he knew about the first purchaser. Of course, if the first contract is not in writing, but relies on part performance for enforcement, then the first purchaser cannot register the contract, and his interest will be protected by reference to common law priority principles: *Wong Chim Ying v Cheng Kam Wing* [1991] 2 HKLR 253.

The second factor is that secondary sales in Hong Kong frequently start out under a binding Provisional Agreement which is later replaced by a formal Sale and Purchase Agreement. The contract usually contains a clause allowing the vendor to renege without penalty even absent breach by the purchaser, also often proscribes the purchaser taking action on the vendor's breach other than for the return of the deposit: *Wong Lai Fan v Lee Ha* [1992] 1 HKLR 125.

In the case of non-registration does the fact that the purchaser failed to protect his interest mean that the bare trust is irrelevant: *Snider*? In the case of the exclusion of specific performance, could a purchaser be the beneficiary of a trust where there is no right to, nor availability of, specific performance unless the exclusionary clause can be set aside.

Assuming neither of these complications occurs then the purchaser can seek specific performance if the vendor has not executed an Assignment in favour of the second purchaser; if this has been done equity will not allow a remedy which is impossible to perform. But is that enough? The first purchaser will want to be re-imbursed for all losses, and will want to gain the profit which the vendor receives by selling on.

The question depends not so much on how the relationship between the vendor and the first purchaser is defined, ie as one of trust rather than as one of contract, but depends more on the state of the market. If the market is on an upwards streak, the vendor might consider that, even absent a clause proscribing monetary compensation to the purchaser, it was cheaper to breach the **contract** but to sell on and keep the profit. One factor which helped such vendors is that generally most parties here are not in favour of litigation. Where the contract **does** contain a proscribing clause, then the vendor can do what he likes because no default will really cost him money. But once the classification of the relationship changes, and the **contract** is disregarded in favour of the **bare trust**, the vendor might think twice before

selling on. *Lake* and *Pong* would require the vendor as trustee with a corresponding fiduciary obligation to 'disgorge' the profit. Now that the market is on a downwards plunge, vendors are more anxious to complete the contract than to breach.

In the local context the usual case involves passive action by the vendor, namely where the vendor's creditors take action for judgment debt and then seek to register a charging order against the land: see sections 2 and 5A of the *LRO*. In the past the approach was that if the purchaser failed to register his contract, and the creditor sought to register a charging order, then the charging order would take priority in reliance of section 4: *Consolidated Sales Ltd v Turner* [1970] HKLR 222. But later have found for the purchaser but allowing the charging order to take effect against the purchase price thereby imposing some obligation on the purchaser to pay the creditor rather than the vendor. This of course brings its own problems: *Ng Kam-ha v Vincent Sina Traders (HK) Ltd* [1987] HKLR 1193.

Trespass or nuisance

Can the purchaser, as beneficiary of a trust, take action against a third party for the latter's trespass or where there is private nuisance? See *Clarke v Ramuz* [1891] 2 QB 456: *Hunter v Canary Wharf* [1997] 2 WLR 684: *Lai Sai Kee v Yim Ping Wai* (1997) HCA No 5351/97: *Cheerup Ltd v Wong Sau Fong* [1996] 4 HKC 92. Generally no!

As against the vendor, the question might be complicated by consideration of the vendor's liability for waste, *Rayner* and *Abdullah v Shah* [1959] AC 124 or for his deliberate damage: *R v Lee Sing-wai* [1990] 2 HKC 462.

Vendor's illegality, etc

Does the bare trust arise if the vendor has no authority to sell? Or if the sale is illegal? Or if the sale is at an undervalue? Or the sale is aimed at defeating creditors? Generally see *Lake*: *Tinsley v Milligan* [1994] AC 340: *Nelson v Nelson* (1995) 132 ALR 133.

What effect do confirmation or nomination have?

Does confirmation or nomination have any effect on the existence of the bare trust? What of assignment of the purchaser's interests? See *Douglas Ltd v Ji Shan International Investment Ltd* [1998] 2 HKC 165 **[Douglas]**: *Fulltrend Co Ltd v Longer Year Development Ltd* [1990] 1 HKC 452: *Wellfit: Chong Kai Tai v Lee Gee Kee* [1997] 1 HKC 359 [PC]: *Camberra Investment Ltd v Chan Wai Tak* [1989] 1 HKLR 568: *Qualihold Investments Ltd v Bylax Investments Ltd* [1991] 2 HKC 589 .

The sub-purchaser and the trust under the head contract

Can the third party, for example a sub-purchaser, rely not only on the bare trust *Douglas* but go further *Banque Financiere v Parc Ltd* [1998] 1 All ER 737 where the re-classification of the transaction produced the remedy the plaintiff wanted.

Judith Sihombing
21 August 1998

DOES THE NEW EQUITY ELEVATE THE BARE TRUSTEE INTO A FIDUCIARY?

Introduction

On entry into a valid contract for the sale of land, the parties to the contract are treated as having a variety of persona; the effect of this diversity of status and identity is reflected in the different types of remedies available.

The **first** interest is **contractual.** On the exchange of contracts there is a diminution in the rights of the vendor in respect of the land, with a corresponding enhancement in those of the purchaser. Because the subject matter of the contract is land specific performance is considered to be the proper remedy because the purchaser has an equitable interest in the land, a proprietary interest, which has its own inherent power and rights to relief.

In *Rayner v Preston* [**Rayner**] (1881) 18 Ch D 1 Brett LJ observed:

> I doubt whether it is a true description of the relationship between the parties to say that tfrom the time of making of the contract, or at any time, one was ever the trustee for the other. They are only parties to a contract of sale and purchase of which a court of Equity will under certain circumstances decree specific performance. [at 5]

See Jacobs J in *Chang v Registrar of Titles* (1976) 137 CLR 177 [**Chang**].

In Hong Kong the contract, so long as it is in writing and not merely evidenced by part performance, is registrable under the *Land Registration Ordinance* [**LRO**]; failure to register will enable a subsequent purchaser to deal with the land ignoring the presence of the prior contract: see s4 which abrogates the doctrine of notice, and s3 (2) which refers to part performance.

On completion,

> in return for the price to obtain (as under an old style English completion) a transfer of the property freed from charges. Under a Hong Kong style completion the purchaser's only right is to receive personal undertaking from the vendor's solicitors to procure in the future the delivery of a valid transfer, the discharge of the existing mortgages and possession. [*Wellfit Investments Ltd v Poly Commence Ltd* [1997] 2 HKC 236 [PC] Lord Browne-Wilkinson at 242].

Must there be a traditional contract? What if the interest is one which has developed from an equity to which the court is prepared to grant equitable relief; eg the 'double equity' referred to in *Latec Investments Ltd v Hotel Terrigal Pty Ltd* (1965) 113 CLR 265 [**Latec**]. See also *Jones v Padavatton* [1969] 1 WLR 328: *Polorace Investments Ltd v Director of Lands* [1997] 1 HKC 373: *Citilife Properties Ltd v Innovative Development Co Ltd* [1997] 2 HKC 74.

What if the contract is conditional? Does it matter if the condition is to be observed only by the pruchaser? See *Clarke v Ramuz* [1891] 2 QB 456 [**Clarke**]. Will the bare trust

not arise if there are doubts on the consideration which supports the contract? See the question of 'undervalue' in section 59 of the *Conveyancing and Property Ordinance* **[CPO]:** *Skink Ltd (In Liquidation) v Comtowell Ltd* [1994] 1 HKC 286.

The **second** interest is that of an **equitable lien**, either one in favour of the vendor where he has Assigned the property but has not yet been paid in full, or one in favour of the purchaser as soon as he pays any money under the contract. The lien probably requires the presence of a specifically performable contract.

The **third** interest is that of a qualified, **bare trust** where the vendor holds as trustee for the benefit of the purchaser, whose remedies and liabilities rest in Equity: *Rayner*: *Lysaght v Edwards* (1876) 2 Ch D 499 **[Lysaght]**: *Howard v Miller* [1915] AC 318 **[Howard]**.

THE BARE TRUST

The one and only obligation of a bare trustee is to assign property to the purchaser on payment of the full purchase price. This bare trust is a passive trust [*Herdegen v FCT* (1988) 84 ALR 271] which can arise 'in a number of different contexts': *Target Holdings Ltd v Redferns* [1995] 3 All ER 786.

The trust requires the presence of a specifically enforceable contract which remains so throughout the transaction: *Howard* (at 326): *Central Trust & Safe Deposit Co v Snider* [1916] 1 AC 269 **[Snider]**: *Warmington v Miller* [1973] 1 QB 877 **[Warmington]**: *Inter-Continental Mining Co Sdn Bhdv v Societe Des Etains De Bayas Tudjuh* [1974] 1 MLJ 145. In *Warmington*, Stamp LJ at 887 observed, in the context of the operation of the maxim, that 'equity looks on that as done that which ought to be done', that

> the ... equitable rights do not in general arise when that which is agreed to be done would not be ordered to be done.

What exactly does this mean? Presumably the contract will be one to which specific performance would normally be granted as it involves land. Does the rule also require that **not only** there be a right to specific performance **but also** that there be no discretionary factors preventing such relief? And what of exclusion clauses: *Armitage v Nurse* [1997] 2 All ER 705?

What is a 'bare trust' for these purposes? There are two lines of inquiry.

First: what is the jurisprudential basis of the trust, or perhaps more aptly for the devotee of equity, the question should be: what equitable principles give rise to classifying the relationship of purchaser as one of trust? The second inquiry is: what is the purpose behind the trust? In particular, the second inquiry is considered in the context that the underlying contract really does give adequate relief, bearing in mind that one of the prerequisites for identifying the trust is that the contract gives a right to specific performance.

The real basis of the bare trust is said to be merely the operation of the maxim: 'equity looks on that as done that which ought to be done'. In *Shaw v Foster* (1872) 5 HL 321, at 257 **[Shaw]**, Lord Hatherley LC said

> Equity looks upon the vendor to be a trustee, and looks upon the purchaser to be a cestui que trust, solely upon the hypothesis that it considers all things to be done which ought to have been done.

What is to be done on the part of the parties depends on the point of time at which the trust arises. Assuming it does so when the purchaser has paid the purchase price in full and awaits an executed Assignment, the title deeds and perhaps vacant possession, then the purchaser would be treated as having done all he had to do. On the part of the vendor, if he has handed over an executed Assignment, given vacant possession and -- at least in the Hong Kong context, given an undertaking to deliver -- the title deeds, then not only has he done all which he ought to do **but** at law the title has passed to the purchaser. If all this **has** been done, then under the deeds system is there a need for the bare trust at that point of time? Under the registration of titles system, of course, the position **is** different because title passes only on registration; and registration is the act of the Registrar not of the parties.

But is there a need for the bare trust at that point of time under the deeds system? Does this put the emphasis of the trust on the protection of the purchaser? Or does this merely point to the difficulty in analysis of the point of time at which the bare trust arises, especially when considering the purpose of the bare trust?

Under a registration of titles system, the question of the presence of a bare trust often arises in the context of whether the purchaser has a right to caveat. Sometimes the question is more remote: does a sub-purchaser have a right to caveat the head vendor's title?

A SUBSTANTIVE INSTITUTION OR A REMEDIAL DEVICE OR A MISNOMER?

Is the bare trust a substantive institution, or a remedial device? A substantive-institution trust requires the presence of trustee, beneficiary, and trust property for which the trustee has a personal obligation to hold for the benefit of the beneficiary; broad equitable relief is available on default of the trustee: *Walsh v Lonsdale* (1882) 21 Ch D 9 [**Walsh**]: *Lo Tai Yam v Hu Mu Simon* [1997] 3 HKC 23: *Chang*. By contrast, the simple formula of the bare trust on the sale of land merely converts land into money for the purposes of identifying the **vendor's** interest once the contract has been entered into: *Lysaght*, or once the purchaser has paid the purchase money in full. In *Lysaght* the question was relevant in classifying the land for the purposes of imposing obligations on the appropriate personal representatives where the vendor died prior to execution of the Conveyance.

The bare trust will also become important in identifying assets to which creditors of the vendor are entitled if the vendor becomes bankrupt after entry into the contract. Thus classification of the vendor's interest is the **raison d'etre** for the bare trust; anything which takes this trustee's one duty, namely execution of the Assignment on payment of the purchase price, beyond this simple task would need to be justified on the ground that available relief is inadequate. Once the presence of the bare trust converts the contractual relationship into a trust of a substantive nature, the bare trust is swept through the 'gateway' of restitution/ estoppel/ fidicuary relationships into the world of 'in rem' relief? Such relief has **nothing** to do with the contract for the sale of land. Specific performance should be adequate relief for breach of the the contract, bearing in mind that the ultimate effect of that relief will be that the purchaser ends up with the legal estate. Instead the bare trust focuses on the actions of the vendor, and by granting abundant equitable relief will allow, at the least, tracing and the

taking of account.

When does the vendor lose his status as a qualified trustee? - **once** he steps over the line and makes a profit with the land by selling on? - **or** when he deliberately damages the property prior to completion? - **or** if the contract has denied the purchaser the right to specific performance, regardless of the default of the vendor or of the unconscionable nature of his behaviour? Still yet another instance: if it is accepted that the bare trust arises **only** when the purchaser has paid the purchase price in full and is awaiting the Assignment executed by the vendor, then what is the position where the vendor becomes bankrupt after the purchaser has merely paid the deposit? Does the contractual relationship convert into a bare trust to ensure that the property passes to the purchaser [on his payment of the purchase price]? This last example of conversion may be unnecessary because the purchaser's rights might well be protected, so long as he has not given undervalue.

What does push the bare trust over the edge? Obviously, the availability of lush equity in its new make-over, has not hindered the process. But does not the enhancement of the beneficiary's somewhat sterile rights under a 'pure' bare trust require something more? Perhaps the behaviour of the vendor is the trigger: *Lake v Bayliss* [1974] 2 All ER 1114 **[Lake]** following comments in *Daniels v Davison* [1803-13] All ER Rep 432, or perhaps unconscionability, the presence of contractual vitiating factors, the breach of a fiduciary obligation [this is of course itself perpetually circular], and so on. The bare trust does **not** interfere with the purchaser's rights under the contract, or as the holder of an equitable lien. But the presence of the New Equity transforms the drab remedies already available into something irresistible from Aladdin's Cave. What purchaser can resist the temptation?

The New Equity has done this without regard to the fact that the underlying interest, now sought to be amply protected in Equity, is often already protected by the law. How has this occurred? And at what expense? Presumably the change-over requires

a. the vendor to act dishonourably, or maybe this is not necessary:
b. for the court to pounce on the fact that a trustee **must** be a fiduciary because of course trusts and fiduciary obligations go together like the 'horse and carriage, love and marriage' of the old song: and
c. for the court to treat the defaulting bare trustee in the same way as a defaulting fiduciary.

Restitution, unconscionability, unjust enrichment, are just some of the appellations for the remedies available on the trustee's default: see *Lake*. Restitution involves

a. enrichment to the defendant:
b. gained at the plaintiff's expense:
c. where it would be unjust for the defendant to retain the benefit: and
d. where there are no recognized defences, nor any ground of public policy to deny relief.

Generally see *Pavey & Matthews Pty Ltd v Paul* (1987) 162 CLR 221: *Pong Wing-Shu v Alhambra Investment Co Ltd* [1965] HKLR 163 **[Pong]**: *Phipps v Boardman* [1964] 2 All ER 187 **[Phipps]**: cf the comments in *Maguire v Makaronis* (1997) 44 ALR 729 and *ANZ v*

Petrick [1997] VR 562 where action against the fiduciary required the beneficiary to also 'do equity'; and cf also *Westdeutsche Landesbank Girozentrale v Islington LBC* [1996] 2 All ER 961: *Kelly v Cooper* [1993] AC 205.

In Hong Kong the words of the Court of Appeal in *Pong* would not have be out of place in considering a defaulting fiduciary. The purchase price was to be paid in instalments. A mortgage to which the property was subject at the time of sale was later discharged, and the vendors re-financed on favourable terms. This mortgage was discharged before assignment. However, the purchaser took issue with the vendors using the property for security [especially as the quantum of the second mortgage was higher than the prior mortgage], and sought account of the vendor's 'profits' on the second mortgage. The purchaser succeeded because

> The vendors were trustees, subject to certain limitations. The limitations in question would not, we think, in the ordinary way relieve them from the liability to account for the profit, if any, made out of the trust property by discharging one mortgage and entering into another for a larger sum ...
>
> The rights of a *cestui que trust* against a trustee are not confined to the reparation of damage done to him. If a trustee uses the trust property and thereby makes a profit, he must account for that profit to the beneficiary even though the beneficiary has not suffered any damage from such use. (Hogan CJ at 181)

The court relied on *Phipps*. Was this the appropriate authority? Or should it have been *Lysaght*? If so, there would have been no question of tracing or account, and the decision would have been more in conformity with orthodox interpretation: see *Ho King-yim v Lau Kong-mo* [1980] HKLR 42. The decision in *In Re Hong Kong Home Building and Investment Co Ltd* [1966] HKLR 293 depends on the particular terms of the contract which allowed the purchaser to obtain any profit made by the vendor on resale, even where the purchaser defaulted afer paying only the deposit.

THE AMBIT OF THE INQUIRY

With apologies for breaching the page limit, the following points are made:

Timing

When does the bare trust arise? The timing is entwined with the purpose of the trust. Some say that 'the moment you have a valid contract for sale the vendor becomes in equity a trustee for the purchaser of the estate sold, and the beneficial ownership passes to the purchaser': *Lysaght*, Jessel MR at 506: *Ho King-yim v Lau King-mo* [1980] HKLR 42: *Paine v Meller* (1801) 31 ER 1088. Others say that it is only when the vendor has done everything he must do to divest himself of the legal estate: *Shaw*, even though he then still has a 'paramount right to protect his interest as vendor': *Rayner*.

As the bare trust has seemingly been accepted where the registration of titles system applies, then there must be an inquiry as to whether the nature of the relevant deeds or title registration system play a role in the bare trust: *Temenggong Securities Ltd v Registrar of Titles, Johore* [1974] 2 MLJ 45: *Ong Chat Pang v Valliappa Chettiar* [1971] 1 MLJ 224:

Macon Engineers Sdn Bhd v Goh Hooi Yin [1996] 2 MLJ 53: *Karuppiah Chettiar v Subramaniam* [1971] 2 MLJ 116.

Vendor's actions pending completion

Can the vendor deal with the land pending completion or does his status as bare trustee mean that the vendor no longer has any disposing power for his own benefit in the land: *Lake*? In some cases, the vendor will sell onto a second purchaser whilst the first contract remains valid. Obviously this will constitute a breach of the contract of sale and appropriate relief will be available to the purchaser dependent on the terms of the first contract of sale, and on the point of time at which the first purchaser takes action.

In Hong Kong there are two complicating factors. First: section 4 of the *LRO* abrogates the doctrine of notice so that if the vendor having sold to one purchaser then sells onto to a second purchaser, and the first purchaser had failed to register the contract, the second purchaser will be able to be treated as bona fide even if he knew about the first purchaser. Of course, if the first contract is not in writing, but relies on part performance for enforcement, then the first purchaser cannot register the contract, and his interest will be protected by reference to common law priority principles: *Wong Chim Ying v Cheng Kam Wing* [1991] 2 HKLR 253.

The second factor is that secondary sales in Hong Kong frequently start out under a binding Provisional Agreement which is later replaced by a formal Sale and Purchase Agreement. The contract usually contains a clause allowing the vendor to renege without penalty even absent breach by the purchaser, also often proscribes the purchaser taking action on the vendor's breach other than for the return of the deposit: *Wong Lai Fan v Lee Ha* [1992] 1 HKLR 125.

In the case of non-registration does the fact that the purchaser failed to protect his interest mean that the bare trust is irrelevant: *Snider*? In the case of the exclusion of specific performance, could a purchaser be the beneficiary of a trust where there is no right to, nor availability of, specific performance unless the exclusionary clause can be set aside.

Assuming neither of these complications occurs then the purchaser can seek specific performance if the vendor has not executed an Assignment in favour of the second purchaser; if this has been done equity will not allow a remedy which is impossible to perform. But is that enough? The first purchaser will want to be re-imbursed for all losses, and will want to gain the profit which the vendor receives by selling on.

The question depends not so much on how the relationship between the vendor and the first purchaser is defined, ie as one of trust rather than as one of contract, but depends more on the state of the market. If the market is on an upwards streak, the vendor might consider that, even absent a clause proscribing monetary compensation to the purchaser, it was cheaper to breach the **contract** but to sell on and keep the profit. One factor which helped such vendors is that generally most parties here are not in favour of litigation. Where the contract **does** contain a proscribing clause, then the vendor can do what he likes because no default will really cost him money. But once the classification of the relationship changes, and the **contract** is disregarded in favour of the **bare trust**, the vendor might think twice before

selling on. *Lake* and *Pong* would require the vendor as trustee with a corresponding fiduciary obligation to 'disgorge' the profit. Now that the market is on a downwards plunge, vendors are more anxious to complete the contract than to breach.

In the local context the usual case involves passive action by the vendor, namely where the vendor's creditors take action for judgment debt and then seek to register a charging order against the land: see sections 2 and 5A of the *LRO*. In the past the approach was that if the purchaser failed to register his contract, and the creditor sought to register a charging order, then the charging order would take priority in reliance of section 4: *Consolidated Sales Ltd v Turner* [1970] HKLR 222. But later have found for the purchaser but allowing the charging order to take effect against the purchase price thereby imposing some obligation on the purchaser to pay the creditor rather than the vendor. This of course brings its own problems: *Ng Kam-ha v Vincent Sina Traders (HK) Ltd* [1987] HKLR 1193.

Trespass or nuisance

Can the purchaser, as beneficiary of a trust, take action against a third party for the latter's trespass or where there is private nuisance? See *Clarke v Ramuz* [1891] 2 QB 456: *Hunter v Canary Wharf* [1997] 2 WLR 684: *Lai Sai Kee v Yim Ping Wai* (1997) HCA No 5351/97: *Cheerup Ltd v Wong Sau Fong* [1996] 4 HKC 92. Generally no!

As against the vendor, the question might be complicated by consideration of the vendor's liability for waste, *Rayner* and *Abdullah v Shah* [1959] AC 124 or for his deliberate damage: *R v Lee Sing-wai* [1990] 2 HKC 462.

Vendor's illegality, etc

Does the bare trust arise if the vendor has no authority to sell? Or if the sale is illegal? Or if the sale is at an undervalue? Or the sale is aimed at defeating creditors? Generally see *Lake*: *Tinsley v Milligan* [1994] AC 340: *Nelson v Nelson* (1995) 132 ALR 133.

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Does confirmation or nomination have any effect on the existence of the bare trust? What of assignment of the purchaser's interests? See *Douglas Ltd v Ji Shan International Investment Ltd* [1998] 2 HKC 165 **[Douglas]**: *Fulltrend Co Ltd v Longer Year Development Ltd* [1990] 1 HKC 452: *Wellfit: Chong Kai Tai v Lee Gee Kee* [1997] 1 HKC 359 [PC]: *Camberra Investment Ltd v Chan Wai Tak* [1989] 1 HKLR 568: *Qualihold Investments Ltd v Bylax Investments Ltd* [1991] 2 HKC 589 .

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Judith Sihombing
21 August 1998

Session 3: UNDUE INFLUENCE: GUARANTEES: MORTGAGES: CONSCIENCE

Thursday 10th September 1998
2.00 - 3.00
4.30 - 5.30

1. **THE ROLE OF NEW EQUITY - MAKING CONTRACTUAL ROLE FOR CONSCIONABILITY IN IRELAND**

   Ms Oonagh Breen
   University College, Dublin [Ireland]

2. **AG v REID: RESTITUTION? COMPENSATION? CRIMINAL? CIVIL?**

   Mr Michael Jackson
   Univeristy of Hong Kong

3. **PROPERTY RIGHTS AND CONSCIENCE**

   Dr William Swadling
   Oxford University [UK]

The Role of New Equity: Making Contractual Room for Conscionability in Ireland

by Oonagh Breen

When, if ever, should equity interfere in commercial transactions? Even if it is accepted that there is a place for equity's input into agreements negotiated between parties bargaining at arms length and with the full benefit of legal advice, the question remains as to what form this 'assistance' or 'interference' (depending on your viewpoint) should take. This is by no means a novel question and is in fact one which has exercised the minds of the great and good in the past. Writing in 1905, Roscoe Pound, in his article *The Decadence of Equity*, opined that,

> The commercial world demands rules. No man makes large investments trusting to uniform exercise of discretion. It may be that the judge's decision will be governed by the social standards of justice, but the essential point is that no human being can tell how the social standard of justice will work on that judge's mind before the judgment is rendered.[1]

This sentiment is one, no doubt, which would find favour with many commercial or common law lawyers. The need for certainty in the spheres of property and commercial law is well established. The issue, which needs to be addressed, is when does the requirement of certainty become so indispensable that it should take priority to the need for justice **inter partes**? Lord Denning summarised the problem as being the need to find the proper balance between the two great objects of preserving order and doing justice; objects, he noted, which do not always coincide.[2]

Lord Denning can certainly be categorised as belonging to group of lawyers who put redress of grievances before certainty, despite his common law background. Champion of the need for what he called a 'new equity', his critics accused him of engaging in 'palm tree justice'. Yet the lacuna identified by him and the need, as he saw it, for the rising of another 'Bentham to expose the fallacies and failings of the past and to point the way to a new age and a new equity'[3] are matters which various jurisdictions have been grappling with for the last 30 years. The Australian courts have undoubtedly led the way on the doctrine of unconscionability. In the United Kingdom, however, and in light of *Union Eagle*, in Hong Kong there seems to be a certain reticence in embracing this new equity, with efforts instead being concentrated on the development of restitutionary remedies or the doctrine of estoppel -verging more on a *quantum meruit* based approach.

This paper will focus on the approach of the Irish courts and the extent of their openness to the existence of a new equity. It may be noted at the outset that many issues, including the legal issue at the heart of *Union Eagle* have yet to come before the Irish Courts[4]. For some reason, legal questions which tax the judicial minds of other jurisdictions have still to be raised in Ireland. Thus, equity lawyers can only anticipate the likely approach of the courts on a range of matters from knowing receipt and accessory liability to whether equity can give post rescission relief following the forfeiture of a deposit for failure to complete, thereby restoring the purchaser's

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1 (1905) Columbia Law Review 11, at 15.

2 "*The Need for a New Equity*" (1952) Current Legal Problems 1.

3 Ibid., at p. 10.

4 In terms of the direct issue in *Union Eagle*, the nearest relevant authority in Ireland is the case of *Maye v Merriman* (unreported High Court, 13 February 1980) where equity's role in the face of time essential clauses was considered by Hamilton J, who approved the comments of Earl Lorebury in *Stickney v Keeble* [1915] AC 386 where he had noted, "[T]he date fixed for the completion of the contract for the sale of land is no less part of the contract than any other clause... Equity will grant relief where a party seeks to make an unfair use of the letter of his contract in this respect.

equitable interest in the property and enabling him to get specific performance when otherwise appropriate.[5]

When Should Equity Interfere In Commercial Contracts - The Irish Experience

In the *Union Eagle* case, the Privy Council found in favour of upholding the provisions of the contract on the facts of the case -- certainty of contract won the day. The Board held, in essence, that on the evidence before them there was no need for equity to intervene. They did not go so far as to say that there would never be exceptions -- just that no exception arose in the present case. Commentators, however, have not been slow to highlight situations in which it seems even the Privy Council would be willing to allow equitable assistance.[6] In Ireland while there is an overall evolving judicial respect for the sanctity of the commercial transaction, one can still identify two lines of authority. Firstly, there are those instances where certainty of contract wins out and commercial practice is upheld and secondly, there are cases where almost in spite of what commercial consensus or contractual certainty may expect, the Court finds room for equity's input.

The Strong Commercial Line

One area known for its susceptibility to equitable relief is that of forfeiture for non-payment of rent. Recently, in a case concerning forfeiture of a commercial lease, the Supreme Court retrenched on the general availability of such relief. Murphy J, giving judgment for the Court stated that,

> 'the nature of the equitable discretion exercised by the Courts in granting to a lessee relief against forfeiture is hardly applicable or applicable to the same extent where the Court is dealing with substantial commercial transactions in which the lessor and lessee are on equal terms.[7]

In the *Navaro* case, the appellant had defaulted on rent payments and ultimately acceded to a consent order granting possession to the respondents. Appealing subsequently to the Supreme Court and seeking to set aside the order, the appellant alleged that there had been a common mistake regarding the calculation of the arrears owed. Rejecting its claims, the Court drew attention to the fact that both parties had access to the lease, which contained the disputed formulae, and the fact that the compromise which was the subject of the consent order had been negotiated by solicitors. Making reference to the Court's equitable discretion in commercial dealings, the learned judge dismissed the appeal and concluded that even if the parties had been labouring under a misapprehension as to their rights in the original proceedings, no court would grant relief against forfeiture in the circumstances of the present case.[8]

A more recent decision of the High Court and the subject of popular controversy is the case of Lakes

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[5] It should be noted that although there is a lack of judicial precedent in some areas these matters have been the subject of academic consideration -- thus, in relation to the availability of post rescission relief in equity, Farrell *The Irish Law of Specific Performance*, (Butterworths, 1994) at 200) has noted that if such jurisdiction exists in Ireland 'its exercise probably will be exceptional'.

[6] See, for instance, Heydon in [1997] LQR 385, who notes instances where the time-essential condition has been varied by the parties (as in *Kilmer v British Columbia Orchard Lands* [1913] AC 319); or where the character of the sale is more in line with the mortgage of land - a situation where equitable relief against forfeiture of the equity of redemption is well established (see the discussion in *Stern v McArthur* (1988) 165 CLR 489). Similarly the Privy Council's concentration on 'ordinary contracts for the sale of land' leaves the way open for equitable relief in 'extraordinary' cases, whether that relief takes the form of estoppel or some other form of restitutionary relief.

[7] *Cue Club Ltd v Navaro Ltd*, unreported Supreme Court, 23 October 1996.

[8] It appears from the judgment that the appellant had earlier claimed that the respondent had altered the terms of the written document, which had postponed execution of the consent order, if the appellant paid within a certain time. These forgery allegations were later withdrawn in favour of an argument of common mistake as to the effect of the order.

v Unipark Properties & Durkan Homes Ltd.[9] The plaintiffs contracted to buy a new house from site plans in October 1997 and paid a booking deposit. They proceeded to arrange their mortgage and engaged an assessor to examine the site plans and maps. In February 1998 their $2,000 deposit was returned and they were informed by the builder that the price of the as yet unfinished property had risen by $36,000. The plaintiffs sued for specific performance of their original agreement. McCracken J, while having considerable sympathy for the couple, found in favour of the defendants. Focusing on the fact that only the plaintiffs executed the contracts, the learned judge went on to note that the receipt issued after payment of the deposit stated clearly that it was not intended to bind the parties in the absence of a formal contract. Finding neither a sufficient memorandum to satisfy the *Statute of Frauds* 1695 or evidence of acts of part performance, the judge, in an ex-tempore judgment, refused specific performance. Interestingly, two months earlier the Circuit Court in Cork reached a different conclusion in a very similar case.[10] The plaintiffs again paid a booking deposit in respect of a new house and received copies of the memorandum of proposed sale. They did not respond to the memo nor to a subsequent draft contract sent to them in February, but instead proceeded to arrange their finances, requesting the foreman to make slight changes to the property and engaging a firm of interior designers. Moreover, they engaged the third defendant to act as sole agent in respect of the sale of their old home, which they then advertised for sale. In March, the defendants wrote to the plaintiffs stating that in light of the latter's silence in relation to the draft contract, they were not now proceeding with the sale and would return the booking deposit in due course. The plaintiffs sued for specific performance. As in the later *Lakes* case, Judge Buckley found that the documentary evidence (consisting of the receipt for $35,000, the memorandum of sale and the draft contract) did not constitute a sufficient note or memorandum for the purposes of the *Statute of Frauds*. However, in view of the acts of part performance in this case, described by the learned judge as being 'referable only to an agreement that the defendant companies would procure the completion of the property and transfer it to the plaintiffs', Buckley J held that it would be inequitable to allow the defendants to rely on the statute. Granting the plaintiffs a decree of specific performance, he concluded that,

> "Where a party seeking relief in proceedings has taken some step in pursuit of the contract which has left him in such position that it would amount to a fraud on the part of the other party to rely on the fact that there was no sufficient memorandum of the contract, the case is taken out of the statute and the courts will enforce the
> contract."[11]

The commercial world may demand certainty, but where it fails to provide this in its dealings the Court must be in a position to call upon its inherent equitable discretion to ensure that contract is honoured as far as is reasonable in all the circumstances of the case. So while one may agree with the sentiments of Pound, it is arguable, with all due respect, that the great opponent of slot machine justice underestimated the tenacity of equity to function in a commercial world. Equity, however, does not set out to thwart commercial bargains -- the exercise of its jurisdiction is only warranted in cases where if Equity were to 'follow the law' the outcome would be of credit to neither discipline. The very fact that different results were reached in *Lakes* and *Prendiville* is, if anything, further evidence of the fact that Equity works within the law. It is not a magic wand that can be waived at the whim of the judge. In *Prendiville* the evidence of part performance was very cogent - the very appointment of the defendant as sole selling agent put the latter on notice of the plaintiffs commitment. By contrast, in *Lakes*, apart from the payment of the booking deposit, which has been held not to give a purchaser an equitable lien over property,[12] the engagement of an assessor was not such an unequivocal action as to indicate the presence of part performance.

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9 Unreported, High Court, 11 May 1998.

10 *Prendiville v Gable Holdings Ltd, Clarke Homes Ltd and O'Sullivan*, unreported Circuit Court, February 12, 1998.

11 Judge Buckley followed in this respect the decision of McWilliam J in *Howlin v Thomas F Power (Dublin) Ltd*, unreported High Court, 5 May 1978.

12 *Re Barrett Apartments Ltd* [1985] IR 350.

Equitable Intervention\Assistance or Interference?

Two other cases illustrative of the necessary role of equitable discretion in commercial law are *Irish Life v Dublin Land Securities*,[13] and *Ferguson v Merchant Bank Ltd*[14] The facts in both again are very similar. In the *Irish Life* case, the plaintiff had agreed to sell a portfolio of ground rents to the defendant for a stated price. The portfolio, containing in excess of 10,000 properties, was akin to a job lot in that some of the land was worth very little but other areas had possible development potential.[15] In an oversight by the plaintiff's conveyancing department a valuable site, which the plaintiff had no intention of selling, was inadvertently included in the sale without the knowledge of either party. On the plaintiff's belated discovery of this fact it sought rectification of the contract to exclude the land (which in itself was worth way more than the total portfolio purchase price paid by the defendant). When the defendant realised the extent of its windfall, it counterclaimed for specific performance of what it claimed was, in essence, a speculative purchase. The evidence revealed that on the completion day the defendant had expressed disquiet that it was not getting all the lands it was entitled to under the agreement. In response the plaintiff issued an ultimatum either to complete there and then, accepting whatever properties were in the draft contract, or the deal was off. The Supreme Court, in affirming the decision of Keane J in the High Court, ordered specific performance of the contract.[16] It held[17] that the relevant issue was 'whether there was convincing proof, reflected in some outward expression of accord, that the contract in writing did not represent the common continuing intention of the parties' on which the court could act and 'whether the plaintiff could positively show what that common intention was in relation to the provisions which it says were intended to exclude the CPO lands' at the heart of the litigation. Given the vagueness of the contractual terms equity's intervention merely gave effect to the spirit of the agreement in light of the plaintiff's prior ultimatum to the defendant to complete or pull out. The same approach was adopted by the High Court in *Ferguson*,[18] where the contract for the sale of lands was even more ambiguous in terms of contents. There, the receiver seeking rectification to exclude valuable lands from a sale to the plaintiff, was unable to show that the liquidator, who had acted as vendor, was even aware of the value of the development lands he sold, much less had an intention to exclude them. Murphy J cited with approval the views of Russell LJ in *Riverlate Properties Ltd v Paul*,[19] to the effect that,

> "If reference be made to the principles of equity, it operates on conscience. If conscience be clear at the time of the transaction, why should equity disrupt the transaction? If a man may be said to have been fortunate in obtaining a property at a bargain price, or on terms that make it a good bargain, because the other party unknown to him has made a miscalculation or other mistake, some high-minded men might consider it appropriate that he should agree to a fresh bargain to cure the mistake, abandoning his good fortune. But if equity were to enforce the views of those high-minded men, we have no doubt that it would run counter to the attitudes of much the greater part of ordinary mankind (not least the world of commerce), and would be venturing upon the field of moral philosophy in which

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[13] High Court [1986] IR 332, affirmed by the Supreme Court at [1989] IR 253.

[14] [1993] 3 IR 383.

[15] The plaintiff invariably referred to the land included in the sale as 'bits and pieces' or 'odds and ends' while the defendant in buying such a mixed bag of property rights spoke more optimistically of the potential of there being 'plums' or 'jewels in the potatoes' in the conveyed land.

[16] The plaintiff, wishing for commercial reasons to be rid of ground rents, had steadfastly refused the Court's invitation to amend its pleadings to seek an order of rescission instead.

[17] Applying the principles set out in *Joscelyn v Nissen* [1970] 2 QB 86 and *Rooney and McParland v Carlin* [1981] NI 138.

[18] [1993] 3 IR 382.

[19] [1975] Ch 133.

it would soon be in difficulties.[20]

Words of wisdom indeed! The significance of such an approach should not be glossed over -equity has had to adapt itself to the rigours of the commercial world and its 'tampering' with bargains has to be conducted in light of business efficacy. This makes the final case of even greater interest in so far as it seems to impose higher standards on the business community in the name of certainty than they are wont to impose on themselves. In *Wanze Properties (Ireland) Ltd v Five Star Supermarket and Tesco (Ireland) Ltd*[21] the High Court granted an interlocutory injunction compelling the defendant to reopen its supermarket in the plaintiff's shopping centre and to abide by its covenant to trade. The defendant, relying on *Co-operative Insurance Society Ltd v Argyll Stores (Holding) Ltd*,[22] had argued that commercial practice meant it should only be subject to common law damages for its admittedly deliberate breach of its lease and that specific performance was never granted in a case of this calibre. The President of the High Court distinguished *Argyll* from the present case on the ground that unlike the former, Tesco was not in financial difficulties at the time of its breach but rather made a commercial decision to reallocate to a more lucrative catchment area. In granting the mandatory injunction, Costello P. ruled that the plaintiffs had established a strong probability that the y would be entitled to a decree of specific performance at the main trial of action - ie that the Court would have equitable jurisdiction to enforce the contract, despite the common practice that such breaches resound only in damages.

So where do the Irish courts stand on the issue of new equity? Unconscionability has long been accepted as a basis for equitable relief in Ireland. In 1979 the High Court in *McMahon v Kerry Co Council*[23] used estoppel to prevent recovery by the plaintiffs of their land, which the defendants had mistakenly built upon, despite the absence of acquiescence by the plaintiffs and the fact that the defendants had constructive notice of the former's 'interest in the land'. Holding that it would be unconscionable to return the property to the plaintiffs at its current value of L318,000 when they had paid but L360 and had no sentimental attachment to the site, Finlay P. stated that the plaintiffs were in this action asserting a clear and well established legal right and have been defeated in the enjoyment of that by what I conceive to be a novel application of a general equitable principle. More recently in *Re JR*,[24] the approach of Costello P in the High Court, again in an estoppel case, where he appeared to fuse both promissory and proprietary estoppel in the course of his judgement, has drawn academic comment that the learned judge seems to be following Australian authorities without necessarily citing them or reasoning out the implications of this approach for Irish law. This has caused one commentator in particular to state that 'the temptation to read [the] decision as recognition of one overarching doctrine of estoppe should be resisted."[25]

The Irish courts look favourably on equity and a shift in the approach of Irish judges from one of principles to pragmatism has been observed and much commented upon.[26] The esteem in which equity is held can, however, be self-defeating at times. We have come to a strange pass when contract law is utilised in preference to equity in order that equity may be restored 'to the high ground which it should properly occupy

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20 See note 17 above, at p389-390.

21 Unreported High Court, 24 October 1997 (hereinafter referred to as '*Wanze*'.

22 [1997] 3 All ER 297.

23 [1981] ILRM 419.

24 [1993] ILRM 657.

25 Coughlan, *Equity - Swords, Shields and Estoppel Licences* (1993) 15 DULJ 188, at 202.

26 See for instance, Brady, *Judicial Pragmatism and the Search for Justice Inter Partes* (1986) The Irish Jurist (n.s.) 47.

to ameliorate the harshness of common law rules on occasion rather than itself be an instrument of injustice'.[27]

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[27] Flaherty J, giving judgment for the Supreme Court in *Lynch v Burke* [1996]1 ILRM, a case concerning the rights of dormant depositors in joint deposit accounts on the death of the active depositor. The Court, on appeal, held that a resulting trust did not arise, but decided the entitlement of the dormant depositor on the basis of privity of contract. The case engendered subsequent commentaries by commercial lawyers as *Survivorship rights and joint deposit accounts: Lynch v Burke: Contract*. -1. Equity - 0" (1996) Commercial Law Practioner.

Law Faculty, HKU
WORKSHOP ON NEW EQUITY
10-12 September 1998

Att-Gen for Hong Kong v Reid:
Depriving the Criminal of the Benefits of his Crime?

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A. Thesis: that developments in the criminal law are increasingly influencing the development and operation of equitable principles and remedies.

B. Att-Gen. for Hong Kong v Reid [1994] AC 324 PC

1. Background

Facts: corruption offences under the Prevention of Bribery Ordinance (cap 201) - s10(1)(b): being in control of unexplained pecuniary resources and property disproportionate to his official emoluments - HK$12.4m - 8 years imprisonment - ordered to "pay to the HK Government the sum of HK$12.4m, the sum equivalent to the disproportionate and inexplicable assets under his control."
Bribe moneys used to purchase three properties in NZ. The Govt of HK registered caveats on the titles to the properties in NZ, and subsequently applied to the NZ High Court for orders that the caveats not lapse.

Issue: did the Govt of HK have a caveatable interest in the properties. This depended on whether or not the bribes were held by Reid on constructive trust for the Crown.

Decision of the PC: overruling Lister & Co v Stubbs (1890) 45 Ch D 1 (CA), the Judicial Committee held that the bribes received by Reid and the property subsequently acquired therewith in NZ were held on constructive trust for the benefit of the Crown, which therefore had a caveatable interest in the properties.

2. "Equity considers as done that which ought to have been done"

(a) Reid: Lord Templeman (at 331):

"Equity, ... which acts in personam, insists that it is unconscionable for a fiduciary to obtain and retain a benefit in breach of duty ... The false fiduciary who received the bribe in breach of duty must pay and account for the bribe to the person to whom that duty was owed. ... if the bribe consists of property which increases in value or if a cash bribe is

invested advantageously, the false fiduciary will receive a benefit from his breach of duty unless he accountable not only for the original amount or value of the bribe but also for the increased value of the property representing the bribe. As soon as the bribe was received it should have been paid or transferred instanter to the person who suffered from the breach of duty. Equity considers as done that which ought to have been done. As soon as the bribe was received, whether in cash or in kind, the false fiduciary held the bribe on a constructive trust for the person injured."

This followed the analysis of Sir Peter Millett, "Bribes and Secret Commissions" [1993] RLR 7, where he argued that the question "whether, and if so in what circumstances, the law should ... give [a principal whose agent has received a bribe or secret commission in breach of his fiduciary duty] a proprietary remedy" (at 7) "is a question of legal policy" (at 16). In his view, the principle that a fiduciary must not place himself in a position where his interest may conflict with his duty, and must not make for himself out of his position without his principal's consent, led to the conclusion that "Neither the fiduciary himself nor his creditors can be allowed to derive any advantage from his violation of his fiduciary duty." (at 17). But Millett also asserted that it would be "deeply unsatisfying if the availability of a proprietary remedy could be explained only on grounds of policy" (at 17), leading him to argue that the same result may be justified on ordinary equitable principles, based on the maxim that "equity treats as done that which ought to be done".

See also Millett's post-Reid analysis, "Restitution and Constructive Trusts', (1998) 114 LQR 399, at 407

(b) Criticisms of the decision in Reid

"Confounding obligation with ownership" (Lister & Co v Stubbs (1890) 45 Ch D 1, at 15, per Lindley LJ).

Peter Watts, "Bribes and Constructive Trusts" (1994) 110 LQR 178, 180: "generosity of remedy"
D Crilley, "A Case of Proprietary Overkill" [1994] RLR 57

Its effect on the criminal law (particularly the law of theft) also commented on critically. eg. JC Smith, "Lister v Stubbs and the Criminal Law" (1994) 110 LQR 180, 183:
"If Att.-Gen. for HK v Reid is followed in England, it has a profound effect on the law of theft, making a substantial extension of the crime which the Criminal Law Revision Committee expressly declined to recommend and which it must be assumed Parliament, having considered the CLRC's report on theft (8th Report, 1966, Cmnd 2977), did not intend to make."

3. Re-reading Reid in terms of fulfilling criminal policy

The Privy Council was alert to the reality that they were dealing with a convicted person against whom confiscation orders had been made, but no payment had been made. Lord Templeman's judgment refers throughout to the criminal reality of the case.

eg.
(at 330-31): "Bribery is an evil practice which threatens the foundation of any civilised society. In particular bribery of policemen and prosecutors brings the administration of justice into disrepute."
(at 338): "If a fiduciary acting honestly and in good faith and making a profit which his principal could not make for himself becomes a constructive trustee of that profit [as in Boardman v Phipps [1967] 2 AC 46] then it seems to their Lordships that a fiduciary acting dishonestly and **criminally** who accepts a bribe and thereby causes loss and damage to his principal must also be a constructive trustee and must not be allowed by any means to make any profit from his wrongdoing."
(at 339): "Since an unfulfilled order has been made against the first respondent in the courts of HK to pay HK$12.4m., his only purpose in opposing the relief sought by the Crown in New Zealand must reflect that the properties, in the absence of a caveat, can be sold and the proceeds whisked away to some Shangri La which hides bribes and other corrupt moneys in numbered bank accounts."

C. The Rising Tide of Criminal Policy Influences on Equity?

Criminal policy appears to be increasingly influencing the operation and development of equity at two levels:

1. Pragmatic: enabling equitable issues to come before the courts

(a) enactment of money laundering offences to deprive criminals and those assisting them of the proceeds of their crimes

e.g.
in UK: Money Laundering Directive
(Council Directive 91/308/EEC of 10 June 1991 on prevention of the use of the financial system for the purpose of money laundering)

eg. Helen Norman, "Tracing Proceeds of Crime: An Inequitable Solution?" in P Birks (ed), Laundering and Tracing (Clarendon Press, 1995), 95, at 113:

> "The growth industry of commercial fraud necessitates a coherent response from the law."

S Gleeson, "The Involuntary Launderer: the Banker's Liability for Deposits of the Proceeds of Crime" in P Birks (ed), Laundering and Tracing (Clarendon Press, 1995) 115, at 132:

> "The last question to be considered is whether the fact that a particular omission is criminal renders it a breach of trust. In other words, if the omission is on the borderline according to ordinary criteria of 'naughtiness' of knowledge, does the criminalization of omission as criminal therefore render it 'naughty' per se. Having raised the question I must say that I cannot answer it. The solution seems to me to lie in the outer reaches of public policy ..."

(b) rapid expansion, internationally and domestically, of statutory based confiscatory regimes

eg.
drug trafficking

- Vienna Convention (20.12.1988) (UN Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances)
- HK: Drug Trafficking (Recovery of Proceeds) Ordinance (cap 405)
  Cheang Kwok Sam v Chui Kin Wing & Another [1995] 1 HKC 637: competing claims of the (then) Att-Gen of HK (acting on behalf of the Govt of the USA) under the Drug Trafficking (Recovery of Proceeds) Ordinance and Cheang as equitable mortgagee

organized crime

- HK: Organized and Serious Crimes Ordinance (cap 455)

eg.
Halifax Building Society v Thomas [1996] Ch 217; CA
mortgage fraud: fraudulent misrepresentations to BS - sale under mortgagee's power of sale - surplus after repayment of mortgage loan - BS claimed disgorgement of this surplus - T also convicted of mortgage fraud and confiscation and charging orders had been made in respect of the surplus
Peter Gibson LJ rejected BS's claim to the surplus, enabling criminal confiscation and charging orders to attach - rejected personal claim for disgorgement on basis that restitution for a wrong only recognised for breach of fiduciary duty and wrongful use of property, but not fraudulent misrepresentation - BS's claim for disgorgement of "profits of fraud" rejected - "the fraud [was] not in itself a sufficient factor to allow the society to require [T] to account to it" - rejected test based on whether claim is "an affront to the public conscience" as a criterion to determine whether a remedy should arise

P Jaffey, "Disgorgement and Confiscation (Halifax BS v Thomas)" [1996] RLR 92: argues that Peter Gibson LJ was "misconceived" in considering the criminal confiscatory jurisdiction to be irrelevant to his decision

(c) availability of criminal investigation resources to uncover and trace theft/fraud/corruption, especially involving electronic money transfers through banks

2. Policy level: compelling coherence?

(a) stripping the criminal of the proceeds/profits of his crime

- re-invigorating the equitable principle that no criminal may benefit from his crime?

Reid : "... it seems to their Lordships that a fiduciary acting dishonestly and **criminally** who accepts a bribe and thereby causes loss and damage to his principal must also be a constructive trustee and must not be allowed by any means to make any profit from his wrongdoing."

(b) restitutionary damages/disgorgement for wrongs: promoting a re-think?

- disgorgement for wrongs under the civil law (primarily for breach of fiduciary duty and the wrongful use of property) serves a similar (quasi) punitive function to that of criminal confiscation and forfeiture

  - expansion beyond the existing categories of wrongs?
  - procedural protections analogous to those applying to criminal proceedings?

P Jaffey, "Restitutionary Damages and Disgorgement" [1995] RLR 30
P Jaffey, "Disgorgement and Confiscation (Halifax BS v Thomas)" [1996] RLR 92, at 99: "Indeed one might treat the enactment of confiscation legislation as an endorsement of the principle [that a defendant should be stripped of his wrongful gains], and as providing support for the development of the common law to give effect to it more widely."

PROPERTY AND CONSCIENCE

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I: INTRODUCTION

I want in this short paper to explore two propositions laid down by Lord Browne-Wilkinson in the recent decision of the House of Lords in *Westdeutsche Landesbank Girozentrale v Islington LBC*.[1] The first is that a person cannot be a trustee of property he holds at law unless there is some factor affecting his conscience. The second is that if there is some factor affecting his conscience, any property he holds which was received in connection therewith will be held by him on trust for the transferor. Both propositions, I will argue, are flawed. But before doing so, we must set out the facts and decision in the *Westdeutsche* case itself.

II: FACTS AND DECISION IN *WESTDEUTSCHE*

i. Facts

Because of central government controls imposed after the Conservative election victory in 1979, local authorities across the United Kingdom were prohibited from raising revenue by the device of increasing the rates. Nor had they had power simply to borrow the money they needed. The result was that to make ends meet, resource was had to some very creative accounting. Many authorities, of all political persuasions, entered into transactions with merchant banks known as "interest-rate swap" agreements. Under an interest-rate swap, one party (called the fixed-rate payer) agrees to pay to the other over a certain period of time (usually five to ten years) interest at a *fixed* rate on a notional capital sum. The other party (called the floating-rate payer) agrees to pay to the former over the same period interest on the same notional sum at the prevailing *market* rate, a rate which is obviously not fixed but floats. Hence the name "interest-swap": one pays fixed-rate interest, the other floating-rate interest.

Why were such arrangements attractive to local authorities? One form of interest rate swap involves what is called an "upfront payment". A capital sum, the upfront payment, is paid by one party to the other, which is balanced by an adjustment of the parties' respective liabilities. Thus, the fixed rate payer may make an upfront payment to the floating rate payer, and in consequence the rate of interest payable by the fixed rate payer is reduced to a rate lower than the rate which would otherwise have been payable by him. The practical effect is to achieve a form of borrowing by the floating rate payer through the medium of the interest rate swap transaction. It was in this way that the local authorities used interest-rate swaps to raise revenue.

After an objection by the district auditor of one authority, the London Borough of Hammersmith, the courts were asked to rule on whether interest-rate swaps, though legal in themselves, were within the powers of local authorities. In 1991, the House of Lords, in *Hazell v Hammersmith & Fulham LBC*,[2] held that the contracts were beyond the powers of the local authorities and therefore void from the outset. By this stage, however, many agreements had been either partly or even fully executed. What was to happen to the vast sums of monies which had changed hands under what had now turned out to be invalid contracts? Could the various receivers keep it, or did they have to return it to whence it came? A number of test cases were brought before the courts, the leading one of which was *Westdeutsche Landesbank Girozentrale v Islington LBC*.

In this case Islington London Borough Council had received an upfront payment of £2.5 million and had paid £1.3 million in interest payments to Westdeutsche before the successful legal challenge brought by Hammersmith's district auditor. At that point, the council stopped payments under the contract. The bank then brought an action to recover the remaining £1.2 million. Two routes to restitution were sought: one, a personal claim to restitution at common law based on the underlying invalidity of the contract pursuant to which the money had been paid; the other, a claim that property in the money paid, both at law and in equity, had, because of the invalidity of the underlying contract, been prevented from passing and that, even though legal title might by now have been destroyed by Islington's mixing of the money with its own, equitable title could be traced into assets still in their hands. Though in the course of the litigation this second claim became a personal claim that Islington be made to account as trustees for the sums received, it still depended on an argument that property did not pass in equity.

ii. Why was the proprietary claim brought?

The usual reason why proprietary restitutionary claims are brought is in an attempt to gain some advantage over the defendant's unsecured creditors in an insolvency *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd*,[3] in which $US 2 million dollars was paid to

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[1] **[1996] AC 669.**

[2] **[1992] 2 AC 1.**

[3] **[1980] Ch 105.**

a bank which very soon afterwards became insolvent, is an obvious example of such a tactic. But Islington were not insolvent, and nor was there any prospect of them becoming so.

The real reason, nowhere spelt out, why a proprietary claim was made seems to have been because of doubts over the success of the personal common law claim in unjust enrichment. That claim was originally framed on the basis of a total failure of consideration,[4] but since Islington had paid £1.3 million the failure was clearly not total. Indeed, in another of the Swaps cases, *Kleinwort Benson Ltd v Sandwell Borough Council*,[5] which was heard at first instance at the same time as *Westdeutsche* but never taken on appeal, one of the swaps had run its full course and so there was clearly no failure of consideration whatever, the parties having got all they bargained for.[6] Moreover, the heresy contained in *Sinclair v Brougham*,[7] that a contract to repay could not be implied in circumstances where the parties had no capacity to contract, was still extant and might have been fatal to the bank's claim. All things considered, the plaintiffs were on very thin ice so far as the common law was concerned.[8]

But as things turned out, the availability of a proprietary claim became important for a totally different reason. Whether property in the monies had passed had implications so far as the amount of interest payable on the sum ordered by the court to be repaid. If property in the money had passed, there would only be a debt, and simple interest would be payable. If, on the other hand, property in the money had not passed, compound interest would payable. Given that over £1 million was at stake, the question of interest became crucial. The proprietary claim succeeded both before Hobhouse J[9] and in the Court of Appeal,[10] and it was on the correctness of this award, and on this point alone, that the case was taken to the House of Lords.

iii. On what ground had it succeeded in the courts below?

There is little discussion in the judgments of the lower courts of the exact reason why a proprietary claim should succeed.[11] It was simply asserted throughout by Westdeutsche that the invalidity of the underlying contract meant that title to the money failed to pass both at law and in equity.[12] And though no authority was cited for this proposition at law, it was nevertheless accepted as correct, at least by

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[4] **Though the requirement that a failure of consideration be total before a restitutionary claim can succeed was reversed in *Goss v Chilcott* [1996] AC 788, so that, at least where there are no computational difficulties, a partial failure will now suffice, the decision came too late for the Swaps litigation.**

[5] **[1994] 4 All ER 809.**

[6] **Despite this obvious truth, the Court of Appeal have recently held that there is a total failure of consideration in the case of payments under a void contract, holding that a contract void from the start was devoid of any legal effect and payments made in purported performance thereof were necessarily made for a consideration which had totally failed: *Guinness Mahon & Co Ltd v Kensington & Chelsea RLBC* [1998] 2 All ER 272. This reasoning is flawed in that it confuses the contractual and restitutionary senses of the word "consideration". The case has been subject to an appeal to the House of Lords and judgment is anxiously awaited.**

[7] **[1914] AC 398.**

[8] **It may also be, though this is pure quesswork, that the bank feared (wrongly) that it might be met with a defence of change of position to which proprietary claims, some might argue, are immune.**

[9] **[1994] 4 All ER 809.**

[10] **[1994] 1 WLR 938.**

[11] **See generally, W J Swadling, "Restitution for No Consideration" [1994] *Restitution Law Review* 73, 81.**

[12] ***Per* Lord Browne-Wilkinson [1996] AC 669, 702.**

Hobhouse J, though the point seems to have been conceded by counsel for Islington,[13] presumably because the position in equity meant that it was not worth defending.

As to equity, there was this time authority, binding on both Hobhouse J and the Court of Appeal, in the decision of the House of Lords in *Sinclair v Brougham*.[14] In that case money had been lent to the Birkbeck Permanent Building Society, which was acting, *inter alia*, as a bank. It later transpired that this banking business was *ultra vires*. On the insolvency of the Society the *ultra vires* depositors claimed repayment of their deposits. Although a personal claim failed, the House of Lords held that the moneys paid were held by the Society on a resulting trust, which had the unwelcome effect of giving the *ultra vires* depositors priority over the Society's *intra vires* creditors. Exactly why a resulting trust should have arisen on the facts of that case was unfortunately not explored The idea of making a proprietary claim only arose during argument in the House of Lords, at the suggestion of Viscount Haldane.[15] Counsel for the Society took only the procedural objection, ultimately rejected, that a proprietary claim had not been pleaded below,[16] conceding the point that property cannot pass under an *ultra vires* contract.[17]

iv. How did the proprietary claim fare in the House of Lords?

When *Westdeutsche* reached the House of Lords, the argument for proprietary relief became more focused, probably because that was by now the only point in contention. As well as *Sinclair v Brougham*, the bank relied on an argument put forward by Professor Birks, which sought to justify the resulting trust as a route to restitution of unjust enrichment.[18] The proprietary claim was, however, rejected by all five members of the House and Islington's appeal allowed for three reasons. First, *Sinclair v Brougham* was, at least according to a majority of the court (Lord Goff dissenting) wrong to give the *ultra vires* creditors a proprietary claim. Second, the argument of Birks as to a new role for resulting trusts in the law of restitution was, it was said, misconceived. And third, and this is the point I wish to examine, Lord Browne-Wilkinson said that Islington could not be a resulting trustee of the money at the date of receipt because at that time it had no knowledge of the invalidity of the underlying contract. By the time knowledge did intervene, it was too late, for the money (or possibly its traceable proceeds) was no longer in Islington's hands.

Before we move on to a detailed discussion of this last point, there is one final thing to note about the case. There is the overarching theme which prefaces the judgment of Lord Browne-Wilkinson and from which it appears no other member of the House dissented, viz a general antipathy towards what his lordship calls "off-balance sheet" liabilities. Lord Browne-Wilkinson said that if a proprietary claim were to succeed on the facts of the case:

> "a businessman who has entered into transactions relating to or dependent upon property rights could find that assets which apparently belong to one person in fact belong to another; that there are "off-balance-sheet" liabilities of which he cannot be aware; that these property rights and liabilities arise from circumstances unknown not only to himself but also to anyone else who has been involved in the transactions. A new area of unmanageable risk will be introduced into commercial dealings."[19]

As we shall see, an application of the second principle we will later discuss would do the very thing his lordship was so keen to avoid and

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[13] **This is clear from Hobhouse J's statement that: "It was not in dispute that the legal property in the various sums of money which were paid to each other by the parties to these action passed to the recipients. They were paid into mixed funds and *thereafter* became in law the property of the recipient": [1994] 4 All ER 890, 915-916 (my emphasis).**

[14] **[1914] AC 398.**

[15] **[1914] AC 398, 404.**

[16] **[1914] AC 398, 408.**

[17] **[1914] AC 398, 406.**

[18] **The argument was made on the basis of a passage in his book, *An Introduction to the Law of Restitution* (1989), pp 369 et seq: [1996] AC 669, 678. After argument was completed, the House was alerted to the existence of a more developed version of the same thesis in Goldstein, S (ed), *Equity and Contemporary Legal Developments* (1992, Jeruselem): [1996] AC 669, 702-703.**

[19] **[1996] AC 669, 704-705.**

create property rights which no creditor could ever know about.

III: NO TRUST UNLESS CONSCIENCE AFFECTED

It will be recalled that the third reason why Lord Browne-Wilkinson said that there could be no resulting trust of the moneys paid by Westdeutsche to Islington was that at the moment of receipt, Islington had no knowledge of the invalidity of the contract under which it was paid. Any argument to the contrary was, he said:

> "... incompatible with the basic premise on which all trust law is built, viz. that the conscience of the trustee is affected. Unless and until the trustee is aware of the factors which give rise to the supposed trust, there is nothing which can affect his conscience."[20]

Earlier in his judgment, Lord Browne-Wilkinson had said that this proposition was "fundamental to the law of trusts and I would have thought unarguable".[21] Unfortunately, he did not give counsel the chance to argue either for or against it, as it seems only to have occurred to him after the conclusion of the oral hearing.

And since it was "fundamental" and "unarguable", Lord Browne-Wilkinson did not think it necessary to cite any authority for his proposition. This is never a good idea, especially in a system of law which depends for its operation on precedent. For if his lordship had looked, he would have found no authority in its favour. Indeed, his statement is inconsistent both with previous usage of the word "conscience" and with the rules on the priority of interests in equity. Moreover, there are many cases in which transferees have been made trustees without their knowledge.

(a) Conscience

As to the meaning of the word "conscience", it was made clear in *re Diplock*[22] that it had a technical meaning divorced from either wrongdoing or knowledge. That case, it will be recalled, involved the payment away by executors of hundreds of thousands of pounds to completely innocent charities under a trust which it later transpired had been void from the outset. Successful personal claims in equity were brought against the recipient charities by the residuary legatees. One of the arguments made by counsel for the charities was that they could not be liable because the formulation of any equitable claim "must at least postulate that the consciences of the respondents must in some degree be affected".[23] The invalid trust under the will showed that the charities and not the residuary legatees were the real objects of the testator's bounty; how then could they be said to be acting against conscience in receiving it? The Court of Appeal said that such an argument was:

> "... wholly untenable. It is ... impossible to contend that a disposition which according to the general law of the land is held to be entirely invalid can yet confer upon those who, ex hypothesi, have improperly participated under the disposition, some moral or equitable right to retain what they have received against those whom the law declares to be properly entitled."[24]

The decision of the Court of Appeal was, as is well known, upheld by the House of Lords on appeal, Lord Simonds, speaking for a unanimous House, taking the opportunity to say that its reasoning and conclusion were "unimpeachable".[25]

There are many other cases in which unimpeachable defendants have been made liable in equity. Thus, in *Allcard v Skinner*,[26] a case of undue influence, though the mother superior was exonerated from all blame in the matter she would nevertheless have had to

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[20] ***Ibid.*, at p 709.**

[21] **[1996] AC 669, 705.**

[22] **[1948] Ch 465.**

[23] **[1948] Ch 465, 476 (Neville Gray, KC).**

[24] **[1948] Ch 465, 476.**

[25] **[1951] AC 251, 265. Lord Simonds gave the only reasoned judgment, the other Law Lords being content merely to agree with what he said.**

[26] **(1887) 36 Ch D 145.**

return the wealth transferred to her had the plaintiff's claim not been barred by laches.[27] The same is true of cases of breach of fiduciary duty, where ever since the decision of Lord King LC in *Keech v Sandford*[28] it is well-known that liability to make restitution of gains does not turn on the honesty or dishonesty of the defendant, a proposition confirmed by the House of Lords at least twice this century, in *Regal (Hastings) Ltd v Gulliver*[29] and *Boardman v Phipps*.[30]

Lord Browne-Wilkinson's *dictum* would thus seem to have been made *per incuriam re Diplock*, *Allcard v Skinner*, *Keech v Sandford*, *Regal (Hastings) Ltd v Gulliver* and *Boardman v Phipps*, an easy thing to do when arguments are not tested in the heat of forensic battle. As Megarry J famously remarked out when refusing to follow a passage from his own book, Megarry and Wade on *Real Property*, "Argued law is tough law ... by good disputing shall the law be well known."[31]

(b) Priorities

The assertion by Lord Browne-Wilkinson of no trust without knowledge seems also to contradict the rules on priorities. Suppose a trustee of an express trust, in breach of trust, makes a gift of the subject-matter to his wife. Let us further suppose that at the time the gift is made the wife is completely innocent, though she discovers the truth some years later. According to *Pilcher v Rawlins*,[32] equitable property rights bind all save equity's darling, the bona fide purchaser of legal title without notice that the transfer was in breach of trust. Since she was only a donee, *Pilcher v Rawlins* dictates that the wife's legal title will be subject to the equitable interests of the beneficiaries. And to give effect to that conclusion she will have to hold the property transferred to her on some sort of trust. How then can it be that she only later becomes a trustee when she learns of the breach of trust? If that is correct, what has happened to the *nemo dat* rule? And more importantly, where, in the meantime, has the beneficial entitlement been, which according to *Pilcher v Rawlins* was not destroyed? The question is not just academic. It may be important for tax reasons or for limitation purposes to know the answer to this question. And suppose the subject-matter of the trust was shares. Who would be entitled to the dividends declared during the wife's innocence? According to Lord Browne-Wilkinson, it would be the wife herself; according to *Pilcher v Rawlins*, the beneficiaries under the trust. In that it contradicts the "fundamental and uncontroversial" decision in *Pilcher v Rawlins*, Lord Browne-Wilkinson's *dictum* must, by its own reckoning, be suspect.

(c) Cases in which trusteeship has arisen without knowledge

There are many cases in which a person has been made a trustee without knowledge even that the legal title had been transferred to them. Many examples can be found in the law relating to resulting trusts. For instance, it is highly unlikely that in *re Vinogradoff*[33] that the

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[27] **"In this particular case I cannot find any proof that any gift made by the Plaintiff was the result of any actual exercise of power or influence on the part of the lady superior ..., apart from the influence incidental to [her] position in the sisterhood. Everything that the Plaintiff did is in my opinion referable to her own willing submission to the vows she took and to the rules which she approved, and to her own enthusiastic devotion to the life and work of the sisterhood. This enthusiasm and devotion were nourished, strengthened and intensified by the religious services of the sisterhood and by the example and influence of those about her. But she chose the life and work; such fetters as bound her were voluntarily put upon her by herself; she could shake them off at any time had she thought fit, and had she had the courage so to do; and no unfair advantage whatever was taken of her": per Lindley LJ, *ibid*, at pp 183-184.**

[28] (1726) Cas T King 61.

[29] [1942] 1 All ER 379.

[30] [1967] 2 AC 46.

[31] *Cordell v Second Clanfield Properties Ltd* [1969] 2 Ch 9, 16.

[32] (1872) 7 Ch App 259.

[33] [1935] WN 68.

four-year old granddaughter knew that she had been constituted a trustee. And in *re Diplock*,[34] the failure of the express trusts meant that the trustees held the property on resulting trust for the testator's estate. But not knowing that the express trusts were invalid, and so not knowing that they were resulting trustees, they distributed the funds to the charities as per the will. Yet despite this lack of knowledge, the trustees were held personally liable by the House of Lords for every penny they wrongly paid away. But if Lord Browne-Wilkinson's "uncontroversial" proposition was true, their lack of knowledge meant that they paid away their own money, an act for which no liability can attach.

There are even cases of express trusts in which the same proposition holds true. In *Childers v Childers*[35] a father conveyed land into the name of his son so as to qualify him for a particular office. The father's intention throughout was that the son be only a trustee of the land. At all material times, the son was abroad and knew nothing of the transfer. Knight Bruce LJ, with whom Turner LJ agreed, held that on the son's death those who took under his will held that land on trust for the father. The same result obtained in the earlier case of *Birch v Blagrave*,[36] a decision of one of the most eminent of Chancellors, Lord Hardwicke. Here a father had conveyed land to his daughter so as to disqualify himself from being sheriff of London. It was proved that the father intended the daughter to be a trustee for him, though she was never informed even of the conveyance of the legal title. The father devised all his real estate to the plaintiff who was able to recover the land from the daughter's estate. If Lord Browne-Wilkinson is right, these cases must have been wrongly decided, for in both the child to whom the land was conveyed was held to be a trustee, despite the lack of knowledge. Given that Lord Browne-Wilkinson described his principle as "fundamental" and "uncontroversial", it must be presumed that he was not intending to cast doubt on any previous case-law. So if there is an error anywhere, it is with his unsupported and unverified statement.

IV: KNOWLEDGE TURNS PERSONAL CLAIM INTO PROPRIETARY CLAIM

The story, however, gets worse, for Lord Browne-Wilkinson said that not only was knowledge a necessary condition for a proprietary restitutionary claim, but it was also a sufficient condition. That conclusion follows from his lordship's analysis of the decision of Goulding J in *Chase Manhattan Bank NA v Israel-British Bank (London) Ltd.*[37] As we saw earlier, the plaintiff in that case, acting under a self-induced mistake, paid US$2 million to the defendant, who, within a matter of days and after being alerted to the mistake, became insolvent. Goulding J held that the plaintiff had a personal restitutionary claim for $2 million and also that equitable title to the $2 million mistakenly paid remained in the plaintiff, who could therefore assert a proprietary right to this sum through the medium of a constructive trust should the money be shown, through the process of tracing, still to be present in the defendant's hands. And though Goulding J answered this question as a matter of the law of New York, he said he believed it also represented the position in English law. No English authority on the question was, however, cited.

In Lord Browne-Wilkinson's view, Goulding J was wrong to conclude that there was a trust from the moment of receipt; applying his first "fundamental" and "uncontroversial" proposition, there could be no trust at that stage the defendants had no knowledge of the plaintiff's mistake and so their conscience could not be affected. But he nevertheless said that the conclusion was probably right:

> "The defendant bank knew of the mistake made by the paying bank within two days of the receipt of the moneys. The judge treated this fact as irrelevant but in my judgment it may well provide a proper foundation for the decision. Although the mere receipt of the moneys, in ignorance of the mistake, gives rise to no trust, the retention of the moneys after the recipient bank learned of the mistake may well have given rise to a constructive trust."[38]

This seems to indicate that a restitutionary plaintiff will always have a proprietary claim immediately the defendant learns of the grounds for reclaiming the property transferred. In other words, knowledge is now not only a *necessary* but also a *sufficient* condition for a proprietary claim. I make a mistaken payment to you. You do not know of the mistake. I have only a personal claim. I telephone you to inform you of my mistake and my claim crosses the personal/proprietary divide. It is difficult to see how this can be so.

First, as Professor Birks has pointed out,[39] this would directly affirm the result in *Sinclair v Brougham* itself, for at the date of the insolvency the *ultra vires* nature of the banking activity was known and the funds traceably survived. Yet Lord Browne-Wilkinson thought it wrong that the *ultra vires* depositors had a claim which took priority over third parties in an insolvency and overruled the case because of that.

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[34] **[1948] Ch 465.**

[35] **(1857) 1 De G & J 482.**

[36] **(1755) 1 Amb 264.**

[37] **[1981] Ch 105.**

[38] **[1996] AC 669, 715.**

[39] **[1996] *Restitution Law Review* 3, 22.**

Second, there is the problem of "off-balance sheet" liabilities which Lord Browne-Wilkinson was so eager to combat. If his lordship is right then, as we have seen, a simple telephone call will mean that the balance sheet will now tell lies, for it will contain assets which apparently belong to one person but which in fact belong to another.

Third, and most important, his lordship fails to explain why the addition of knowledge on the part of the defendant of the existence of the facts giving rise to a cause of action elevates an otherwise personal right to restitution to a proprietary one to the detriment of the defendant's other creditors. If I negligently run you over I know that I will have to pay you damages. But your claim is only ever personal. If I buy goods from you on credit I know that I am expected to pay for them. If I later refuse to do so, then, in the absence of some security device or retention of title clause, you have no proprietary claim to those assets, even though they may still be sitting under my bed

How then can knowledge or notice of facts sufficient to generate a personal restitutionary claim allow us to leap the hitherto unbridgeable personal/proprietary divide? Where the question has been properly raised, in the law relating to land, the answer repeatedly given is that the jump cannot be made Such thinking (personal right + knowledge of facts giving rise to personal right = property right) runs completely counter to a long line of cases which hold that mere knowledge or notice of a right does not alter the nature of that right. Thus, in *Haywood v Brunswick Permanent Building Society*[40] the Court of Appeal held that a purchaser of land was not bound by a covenant entered into by his predecessor in title to erect and keep in repair certain improvements on the land, even though he took with notice of the covenant. Likewise, in *King v David Allen (Billposting) Ltd*[41] the House of Lords held that a purchaser of land who bought with actual notice of a contract by his predecessor in title to give a third party rights to place advertisements on the land for a fixed period was not bound by that agreement. The most recently example is the decision of the House of Lords in *Rhone v Stephens*[42] in which a purchaser with actual knowledge was held immune from a positive covenant to repair the roof.[43] There are many other decisions in a similar vein. Indeed, if there were not, there would be no *numerus clausus* doctrine in English property law,[44] for, by simply advertising the existence of personal rights "incidents of a novel kind [could] be devised and attached to property at the fancy or caprice of any owner".

The reason why notice cannot turn a personal right into a property right is simple, though easily overlooked. The doctrine of notice is in fact a shorthand for the rule that equitable interests will not bind a bona fide purchaser of a legal estate for value without notice (equity's darling). This in turn forms an exception to the general rule *nemo dat quod non habet*, that no-one can give an interest which he does not have. An application of that general rule means that a legal title burdened with an equitable proprietary interest will remain so burdened into whosoever's hands it comes unless the transferee is equity's darling. And the presence of notice of the equitable interest will disqualify the transferee from pleading this defence. Thus, the role of notice is a purely negative one. It does not turn rights which are otherwise personal into proprietary rights but simply prevents pre-existing property rights from being destroyed. For this reason, the bridge that Lord Browne-Wilkinson builds in *Westdeutsche* between personal and proprietary rights will simply not bear the weight of later scrutiny.

V: GOOD REASONS FOR PROPRIETARY RESTITUTION?

Doctrinal disputes apart, are there any good reasons why a restitutionary plaintiff should be given a proprietary claim? There seem to be two arguments in favour of proprietary restitution, although both are ultimately flawed. Notice that in neither argument does the question of notice on the part of the defendant have any role to play.

i. Plaintiff did not accept the risk of defendant's insolvency

There is a good argument for saying that those who trust in the solvency of their obligee should not be later awarded proprietary rights by the courts when it turns out that that trust was misplaced. The creditor had the opportunity to bargain for security but chose not to take

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[40] **(1881) 8 QBD 403.**

[41] **[1916] 2 AC 54.**

[42] **[1994] 2 AC 310.**

[43] **The question has also arisen in relation to contractual licences to occupy land, where the Court of Appeal recently affirmed that such rights do not bind purchasers, even purchasers with notice: *Ashburn Anstalt v Arnold* [1989] Ch 1, 15.**

[44] **B Rudden, "Economic Theory v. Property Law: The *Numerus Clausus* Problem", in J Eekelaar and J Bell (eds), *Oxford Essays in Jurisprudence* (3rd edn, 1987), p 239.**

it, this lack of security probably being reflected in the price.[45] For the court now to award proprietary rights would be to give the creditor a benefit which was totally undeserved. Such an argument has sometimes been used to deny a restitutionary plaintiff proprietary rights where the ground of claim is failure of consideration, for there it might be foreseen that the condition of the payment would not be met. But the argument has also been turned on its head and used to justify the award of restitutionary proprietary rights. Thus, in a contemporary comment on *Chase Manhattan*, Professor Gareth Jones defended the grant of a proprietary remedy on the basis that "a person who pays money under mistake does not advance credit to another; he does not consciously take the risk that his recipient may become insolvent and that he may have to share the pickings of his estate with the general creditors."[46] However, this explanation fails to notice that there will be many other persons who will have only personal rights viz a viz the defendant but who will equally not have taken the risk of his insolvency. The simplest example is that of the victim of the defendant's negligent driving. Although such a person will not have trusted in the tortfeasor's solvency, he will nevertheless be confined to a personal right in the event of the latter's insolvency. What this explanation of *Chase Manhattan* fails to provide is any reason why the mistaken payer should be treated more favourably than the accident victim.

ii. Enrichment a windfall

What we might call the "windfall" argument is concerned to counter the argument that the restitutionary defendant's other creditors are prejudiced by the award of a proprietary right to the restitutionary plaintiff. It was also used by Professor Jones to defend *Chase Manhattan*, and more recently by Lord Templeman in *A-G for Hong Kong v Reid*[47] to defend the award of a proprietary claim to the victim of the wrong of breach of fiduciary duty. Professor Jones said that "The recipient's general creditors do not expect to be, and should not be, reimbursed from what is after all a windfall which should never have formed part of the recipient's trading assets. Only if a person has been induced to grant or extend credit because of the existence of assets materially swollen by the mistaken payment, is it arguable that his claim should rank *in pari passu* with that of the mistaken payer".[48] Lord Templeman put the matter more simply: "the unsecured creditors cannot be in a better position that their debtor".[49]

However, the argument that the general creditors should not have recourse to such a "windfall" (which, because it will also apply to payments made for a consideration which later fails, must be different from the argument that the restitutionary plaintiff did not trust in the solvency of the defendant) is also open to criticism. The defendant's creditors are not seeking to take a windfall: they are simply trying to have their losses made good.[50] And in any case, the argument ignores the fact that the defendant's assets will also be swollen by loans which he has failed to repay and by goods the price of which remains outstanding.[51] No-one has ever suggested that these creditors should also be given priority. Indeed, such a contention was expressly rejected by the New Zealand Court of Appeal in the recent case of *Fortex Group Ltd v Macintosh*.[52]

VI: GOOD REASONS AGAINST PROPRIETARY RESTITUTION?

Are there any arguments of substance[53] in favour of confining restitutionary plaintiffs to personal rights? There are at least two. The first is that the award of both a personal and a proprietary award is logically inconsistent. The second is based on equality between creditors.

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[45] As is well known, the interest rate on an unsecured loan is far higher than on a secured one.

[46] [1980] CLJ 275 at 276.

[47] [1994] 1 AC 324.

[48] *Ibid.*

[49] [1994] 1 AC 324 at 331.

[50] D Crilley [1994] *Restitution Law Review* 57, at 67-69.

[51] A Tettenborn [1980] CLJ 272.

[52] (Unreported) 30th March 1998.

[53] One pragmatic argument which might be advanced is that proprietary awards should be restricted in the interests of certainty. But this is not an argument against proprietary restitution as such, for if certainty was our only goal, we might achieve it by holding that proprietary restitution should be available in all cases.

In the majority of cases in which a restitutionary proprietary right is awarded, this will be in addition to a personal right to restitution. As we saw, the plaintiff in *Chase Manhattan* had both a personal right to repayment at law and a proprietary right in equity. But this is not simply a consequence of the law/equity divide, for, as we have seen, in *A-G for Hong Kong v Reid*,[54] the Privy Council held that not only was there an equitable debt for the amount of bribes received by the Assistant Director of Public Prosecutions, but also that he held the very bribes received on trust for the Hong Kong Government. That is logically inconsistent.[55]

The problem is that the plaintiff is in the same breath saying that the defendant both owes a certain sum to him and that the plaintiff owns that sum in the defendant's hands. The logical implication of such an assertion must be that satisfaction of one claim cannot affect the availability of the other, for if I both have a £10 note which belongs to you and in addition owe you £10, the repayment of the debt does not in any way mean that the specific £10 note no longer belongs to you. As Lindley LJ pointed out in long ago in *Lister v Stubbs*, to say that one can have both types of right confounds "ownership with obligation".[56] The result is that the plaintiff gets the best of both worlds, for as Meagher and Gummow have pointed out, albeit in the context of *Quistclose*-type trusts:

> "As [owner] he could stand outside the liquidation and recover the property in full, yet if the [defendant] remained solvent but, without fault on its part, the fund had disappeared, the [plaintiff] could recover the money ... as a debt."[57]

And this argument is not met by the pragmatic qualification that the court can always deny the plaintiff double-recovery [58]

The second argument is a simple one. It is one of equality of treatment in insolvency. As we have seen, the effect of the award of proprietary restitutionary rights is to give preference to one class of creditor at the expense of the others. No satisfactory reason has ever been advanced as to why this should be so. Indeed, as Professor Goode has observed:

> "To accord the plaintiff a proprietary right to the benefit obtained by the defendant, and to any profits or gains resulting from it, at the expense of the defendant's unsecured bankruptcy creditors seems completely wrong, both in principle and in policy, because the wrong done to the plaintiff by the defendant's improper receipt is no different in kind from that done to creditors who have supplied goods and services without receiving the bargained-for payment ..."[59]

The validity of this argument was recently accepted by the English Court of Appeal in *re Polly Peck (No 4)* and a remedial constructive trust rejected on the ground that it would disturb the statutory principle of *pari passu* distribution in an insolvency.[60] Although other jurisdictions might be willing to create such trusts, the courts in England would not. Mummery LJ said:

> "To a trust lawyer, and even more so to an insolvency lawyer, the prospect of a court imposing such a trust is inconceivable and, in my judgment, even the most enthusiastic student of the law of restitution would be forced to recognise that the scheme imposed by statute for a fair distribution of the assets of an insolvent company precludes the application of the equitable

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[54] [1994] 1 AC 324.

[55] *Cf Morley v Morley* (1678) 2 Ch Cas 2, where it was held that a trustee was not a debtor to his beneficiary in respect of the trust property, so that when it was stolen from him without fault he was under no obligation to make good the loss. It is, of course, no defence to a claim in respect of a loan that the money was stolen after delivery.

[56] (1890) 45 Ch D 1 at 15.

[57] R P Meagher and W M C Gummow, *Jacobs' Law of Trusts in Australia* (5th ed, 1986), para 215.

[58] *A-G for Hong Kong v Reid* [1994] AC 324 at 331 (Lord Templeman).

[59] R M Goode, "Ownership and Obligation in Commercial Transactions" (1987) 103 LQR 433 at 444.

[60] (1998) *The Times* 18th May.

principles manifested in the remedial constructive trust developed by the Supreme Court of Canada."[61]

VII: CONCLUSION

The conclusion must be that Lord Browne-Wilkinson's judgment in *Westdeutsche* totally exaggerates the role that conscience plays in the law of property. It is not, and never has been, a prerequisite to the imposition of a trust, and nor is a sufficient condition for the creation of a property right in equity. Indeed, as regards the latter, notice plays only a negative role in disqualifying someone from immunity from a pre-existing equitable property right. It certainly cannot be used to create a property right which did not exist before.

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[61] Nourse LJ went even further. For him, the whole notion of a remedial constructive trust was beyond the competence of courts:

> "... we must recognise that the remedial constructive trust gives the court a discretion to vary proprietary rights. You cannot grant a proprietary right to A, who has not had one beforehand, without taking some proprietary right away from B. No English court has ever had the power to do that, except with the authority of Parliament."

Programme for: Workshop on the New Equity
10th to 12th September 1998
Faculty of Law
University of Hong Kong
to be held in the
Convocation Room, Main Building

Rapporteur: *Lord Justice Mummery*

10th September
9.30 to 5.30
SESSION 1
BACKGROUND TO THE WORKSHOP

SESSION 2
EQUITY AND REMEDIES

SESSION 3
UNDUE INFLUENCE: GUARANTEES: MORTGAGES: CONSCIENCE

Thursday 10th September 1998
** *Programme*

Registration 9.00 - 9.30

9.30 - 10.30
Chair: js

1. Introductory remarks on Hong Kong conveyancing
   js

2. *Union Eagle*: Or, The Beguiling heresy of the court's unfettered jurisdiction to grant relief against forfeiture

   Mr Justice Litton, PJ, CFA

tea/coffee - 10.30 - 10.50

10.50 - 12.30
Chair: tba

3. The defaulting purchaser and equity's protection
   Professor Ted Tyler [HK]

4. Part performance and restitution
   Mr David Humphries [HK]

5. Overcoming a Lack of Formalities-- Equity's role
   Ms Sarah Nield [Southhampton]

6. Discussion

lunch 12.30 - 2.00

2.00 - 3.00
Chair: js

7. The role of New equity - Making Contractual role for Conscionability in Ireland
Ms Oonagh Breen [Ireland]

8. *Att Gen v Reid*: restitution? compensation? criminal? civil?
Mr Michael Jackson [HK]

9. Discussion

tea/coffee 3.00 - 3.20

3.20 - 5.30
Chair:

10. Bare trusts: the new proprietary interest?
Judith Sihombing [HK]

11. Mortgages, Guarantees, Undue Influence and unconscionability
Professor Nigel Gravells [Nottingham]

12. Property rights and conscience
Dr William Swadling [Oxford]

13. Discussion

11th September 1998
9.30 to 5.30

SESSION 4
EQUITY AND COMMERCIAL LAW

SESSION 5
EQUITY AS A COURT OF CONSCIENCE:
THE NEW EQUITY

9.30 - 10.30
Chair: JJ

1. Romalpa and Quistclose: Ambivalence and Contradiction:
   Ms Lusina Ho and Mr Philip Smart [HK]

tea/coffee 10.30 -10.50

10.50 - 12.30
Chair

2. Liabiliity of Solicitors to lenders: An equitable perspective
   Mr Alan Sprince [Liverpool]

3. Fiducaries
   Ms Sarah Worthington [London]

4. Tracing and Commercial Law
   Dr Lionel Smith [Oxford]

lunch 12.30 - 2.00

2.00 - 3.00
Chair: Ramy Bulan

5. Malaysia: *Union Eagle:* from the Islamic perspective
   Puan Noor Inayah Yaakob [Malaysia]

6. Singapore: Pragmatism in Equity in Singapore
   Dr Hans Tjio [Singapore]

tea/coffee 3.00 - 3.20

3.20 - 5.30
7. Indonesia: Good faith and equity in the civil law system
   Professor Dr LM Gandhi-Lapian [Indonesia]

8. New Zealand
   Professor Julie Maxton [NZ]

9. Hong Kong: Equity in action
   TBA

10. Discussion

12th September
SESSION 6
9.30 to 12 noon
IS THERE A NEW EQUITY?
SHOULD CAUTION BE EXERCISED WHEN USING THE NEW EQUITY?

The Rapporteur
Panel: all speakers

Is there a New Equity?
Does the New Equity follow the High Court of Australia/ Supreme Court of Canada?
Has the 'chancellor's foot' been revised?
Does the New Equity destroy certainity?
Is there a role for equity in commercial law?
What is the overall effect of the New Equity on

a. traditional and nominate remedies:
b. remedial devices:
c. creation of proprietary interests:
d. principles of law, for example contract, tort, and property?

Does criminal compensation mirror civil restitution in appropriate cases?
Is there still a role for the discretionary bars, especially in relation to contracts for the sale and purchase of land?

4 August 1998
js

Session 4: EQUITY AND COMMERCIAL LAW

Friday 11th September 1998
9. 30 - 10.30
10.50 - 12.30

1. **ROMALPA AND QUISTCLOSE: AMBIVALENCE AND CONTRADICTION**

   Ms Lusina Ho
   Mr Philip Smart
   University of Hong Kong

2. **LIABILITY OF SOLICITORS TO LENDERS: AN EQUITABLE PERSPECTIVE**

   Mr Alan Sprince
   University of Liverpool [UK]

3. **FIDUCIARIES**

   Ms Sarah Worthington
   London School of Economics [UK]

4. **CONSTRUCTIVE TRUSTS AND CONSTRUCTIVE TRUSTEES**

   Dr Lionel Smith
   Oxford University [UK]

Quistclose and Romalpa: Ambivalence and Contradiction

Lusina Ho * and Philip Smart **

1. Introduction

At first glance, workshop participants may wonder what value there is in putting Quistclose[1] and Romalpa[2] side by side: for one involves a peculiar type of trust, and the other is principally concerned with retention of the legal title of goods sold. In fact, very rarely would the two lines of cases refer to each other. Notwithstanding these observations, in this paper, the authors seek to answer the following question:

> "Is there sufficient similarity between Quistclose and Romalpa that the courts should tackle the fiduciary relationship issues raised in such cases in a similar fashion?"

The background to our inquiry is that we feel we may have identified some inconsistency underlying the courts' approach in these two lines of cases. In Romalpa cases, arguments by a supplier of goods that a fiduciary relationship exists between the parties are nowadays consistently rejected by reference to the "reality" or "substance" of the parties' transaction. This, moreover, is the situation even where the terms of the relevant contract make express reference to, and employ the language of, fiduciary obligations. In Quistclose cases, on the other hand, judges have at times appeared happy to "construct" a trust relationship out of what might normally and in substance be described as a commercial loan.

2. A Relevant Inquiry?

At the outset it must be stated that we recognise there may be those who feel that ours is not a relevant line of inquiry. It might be argued that any so-called "inconsistency" we identify is simply the inevitable consequence of the circumstance that the facts of and arguments raised in the Romalpa and Quistclose cases are very different: systematic differences in facts generate different results. Our response to any such argument is two-fold. First, it is not so much the results of the cases which interest us, but rather the approach of the courts – particularly whether or not the judge concentrates on the "substance" or "reality" of the transaction in question. Secondly, we feel we have weighty authority that supports our line of inquiry.

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1 Barclays Bank Ltd v Quistclose Investment Ltd [1970] AC 567.

2 Aluminium Industrie Vaassen BV v Romalpa Aluminium Ltd [1976] 1 WLR 676, [1976] 2 All ER 552.

Although there is a large (and ever increasing) body of literature in the area, the article in 1980 by Goodhart and Jones in the *Modern Law Review* remains essential reading.[3] Goodhart and Jones looked at the two lines of cases and a passage from their conclusion is worth recalling:[4]

> "The common link between all the cases is the attempt of a person who has paid money or supplied goods to an insolvent company to escape from the normally fruitless position of unsecured creditor by claiming a beneficial interest in the money or goods supplied or in assets which in some way represent them. The court's attitude to these attempts has been ambivalent. In some cases (explicitly in Kayford, and implicitly in Romalpa) the courts appear to have regarded the claim of the supplier as having the greater merits. In Borden, however, Templeman LJ strongly expressed the view that proprietary claims of this kind were objectionable...."

Accordingly, 20 years ago - not so very long after the first cases were decided - the different attempts to employ fiduciary concepts, in circumstances where either goods or credit were supplied, in order to establish proprietary claims were looked at side by side. Parallels continued to be drawn for a few more years. Hence Mr Justice Priestley wrote in the mid-1980s:[5]

> "The Romalpa clauses represent an attempt by suppliers to prevent goods supplied by them from becoming part of the assets of the buyer, available for all creditors in the event of insolvency, before they have been paid for. In their construction the courts have shown a readiness to acknowledge fiduciary ideas in ordinary sale of goods situations. Quistclose trusts demonstrate an analogous attempt by suppliers of credit in that (in most cases) they show an attempt by such suppliers to prevent moneys advanced by them becoming part of the recipient's assets until some particular purpose for which the loan is made is accomplished. The courts in these cases too have been quite ready to use equitable ideas in commercial law."

Over the last 10 or 15 years, however, Romalpa and Quistclose have normally been placed (certainly in many of the textbooks) in their own quite separate, distinct categories. Of course, everyone accepts that Quistclose and Romalpa are both forms of "quasi-security", falling within the broad rubric of what may be called personal property securities law. But if one surveys the extensive literature in the journals, one is struck by the number of articles dealing with either the Romalpa or the Quistclose line of cases. Teasing out the similarities and differences between the two lines of cases appears somewhat to have gone out of fashion.[6] This is, to us at least, perhaps a little surprising. For although, writing in 1980, Goodhart and Jones thought that the judges' response to the two lines of cases was ambivalent, in the past 20 years, such ambivalence may have been replaced by a marked difference in approach. On the one hand, the Quistclose line of cases has continued to flourish - even recently recognised

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3 W Goodhart & G Jones, "The Infiltration of Equitable Doctrine into English Commercial Law" (1980) 43 MLR 489.
4 Ibid at p 511.
5 LJ Priestley, "The Romalpa Clause and the Quistclose Trust" in PD Finn (ed) *Equity and Commercial Relationships* (Law Book Co, 1989) Ch 8 at pp 229-300.
6 Although certain issues are touched upon in J Ulph [1996] JBL 482.

by the Law Lords as falling within conventional trust principles.[7] On the other hand, the "fiduciary side" to retention of title has been to all intents and purposes obliterated: as Goode has recently commented, in this regard Romalpa has been explained away as based on inappropriate concessions by counsel.[8]

To sum up, the idea behind this paper is simply that, whilst in no way denying the very real and extensive differences between Quistclose cases and Romalpa cases, it is instructive to recall the approach of Goodhart and Jones and take a broader view when considering developments over the last decade or so. If by the end of this paper participants feel that there is some value in looking at the two lines of cases side by side - rather than simply focusing on the latest Quistclose case or the latest Romalpa case - then the authors' objective will have been met. But, in addition, we will try to go further and broach new ground, suggesting that Quistclose and Romalpa may be more closely linked than has hitherto been appreciated. Indeed, albeit only perhaps half-seriously, it might even be suggested that the next development will be the "RomQuist" clause.

3. Overview of the Substantive Law

The insolvency background against which Quistclose and Romalpa were decided is, in general terms, relatively straightforward. A liquidator is required to gather in and realise all the company's property. Any disposition of the company's property after the commencement of the winding up is prima facie void. The position was recently re-stated in Re Polly Peck International plc (in Administration); Marangos Hotel Co Ltd v Stone:[9]

> "The essential characteristic of the statutory scheme is that the liquidator or administrator is bound to deal with the assets of the company as directed by statute for the benefit of all creditors who come in to prove a valid claim ... A question may arise whether a particular asset was or was not the beneficial property of the company at the date of the commencement of the winding up (or administration). If it is established in a dispute that it is not an asset of the company then it never becomes subject to the statutory insolvency scheme ... If, on the other hand, the asset is the absolute beneficial property of the company there is no general power in the liquidator, the administrators or the court to amend or modify the statutory scheme so as to transfer that asset or to declare it to be held for the benefit of another person."

Thus, just as Goodhart and Jones noted (above), establishing beneficial ownership of the goods or money in question is the central issue.

(i) Romalpa

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7 Westdeutsche Landesbank Girozentrale v Islington LBC [1996] AC 669 at p 708, per Lord Browne-Wilkinson.
8 R Goode, "Commercial Law in the Next Millenium" (Hamlyn Lectures, 1998) p 24
9 [1998] 3 All ER 812.

S supplies goods on 30 days credit to B Ltd but, before B has paid for the goods, the company goes into liquidation. The contract between S and B contains a "Romalpa" or retention of title ("ROT") clause. S may seek to rely upon the ROT clause in an attempt to recover one or more of the following:

(a) the (unprocessed) goods themselves, i.e. as supplied (for example, leather);
(b) processed goods (e.g. shoes made from the leather supplied by S); and
(c) the proceeds of sale of (a) and/or (b) above.

In relation to (a) - the goods as supplied - a "simple" ROT clause will generally be enough for the seller to retain legal ownership of the goods: for the intention of the parties determines when title passes and that, of course, is not necessarily upon delivery. But where the liquidator holds (b) manufactured items - not leather, but shoes - or (c) the proceeds of sale (of the leather or of the shoes) then legal title to the goods as supplied will have been lost: as either the original goods no longer exist (in the case of manufactured items and their proceeds) or title over them has already passed to the sub-purchaser (in the case of the proceeds of the original goods), no title can be "retained" by the supplier.

Accordingly, when dealing with facts involving the proceeds of sale or "new" (manufactured) items, sellers have sought to rely upon equitable principles and doctrines (in a variety of guises) in an effort to avoid being left as an unsecured creditor for the outstanding contract price.[10] Despite the circumstance that in Romalpa itself the Court of Appeal was prepared to accept that a seller could establish beneficial ownership of the proceeds of sub-sales (aluminium foil re-sold by buyer) on the basis that the agreement between buyer and seller had established a bailment or agency relationship,[11] subsequent cases have adopted a far more restricted approach.[12] Romalpa has, as Goode puts it, been treated as based on inappropriate concessions on the existence of the bailment relationship.[13]

The key point appears to be that, whatever the terminology found in the parties' contract, the reality or substance of their relationship is a contract for the sale of goods. If the buyer were indeed the agent of the supplier - or otherwise liable to account - it would follow that any profit made on a re-sale to a third party would accrue to the supplier. Yet, obviously, the buyer/manufacturer will be in business on its own behalf, not for the benefit of its suppliers. Moreover, the extent of any interest which a supplier is said to have in either manufactured goods or the proceeds of sale will be inextricably linked to the debt owing from

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10 It may be noted that, at the time Romalpa was decided, any attempt to rely upon *common law tracing* would have been bound to have failed. The recent expansion of common law tracing after Lipkin Gorman v Karpnale Ltd, [1991] 3 WLR 10, and Trustee of the Property of FC Jones and Sons v Jones, [1996] 3 WLR 70, seem to offer a ray of hope to sellers, in that common law tracing is now available against exchange products (such as proceeds of sale) and increase in value. However, this development is unlikely to be of any practical help to Romalpa sellers, for the claim following common law tracing is an in personam claim, and the sub-sale is always treated as authorised. See L Smith, *The Law of Tracing* (Oxford: Clarendon, 1997) pp 370-2.

11 The Court of Appeal did not clearly determine the nature of the fiduciary relationship between the parties, although Roskill LJ leant in favour of agency (see [1976] 1 WLR 676 at 690).

12 It has become "standard practice" for Romalpa to be distinguished on the basis of a (supposed) concession by counsel that on the facts the parties were in a bailment relationship: see W Goodhart & G Jones, above n 3, at p 501, n 53.

13 Above n 8.

the buyer to the supplier. It will be noted that in a Romalpa situation (unlike Quistclose, discussed below) there is no question but that there is a debt owing when the goods are supplied: there is a debtor/creditor relationship from the outset. In real terms, if the buyer pays in full for the goods, thereby extinguishing any and all debts,[14] the supplier has no further involvement or interest. Thus, to take an illustration, if the value of the processed goods is $100,000 but the outstanding debt is merely some $20,000, then it is perhaps inevitable that such facts are viewed as giving rise to a charge over the processed goods to secure the amount of the debt.[15] Such a charge, we all know, becomes void if not registered.[16]

Of course, no one is maintaining for a moment that all Romalpa cases are the same, or that all ROT clauses are drafted in identical terms. Nevertheless, we would suggest that it would be quite unrealistic to deny that, particularly since Tatung[17] and Compaq Computer,[18] the tide has very much turned against fiduciary arguments in this particular context. It is surely inconceivable that if he were speaking today Priestley J would suggest that the courts have "shown a readiness to acknowledge fiduciary ideas in ordinary sale of goods situations".[19] However hard the draftsman may have tried, and however much "fiduciary" terminology has been inserted into the contract, the courts will not be deflected from the substance of the parties' relationship.

To sum up, a ROT clause is effective to the extent that legal title can be and is retained by a supplier of goods. This flows from the common law rule (now enshrined in legislation)[20] that title passes in accordance with the intention of the parties. On the side of equity, however, the supplier will come away empty-handed. The cases state plainly that fiduciary obligations will not readily be imported into what is essentially a contract for the sale of goods. Moreover, whilst it may be strictly speaking correct that a supplier may have some equitable interest in manufactured goods or the proceeds of sale - being the holder of a floating charge created by the buyer over the goods or money in question - that interest will almost always be worthless.[21] More importantly, from the point of view of theory, the supplier only has a debt secured by a charge: so even if we assume that the charge has been registered (which, of course, does not happen) there is no fiduciary relationship between the parties. From the very outset the parties stand in a debtor/creditor relationship and the courts will not depart from that reality.

(ii) Quistclose

14 The presence of an "all-moneys" clause does not affect the principle involved here: see passim Thyssen v Armour Edelstahlwerke AG [1991] 2 AC 339.

15 See Compaq Computers Ltd v Alercorn Group Ltd [1991] BCC 484, [1993] BCLC 602.

16 Examples of typical registration provisions can be found in s 399 of the Companies Act 1985 (UK) or s 80 of the Companies Ordinance (HK).

17 Tatung (UK) Ltd v Galex Telesure Ltd (1989) 5 BCC 325.

18 Compaq Computer Ltd v Abercorn Group Ltd [1991] BCC 484, [1993] BCLC 602.

19 Above, n 5 at p 230.

20 See, for example, s 19 of the Sale of Goods Act 1979 (UK).

21 The charge will likely be void for non-registration and, even if (which is unlikely) the charge were registered, in practice there would in all probability be prior charges which covered the property in question.

Suppose S supplies money (repayable in 3 months) to B Ltd to be held at a designated account for the specific purpose of paying C Ltd, a creditor of B, but, before B has done so, it goes into liquidation. S may seek to recover the money itself.

In the important decision of Barclays Bank Ltd v Quistclose Investments Ltd, Lord Wilberforce suggested that such an arrangement gave rise to 'a relationship of a fiduciary character or trust, in favour, as a primary trust, of the creditors [C], and secondarily, if the primary trust fails, of the third person [S].'[22] As his Lordship explained, 'when the money is advanced, the lender acquires an equitable right to see that it is applied for the primary designated purpose ...: when this purpose has been carried out (*i.e*... the debt paid) the lender has his remedy against the borrower in debt: if the primary purpose cannot be carried out, the question arises if a secondary purpose (*i.e*...repayment to the lender) has been agreed, expressly or by implication: if it has, the remedies of equity may be invoked to give effect to it, if it has not (and the money is intended to fall within the general fund of the debtor's assets) then there is the appropriate remedy for recovery of a loan.'[23]

Accordingly, even though the lender may not have expressly invoked trust or equitable principles, the court is quite ready to infer both a primary and a secondary trust or fiduciary relationship from the facts; if the money loaned is meant to be used for a designated purpose and kept separate from the borrower's general fund.

After almost thirty years since the 'Quistclose trust' was established, there have been significant developments in both its scope and nature. As to its scope, while Quistclose itself involves the common intention of the parties at the time the 'trust' is established, subsequent decisions suggest that the trust can be established unilaterally by the recipient and after the time of payment.[24] It is also clear that Quistclose is not limited to money supplied upon a loan, but is applicable to, say, purchase moneys,[25] subscription money for shares,[26] and membership fees.[27] Moreover, the money need not be kept in a separate account as such, as long as it is not intended to fall within the general fund of the recipient.[28] In any case, the subject matter of the Quistclose trust need not be money, but can be a chose in action or other property. (In fact, Quistclose itself involves the transfer of an amount to the borrower's account at Barclays Bank, not the physical delivery of cash. Hence, the specific property at issue is the debt against the bank held in the form of a deposit, which is a chose in action.)

It is apparent from this brief survey that the potential scope for invoking the Quistclose trust is very wide. A Quistclose trust can arise upon any gratuitous or contractual transfer of property to another person for a designated purpose, as long as the property is meant to be kept separate from the recipient's general assets. Of course, the courts have so far

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22 [1970] AC 567 at 580.
23 Ibid at pp 581-2.
24 Re Kayford Ltd [1975] 1 All ER 604; Re Goldcorp Exchange Ltd (in receivership) [1995] 1 AC 74.
25 Re Kayford Ltd, ibid; Re Goldcorp Exchange Ltd (in receivership), ibid.
26 Re Nanwa Gold Mines Ltd [1955] 1 WLR 1080.
27 Re Challoner Club Co Ltd, Times, 4 November, 1997. Though the court held that a trust did not arise in this case, it was not because the property involved was membership fees as opposed to a loan.
28 Re Goldcorp Exchange Ltd (in receivership), above n 24.

refused to relax the requirement of a separate fund. Thus, Lord Nicholls in Re Goldcorp[29] distinguished Re Kayford, which represents the high point of the Quistclose doctrine, on the basis that there was no constraint in Re Goldcorp on the recipient's freedom to use the purchase money supplied. Similarly, in Re ILG Travel Ltd,[30] Parker J held that where an express agreement provided that pipeline moneys received by a travel agent on behalf of a package tour operator was to be held on trust, only a charge in equity was created. For the travel agent was allowed to mix pipelines moneys with moneys held in its hands.

While the scope of the Quistclose doctrine is pretty much established, the nature of the Quistclose trust has only been recently clarified (at least for the time being). In Westdeutsche Landesbank Girozentrale v Islington LBC, Lord Browne-Wilkinson treated the secondary trust in the Quistclose doctrine as a resulting trust which arose "where A transfers property to B on *express* trusts, but the trusts declared do not exhaust the whole beneficial interest..."[31] Such a ruling not only affirms the preponderant view that the secondary trust is a resulting trust, but also recognises the primary trust as an orthodox express trust. The logical consequence of this must be that any exchange products or profits of the original trust property, whether authorised or not, shall also be subject to the trust.[32]

In concrete terms, suppose S supplies money to B upon a Quistclose trust for the specific purpose of providing funding for B to satisfy a profitable contract, and B exchanges the money for goods in order to manufacture certain products for such contract. B then goes into liquidation before the process has begun. The goods will then be subject to the (express and then resulting) trust. Alternatively, suppose the (Quistclose) money is loaned in HK dollars, but deposited by B in US dollars at an interest rate of 5% p.a. with a view of using the money to pay its US creditors. B then goes into liquidation before the payment is made, but after the Hong Kong government has announced to break the peg between the two currencies and the value of HK dollars has dropped significantly. One would expect that S can recover the whole deposit in US currency together with interest, even though it may now be worth a lot more in HK dollars. The same consequences will ensue if the above situations occur without S's authorisation.

In sum, a supplier of credit under Quistclose terms is in a much better position than that of a seller of goods under a ROT clause, even though the latter, in effect, also supplies credit by deferring the buyer's obligation to pay for the goods. The lender under Quistclose terms can pursue the trust analysis to recover (a) the money itself; (b) profits made from the money; and (c) the proceeds or exchange products of the money and the profits.

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29 Ibid, pp 100-101.

30 [1996] BCC 21 at pp 43-47.

31 Above n 7 at p 708. See the contrary opinion in R Chambers, *Resulting Trust* (Oxford: Clarendon, 1997) Ch 3. Chambers argues that (1) the supplier of credit only has an equitable right to restrain the recipient from using the money otherwise than for the specified purpose, but this equitable right can still be called a trust in a loose sense; (2) upon failure of the specified purpose, there is a resulting trust in favour of the lender. It is difficult, however, to see why a right to obtain an injunction for a breach of contract should be called 'trust', and in any case why breach of the contract would give rise to a resulting trust, and not just a right to damages (where the injunction is unavailable).

32 If the exchange products or profits result from a breach of trust, they would be subject to a constructive trust, accepting always the possibility of equitable allowance or apportionment of gain where appropriate.

The trust analysis is adopted even if the parties have not expressly invoked it, and where the underlying transaction is in substance a loan or payment for a specific purpose, the performance of which is secured by the payor's right to recover the amount supplied even in the event of the payee's insolvency. While a court that looks at the reality of the transaction might construe it as providing security for the payee's performance of the special purpose,[33] the English courts have thus far been content to fit it, albeit uncomfortably, into trust principles. As a result, the parties are seen not as in a debtor/creditor relationship, but a settlor (or beneficiary)/trustee relationship, with all the inappropriate consequences (at least theoretically) of the trust.[34]

(iii) Points of Comparison

Both Quistclose and Romalpa were concerned with a supplier of credit or goods seeking to establish beneficial ownership of the property in question in an attempt to prevent that property being administered, as property of the company, in the course of insolvency proceedings. Thus, the common issue raised by both lines of cases is: should the courts characterise the relevant transaction according to the reality of the situation, and ignore the suppliers' attempt to use equitable devices to escape the consequences of insolvency, or should they respect the parties' intention to "contract out" of the insolvency net and accordingly give effect to these devices?

At the level of technical, legal analysis both lines of cases focus on ownership of the relevant property. Yet in practical, as well as economic terms, the courts are dealing with a (disguised) form of "security" - hence the calls for both lines of cases to be brought within a statutory regime for personal property securities registration. The extent to which Quistclose and Romalpa operate in a broadly similar fashion to a "true" security interest has been discussed elsewhere,[35] but these two forms of "quasi security" must also be considered in the light of modern insolvency law and practice.

When our two leading cases were decided, more than 20 years ago, winding up and receivership were the only formal options generally available to a company in financial difficulty. Informal workouts did take place but the legislative framework did little, if anything, to assist such arrangements. Over the last 20 years, however, there has been a move in many jurisdictions towards structured procedures to encourage and facilitate corporate rescues. Although Quistclose and Romalpa were decided before the advent of the current rescue culture, both devices impact upon corporate rescue in broadly similar ways. For both devices, it may be argued, can be employed to assist a company in its attempts to obtain either finance or essential raw materials in order to carry on trading. If suppliers of credit or of goods could not look to the "security" offered by the Quistclose trust or the Romalpa clause then, it might be maintained,

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33 For a similar view, see M Bridge (1992) 12 OJLS 333; J Hackney, *Understanding Equity and Trusts* (London: Fontana, 1987) p 51.

34 Such as windfalls on the part of the creditor arising from gains obtained from the amount supplied.

35 See A Belcher & R Beglan [1997] JBL 1. Note also Report of the Review Committee on Insolvency Law and Practice (Cmnd 8558, 1982)('the Cork Report') para 1623: '... there is a considerable body of informed opinion which ... believes that the problems arising in relation to the impact of reservation of title clauses on insolvency are only part of more extensive problems deriving from the unsatisfactory law concerning security interests in personal property.'

those suppliers might be unwilling to deal with a company in financial difficulty - or only deal with the company on unfavourable terms. On the other hand, both Quistclose and Romalpa may in certain instances hinder efforts to effect a rescue. As both forms of "security" are not registered, it may be quite difficult for a third party lender to ascertain the true financial state of the company. The lender will be aware that what may appear in the books of the company as its property, or its cash at bank, may not actually be so. This may operate as a disincentive to involvement in any corporate rescue plan.

Moving on to more academic considerations, when we analyse Quistclose and Romalpa it is plain that the arguments raised in those cases depend upon the co-existence in one transaction of contractual and fiduciary relationships. The following observation of Lord Wilberforce in Quistclose is always quoted:[36]

> "There is surely no difficulty in recognising the co-existence in one transaction of legal and equitable rights and remedies ... "

More particularly, one is dealing with: (i) a fiduciary relationship; and (ii) a debtor/creditor relationship. In the cases that have come after Romalpa the judges have consistently rejected the argument that the company is, at one and the same time, both a debtor and a fiduciary. Whereas in Quistclose cases the corresponding argument has proven to be acceptable; and this is so, even though the argument in Quistclose cases is necessarily more complex and, it is suggested, appears to be just as much at odds with the reality of the parties' dealings. For the very basis of Quistclose is that the company is not - at one and the same time - a fiduciary and a debtor. Rather, the company holds the money on trust until the "purpose" is carried out - only then does the company become a debtor.[37] Thus in Quistclose cases the fiduciary and debtor/creditor relationships do not co-exist (i.e. at one time) instead they follow one another: as if in series. It is suggested that, focusing on the substance of the transaction in a Quistclose situation, when the money is actually paid into the company's bank account that would normally (and fairly) be called a loan - indeed even Lord Wilberforce uses the expression "the lender".[38] But Quistclose itself requires us to conclude that at this stage there is no loan (no debtor/creditor relationship). Subsequently, the fulfilment of the purpose results in a process of "reverse alchemy": the (precious) trust is somewhat mysteriously converted into a (base) debt.

Whilst we would suggest that appeals to the "reality" or "substance" of a transaction are often more than justified, in relation to Quistclose it has to be stressed that the "lender" does not stand in a debtor/creditor relationship with the company, at least not until the process of reverse alchemy has been brought into operation upon the fulfilment of the specified purpose. The connection to the commercial reality of the parties' transaction - a loan - is perhaps more than a little strained.

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36 Barclays Bank Ltd v Quistclose Investment Ltd, above n 1 at p 581.

37 As Megarry J succinctly put it in Re Kayford Ltd [1975] 1 WLR 279 at 281: "... One is concerned here with the question not of preferring creditors but of preventing those who pay money from becoming creditors, by making them beneficiaries under a trust."

38 [1970] AC 567 at 581-2, see text to n 23 above.

4. Fact Scenario: Drawing Quistclose and Romalpa Together

Having already pointed out certain broad similarities between Quistclose and Romalpa, we now propose to venture upon what we believe to be new ground. The objective in this section of the paper is to come up with a fact scenario where a Quistclose trust - suitably modified - can arguably be employed to "make good" the failings of the normal ROT clause. This is done not (merely) to be provocative, but rather to emphasise that a "substance" approach is just as appropriate in relation to Quistclose arguments as it is in relation to ROT clauses.

Before setting out the precise details of the Fact Scenario, a few brief points concerning the scope of Quistclose must be rehearsed. Although the so-called "Quistclose trust" has at times been said to be restricted to a trust of "money", in actuality a great many of the cases have involved not money but a debt. (Hence, as mentioned above, in Quistclose itself the debt owing from Barclays Bank to Rolls Razor was the subject matter of the dispute.) It is submitted that just as there may be a Quistclose trust of an intangible movable (i.e. a debt), the trust can operate in respect of a tangible movable. As a matter of theory this must surely be conceivable, particularly as Westdeutsche tells us that Quistclose is (conceptually) an example of an orthodox resulting trust arising from non-exhaustion of the funds of an express trust. If the Quistclose trust involves an orthodox express trust then, always provided the necessary evidence is present, it is difficult to conceive of any inherent reason why its subject matter cannot be movable property.[39] There is some measure of judicial authority to this end.[40]

Of course, our Fact Scenario is being used primarily to illustrate a point of principle. In a real case evidence of the intention to create a trust in the Quistclose fashion might present some difficulty. You are asked to assume sufficient facts to establish a basis for the relevant intention. Nevertheless, if it can be accepted that Quistclose can apply as a matter of principle to movables, then it becomes fairly evident that Quistclose trust arguments may be used (in certain circumstances) where ROT clauses are bound to fail.[41]

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39 To take an illustration (of the movable property point), let us say that a company is in the gold bullion and coins business. The company is bound to deliver 100 maples to each of four customer (A, B, C and D) by the end of the month. The company will receive payment from the customers upon delivery. X supplies all the company's maple requirements and is fully aware of the above facts. X and the company enter into an agreement whereby X will provide the company with the necessary maples - which are to be kept in a separate safe at the company's warehouse and are not to be used for any purpose other than meeting its obligations to A, B, C and D. In addition, the company's obligation to pay X for the coins is expressly agreed only to arise after the purpose has been carried out - i.e. after the customers have taken delivery. (Let us further assume, just to make things as clear as possible, that the agreement specifies that its terms will not operate as a retention of legal title by X, but that the company will hold the maples on trust until the specified purpose has been carried through.) In other words, our facts follow the more usual type of case where X provides money to a company specifically to pay certain identified creditors and for no other purpose: the difference here being that we are dealing with gold coins, not cash or a debt.

40 Sopp v Goldcorp Refiners Ltd (in receivership), unreported, High Court of New Zealand, Auckland. CP 21/88, October 17, 1990, Thorp J; discussed in CEF Rickett (1991) LQR 608 at p 642.

41 Those circumstances will be where the goods supplied have been made into something else (i.e. processed items). The suggested device can have no application where one is dealing with proceeds of sale either of the goods as supplied or of the processed items. Because once the purpose has been achieved, it follows that the trust will end and the supplier will be left as a simple debtor.

(i) Fact Scenario

Universal Coins Ltd ("UCL") manufactures silver coins, medallions and memorabilia. The particular process of manufacture relevant for present purposes involves taking "blanks" - which are unpolished, rough disks of low silver content - polishing the blanks and then stamping them with an appropriate motif. (The more technologically minded may think of the motif being etched onto the blanks by a laser!) All the blanks are supplied to UCL by Queens Memorial Coins ("QMC"). UCL is in financial difficulty and has little ready finance. UCL has, however, negotiated some potentially profitable contracts with Purchaser to supply 10,000 Marilyn Monroe medallions ("the medallions"). The medallions are to be delivered to Purchaser on 20 September 1998, when UCL will receive payment. QMC has agreed to supply UCL with 10,000 blanks in order for UCL to carry out its contract with Purchaser. QMC is aware of all relevant facts and has insisted that the 10,000 blanks are not to be used by UCL for any other purpose and are to be stored separately from all other blanks. The contract between QMC and UCL specifically states that QMC has supplied the blanks to UCL for the sole purpose that, in the course of carrying on UCL's business in the ordinary way as a going concern, such blanks will be used to make the medallions that are to be sold on to Purchaser. (Again, one may have to assume other facts indicating evidence to create a Quistclose trust).

In accordance with the contract between UCL and QMC, the blanks were delivered to UCL on 10 September 1998. On the following day the polishing and stamping process commences and by 14 September 1998 all the medallions are finished. However, on 15 September 1998 UCL goes into liquidation. The medallions are at that time separately stored in UCL's warehouse.

(a) Romalpa

If there were a Romalpa clause in the contract between UCL and QMC it is extremely unlikely that QMC would get anything. Of course, QMC could retain (legal) title to the blanks, but the manufacturing process has created a new type of property in respect of which QMC never had a legal title to retain. In relation to the new items (the medallions) a claim by QMC would almost inevitably be categorised as a charge. For QMC's interest in the new items would only be present to the extent that - and as long as - a debtor/creditor relationship existed between QMC and UCL. If, let us say, the sale price was $10,000 (for the blanks) but the value of the medallions was $20,000, it would strongly be argued that the value added by the industrial process was not in reality done for the benefit of QMC. QMC was only concerned with being paid for the goods it had supplied. Accordingly, in the type of circumstances envisaged - a claim to processed goods - a ROT clause will be of little use to a supplier.

(b) Quistclose

Our fact scenario, however, has been deliberately structured to avoid there being a ROT clause. We are working on the assumption that property was supplied to the company for a specified (and restricted) purpose. The liquidation has intervened and that purpose can no longer be carried out.

Starting from basic principles, UCL does not receive the property (the blanks) as beneficial owner but rather as a trustee under the Quistclose principle. Although the blanks have been turned into something else, i.e. the medallions, if UCL were a trustee of the blanks it cannot - by dealing with the trust property in an authorised and intended manner - become the beneficial owner of the medallions. At this stage, prior to the insolvency, the specified purpose remains in operation: blanks were supplied to be made into medallions and subsequently sold to Purchaser.[42]

Whilst there is no case law on Quistclose trusts involving movable property, let alone processed items, it is perhaps instructive to look at a more "traditional" Quistclose arrangement. A supplies cash to a company, it being intended by both parties that the cash will be paid into a separate account and thereafter the company will draw cheques on that account to pay off certain pressing creditors. Under the Quistclose line of cases the company is, first, a trustee of the cash it receives and, later, a trustee of the debt it is owed by the bank. The property as supplied (cash) has in accordance with the parties' intention been converted into something else (a debt). Nevertheless, that process - if it can be so called - does not end the trust and make the company the beneficial owner. Recalling what has been suggested above, the same would be the case if A supplied the company with US dollars, which were to be converted into pounds sterling and French francs before paying different creditors. Here there might be an element of skill - and of profit - involved in the timing of the conversion from one currency to another.

(ii) Summary

It is suggested that there is no compelling reason why Quistclose - which after all involves an express trust - must be restricted to:

(a) money or debts; or

(b) property as originally supplied.

Theoretically speaking, we can see no reason why you cannot create a trust in the Quistclose fashion applying to items of movable property in general (including goods) and extending to whatever final items come into existence: whether the final item is exchange property or a "new" property, such as processed goods. (Such a trust would have a limited lifespan, existing for the period that the specified purpose remained unfulfilled. When the purpose was carried out, the trust would be determined and the supplier would become a debtor in the amount of the agreed value of the goods as originally supplied.)

42 One could even add additional facts to the effect that in their contract UCL and QMC agree that the medallions would not vest beneficially in UCL but fall under the trust.

In relation to processed good, such as blanks becoming medallions, the critical argument in ROT cases simply does not apply. In ROT cases the supplier is at once a creditor of the company upon delivery of the goods. The extent of the supplier's interest in any processed goods will in substance be inextricably linked to the debt between the parties; and this is so both in relation to the extent of the supplier's interest and in respect of the extinction of that interest (e.g. by payment of the debt). The strength of this charge argument has been clearly revealed by the case law over the last decade.

However, when it comes to our Fact Scenario (and our "RomQuist" clause), we have the authority of the House of Lords that - pending the carrying out of the Quistclose purpose - there is no debt: the parties do not stand in a debtor/creditor relationship. If there is no debtor/creditor relationship then any charge argument inevitably becomes irrelevant. If there is no debt - until the purpose has been carried out - then there can be no charge (securing that debt). At the time when the liquidation intervenes, there is simply no debt.

(iii) Practicalities

Our Fact Scenario is intended to be used as a way of focusing discussion on the theoretical issue of whether there can be a Quistclose trust in relation to goods and which extends to new products created (by the trustee's efforts) from those goods. We are trying to show that Quistclose and Romalpa are more closely linked than has perhaps hitherto been appreciated. In particular, the same Fact Scenario would yield different results depending on whether a ROT clause or the 'Quistclose' trust is used. The response may perhaps be: "That may be all very well in theory, but it could not be of any practical relevance." Reference may here be made to the facts in Chaigley Farms.[43]

A farmer supplied a company with sheep for slaughter, the sheep being supplied under a contract containing a more or less standard retention of title clause. By the time receivers were appointed, a number of sheep had been slaughtered but the carcasses (which had been processed in various ways) were still at the company's premises. It was held, in effect, that the ROT clause did not extend to the carcasses, since they were new items - different from the (live) animals which had been originally supplied.

Now one can look at these facts from a Quistclose perspective. (Although one needs to assume one additional fact, namely that the farmer supplied the sheep intending that the meat would be going to a purchaser - "Y" - and that the sheep should not be mixed with other sheep owned by the purchaser, if any.) If the transaction is re-cast in Quistclose terms, then the animals are supplied to the company for the sole purpose of being slaughtered so that the meat can be delivered to Y - no other purpose is contemplated. The company is expressly not allowed to re-sell the live animals or sell the meat to any other purchaser. The argument now is that the company held the animals on a Quistclose trust and, therefore, did not become the beneficial owner of the carcasses - which are held on resulting trust for the farmer.

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43 Chaigley Farms Ltd v Crawford, Kaye and Grayshire Ltd [1996] BCC 957.

Of course, you may not particularly like this argument and you may think of many reasons why a court would not accept that in reality the parties intended to create a trust. We very much hope so. For our point is not that a Quistclose trust will definitely succeed in these circumstances. Our contention is that such examples show that Quistclose and Romalpa can operate - or at least be argued to operate - in very similar factual circumstances. The "substance" or "reality" approach should be even-handedly applied to both lines of cases.

5. Conclusion

Not too many years after Quistclose and Romalpa had been decided, Goodhart and Jones had no difficulty in looking at the two cases side by side; seeing both as examples of the "infiltration" of equity into commercial transactions. Although the authors of this paper would not use the term "infiltration", there is no doubt that both Quistclose and Romalpa challenged existing notions and were seen by many as distorting established doctrine. Indeed, in certain ways Quistclose could be seen as the greater "culprit" in this regard. For essentially in Romalpa the court interpreted or re-cast the facts to permit of an agency (or bailment) relationship between the parties.[44] Whereas the absolute heresy lurking in Quistclose was the permissibility of a private purpose trust: a potentially radical departure from decades, if not centuries, of judicial wisdom.

The last 20 years, however, has seen Romalpa distinguished out of existence, whilst Quistclose has appeared to remain quite vibrant. The nemesis of the fiduciary side of Romalpa has been "reality": the substance of the parties' transaction. Reality, it would seem, has not yet sharply focused its gaze upon the Quistclose trust. If it were to do so, it would uncover: (i) a "loan" which is not a loan; and (ii) the (surely more than a little unusual) concept of fiduciary and debtor/creditor relationships not co-existing but following one another as if in series. But whether these two considerations fit with the substance of the parties' transaction - often, in effect, a commercial loan - must be very much open to question. Nor, in our opinion, is it wholly satisfactory to maintain that Quistclose and Romalpa deal with such very different situations that developments in one area can have no possible bearing upon the other line of cases. In the discussion above we have sought to show that Quistclose and Romalpa may in fact operate in circumstances that are far more similar than have hitherto been appreciated.

In short, we are not arguing that the recent judgments dealing with the fiduciary arguments raised in Romalpa cases are wrong, nor that a Quistclose trust may never be found to have been created by the parties. Rather it is our contention that the "substance" approach developed in relation to the fiduciary side of retention of title should, in the future, be just as strictly applied to suppliers of credit as it is currently applied to suppliers of goods. After all, "equality is equity".

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44 The Court of Appeal did not suggest that a conceptually new and distinct type of agency had to be created; their Lordships were instead allowing the facts to be "distorted" so as to be brought within existing agency principles. The substance approach will not permit of such distortion.

The Liability of Solicitors to Lenders: An Equitable Perspective

by Alan Sprince

1. INTRODUCTION AND OVERVIEW

The nature of a solicitor's duty to a client has proved significant in the spate of recent English decisions on a solicitor's professional liability to a mortgage lender client for lending losses suffered in a falling market. A solicitor's duty has, of course, always been important to potential professional liability, whether in contract, tort, or as fiduciary, its precise scope driving the axiomatic consideration of breach in individual cases. Yet, particularly in relation to the paradigm common law action in tort and contract for failing to act with reasonable care, a solicitor's duty generally, and its precise delineation in any particular case, now assumes an even greater practical significance in the light of the landmark decision of the House of Lords in *South Australia Asset Management Corp* v *York Montague Ltd* [1996] 3 All ER 365 ('*SAAMCO*') on the question of the measure of damages applicable to negligent valuers sued by mortgage lender clients. Lord Hoffmann concluded that the answer lay in an 'informer/adviser' dichotomy determined according to the scope of the originating duty. He distinguished between those under a duty to *advise* on what is the appropriate course of action and those, like the valuers in the *SAAMCO* case, whose duty related only to the provision of *information* on which someone else would rely in making the relevant decision. An 'adviser' would be liable for all the foreseeable consequences of the action taken in reliance, including any decline in the value of the securities as a result of a fall in the property market, whereas the valuers, as 'informers', were only responsible for the consequences of the information being wrong, being the difference between their valuations and the correct valuations. Though expressly decided in the context of such lender-borrower-*valuer* cases, it has been no surprise to find that the *SAAMCO* principle has, since, been applied to solicitors in similar situations, nor that they have typically benefited from its potential to 'cap' damages. Indeed, in allowing the scope of a solicitor's original instructions to frame and, thereby, typically to limit, ultimate exposure to a lender, the SAAMCO principle also reflects the charge of hypocrisy that solicitors and other professionals have levelled against lenders who have sought to make them pay the price for an earlier era's less than fastidious lending practices. There seems a certain symmetry and, perhaps, no little 'justice' in a principle that denies a lender the opportunity to recover their full losses because the overriding obligation to get the initial lending decision right was, in fact, the lender's own. But, before solicitors bask in the apparent convenience of the *SAAMCO* regime or the attractive simplicity of its logic, it might be prudent to make sure that the 'devil' isn't in the detail of its application to them, or, more precisely, in the sort of legal issues that may fall to be considered as a result of other features of the solicitor-client relationship generally, and the lender-borrower-solicitor scenario in particular, including the potential for a solicitor's duty to be both shaped by certain relevant market forces and drawn from a range of legal and equitable sources.

2. *FANCY AND JACKSON - EXPOSING THE ISSUES*

A means of exposing those issues is through the ostensibly solicitor-friendly decision of Chadwick J. in the eight sets of proceedings consolidated in *Bristol and West Building Society* v *Fancy and Jackson* [1997] 4 All ER 582, one of the last of the series of actions brought by the Society against firms of solicitors in an effort to recover mortgage lending losses, where, in each case, the firms had acted for both lender and borrower. Earlier, in *Bristol and West Building Society* v *May May and Merrimans* [1996] 2 All ER 801, Chadwick J had dismissed the majority of the Society's applications for summary judgment against various firms, save for one instance in which he awarded summary judgment for the *whole* of the lender's loss, calculated *outside* of the *SAAMCO* principle, against solicitors whom he had found to be in breach of *fiduciary* duty by having given the lender information that they knew or ought to have known was misleading -in short, a misrepresentation. This was to prove a short-lived defeat for the legal profession, as the Court of Appeal in *Bristol and West Building Society* v *Mothew* [1996] 4 All ER 698, on similar facts, effectively overruled Chadwick J's finding in *Merrimans* and held that, in the absence of 'bad faith', the breach in question *would be* a *common law* breach only and that, consequently, quantum was susceptible to calculation on the *SAAMCO* basis, and on the 'lower' of the *SAAMCO* bases at that. Though *Mothew* has, therefore drawn much of the sting from the anti-solicitor finding in *Merrimans*, it will be suggested that there is still much in Chadwick J's basic reasoning there for lenders to salvage. At this point, it is enough to note that, while Chadwick J in

Merrimans felt constrained (however inappropriately) to deal with quantum outside of the *SAAMCO* principles, *Fancy and Jackson* involved him in their conventional application towards the equally expected consequence that an errant solicitor's duty would typically indicate that the risk of a reduction in security value in a falling market was the lender's, and not theirs. This was because the majority of the material findings on breach and causation there related to the solicitors' common law duties of the 'informer' rather than 'adviser' variety.

3. 'DEVIL' IN THE 'DETAIL' IN APPLYING *SAAMCO* TO SOLICITORS?

Yet, in the context of the lender-borrower-solicitor scenario, the Bristol and West litigation in general and the *Fancy and Jackson* case in particular ought to provide the basis for a thorough re-examination of a much wider range of quantum-related issues. For instance, there are, in *Fancy and Jackson* itself, hints that some 'devil' still lurks in the 'detail' of the application of *SAAMCO* to solicitors. This is apparent in the one circumstance in *Fancy* v *Jackson* in which Chadwick J held that, even under the *SAAMCO* principle, the solicitors were exposed to the *whole* of the lender's loss, including the fall in market value. This initially devastating finding was made in relation to solicitors found to be in breach of a disclosure duty that Chadwick J had constructed out of a combination of breaches of common law duties *and* a breach of a fiduciary duty (failing to inform the lender that they acted also for the vendor). Notably, though, Chadwick J came to his conclusion on quantum, not by finding that the duty that he had constructed was such as to make the solicitors 'advisers' rather than 'informers', but because, on the facts, even as 'informers', the whole loss *was* consequent upon the 'information' being wrong. Given the number of other findings which enabled the other defaulting solicitors to restrict the amount of loss to which their obligations left them exposed, this latter finding is, perhaps, the exception that proves the rule of the usually more favourable quantum exposure that would prevail in most lender-borrower-solicitor cases. Yet it also proves, more ominously, the essential fluidity of the vague yet crucial informer/adviser categorisation, and even its potential redundancy in the lender-borrower-solicitor context. It is fluid anyway, because it is always theoretically open to the judge to ascribe decision-*making* relevance to a particular factor or combination of factors, thereby categorising the solicitors as advisers, inflating potential quantum accordingly. It is potentially redundant because Chadwick J did not, strictly, need to go this far in *Fancy and Jackson* in order to achieve the same result.

4. THE 'WIDER' ISSUES

But, that particular finding on quantum is more than simply a salutary reminder to solicitors that their common law duty can still, under *SAAMCO*, expose them to the lender's whole loss. With its appeal to a combination of breaches of common law and fiduciary obligations as a means of configuring the relevant duty, it hints also at the wider issues at play in any proper consideration of the seemingly crucial interrelated questions of duty and quantum in the typical lender-borrower-solicitor scenario.

'What is the nature of the *duty*?' - express terms and the *common law* duty

Fundamentally, in that interplay between the common law and fiduciary duties, Chadwick J.'s judgment is a reminder that the solicitor-client relationship provides for a multiplicity of sources from which a solicitor's duty could be drawn in any given case. *Fancy and Jackson* re-affirms the importance of the formulation *process*, particularly to the question of quantum where it ultimately proved favourable in all bar one of the cases. In turn, this should prompt re-evaluation both of the various ways that the duty could be constructed, where the governing question might be 'what is the nature of the *duty*?', and the nature of any interrelationship between those bases, where, ironically, the governing question might become 'what is the nature of the *breach*?'

In addressing the question 'what is the nature of the *duty*?', it is trite that the solicitors' retainer can be made up *inter alia* of the common law duties (owed concurrently in tort and via the express and implied terms of the contract) and duties that a solicitor owes in equity as fiduciary. What this abstract formulation can not reveal is the current and likely future trends as to which particular basis of duty might predominate in the typical lender-borrower-solicitor scenario. *Fancy and Jackson* can help here, being notable not merely for a predominance of *common law* duties, but, more significantly, for the fact that most originated in *express* terms. This is no quirk of the particular litigation, nor is its claimed significance simply that the judge's determinations of duty content and breach liability were

facilitated commensurably. Rather, the significance is as to quantum, and the potential, in future, for express contractual terms to be targeted by lenders *inter alia* to the achievement of a favourable quantum calculation under *SAAMCO* principles that might not have seemed relevant considerations when the *Fancy and Jackson* instructions were drafted - in short, to gain this advantage through a positive, express term 'design', rather than relying on the 'accident' of the inherent instability of the 'informer/adviser' distinction in the lender-borrower-solicitor context. Moreover, though mainly missing that particular target, the proliferation of express terms in *Fancy and Jackson* is, far from being a quirk, actually reflective of the inherent bargaining strength possessed by the large lending institutions, who are able to 'call' the contractual 'tune' when retaining solicitors keen to secure their bulk conveyancing instructions. If one were needed, the likely catalyst for lenders to press home this potential contractual advantage is to be found in the Court of Appeal's decision in *National Homes Loans Corp. plc* v *Giffen Couch and Archer* [1997] 3 All ER 808 in which it was held that, where, as is common, disclosure duties are delineated in precisely drafted express terms, there is no room for the incorporation of an implied, wider tortious duty of disclosure. Lenders will doubtless treat the *Giffen* decision as a usefully explicit lesson in how best to draft instructions, imposing more, and more precisely drafted, disclosure clauses, geared not only to disclosure and the *liability* issue, but, at the same time, also to *quantum*, and the new need to encompass those matters that would, at best, take the solicitors' retainer outside the ambit of 'informer' and into that of 'adviser', or, at least, gain for the lender an advantageous basis of calculation even if the duty remained that of 'informer'.

It is easy both to forget that *Fancy and Jackson* also involved the judge in some consideration of fiduciary duties, and to assume that dominating the common law duties necessarily means that express terms would dominate all other obligations as well. This serves as a reminder, on one, more abstract level, that any consideration of 'what is the nature of the duty?' would not be complete without an examination of the nature of a solicitor's fiduciary duties. More significantly, it also reminds that such duties might found an alternative means by which lenders might meet the *SAAMCO* challenge, not by *overcoming* it via an appropriately constructed 'adviser' duty, but, more dramatically, by attempting to *side-step* it altogether. This was, of course, precisely the strategy employed by the lender in relation to one of the cases considered by Chadwick J in *Merrimans*. Though his finding of fiduciary breach there must now be read in the light of the more restrictive approach laid down by the Court of Appeal in *Mothew*, it would be unsafe for solicitors to assume that the strategy itself has thereby been eliminated.

'What is the nature of the *breach*?' - the fiduciary duties

It is trite that as well as duties owed (in tort and contract) at *common law*, a solicitor owes duties to clients in *equity*. Such 'fiduciary' duties include, *inter alia*, those relating to undue influence, personal dealings with clients, obtaining a personal benefit from a client's property, confidentiality, and bribes and secret commissions. Most prominent, though, in the context of a lender-borrower-solicitor transaction, is the duty to avoid a conflict of interest. Where it is the solicitor's own personal interest that is in conflict with that of the primary client, the allegation is often framed as an allegation that the solicitor has made a 'secret profit' as a result of the solicitor-client relationship. In relation to a conflict between the interests of two clients, there is a *potential* conflict of interest every time a solicitor accepts instructions from two or more clients in the same transaction (the 'double employment rule'), even in a conveyancing transaction. English law, though, would not hold there to be a breach where, as is common, the clients have given prior informed consent to the same solicitors acting. If the risk of a conflict, central to the prohibition on acting without consent for two or more parties, actually materialises and the solicitors appreciate that it does, then there is said to be an 'actual' conflict of interest, and a solicitor will be in breach, *inter alia*, by continuing to act. While this outline of the fiduciary duty framework may ensure comprehensive consideration of the 'what is the nature of the duty?' question, it also shows up the inherent limitation of the question itself in the context of lender-borrower-solicitor transactions. Consequently, it might betray the fallacy in assuming that that question is the sole important enquiry in the consideration of quantum in such cases post-*SAAMCO*. The question is limited where fiduciary duties are concerned simply because the answer is fixed. In every case there will be the same abstract duties just outlined. This is because the solicitor's duties in equity arise automatically by operation of the law, by virtue of the fact that the solicitor is said to be in the position of a fiduciary *vis a vis* their client. Moreover, though the fiduciary duties can be varied directly by *specific* express provisions designed to do so, there is no reason to conclude that express provisions *generally* (of the type predicted to predominate post-*Giffen*) would have the effect of ousting the fiduciary duties or affecting them in any other way - contract does not necessarily 'trump' equity in this way. By contrast, because the common law duties are capable of being *created* by the parties' behaviour and

negotiations, the question 'what is the duty?' can, notwithstanding predicted trends, yield a different answer in each case. This dichotomy presents a problem. On the one hand, a solicitor's potential liability to a lender lies in equity as well as the common law, and such equitable liability has been the subject of (so far abortive) attempts by lenders to gain more advantageous quantum ground. But, on the other hand, enlarging the scope of the duty enquiry can only tell us that, in any given case, a solicitor would, in the abstract, owe their lender client a constant set of fiduciary obligations concurrently with whatever common law obligations had been created. It then becomes important to find another way to identify the precise interrelationship between the common law and fiduciary duties. The search for such an identification is, of course, here in the context of the potential impact, if any, that fiduciary duties might have on the issue of quantum. It has already been seen that, in the context of the common law duties, that issue can be comprehensively and meaningfully addressed via the question 'what is the nature of the duty?', where the precise nature of that duty also shapes ultimate financial exposure as adviser or informer under *SAAMCO*. Where the fiduciary duties are concerned, it is suggested that the more meaningful question becomes 'what is the nature of the *breach*?' Addressing that question helps to demonstrate where concurrent obligations (as fiduciary and at common law) end and relevant independent (fiduciary) breaches begin. It does this by unlocking the distinction between breaches of fiduciary duty that coincide with breaches (technical or otherwise) of co-existing common law duties, and breaches of fiduciary duty that do not coincide with a breach of an albeit co-existing common law duty. It is the latter category of fiduciary breaches that are potentially critical to the question of quantum.

In this context, *Fancy and Jackson* provides a prime example for solicitors of a largely benign fiduciary breach for the purposes of quantum i.e. where the particular fiduciary breach coincides with a breach of a co-existing common law duty. The fiduciary breach in question was the solicitors' failure to advise the lender that they acted also for the vendor. There was no evidence of improper motive on the part of the solicitors. Nonetheless, there being no consent, this was a breach of a solicitor's fiduciary duty to avoid a *potential* conflict of interest. This was also a technical breach of the parallel common law (tortious) duty to avoid a potential conflict of interest - 'technical' in that it would be actionable as negligence only if damage resulted from it, which, on the facts, did not. For the purpose, though, of distinguishing the type of fiduciary breach in *Fancy and Jackson* from one which would *not* coincide with a common law breach, it is submitted that the presence of such damage makes no difference. More central to that distinction is the degree of culpability at the breach stage, with the errant solicitors in *Fancy and Jackson* being in breach of fiduciary duty to the same degree of culpability sufficient for there to be a breach in any parallel allegation at common law. The breach of fiduciary duty in *Fancy and Jackson* has, for the purposes of this analysis, no independent relevance. It does have some relevance (and is, thus, referred to above as a 'largely' benign fiduciary breach), because it contributed to the common law duty that Chadwick J was able to construct, which, after all, was deemed sufficient to make the solicitors initially liable for the *whole* of the lender's loss even under the *SAAMCO* principle. But, it has no independent relevance as a fiduciary breach because Chadwick J expressly confined it to its impact on the construction of that common law duty as part of the process of determining where (and with what consequences) that duty fitted *into* the *SAAMCO* classification. It was *not* employed as a means of *avoiding* that classification altogether. To have done that, Chadwick J would have had to ascribe greater significance to the fiduciary breach. Essentially, he would have had to have found that it was a breach that could *not* coincide with a breach (technical or otherwise) of a co-existing common law duty. That, in turn, would only now be possible where the fiduciary breach had involved a higher degree of culpability than that which would suffice at common law. In such a case, a lender would argue (as in *Merrimans*) that a breach finding ought to result in damages being measured outside of the typically defendant-biased *SAAMCO* rules. Before considering the validity of that assertion, it should be noted that, for lenders, the desirability of there being such a finding goes beyond the simple initial calculation of loss. In *Fancy and Jackson*, Chadwick J observed that, particularly during the 1980s, lenders frequently contributed to such losses by lending over and above the substantial part of a property's value and that the very presence of a Mortgage Indemnity Guarantee Policy ('MIG') in many such cases could provide both evidence of the folly itself and the convenient means of measuring its extent. The solicitors found initially liable for the whole of the lender's loss were, thus, entitled to credit for the lender's contributory negligence in a sum representing the MIG. But, English law would probably only make contributory negligence allegations available to a solicitor in breach of their relevant duty at *common law*, and not in relation to a material breach of a *fiduciary duty*. Though the New Zealand Court of Appeal in *Day* v *Mead* [1987] 2 NZLR 433 have allowed a deduction on such grounds, and though there is no English authority directly on the point, it is suggested that its 'bad faith' threshold makes the current material fiduciary breach incompatible with contributory negligence.

Theoretically, then, the finding of a breach via the equitable, rather than common law, route, presents itself as a potent means of circumventing both an initial calculation of quantum under the *SAAMCO* principle and any subsequent reduction by way of contributory negligence But, this still begs fundamental questions as to the precise circumstances in which this lender's 'holy grail' might be found, and as to whether it would actually then have the desired consequences. The answer to the former question is relatively settled, which, ironically, has meant that the answer to the latter has become riddled with uncertainty.
In *Mothew* Millett LJ stated that a material breach of fiduciary duty could only arise if there was 'bad faith' on the part of the fiduciary solicitors. The lender had to prove deliberate concealment or an intention to mislead on the part of the solicitors - 'dishonesty' akin to that later spoken of by Millett LJ in the context of breach of breach of trust in *Armitage* v *Nurse* [1997] 3 WLR 1046. Mere incompetence would not suffice. The solicitor's conscience would have to be affected by virtue of a deliberate decision to prefer one client to another with full appreciation of the consequences. *Mothew* has the effect of making a solicitor liable as fiduciary in the same circumstances in which they would now be made liable to account to a third party as constructive trustee, where, in practice, an errant express trustee is not worth suing. The compatibility of the basis for and finding of liability in both cases is apparent from the decision of the Privy Council in *Royal Brunei Airlines* v *Tan* [1995] 3 WLR 64, in which it was held that constructive trusteeship could not be imposed on a 'stranger' to a trust in the absence of actual (subjectively determined) dishonesty, contrary to earlier decisions which had indicated that (objectively determined) constructive knowledge would suffice. This has, therefore, had the effect of uniting, at the point of requisite knowledge, what are essentially distinct classifications. For, it may be that a solicitor's relationship with a client makes him a fiduciary, but that that does not necessarily mean that he is a trustee. The effect of *Tan* and the other decisions made in its wake is not to eliminate the distinction between the two classifications so far as a solicitor is concerned. Rather, it is to find, in the way that a trusteeship could be imposed (constructively) upon them, the *only* basis upon which a solicitor could now be in an *actual* conflict of interest and so in material breach of fiduciary duty.

It is difficult, though, to draw unequivocal conclusions on the likely consequences of such a finding on quantum, either in relation to causation or the measure of damages question from *SAAMCO*, each, it should be emphasised, being potentially separate considerations. As for causation, there are two ostensibly conflicting lines of authority. First, there is the decision of the Privy Council in the Canadian case of *Brickenden* v *London Loan and Savings* [1934] 3 DLR 465 that common law principles of causation were 'not relevant' to the case of breach of fiduciary duty before them. Subsequently, however, in *Target Holdings* v *Redferns* [1996] 1 AC 421 the House of Lords did not follow *Brickenden*, but, instead, adopted the decision of the majority in the Canadian case of *Canson Enterprises* v *Broughton* (1991) 85 DLR (4th) 129 and held that, notwithstanding a fiduciary/trust law nature of the breach, common law principles of causation should still apply. Their Lordships acknowledged that such common law principles were not traditionally applicable in equity, but held that they would be in lender-borrower-solicitor cases, as they were essentially *commercial* transactions largely governed by contract. It should be easy to choose between these two authorities and determine that a solicitor in material fiduciary breach could at least still require a lender to establish 'but for' causation. After all, *Brickenden* is rather aged Privy Council to *Target*'s relatively recent House of Lords, and, while it has attracted a long-standing following in some Commonwealth jurisdictions, *Target* has received strong *obiter* support from Mummery L.J. in *Swindle* v *Harrison* [1997] 4 All ER 705. But, the equivocation comes from the fact that *Target* did not involve the sort of fraudulent fiduciary breach that, post-*Mothew*, a lender would need to establish if pursuing the equitable route to compensation and Mummery LJ's statements in *Swindle* are matched by *obiter* but equally strong statements by Evans LJ in the same case that, in a case of fraud, *Brickenden* would apply and common law rules on causation would not. The nature of Evans LJ's pronouncements indicates also that a court would probably award any lender able to establish a fraudulent fiduciary breach with the desired prize of quantum calculated without reference to *SAAMCO* principles that were, after all, formulated by Lord Hoffmann expressly to address a common law scenario, and to operate via a duty concept that does not seem to have its fiduciary equivalent. Such an equitable by-pass is also suggested by Chadwick J's quantum finding in *Merrimans*, and even by the Court of Appeal's subsequent correction of it in *Mothew* in that there, Millett LJ made a plea that the term 'fiduciary duty' should be limited to those duties where breach attracts different legal consequences from the breach of other duties. It must, though, be acknowledged that such a conclusion remains, strictly, untested. In *Mothew* and *Target*, fraud was not in issue at all, while, in *Swindle*, though it was, it was constructive rather than actual. Moreover, it is not clear that Evans LJ's *obiter* approval of *Brickenden* in a case of actual fraud is intended to be read with a corresponding disapproval of *SAAMCO* principles in such a case, while

it is clear that Mummery LJ thought that such principles might signal the way forward even in such cases of equitable compensation.

For practical purposes, though, even if theoretically available, *Mothew* may have all but shut the door on a lender's strategic plea of breach of fiduciary duty for the purposes of avoiding any 'cap' that *SAAMCO* might otherwise place on quantum. In the same way that, in the context of the common law duty and *SAAMCO*, *Giffen* struck at the fundamental pre-requisite of *liability*, without which a lender's ambitions as to quantum would be meaningless, so, by restricting findings of breach of fiduciary duty to the limited situations where deliberate wrongdoing can be proved, *Mothew* too has narrowed commensurably the potential for securing a more advantageous finding as to quantum, even if available. The difference here is that, where the common law at least allows theoretical scope for a lender to manipulate the content of the duty so as to overcome a *Giffen* barrier on breach and liability, the fiduciary duty, being fixed by law, does not. Moreover, the extent to which a finding of a relevant *equitable breach* could ever be facilitated by a lender's ability to manipulate the *common law duty* seems similarly limited. It may be possible for a lender to expand the common law duty through the imposition of express terms in order to produce the sort of *common law breach* that might, in turn, allow damages to be calculated in full under the *SAAMCO* principle, either because that is the consequence of a failure to meet such a duty as 'informer', or even because the solicitors' duty is actually as 'adviser'. It may even be possible, as in *Fancy and Jackson*, for a particular *fiduciary breach* to be instrumental in the creation of a *common law duty* that has such an effect. But, while *Fancy and Jackson* shows that there may be some 'backwards compatibility' between a *fiduciary breach* and the construction of a *common law duty*, it does not follow that there can be 'forward compatibility' between the common law duty, however constructed, and the elusive fiduciary breach in issue here. That is because the common law duty would be contained by a wholly different mindset, negligence and its objective tests being sufficient for breach, whereas something significantly more heinous, subjectively determined, is now necessary for there to be the material breach in equity. For the moment at least, it seems unlikely, therefore, that the common law route, over which the lender has some theoretical control, could exert a meaningful influence on the finding of a material fiduciary breach. The vulnerability, if at all, for the fiduciary solicitor, would lie more in the equitable basis of the liability itself. The fact that the liability is in equity might not, as indicated, give the *parties* much scope for influencing the question of breach, but it certainly does not preclude creativity by the *court*. Far from it. While respecting the need for certainty, the court's approach to its equitable jurisdiction is (by English standards, at least) traditionally flexible. The knowledge threshold for a material fiduciary breach provides plenty of room for such judicial flexibility, 'bad faith' not providing the most concrete means of distinguishing, in effect, between fiduciary breaches that could carry economically disastrous consequences and those that could not. That requirement is prone anyway to being re-shaped generally by parallel developments towards expanding the notion of fiduciary duty into a series of fiduciary obligations, including, in particular, a fiduciary obligation of 'good faith', a concept described by Reynolds as a 'fifth column waiting for its moment' and as 'an answer waiting for its question' (*Drawing the Strings Together*, in Birks (ed) *The Frontiers of Liability Volume II*, OUP, Oxford, 1994, at 157). More particularly, it may be that, for the moment, requiring bad faith for the fiduciary breach, in the form of subjectively determined deliberate dishonesty, corresponds with the current requirement for such actual dishonesty in order for constructive trusteeship to be imposed on a stranger to the trust. Yet, that latter requirement is itself the recent product of the court's flexible approach to equitable liability. The potential for such a radical *volte face* one way does not preclude a similarly sudden return to the former basis of liability. If the basis for the imposition of constructive trusteeship were to change in such a way, it is arguable that, though not a direct comparison of like with like, the knowledge requirement in the context of the fiduciary breach would then look out of place if construed as requiring actual fraud.

5. SUMMARY AND CONCLUSION

From this analysis of the legal and other features of the lender-borrower-solicitor relationship conclusions favourable to solicitors seem relatively easy to draw. *Fancy and Jackson* confirms the importance of duty and the typically advantageous impact it might have on ultimate quantum after *SAAMCO*. Though *Mothew* illustrates the theoretical importance of the breach enquiry in the context of a solicitor's co-existing fiduciary duties, its requirement of bad faith for the material fiduciary breach will, in practice, surely limit the availability of such a finding, or, at the very least, make a judge reluctant to award summary judgment where dishonesty is denied. *Fancy and Jackson*'s confirmation of the availability of contributory negligence allegations at common law is, solicitors would argue,

particularly appropriate to an era in which lending practices generally have been revealed to have been less than fastidious, and MIG practices in particular exposed as a somewhat distasteful means of forcing borrowers to pay the price of protecting lenders against the consequences of their own folly.

Conclusions adverse to solicitors are necessarily tentative, lying more in their potential to tip the liability and quantum see-saw in the lenders' favour than in any current detrimental effect. The most immediate threats involve the common law aspect of the duty. *Fancy and Jackson* illustrates the inherent instability of the *SAAMCO* 'informer/adviser' dichotomy in the case of a solicitor, as well as exposing the likely predominant distribution of *express* terms, targeted towards liability (post-*Giffen*) and quantum (post-*SAAMCO*), drafted by lenders in accordance with lessons drawn from defeat in *Giffen*, and made possible largely as a result of their dominant market and bargaining position. The more ominous, though less immediate, concern lies in the potential for lenders to employ the fiduciary basis of liability to deny errant solicitors the solace of contributory negligence, causation and *SAAMCO*. Removing the current uncertainty as to whether such consequences would, indeed, result from fiduciary liability would, of course, be a policy choice, which, for some judges would be an appropriate means of exacting the maximum civil penalty for fraudulent action, while, for others, it might prove too extreme a means of laying off an entire market risk on 'fraud' principles that are inherently difficult to draw. For the moment, *Mothew* may have marginalised such a strategy anyway, by making the initial finding of fiduciary fault dependent on such a high degree of culpability. But, solicitors, traditionally fearful of the common law and an expanding tort of negligence, would do well to heed the inherent elasticity of the court's equitable jurisdiction upon which their fiduciary liability rests. In future, it may be the Chancellor's foot rather than negligence's prying nose that they find poking inconveniently into their business.

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FIDUCIARIES: PRINCIPLES AND POLICY

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A highly paid agent sets out to undermine his principal's business. A doctor wangles sex-for-drugs favours from a patient. An advisor offers self-interested advice to his client. A father engages in an incestuous relationship with his child. In each case the perpetrator is clearly a wrongdoer and the law must somehow respond. But *what* is the legal wrong and *how* should the law respond?

The thesis of this paper is that it is too easy—and ultimately highly unsatisfactory—to meet any justifiable moral outrage simply by tagging these people as fiduciaries and then applying against them the full remedial force of fiduciary law.[1] If the law is to be applied consistently, predictably and efficiently, then categorisation of fact situations as illustrating particular wrongs and as meriting particular remedies must be more discriminating. There are real choices to be made in deciding how to develop this area of the law, choices which can be seen in operation in different Commonwealth jurisdictions. Albeit only in outline form, this paper puts the case for a very tightly defined notion of fiduciary obligation and an equally restrictive view of the appropriate remedial response. It points to several issues which appear to work against precision in fiduciary law, and advocates a strict response. It concludes by attempting to pinpoint what appears to be critical in identifying fiduciaries.[2]

1. Precision in legal classification and legal analysis

The drive for better remedies provides much of the modern impetus for a loose—and purely instrumental—use of the fiduciary tag. The primary objective in attaching a fiduciary label is often to obtain the advantages of a proprietary claim (via a constructive trust);[3] other incentives include the avoidance of restrictive limitation periods[4] and (more questionably) the avoidance of contractual rules on remoteness of damage.[5] The expansion necessarily inherent

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[1] As various judges have: see *USSC v Hospital Products International Ltd* [1982] 2 NSWLR 766, rev'd (1984) 156 CLR 41 (Aust HCt); *Norberg v Wynrib* (1992) 92 DLR (4th) 449 (SCt Canada); *Hodgkinson v Simms* (1994) 117 DLR (4th) 161 (SCt Canada); *M (K) v M (H)* (1992) 96 DLR (4th) 289 (SCt Canada).

[2] Much has been written on fiduciaries. See especially A Scott, 'The Fiduciary Principle' (1949) 37 Cal LR 539; LS Sealy, 'Fiduciary Relationships' [1962] CLJ 69; JC Shepherd, 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 LQR 51; T Frankel, 'Fiduciary Law' (1983) 71 Cal LR 795; PD Finn 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) ch 1; R Flannigan, 'The Fiduciary Obligation' (1989) 9 OJLS 285; Hon JRM Gautreau, 'Demystifying the Fiduciary Mystique' (1989) 68 Can Bar Rev 1; J Glover, *Commercial Equity - Fiduciary Relationships* (Butterworths, Sydney, 1995).

[3] Eg *Re Goldcorp Exchange* [1995] 1 AC 74; *Re Stapylton Fletcher* [1994] 1 WLR 1181; and *Daly v Sydney Stock Exchange* (1986) 160 CLR 371 (HCt Aust), all cases where the proprietary claim failed.

[4] Eg *Nocton v Lord Ashburton* [1914] AC 932.

[5] Eg *Hodgkinson v Simms* (1994) 117 DLR (4th) 161 (SCt Canada).

in this drive for better remedies does little to enhance the doctrinal purity of fiduciary law. One response to this is to concede the logical flaws in adopting a purely instrumental fiduciary tag, but to claim the desired remedies anyway by rejecting the notion of a necessary link between the fiduciary tag and any particular remedy. Instead, the view is taken that the common law simply provides a vast remedial menu from which it is possible to select the most appropriate response to any given set of facts.[6]

Common sense suggests that no legal system can survive, as a system, on such a footing. Before long generalised rules must develop indicating which behaviours will be punished and what form the punishment will take. Moreover, every jurisprudential theory recognises the intimate link between rights and remedies: if a remedy is altered, then the right, too, is changed. If currently-styled 'fiduciary remedies' were made available for some (or all) non-fiduciary wrongs, then of necessity this means that the underpinning right has metamorphosed. Taken to extremes, such a meta-fiduciary law has the potential to swallow whole much of contract and tort law.[7] However, this could happen only if the legal system restyled contract and tort obligations to focus on prophylactically ensuring the affirmative advancement of defendants' interests, rather than simply ensuring their protection from harm. Such a transition is not impossible, but it goes far beyond what is commonly intended by the advocates of a liberal use of the common law's 'remedial menu'.

In short, a legal system entails that rights and remedies can be subjected to some form of classification: rights only mean something in terms of the remedies they attract.[8] The difficulties in defining that system, including fiduciary obligations and their associated remedies, cannot be evaded by claiming the remedies where the rights do not exist.

2. Precision in 'fiduciary' terminology

Loose terminology is a further cause of imprecision in fiduciary law. At its worst, it engenders the assumption that any breach of obligation by a fiduciary (whether a common law or an equitable obligation) is a breach of fiduciary obligation. The carelessly accepted inference is then that preferential ('fiduciary') remedies are available. At least where the common law is concerned, such loose usage is now explicitly decried:[9] a negligent fiduciary commits a tort, not a breach of fiduciary obligation;[10] fraud, even when committed by a trustee, is a tort, not a

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[6] Eg *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301; *Butler v Countrywide Finance Ltd* [1993] 3 NZLR 623, 631 *per* Hammond J. For criticism, see the references cited in J Geltzer, 'Patterns of Fusion' in P Birks (ed), *The Classification of Obligations* (1997) ch 7, p 160 n 14. But also see EJ Weinrib, 'The Juridical Classification of Obligations' in P Birks (ed), *The Classification of Obligations* (Clarendon, 1997) ch 2, 48-51, advocating a different and more limited version of the 'remedial menu', justified simply on the basis of corrective justice.

[7] JD McCamus, 'Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada' (1997) 28 Can Bus LJ 107, 115.

[8] See J Stapleton, 'A New 'Seascape' for Obligations: Reclassification on the Basis of Measure of Damages' in P Birks (ed), *The Classification of Obligations* (Clarendon, 1997) ch 8.

[9] See the cases cited in the footnotes immediately following, and also *Clark Boyce v Mouat* [1994] 1 AC 428, 437 *per* Lord Jauncey; *NZ Netherland Soc v Kuys* [1973] 1 WLR 1126, 1130 (PC) *per* Lord Wilberforce; *Permanent BS v Wheeler* (1994) 14 ACSR 109, 157 *per* Ipp J; *Breen v Williams* (1996) 70 ALJR 772, 807.

[10] See *Henderson v Merrett Syndicates Ltd* [1994] 3 WLR 761, 799 *per* Lord Browne-Wilkinson; *White v Jones* [1995] 2 WLR 187, 209-10 *per* Lord Browne-Wilkinson; *Bristol & West BS v Mothew* [1996] 4 All ER 698, 710, 712 *per* Millett LJ (although referring to an equitable duty of care); *Girardet v Crease & Co* (1987) 11

breach of trust;[11] an obligation to perform a contractual undertaking honestly and conscientiously does not imply that the obligation is fiduciary;[12] finally, an obligation to make restitution is not fiduciary.[13]

The related recognition that not all breaches of equitable obligations are breaches of fiduciary obligation seems later in coming. True, such terminology is a matter of choice; but the underlying distinctions need explicit recognition.[14] The term 'fiduciary' could be used quite generally to refer to all persons subjected to equitable obligations.[15] But then separate terms would be needed to differentiate between individuals subjected to some but not all of the different equitable ('fiduciary') obligations. It seems preferable to adopt a much narrower usage. Here the term 'fiduciary' is confined to those individuals who are subjected to obligations of loyalty (ie obligations of self-denial). The advantage of such restricted usage is that a concise tag conveys a precise meaning. Certainly, and perhaps for this reason, such usage appears to be gaining hold.[16] Adopting this usage, a breach of confidence is not a breach of fiduciary obligation,[17] nor is a failure to act in good faith in the interests of the beneficiary and for proper purposes[18]—although both are breaches of equitable obligations.[19] To say that individuals occupying certain posts are often subject to all three forms of equitable obligation—fiduciary obligations, obligations of confidence and obligations of good faith and proper purposes—is no more significant than to say that the same individuals are often also subject to obligations in contract, tort and unjust enrichment.

BCLR (2d) 361, 362 *per* Southin J; *LAC Minerals Ltd v International Corona Resources Ltd* [1989] 2 SCR 574, 647, 61 DLR (4th) 14 (SCt Canada) *per* La Forest J and 597-8 *per* Sopinka J.

[11] *Paragon Finance plc v Thakerar & Co (a firm)* Times, 7 August 1998 (CA) *per* Millett LJ.

[12] *Re Goldcorp Exchange Ltd* [1994] 2 All ER 806, 821 *per* Lord Mustill.

[13] The cases do not seem to have gone so far yet, but see *Bishopsgate Investment Management Ltd v Maxwell (No 2)* [1994] 1 All ER 261; *Target Holdings Ltd v Redferns* [1997] 1 AC 421, 432-9 *per* Lord Browne-Wilkinson (although counsel conceded a breach of fiduciary duty). Also see D Hayton, 'Fiduciaries in Context: An Overview' in P Birks (ed), *Privacy and Loyalty* (Clarendon, 1997) Ch 11, pp 286-90; J Heydon, 'Causal Relationships Between a Fiduciary's Default and the Principal's Loss' (1994) 110 LQR 334. On the views advanced here, an obligation to restore a trust fund which has been paid away without authority ought to be seen simply as restitution for unjust enrichment.

[14] And such recognition is slowly emerging: see, eg, L Hoyano, 'The Flight to the Fiduciary Haven' in P Birks (ed), *Privacy and Loyalty* (Clarendon, 1997), ch 8, p 191, citing cases decided on a loose 'fiduciary' basis, but now seen as better explained on alternative bases.

[15] This is how the term is used in PD Finn, *Fiduciary Obligations* (Law Book Co, Sydney, 1977), see p 2.

[16] See *Bristol & West BS v Mothew* [1996] 4 All ER 698, 710, 712 *per* Millett LJ; *Breen v Williams* (1996) 70 ALJR 772, 793-9 *per* Gaudron and McHugh JJ, 782 *per* Dawson and Toohey JJ, 808 *per* Gummow J; *Warman v Dwyer* (1994) 182 CLR 544 (Aust HCt). Also see D Hayton, 'Fiduciaries in Context: An Overview' in P Birks (ed), *Privacy and Loyalty* (Clarendon, 1997) ch 11, pp 286-90; R P Austin, 'Moulding the Content of Fiduciary Duties' in AJ Oakley (ed), *Trends in Contemporary Trust Law* (OUP, 1996) ch 7, p 156-9; P Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) ch 1.

[17] *Indata Equipment Supplies Ltd (trading as Autofleet) v ACL Ltd* Times, 14 August 1997 (CA).

[18] *Breen v Williams* (1996) 70 ALJR 772, 793-9 *per* Gaudron and McHugh JJ; *Sidaway v Governors of Bethlem Royal Hospital* [1985] AC 871, 884 *per* Lord Scarman, and [1984] 1 All ER 1019 (CA), 1032 *per* Browne-Wilkinson LJ.

[19] See *Hodgkinson v Simms* [1994] 3 SCR 377, 411-2 *per* La Forest J, pp 464, 466 *per* Sopinka and McLachlin JJ (diss). In this context, a further comment on categorisation is warranted. The doctrine of undue influence (albeit an equitable doctrine discussed at length in texts on equity) is completely independent of and distinct from the various equitable *obligations*, including fiduciary obligations, being considered here. Undue influence concerns the sufficiency of consent; it enables a transaction (whether by gift or contract) to be set aside: in short, it is a doctrine relevant to the law of unjust enrichment. See D Hayton, 'Fiduciaries in Context: An Overview' in P Birks (ed), *Privacy and Loyalty* (Clarendon, 1997) ch 11, p 286. But see *CIBC Mortgages plc v Pitt* [1993] 4 All ER 433, 439-40 *per* Lord Browne-Wilkinson, querying the difference, if any, between fiduciary

In short, fiduciary terminology should be used carefully and restrictively, so that fiduciary law operates *only* to exact loyalty; it does not concern itself with matters of contract, tort, unjust enrichment and other equitable obligations (such as breach of confidence).[20]

3. Rationalising the law/equity divide

A further concern to modern fiduciary law is the relevance and significance of the traditional law/equity divide. One suggestion for avoiding the difficulties in defining fiduciaries is to subsume equitable (including fiduciary) obligations under the common law umbrella of contract, tort and unjust enrichment. Certainly common sense suggests that 'the law' must respond to injustices, and that its response ought to be right the first time: there should be no place for an initial 'common law' response subsequently overridden by a different 'equitable' one. The history of the law's evolution—and the fact that certain developments took place in physically distinct courts—should not be allowed to overshadow the truth that the whole process, in all the courts and legislatures, has simply been a movement towards further refinement and sophistication of the legal *system*. It ought by now to be possible to see the law as it is, in its entirety, without the need to rehearse forevermore the saga of its development. Certain contracts are simply specific enforceable; there should be no need to add, each time, the historical truth that initially the common law would only award damages, but that subsequently equity allowed orders for specific performance. Similarly with contracts which are subject to rescission (in equity!) for mistake or misrepresentation.

Even accepting this, it remains true that fiduciary law—and the law relating to other equitable obligations—demands separate treatment. It is not simply an evolutionary and sophisticated gloss on the common law of contract, tort or unjust enrichment.[21] Fiduciary obligations cannot be classed as a sub-category of contract: they do not arise by process of offer and acceptance supported by consideration; the remedies for their breach are not aimed at placing the victim, so far as money can do it, in some pre-agreed end-position. Nor are these obligations a sub-category of tort. Like tort (and unjust enrichment), they are obligations imposed by operation of law rather than by agreement, but there the similarities end. The policy imperatives which underpin fiduciary obligations are quite different from those underpinning tort, and neither mirror those underpinning unjust enrichment.[22] These differences have ensured that the remedial consequences for all three remain appropriately distinct. It follows that the three should necessarily be seen as different and distinct subdivisions of the law.

If these differences are conceded, then it might be possible to eliminate the distracting and traditionally unhelpful 'equitable' tag by siting all the conventional 'equitable' obligations under the umbrella term of 'obligations of good faith and loyalty'. The class would include

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obligation and presumed undue influence. Also see PD Finn, *Fiduciary Obligations* (Law Book Co, Sydney, 1977) ch 16; LS Sealy, 'Fiduciary Relationships' [1962] CLJ 69, 79, where undue influence is discussed in the context of fiduciary obligations.

[20] P Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) ch 1, p 28.

[21] See J Geltzer, 'Patterns of Fusion' in P Birks (ed), *The Classification of Obligations* (1997) ch 7, pp 166-7 and the references cited.

[22] See S Worthington, 'Reconsidering Disgorgement for Wrongs' (forthcoming).

fiduciary obligations, obligations of confidence, and duties to act bona fide and for proper purposes. This distinct class would permit formal recognition of the significant divisions between contract, tort, unjust enrichment and 'obligations of good faith and loyalty', but would consign to legal history the chronology and place of the various developments. A side-benefit of this more open-faced classification would be to deny the option for surreptitious and discriminatory law reform—of either remedies or obligations themselves—by the simple device of attaching an 'equitable' tag to a defendant.[23]

4. Rationalising the incidence of fiduciary obligations

Even if it is conceded that fiduciary obligations are obligations of loyalty imposed by law rather than by agreement[24] and contained within a wider category of obligations of good faith and loyalty, the central issue remains: when will such obligations be imposed? The issue has inspired numerous academic writers, many reciting theories too well-known to need rehearsing here. Also too well-known is the disappointing fact that none so far has satisfactorily defined the circumstances which give rise to the obligation.

Commentators have tended to focus on relationship descriptors, assuming that when similarly styled relationships arise one party will be bound by fiduciary obligations.[25] Mason J in *Hospital Products v United States Surgical Corporation*[26] isolated what are frequently seen as the central ideas underpinning fiduciary relationships:

> 'The critical feature of these relationships is that the fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion which will affect the interests of that person in a legal or a practical sense. The relationship between the parties is therefore one which gives the fiduciary a special opportunity to exercise the power or discretion to the detriment of that other person who is accordingly vulnerable to abuse by the fiduciary of his position. The expressions 'for', 'on behalf of' and 'in the interests of' signify that the fiduciary acts in a 'representative' character in the exercise of his responsibilities.'[27]

This quotation earmarks the characteristics commonly asserted to be critical in determining the incidence of fiduciary obligations: one party entrusts property to another; or undertakes to act in the interests of another; or relies on another; or is vulnerable to abuse by another;[28] or is able

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[23] See the later comments.

[24] PD Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) Ch 1, p 54. 'Imposing' these obligations remains controversial: see L Smith, 'Fiduciary Relationships - Arising in Commercial Contexts - Investment Advisors: *Hodgkinson v Simms*' (1995) 74 Can Bar Rev 714, 717: a person 'cannot become a fiduciary unless he or she wills it'; also see L Hoyano, 'The Flight to the Fiduciary Haven' in P Birks (ed), *Privacy and Loyalty* (Clarendon Press, 1997) Ch 8, pp 182-3, asserting that fiduciary relationships outside the traditional categories require an express or implied undertaking to act solely in the interests of another, an undertaking which parallels the assumption of responsibility doctrine in tort.

[25] The most popular theories are critiqued in JC Shepherd, 'Towards a Unified Concept of Fiduciary Relationships' (1981) 97 LQR 51.

[26] (1984) 156 CLR 41.

[27] *Ibid* 96-7. Also see Lord Browne-Wilkinson in *White v Jones* [1995] 2 AC 206, 271: 'The paradigm of the circumstances in which equity will find a fiduciary relationship is where one party, A, has assumed to act in relation to the property or affairs of another, B'.

[28] This idea is especially relied on in Canadian cases: see, eg, *LAC Minerals v International Corona Resources* (1989) 61 DLR (4th) 14, 63 *per* Sopinka J; *Guerin v R* (1984) 13 DLR (4th) 321(SCt Canada)); *Frame v Smith*

to exercise a discretion affecting the other.[29] But the difficulty has always been that these descriptors, although apt to describe relationships where fiduciary obligations *are* imposed, are often equally apt when such obligations are absent.[30] It follows that they cannot adequately and restrictively define the incidence of fiduciary obligations.

Fewer commentators have focused on the social purpose of the fiduciary obligation itself. This must surely be the starting point for any analysis of the incidence of the obligation: legal 'rules' must be linked to the particular social purpose for which they were devised, [31] albeit the link may only be apparent with hindsight. Fiduciary law originated in public policy.[32] To that extent it has parallels with negligence and, as with negligence, it can be expected to adapt to reflect changing social standards. This is already evident in the incursions of fiduciary law into commerce,[33] incursions justified by economic analysis.[34]

What is suggested here is that fiduciary obligations should be imposed not simply when certain descriptors are apt, but when the very *function* or *purpose* or *reason* for one party's role in relationship *demands* that the party operate on the basis of self-denial. This condition is not met simply because one party would prefer the other to act selflessly, or has assumed this to be the case; nor is the condition denied simply because it is conceivable that the subject's interests can be served notwithstanding selfish behaviour.[35] All of our law is directed at protecting the interests of parties to a relationship (consensual or otherwise). Imposition of an obligation of self-denial affords ultimate protection, but it operates as a sledge-hammer: it ought to be used only when absolutely necessary. Arguably it is needed only if, without it, the subject would be left with no effective legal means of monitoring the relationship; if, without it, obligations imposed in contract or tort, or by a duty to act for proper purposes, would be insufficient for the task. As a defining characteristic, this purpose-based requirement appears very elastic. However, it ought to prove no more difficult to apply than the search for implied terms in contract, or a duty of care in negligence.

This restrictive test for the imposition of fiduciary obligations is met by what are currently styled the 'status-based' fiduciary relationships—trustee and beneficiary, director and company, partners, and certain agents and their principals. Maybe outside these nominated categories there is never, or rarely ever, a justification for imposing fiduciary obligations. Certainly great care needs to be exercised in discriminating between these relationships—which clearly demand the protection of fiduciary law—and relationships where

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(1987) 42 DLR (4th) 81 (SCt Canada), 98-9 *per* Wilson J, dissenting. This focus on vulnerability has been criticised as evidencing a departure from the core fiduciary notion of the defendant's selflessness: see LS Sealy, 'Fiduciary Obligations Forty Years On' (1995) 9 JCL 37, 40.

[29] See E Weinrib, (1975) Uni of Toronto LJ 1, 7; *Guerin v R* (1984) 13 DLR (4th) 321, 341 *per* Dickson J.

[30] For example, the characteristics are equally apt to describe the relationship between home-owner and house-painter, diner and chef, driver and other road-users, all relationships accepted as adequately protected by contract and tort law.

[31] J Hackney, 'More than a trace of the old philosophy' in P Birks (ed), *Classification of Obligations* (Clarendon, 1997) Ch 6, 126.

[32] P Finn, 'The Fiduciary Principle' in TG Youdan (ed), *Equity, Fiduciaries and Trusts* (Carswell, Toronto, 1989) ch 1, p 27. Also see *Welles v Middleton* (1784) 1 Cox 112, 124-5, where fiduciary status was justified as necessary 'for the preservation of mankind.'

[33] J Glover, *Commercial Equity - Fiduciary Relationships* (Butterworths, Sydney, 1995) pp 17-8.

[34] GK Hadfield, 'An Incomplete Contracting Perspective on Fiduciary Duty' (1997) 28 Can Bus LJ 141.

[35] As in *Boardman v Phipps* [1967] 2 AC 46.

the protection afforded by tort and contract (including recourse to equitable doctrines of misrepresentation, undue influence and unconscionable bargains) fully meets the needs and purposes of the parties' engagement.[36]

Finally, none of this necessarily defines or limits the interests which might be protected by a fiduciary obligation demanding loyalty or self-denial. Clearly a subject's economic interests fall most naturally to be protected: the central purpose of many relationships where fiduciary obligations are deemed appropriate is the protection or advancement of these interests. It requires separate argument, however, to assert that fiduciary obligations should be *limited* to protecting economic interests. Nevertheless, this does seem to be the better view. Bodily integrity, privacy, freedom of information, family and community values, and such like appear to be inappropriate subjects for protection via an obligation of *loyalty*.[37] If the law is inadequate in these different areas, then there should of course be pressure for reform. However, fiduciary obligations ought not to be used as a back-door route to law reform of private law obligations and public law protections: this perpetrates in all its worst guises the common law/equity divide discussed earlier.

5. Remedial constraints

As noted earlier, part of the drive for a loose application of fiduciary principles is the attraction of preferential remedies. But the reverse is also a problem. Given an established fiduciary relationship, there is a growing tendency to assert, or assume, that the remedial consequences are not limited to disgorgement of profits (either via personal accounting or a constructive trust, or by rescission of the impugned transaction), but include damages or equitable compensation.[38] When there has been a breach of loyalty, the appropriate remedy, for very good reasons, is disgorgement.[39] For reasons noted earlier, recourse to a wide common law 'remedial menu' is not advocated; it would fundamentally alter the rights being protected. If damages are desired, then a claim needs to be based on proof that other obligations, directed at preservation from harm, have been breached.[40] Often this will not be difficult, but the technical exercise will assist in preserving the structure and content of the rights in issue—or at least in ensuring that any alteration is intentional.

6. Conclusions

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[36] Courts already concede that the finding of a fiduciary relationship between the parties must create 'obligations of a different character from those deriving from the contract itself' (*Re Goldcorp Exchange* [1995] 1 AC 74, 98), obligations which 'support and supplement the other [ie the contractual obligations] and cover matters not provided for by the other'. Also see LS Sealy (1995) 8 JCL 142 and (1995) 9 JCL 37, nn 56, 57.

[37] This appears to be accepted by English and Australian courts: see L Hoyano, 'The Flight to the Fiduciary Haven' in P Birks (ed), *Privacy and Loyalty* (Clarendon, 1997) ch 8, p 173 and the references cited; D Hayton, 'Fiduciaries in Context: An Overview' in P Birks (ed), *Privacy and Loyalty* (Clarendon, 1997) ch 11, p 291-2. But for the contrary approach, see, eg, *Norberg v Wynrib* [1992] 2 SCR 226, 92 DLR (4th) 229, 268-9 and 275 *per* McLachlin J; *Frame v Smith* [1987] 2 SCR 99, 143, 42 DLR (4th) 81 *per* Wilson J; *M (K) v M (H)* (1992) 96 DLR (4th) 289 (SCt Canada).

[38] See JD McCamus, 'Prometheus Unbound: Fiduciary Obligation in the Supreme Court of Canada' (1997) 28 Can Bus LJ 107, 112-3, 129-30.

[39] See S Worthington, 'Reconsidering Disgorgement for Wrongs' (forthcoming).

[40] See J Stapleton, 'A New 'Seascape' for Obligations: Reclassification on the Basis of Measure of Damages' in P Birks (ed), *The Classification of Obligations* (Clarendon, 1997) ch 8.

The conclusions can be shortly stated. Fiduciary obligations are imposed by private law, but their function is public and their purpose social.[41] Accepting this, then although all human interaction cannot sensibly be based on putting others' interests first, some must. When self-denial is *necessary* to achieve the purpose of a relationship, then, and only then, should fiduciary obligations be imposed. In assessing this the focus is squarely on the role undertaken by the fiduciary, not on the individual personal characteristics of either party. More often than not imposition of an obligation of self-denial is unwarranted: the parties interests are adequately protected by obligations imposed in contract, tort, unjust enrichment and so forth. All these bodies of law have been attenuated to meet the perceived and growing needs of parties, and no doubt this development will continue. In those rare situations where an obligation of loyalty and self-denial *is* necessary, its social significance is acknowledged by applying the punitive and prophylactic remedy of disgorgement in cases of breach. In short, the suggestion is that fiduciary law should not be the growing area that is sometimes alleged.[42]

[41] See L Wedderburn 'Trust, Corporation and the Worker' (1985) 23 Osgoode Hall LJ 203, 221.

[42] See T Frankel, 'Fiduciary Law' (1983) 71 Calif Law Rev 795, 798, asserting that 'society is evolving into one based predominantly on fiduciary relations.'

Constructive Trusts and Constructive Trustees
Draft Version

In the law reports, cases about "constructive trusts" and about "constructive trustees" are not hard to find. They multiply year by year, in contexts as diverse as commercial fraud[1] armed robbery,[2] mistaken payments[3], breach of confidence,[4] and, perhaps famously (or infamously) in Hong Kong, breach of public trust.[5] But these are slippery terms. What is constructive about a constructive trust? And about a constructive trustee? What do these terms mean in the modern world? Does the language of constructive trusts and constructive trustees help us, or does it get in the way of the rational development of this branch of the law?

1. "Constructive"

We have quite a lot of "constructive" in different parts of our law. In personal property we have constructive possession and constructive delivery. In the criminal law we have, or have had, constructive murder, constructive manslaughter, constructive malice. When we are concerned about what people may or may not have known, we have constructive knowledge and constructive notice. What does it mean? In 1990, Sir Robert Megarry said, " Constructive' seems to mean 'It isn't, but has to be treated as if it were.'"[6] Sometimes concepts originate as legal fictions; that is, the pretence of something which, if true, would lead to a desired result under accepted principles. The best known example lies in the action of ejectment, which gave a lessee of land a form of legal recourse which was superior to that available to a freeholder. Inevitably, the plaintiff claiming under a freehold would allege that he had leased the land to John Doe, and that John Doe had been dispossessed by the defendant, so John Doe would sue in ejectment.[7] John Langbein has described a legal fiction as a situation in which you know the result you want, but you have no theory to get you

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1 *Agip (Africa) Ltd. v. Jackson* [1990] Ch. 264, aff'd [1991] Ch. 547 (C.A.).

2 *Brinks Ltd. v. Abu-Saleh (No 3)* The Times, 23 Oct 1995; noted R. Stevens [1996] Conv. 447.

3 *McDiarmid Lumber Ltd. v. C.I.B.C.* (1993) 94 DLR (4th) 227 (B.C.S.C.).

4 *LAC Minerals Ltd. v. International Corona Resources Ltd.* (1989) 61 DLR (4th) 14 (S.C.C.).

5 *Attorney-General for Hong Kong v. Reid* [1994] 1 AC 324 (P.C., N.Z.).

6 Rt Hon Sir Robert Megarry, "Historical Development" in *Special Lectures of The Law Soeiety of Upper Canada* 1990--*Fiduciary Duties* (Toronto: De Boo, 1991), 1 at 5.

7 J.H. Baker, *Introduction to English Legal History*, 3 ed. (London: Butterworths, 1990), at

there.[8] In the case of ejectment, the desired result, dictated by logic, was that freeholders should be as well protected as leaseholders; but no argument of mere logic was any match for the weight of history, which insisted that the relatively informal action of ejectment was for leaseholders only, and that freeholders must use more cumbersome processes. In the classical pattern of fictions, a respectable amount of time must pass with legal practice held in the thrall of the fiction; it can only be acknowledged, and so discarded, when lawyers are prepared to admit that they have changed the law without recourse to legislation. Then the theory can emerge from the shadows; it simply wouldn't make sense , for leaseholders to be better protected than freeholders.[9]

"Constructive" is a little more honest than a full-blown legal fiction. Take constructive knowledge. Knowledge of something may suffice for some result; for example, knowledge of another's equitable interest may alter the priority enjoyed by that interest. Then we must consider the case of someone who does not know of another's interest, does not really *know* of it, but only because he has been careful not to remove the doubt that he now relies upon. We might well decide that this person should be treated as if he knew. We say he had constructive knowledge. It is not quite a fiction. A fictional approach would be to say, "He knows," and not allow him to make the argument that he did not really know, just as the defendant in ejectment was not allowed to say that John Doe did not exist. " 'Constructive' seems to mean 'It isn't, but has to be treated as if it were.' " By calling it *constructive* knowledge, we admit up front that it is not knowledge. What this means is that we have to say what it is. Unlike in a fiction, we need a theory.

While the "constructive" approach is not overtly fictional, still it smacks of mystery, obscurity difficulty. If the relevant effect is triggered by genuine knowledge or by closing one's eyes to the obvious, then genuine knowledge is sufficient but not necessary. This is obscured if we say that what is necessary is "knowledge, actual or constructive." So why do we do it? It is not a trick to conceal a change in the law, since "constructive" admits to the ruse. It appears to be a different kind of trick: one which yields a kind of simplicity. If we have "knowledge, actual or constructive,' then we have only one triggering concept: knowledge. If the bailor in a bailment at will is in "constructive possession,"[10] while the bailee is in actual possession, then we can go on saying that a transfer of possession is necessary to create a pledge, even while we let the bailor create one. At common law the mens rea for murder was "malice aforethought," meaning an intention to kill. If an intention to cause really serious harm is "constructive malice," then a person with that intention can be convicted even while we insist that malice aforethought is required. "Constructive" allow

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[8] W. Cornish *et al..*, EDS., *Restitution: Past, Present and Future* (Oxford: Hart Publishing, 1998), at

[9] It should always be remembered that no contemporary lawyer was actually deceived by the fiction (although fictions can lay dangerous traps for legal historians; see Baker, above note 7, at .). The logical impetus for the fiction was present to everyone's mind. This presents a fascinating question, but one which is sociological or psychological rather than legal: who were they trying to fool? [cf Llewellyn?]

[10] R. Goode, *Commercial Law*, 2 ed. (London: Penguin Books, 1995), at

us to multiply operative, triggering concepts, even while we pretend that we are only subdividing a them.

II. "Constructive Trust"

There is one place where this view of "constructive" appears not to fit, and that is constructive trusts. The reason is that a constructive trust is really a trust.[11] The only way to fit constructive
trusts in with the usual idea of "constructive" is to suppose that when the phrase originated.[12] the context was that "trust" meant express trust." Although the phrase "constructive express trust seems like a contradiction in terms, it actually aligns with the way we use "constructive elsewhere. The view outlined above was that "constructive" allows us to have more operative or higher-order concepts while pretending that we are dealing with a static number and merely subdividing them. In line with that, the seventeenth century view could have been that there were just "trusts," the paradigm of which was the (express) family settlement. Then, the relatively small number of constructive trusts were treated as a subdivision: "it isn't [an express trust], but has to be treated as if it were." In the modern world, we acknowledge more fully that there can be perfectly good trusts which are not express trusts; and yet we continue to call some of them constructive.[13]

III. "Constructive Trustee"

Sometimes a defendant is alleged to be "liable to account as a constructive trustee." There are three main categories of cases: trustees de son tort, who have taken it upon themselves to act as trustees; "knowing assisters," those who dishonestly assist in a breach of trust; and "knowing recipients," those who receive trust property with some level of cognition that the

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[11] This, I take to be the orthodox English view. In the U.S. and Canada, it is argued by some that a constructive trust is not really a trust at all (see A.W. Scott and W.F. Fratcher, The Law of Trusts, 4 ed. (Boston: Little, Brown and Co., 1989), at; D.W.M. Waters, "The Constructive Trust in Evolution: Substantive and Remedial" in S. Goldstein, ed., *Equity and Contemporary Legal Developments* (Jerusalem: Sacher Institute, 1992), 457; this paper is also at (1991) 10 E.T.J. 334. Thus, "constructive trust" makes perfect sense: "it isn't [a trust], but has to be treated as if it were."

[12] The Statute of Frauds 1677 exempted from writing requirements "trusts which arise or result by operation or construction of law." check Youdan 84 CLJ

[13] Another way of looking at this development is that the consensus as to what is essential to the concept of "trust" has changed; it has ceased to include the idea of voluntary creation. But it is not totally clear that there is a stable consensus as to what is left. On one view, the essence of the trust is the split between beneficial title and administrative title; on another view *(Westdeutsehe Landesbank Girozentrale v. Islington London B.C.* [1996] A. C. 669, per Lord Browne-Wilkinson), more is required, namely that the trustee be subject to personal obligations similar to those of an express trustee. See birks, smith.

property is subject to the rights of a beneficiary.[14] These claims are personal ones, which establish a liability on the part of the defendant to pay a sum of money; they are not proprietary claims which establish that the defendant holds property on trust for the plaintiff. So there is a tendency to deprecate the traditional form of pleading which alleges that the defendant is "liable to account as a constructive trustee."[15] Since there is no allegation that there is a constructive trust, or any kind of trust, anywhere in the picture, why plead the case in this way?

The interesting thing is that an allegation that the defendant is a constructive trustee makes more sense than the allegation of a constructive trust. We have already seen that "constructive trust" represents a non-standard usage of "constructive." If the allegation that the defendant is a constructive trustee were to fall in line with the usual understanding of "constructive," it would be an allegation that " [he] isn't [a trustee], but has to be treated as if [he] were." Why might a plaintiff plead his case that way?

The reason appears to lie in the logic of the trust. Prima facie, the beneficiary of a trust cannot sue anyone except his trustee.[16] This is part of the package of legal incidents which is delivered when parties choose to use the trust institution to order their affairs; in other words, when they choose to entrust assets to their trustee.[17] Now, if the beneficiary finds a defendant who has received trust property in such a way that it remained subject to the trust, then that defendant is a trustee of that property for the beneficiary, and so the action for an appropriate declaration and consequential relief is an action against a trustee. But if the beneficiary is trying to make a defendant personally liable for something the defendant has done, it is not so easy. The defendant does not now hold, and perhaps never has held, property in trust for the plaintiff. And here, the logic of the long-winded formula comes into its own: to allege that the defendant is liable to account as a constructive trustee is not to

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[14] See generally S. Gardner, "Knowing Assistance and Knowing Receipt: Taking Stock" (1996) 112 L.Q.R. 56.

[15] *Royal Brunei Airlines Sdn Bhd v. Tan* [1995] 2 A.C. 378 (P.C., Brunei), at; and articles [].

[16] *Hayim v. Citibank NA* [1987] A.C. 730 (P.C., H.K.); *Parker-Tweedalev. Dunbar Bank plc (No I)* [1991] 1 Ch. 12, CA; *Bradstoek Trustee Services Ltd. v. Nabarro Nathanson* [1995] 1 W.L.R. 1405.

[17] Here again we see the continuing influence of the original conceptualisation of the trust as extending only to express trusts. The idea that one's remedies should be limited by the logic of the trust makes very little sense to someone whose trust is a constructive one, arising say following a fraud. But this plaintiff is not bound by the logic of the trust; rather, the (constructive) trust is merely one tool available to her. In other words, while the beneficiary of an express trust will not generally be able to deploy a negligence theory against a third party even if the latter was aware of the trust (*ibid.*), the victim of a fraud can simply set aside the trust theory, or use it as an alternative, while attempting to rely on negligent causation of pure economic loss.

allege that the defendant is really a trustee, nor that he ever was, nor that there is or ever was a constructive trust, it is simply to allege that the defendant should be personally liable to the plaintiff, who is (supposedly) only allowed to sue his trustee.

As we saw above, "constructive" multiplies operative categories by nominally subdividing them. In this context, it preserves the appearance that beneficiaries can only sue one type of defendant--their trustees--while in fact adding other categories. But unlike a genuine fiction its ruse is an open one, proclaimed by the word "constructive." In other words, once we allow such a thing as liability to account as a constructive trustee, we have to start deciding who qualifies as one. A great deal has been written.[18] One long-running is whether a recipient of trust property should be strictly liable, subject to defences, rather than being liable only on the showing of some level of cognition regarding the trust.[19] Such debates are healthful and enlightening, but one recent trend might be doubtful: that is, the desire to distinguish between "receipt-based" liability and liability "as a constructive trustee."[20] The reason it is doubtful is that, as has been discussed above, the function of "as a constructive trustee" is nothing more than to get around the normal rule of trust law, which is that beneficiaries can only sue their trustees. "Liability as a constructive trustee" might as well be read as "liability (even though the defendant is not actually a trustee)." In that light, to contrast it with "receipt-based" liability or with "strict liability" would be to compare like with unlike. This observation, on its own,
does not much advance the debate on whether liability should be strict or fault-based: to say that a defendant is "liable as a constructive trustee" is just to say that he is liable even though he is not actually a trustee, it says exactly nothing about what makes someone liable. But it is worth noticing that there is no mileage in a strategy which attempts to sidestep the accumulated authority on what makes someone "liable to account as a constructive trustee" by asserting that "receipt-based" liability is different and so the same conditions need not apply

IV. Constructive Trust and Constructive Trustee

In a simple world, the trustee of a constructive trust would be a constructive trustee. But if what has been said above is correct, that is not right. The constructive trust is a trust, and its trustee is a genuine trustee, holding property in trust; whereas the one thing that the constructive trustee is not is a trustee who holds property in trust. The world is therefore more complex and confusing than it might be, and the reason is that the word "constructive" is used in a unique sense in the formula "constructive trust." At the very least, we have to distinguish two senses of "constructive trustee": one is its usage in the formula "liable to account as a constructive trustee," and the other is the sense in the phrase "trustee of a constructive trust."

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[18] harpum, gardner.

[19] birks; smith.

[20] Lord Nicholls of Birkenhead, "Knowing Receipt The Need for a New Landmark" in W. Cornish *et al., eds., Restitution. Past, Present and Future* (1998); J. Martin, "Recipient Liability after *Westdeutsehe*" [1998] Conv. 13.

The full quotation from Sir Robert Megarry is, " 'Constructive' seems to mean 'It isn't, but has to be treated as if it were, and the less of this there is in the law, the better."[21] Most lawyers would probably agree with the final sentiment. "Constructive" is not fully fictional, but neither is it fully transparent. Can we dispense with it? On the present state of the law, not in respect of constructive trusts, for as we have seen they are not really "constructive" at all. We could, however, stop talking about "liability to account as a constructive trustee" and just identify instances where a defendant is liable to a beneficiary even though that defendant is not a trustee. We seem to be well along this road, a road leading to better terminology and therefore clearer analysis.[22] But it is important to remember that all of the effort which has gone into answering the question, "Who is liable to account as a constructive trustee?" has gone into answering what is the very same question, albeit with improved terminology: "Who is personally liable to trust beneficiaries despite not being a genuine trustee?" This learning cannot be sidestepped by saying that we are going to make a non-trustee defendant liable, but not liable as a constructive trustee; that is a contradiction in terms.

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[21] Above, note 6.

[22] Above, note 15.

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I. "Constructive"

We have quite a lot of "constructive" in different parts of our law. In personal property we have constructive possession and constructive delivery.[6] In the criminal law we have, or have

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[6] R. Goode, Commercial Law, 2 ed. (London: Penguin, 1995), at 48, 277-278.

had, constructive manslaughter and constructive malice.[7] When we are concerned about what people may or may not have known, we have constructive knowledge and constructive notice. What does it mean? In 1990, Sir Robert Megarry said, " 'Constructive' seems to mean 'It isn't, but has to be treated as if it were.' "[8] Sometimes concepts originate as legal fictions; that is, the pretence of something which, if true, would lead to a desired result under accepted principles.[9] The best known example lies in the action of ejectment, which gave a lessee of land a form of legal recourse which was superior to that available to a freeholder. Inevitably, the plaintiff claiming under a freehold would allege that he had leased the land to John Doe, and that John Doe had been dispossessed by the defendant; so John Doe would sue in ejectment.[10] What is the point of such fictions? They allow lawyers to change the law without admitting it. In the words of Maine, "They satisfy the desire for improvement ... at the same time that they do not offend the superstitious disrelish for change which is always present."[11] In the case of ejectment, the desired improvement, dictated by logic, was that freeholders should be as well served by the law as leaseholders; but no argument of mere logic was any match for the weight of history,

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[7] J.C. Smith and B. Hogan, Criminal Law, 8 ed. (Butterworths: London, 1996), at 358, 378.

[8] Rt. Hon. Sir Robert Megarry, "Historical Development" in Special Lectures of The Law Society of Upper Canada 1990 — Fiduciary Duties (Toronto: De Boo, 1991), 1 at 5.

[9] There is a narrower sense of "fiction," well-known to Roman and English lawyers alike, which is confined to matters of pleading but which is also accurately described by the formulation in the text. This narrower sense refers to the making of a false allegation which the other party is not permitted to deny. On the two senses, see H. Maine, Ancient Law (London: Dent, 1917), at 15-16 (this is a repaginated reprint of a book originally published in 1861).

[10] In fact he might allege that John Doe had been dispossessed by Richard Roe, fictional lessee of the real of the defendant. See J.H. Baker, Introduction to English Legal History, 3 ed. (London: Butterworths, 1990), at 341-343.

[11] Maine, above, note 9 at 16. See also S.F.C. Milsom, "Trespass from Henry III to Edward III (1958) 74 L.Q.R. 195 and 561, discussing (at 223) fictions in the narrower sense (on which see above, note 9): "The aim of fictions ... is to keep records straight."

which insisted that the relatively informal action of ejectment was for leaseholders only, and that freeholders must use more cumbersome processes.[12]

"Constructive" is a little more honest than a full-blown legal fiction. Take constructive knowledge. Knowledge of something may suffice for some result; for example, knowledge of another's equitable interest may be a sufficient condition for making a defendant liable for interfering with that interest. Then we must consider the case of someone who has no knowledge of another's interest, but only because he has been careful not to remove the doubt upon which he now relies. We might well decide that this person should be treated as if he knew. We say he had constructive knowledge. It is not quite a fiction. A fictional approach would be to say, "He knows," and not allow him to say that he did not *really* know, just as the defendant in ejectment was not allowed to say that John Doe did not exist. " 'Constructive' seems to mean 'It isn't, but has to be treated as if it were.' " By calling it *constructive* knowledge we admit up front that it is not knowledge. What this means is that we have to say what it is.

While the "constructive" approach is not overtly fictional, still it smacks of mystery, obscurity, difficulty. If the relevant effect is triggered by genuine knowledge *or* by closing one's eyes to the obvious, then genuine knowledge is sufficient but not necessary. This is obscured if we say that what is necessary is "knowledge, actual or constructive." So why do we do it? It is not a trick to conceal a change in the law, since "constructive" admits to the ruse. It appears to be a different kind of trick: one which yields a kind of simplicity. If we have "knowledge, actual or constructive," then we have only one triggering concept: knowledge. If the bailor in a bailment at will is in "constructive possession," while the bailee is in actual possession, then we can go on saying that a transfer of possession is necessary to create a pledge, even while we let the bailor create one. At common law the mens rea for murder was "malice aforethought," meaning an intention to kill or cause serious harm. If one who kills unintentionally while committing a robbery has "constructive malice," then that person can be convicted of murder even while we insist that malice aforethought

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[12] It should always be remembered that no contemporary lawyer was actually deceived by the fiction (although fictions can lay dangerous traps for legal historians; see e.g. Milsom, ibid., at 220-221, 586, positing that a series of actions in trespass for injuring horses "with force and arms" actually involved negligence by farriers). The demand of reason which was met by the fiction was present to everyone's mind. This presents a fascinating question, but one which is sociological or psychological rather than legal: who are lawyers trying to fool when they use fictions? The answer seems to be, another part of themselves.

is required.[13] "Constructive" allows us to multiply operative, triggering concepts, even while we pretend that we are only subdividing them.

II. "Constructive Trust"

There is one place where this view of "constructive" appears not to fit, and that is constructive trusts. The reason is that a constructive trust is really a trust.[14] The only way to fit constructive trusts in with the usual idea of "constructive" is to suppose that when the phrase originated, the context was that "trust" meant "express trust."[15] Although the phrase "constructive express trust" seems like a contradiction in terms, it actually aligns with the way we use "constructive" elsewhere. The view outlined above was that "constructive" allows us to multiply operative or higher-order concepts while pretending that we are dealing with a static number and merely subdividing them. In line with that, the seventeenth century view could have been that there were just "trusts," the paradigm of which was the (express) family settlement. Then, the relatively small number of

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[13] Constructive malice was abolished in England by s. 1 of the Homicide Act 1957.

[14] This, I take to be the orthodox English view; although it does not follow that the trustee of a constructive trust owes fiduciary obligations: see L.D. Smith, "Constructive Fiduciaries?" in P.B.H. Birks, ed., Privacy and Loyalty (Oxford: Clarendon Press, 1997) 249 at 263-267. In the U.S. and Canada, it is argued by some that a constructive trust is not really a trust at all. See D.B. Dobbs, Law of Remedies, 2 ed. (St. Paul: West, 1993), at 401: "The constructive trust is not in fact a trust, but a remedy which is explained by analogy to trusts." Cf. American Law Institute, Restatement of the Law of Restitution, Quasi-Contracts and Constructive Trusts (St. Paul: A.L.I., 1937), §160, comment a; D.W.M. Waters, "The Constructive Trust in Evolution: Substantive and Remedial" in S. Goldstein, ed., Equity and Contemporary Legal Developments (Jerusalem: Sacher Institute, 1992), 457; this paper is also at (1991) 10 E.T.J. 334. On this view, "constructive trust" makes perfect sense: "it isn't [a trust], but has to be treated as if it were."

[15] The earliest constructive trusts, appearing in the late seventeenth century, arose only in the context of express trusts: see Baker, above, note 10, at 425n65. Section 8 of the Statute of Frauds 1677 exempted from writing requirements trusts "which shall or may arise or result by the implication or construction of law." The drafting of this statute was a matter of some debate (see T.G. Youdan, "Formalities for Trusts of Land" [1984] C.L.J. 306, especially at 307n7), but the wording chosen suggests that "constructive trust" was not yet an established phrase.

constructive trusts were treated as a subdivision: "it isn't [an express trust], but has to be treated as if it were." In the modern world, we acknowledge more fully that there can be perfectly good trusts which are not express trusts; and yet we continue to call some of them constructive.[16]

III. "Constructive Trustee"

Sometimes a defendant is alleged to be "liable to account as a constructive trustee." There are three main categories of cases: trustees de son tort, who have taken it upon themselves to act as trustees; "knowing assisters," those who dishonestly assist in a breach of trust; and "knowing recipients," those who receive trust property with some level of cognition that the property is subject to the rights of a beneficiary.[17] These claims are personal ones, which establish a liability on the part of the defendant to pay a sum of money; they are not proprietary claims, which establish that the defendant holds property on trust for the plaintiff. So there is a tendency to deprecate the traditional form of pleading which alleges that the defendant is "liable to account as a constructive trustee."[18] Since there is no allegation that there is a constructive trust, or any kind of trust, anywhere in the picture, why plead the case in this way?

The interesting thing is that an allegation that the defendant is a constructive trustee makes more sense than the allegation of a

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[16] Another way of looking at this development is that the consensus as to what is essential to the concept of "trust" has changed; it has ceased to include the idea of voluntary creation. But it is not totally clear that there is a stable consensus as to what is left. On one view (Hardoon v. Belilios [1901] A.C. 118 at 123 (P.C., H.K.)), the essence of the trust is the split between beneficial title and administrative title; on another view (Westdeutsche Landesbank Girozentrale v. Islington London B.C. [1996] A.C. 669 at 705-707 (H.L.), per Lord Browne-Wilkinson), more is required, namely that the trustee be subject to personal obligations similar to those of an express trustee. See P.B.H. Birks, "Trusts Raised to Reverse Unjust Enrichment" [1996] R.L.R. 3 at 11-12; Smith, above, note 14, at 265-266.

[17] See generally C. Harpum, "The Stranger as Constructive Trustee" (1986) 102 L.Q.R. 114 and 267; S. Gardner, "Knowing Assistance and Knowing Receipt: Taking Stock" (1996) 112 L.Q.R. 56.

[18] The phrase is avoided in Royal Brunei Airlines Sdn Bhd v. Tan [1995] 2 A.C. 278 (P.C., Brunei). For academic criticism of the phrase, see for example A. Burrows, The Law of Restitution (London: Butterworths, 1993), at 151; J.E. Martin, Hanbury and Martin[:] Modern Equity, 15 ed. (London: Sweet and Maxwell, 1997), at 293.

constructive trust. We have already seen that "constructive trust" represents a non-standard usage of "constructive." If the allegation that the defendant is a constructive trustee were to fall in line with the usual understanding of "constructive," it would be an allegation that "[he] isn't [a trustee], but has to be treated as if [he] were." Why might a plaintiff plead his case that way?

The reason appears to lie in the logic of the trust. Prima facie, the beneficiary of a trust cannot sue anyone except his trustee.[19] This is part of the package of legal incidents which is delivered when parties choose to use the trust institution to order their affairs; in other words, when they choose to entrust assets to their trustee.[20] Now, if the beneficiary finds a defendant who has received trust property in such a way that it remained subject to the trust, then that defendant is a trustee of that property for the beneficiary, and so the action for an appropriate declaration and consequential relief is an action against a trustee. But if the beneficiary is trying to make a defendant personally liable for something the defendant has done, it is not so easy. The defendant does not now hold, and perhaps never has held, property in trust for the plaintiff. And here, the logic of the long-winded formula comes into its own: to allege that the defendant is liable to account as a constructive trustee is not to allege that the defendant is *really* a trustee, nor that he ever was, nor that there is or ever was a constructive trust; it is simply to allege that the defendant should be personally liable to the plaintiff, who is (supposedly) only allowed to sue his trustee.
As we saw above, "constructive" multiplies operative categories by nominally subdividing them. In this context, it preserves the appearance that beneficiaries can only sue one type of defendant—their trustees—while in fact adding other categories. But unlike a genuine fiction, its ruse is an open one, proclaimed

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[19] Hayim v. Citibank NA [1987] A.C. 730 (P.C., H.K.); Parker-Tweedale v. Dunbar Bank plc (No 1) [1991] Ch. 12 (C.A.); Bradstock Trustee Services Ltd. v. Nabarro Nathanson [1995] 1 W.L.R. 1405.

[20] Here again we see the continuing influence of the original conceptualisation of the trust as extending only to express trusts. The idea that one's remedies should be limited by the logic of the trust makes very little sense to someone whose trust is a constructive one, arising say following a fraud. But this plaintiff is not bound by the logic of the trust; rather, the (constructive) trust is merely one tool available to her. In other words, while the beneficiary of an express trust will not generally be able to deploy a negligence theory against a third party even if the latter was aware of the trust (ibid.), the victim of a fraud can simply set aside the trust theory, or use it as an alternative, while attempting to rely on negligent causation of pure economic loss.

by the word "constructive." In other words, once we allow such a thing as liability to account as a constructive trustee, we have to start deciding who qualifies as one. A great deal has been written.[21] One long-running controversy is whether a recipient of trust property should be strictly liable, subject to defences, rather than being liable only on the showing of some level of cognition regarding the trust.[22] Such debates are healthful and enlightening, but one recent trend might be doubtful: that is, the desire to distinguish between "receipt-based" liability and liability "as a constructive trustee."[23] The reason it is doubtful is that, as has been discussed above, the function of the phrase "as a constructive trustee" is simply to get around the normal rule of trust law, which is that beneficiaries can only sue their trustees. "Liability as a constructive trustee" might as well be read as "liability (even though the defendant is not actually a trustee)." In that light, to contrast it with "receipt-based" liability or with "strict liability" would be illogical. This observation, on its own, does not much advance the debate on whether liability should be strict or fault-based: to say that a defendant is "liable as a constructive trustee" is just to say that he is liable even though he is not actually a trustee; it says exactly nothing about what makes someone liable. But it is worth noticing that there is no mileage in a strategy which attempts to sidestep the accumulated authority on what makes someone "liable to account as a constructive trustee" by asserting that "receipt-based" liability is different and so the same conditions need not apply to it.

IV. Constructive Trust and Constructive Trustee

In a simple world, the trustee of a constructive trust would be a constructive trustee. But if what has been said above is correct, that is not our world. The constructive trust is a trust, and its trustee is a genuine trustee, holding property in trust; whereas

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[21] See above, note 17; and for further citations to articles, L.D. Smith, The Law of Tracing (Oxford: Clarendon Press, 1997), at 373n16.

[22] See for example P.B.H. Birks, "Misdirected Funds: Restitution from the Recipient" [1989] L.M.C.L.Q. 296; L.D. Smith, "(W)hither Knowing Receipt?" (1998) 114 L.Q.R. 394. The most recent word from the House of Lords is that cognition is required: Westdeutsche Landesbank Girozentrale v. Islington London B.C. [1996] A.C. 669 at 707D, per Lord Browne-Wilkinson.

[23] Lord Nicholls of Birkenhead, "Knowing Receipt: The Need for a New Landmark" in W. Cornish et al.., eds., Restitution: Past, Present and Future (1998) 231; J. Martin, "Recipient Liability after Westdeutsche" [1998] Conv. 13.

the one thing that the constructive trustee is *not* is a trustee who holds property in trust. The real world is therefore more complex and confusing than it might be, and the reason is that the word "constructive" is used in a unique sense in the formula "constructive trust." At the very least, we have to distinguish two senses of "constructive trustee": one is its usage in the formula "liable to account as a constructive trustee," and the other is the sense in the phrase "trustee of a constructive trust."

The full quotation from Sir Robert Megarry is, " 'Constructive' seems to mean 'It isn't, but has to be treated as if it were, and the less of this there is in the law, the better."[24] Most lawyers would probably agree with the final sentiment. "Constructive" is not fully fictional, but neither is it fully transparent.[25] Can we dispense with it? On the present state of the law, not in respect of constructive trusts, for as we have seen they are not really "constructive" at all. We could, however, stop talking about "liability to account as a constructive trustee" and just identify instances where a defendant is liable to a beneficiary even though that defendant is not a trustee. We seem to be well along this road, a road leading to better terminology and therefore clearer analysis.[26] But it is important to remember that all of the effort which has gone into answering the question, "Who is liable to account as a constructive trustee?" has gone into answering what is the very same question, albeit with improved terminology: "Who is personally liable to trust beneficiaries despite not being a genuine trustee?" This learning cannot be sidestepped by saying that we are going to make a non-trustee defendant liable, but not liable as a constructive trustee; that is a contradiction in terms.

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[24] Above, note 8.

[25] In the context of fictions, Maine said (above, note 9) said, at 16: "I cannot admit any anomaly to be innocent, which makes the law either more difficult to understand or harder to arrange in harmonious order."

[26] Above, note 18.

Session 5: EQUITY AS A COURT OF CONSCIENCE - THE NEW EQUITY

Friday 11th September 1998
2.00 - 3.00
3.20 - 5.30

1. **MALAYSIA: *UNION EAGLE* FROM THE ISLAMIC PERSPECTIVE**

   Ms Noor Inayah Yaakob
   Universiti Kebangsaan [Malaysia]

2. **SINGAPORE: PRAGMATISM IN EQUITY IN SINGAPORE**

   Dr Hans Tjio
   National University of Singapore [Singapore]

3. **INDONESIA: GOOD FAITH AND EQUITY IN THE CIVIL LAW SYSTEM**

   Dr LM Gandhi-Lapian
   Universitas Indonesia [Indonesia]

4. **NEW ZEALAND:**

   Professor J Maxton
   New Zealand

5. **HONG KONG: EQUITY IN ACTION - UNTIL *UNION EAGLE* A MIRROR OF THE HIGH COURT OF AUSTRALIA?**

   Judith Sihombing

UNION EAGLE LTD. v GOLDEN ACHIEVEMENT LTD. FROM ISLAMIC PERSPECTIVE

by *Noor Inayah Yaakub*[*]

Introduction

In this paper it is intended to deal with certain legal questions and issues that arise in the case of *Union Eagle Ltd. V Golden Achievement Ltd.* [1997] 1 HKC 173 in light of Islamic principles of contract. Through out the discussion, the paper also examines in depth the Islamic principles of equity. It should be stressed from the outset that the paper does not seek to expound the application of Islamic law in commercial transactions in Malaysia. This is mainly due to the following reasons :

1) Syariah courts in Malaysia only have jurisdiction in respect of matters that fall within the State List in the Federal Constitution.[1] The Civil courts in Malaysia have jurisdiction[2] in respect of matters which fall within the Federal List. The Ninth

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[1] Article 74 of the Federal Constitution states the following matters :

(1) Without prejudice to any power to make laws conferred on it by any other Article, Parliament may make laws with respect to any of the matters enumerated in the Federal List or the Concurrent List (that is to say, the First or Third List set out in the Ninth Schedule).

(2) Without prejudice to any power to make laws conferred on it by any other Article the Legislature of a State may make laws with respect to any of the matters enumerated in the State List (that is to say, the Second List set out in the Ninth Schedule) or the Concurrent List.

(3) The Power to make laws conferred by this Article is exercisable subject to any conditions or restrictions imposed with respect to any particular matter by this Constitution.

(4) Where general as well as specific expression are used in describing any of the matters enumerated in the Lists set out in the Ninth Schedule the generality of the former shall not be taken to be limited by the latter.

[2] See also Noor Inayah Yaakub, " *Evidence Act For Syariah Courts 1997 [Act 561] : A brief Introduction"* , [1998] Malaysian Current Law Journal Supp. I. There were situations where Civil courts decided on Islamic matters for example : *In Re Maria Huberdina Hertogh; Inche Mansor Adabi v Adrianus Petrus Hertogh & Anor* (1951) 17 MLJ 276, *Re Chee Peng Quek* (1963) lxxix, *Nafisah v*

Schedule of the Federal Constitution contains the Federal List and the State List which set out the respective areas where the Federal Parliament or the State Legislature may make laws. Besides, the State List, which provides for the establishment of Syariah Courts, states that the Syariah Courts " shall have jurisdiction only over persons professing the religion of Islam".[3]

2) the application and exposition of Islamic law in commercial transactions by Malaysian Courts is still at an early evolutionary stage and the number of cases arising out of those transactions that have reached the courts is still small.[4] I believe that it will definitely take time for its application to reach reasonable maturity and sophistication within the framework of the common law system.

As there are very few judgments from Malaysian courts on the commercial transactions which apply Islamic law and still less reported in the law reports to which references could be made and on which opinions can be based, the paper therefore discusses the case of *Union Eagle* by examining the principles of equity and contracts

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Abdul Majid [1969] 2 MLJ 174, *Ainan bin Mahmud v Syed Abu Bakar* [1939] MLJ 209, *Fatima binti Mohamad v Salim Bahshrwan* [1952] A.C. 1, *Roberts v Ummi Kalthom* [1966] 1 MLJ 163, *Boto' binte Taha v Jaafar bin Muhammad* [1985] 2 MLJ 98, *Nor Kursiah Baharuddin v Shahril Lamin & Anor* [1997] 1 CLJ 599, *Muhd Munir v Noor Hidah & Other applicants* [1991] 1 MLJ 276, *Shahimin Faizul Kung bin Abdullah v Asma bte Haji Junus* [1991] 3 MLJ 327 and *Majlis Agama Islam Pulau Pinang v Faridah bte Dato' Talib* [1993] 1 CLJ 264.

[3] Ninth Schedule, List II- State List states that :

1) Except with respect to the Federal Territories of Kuala Lumpur and Labuan, Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to succession, testate and intestate, bethrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; Wakafs and the definition and regulation of charitable and religious trusts, the appointment of trustees and the incorporation of persons in respect of Islamic religious and charitable endowments, institutions, trusts, charities and charitable institutions operations wholly within the State; Malay customs; Zakat. Fitrah and bait-ul-Mal or similar Islamic religious revenue; mosques or any Islamic public places of worship, creation and punishment of offences by person professing the religion of Islam against precepts of that religion, except in regard to matters included in the Federal List; the constitution, organisation and procedure of Syariah courts which shall have jurisdiction only over persons professing the religion of Islam and in respect only of any of the matters included in this paragraph, but shall not have jurisdiction in respect of offences except in so far as conferred by Federal law, the control of propagating doctrines and beliefs among persons professing the religion of Islam; the determination of matters of Islamic law and doctrine Malay custom.

[4] See Mohamed Ismail Shariff, " *Conveyancing, Banking and Commercial Practice : An Islamic Perspective*", [1994 4 BLJ lxxi. See also the case of *Bank Islam Malaysia Berhad v Tinta Press Sdn. Bhd. & Ors* [1986] 1 MLJ 256, *Bank Islam Malaysia Berhad v Adnan bin Omar* [1994] 3 CLJ 735, *Commissioner for Religious Affairs, Terengganu & Ors v Tengku Mariam* [1969] 1 MLJ 110.

based on Syariah rulings and provisions available in some of Islamic countries which apply the Syariah law in order to see whether Islamic law assists a purchaser who is only a few minutes late in offering to complete.

THE ISLAMIC PRINCIPLES OF CONTRACT

General Principles

As the fundamental principles which lie at the root of all commercial operations in any legal system, not excluding Islamic law, are to be found in the principles governing the law of contract and the regulations of obligations arising therefrom, I shall first advert to some general principles of Islamic law governing the effect of a contract. It should be noted that the principles of contract in modern[5] Islamic legal systems are regarded as Civil law principles and therefore contained in the respective civil laws of the Islamic nation states.[6] The Quranic injunction[7] " Aufu bi al-Uqud" : "Fulfill Your obligations" is the fundamental principle which governs the sanctity of all contracts, whether private, public civil or commercial. The prohibitions and limitations upon validity provided by the Islamic sources were

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[5] N.L.Coulsen, " *A History of Islamic Law*", Edinburgh University Press, 1964,p.38 where he writes on pre-Islamic commercial customs in the Islamic principles of commerce " The starting point was the review of local practice, legal and popular, in the light of the principles of conduct enshrined in the Quran. Institutions and activities were individually considered, then approved or rejected according to whether they measured up or fell short of these criteria". See also Nabil A.Salleh, " *The General Principles of Saudi Arabian and Omani Company Laws : Statutes and Syariah"*, London, 1981 at p.1 where the author states the prevalent belief concerning early Muslims is of "hoardes of warrins Bedouins". See M.H.haykal, " *Hayat Muhammad*", 13th ed. At p.115 where the writer also pointed out that the pre-Islamic Arabs were not only regarded as intermediaries exposed to the influence of passing merchants, but were themselves believed to have organised trading caravans in pursuit of profit through commerce.

[6] For example, *The Bahrain Contracts Code* 1969, *Kuwait Civil Code* 1980, *Egyptian Code of Civil and* Commercial Procedure 1968, *Abu Dhabi Code of Civil Procedure* 1970, *Dubai Contract Law* 1971, al-*Majallah al Ahkam* (Commission of Ottoman Jurists), *Iraqi Law of Commerce* 1984, *Jordanian Civil* Code 1976, *Qatar Civil and Commercial Law* 1971, Sudanese Civil Transactions Act 1984, Syrian civil Code 1949 1949, *Tunisian Code of Obligatians and Contracts* 1906 and *United Arab Emirates The Federal Civil Code No. 2 of 1987.*

[7] Holy Quran, Al-Maidah : 1

applicable to all contracts.[8]

The Arabic word for contract is "Aqd" (Plural : Uqud) which means to tie or bind[9]. The parties are free to make contracts of their own choice, all kinds of contract would be acceptable providing that they do not contradict the basic principles of the Syariah law of contract and generally acknowledged principles of Islam. Article 126 of United Arab Emirates Federal Civil Code , for example, provides that a contract may contain various incidents and in general " any other thing which is not prohibited by a provision of the law and is not contrary to public order or morals. Article 2 of Dubai contract Law also states " Nothing contained herein shall affect any usage or custom of trade, or any term of a contract which is not inconsistent with the provisions of this law". Similarly, Article 2 of Commercial Code of Bahrain states that : There shall apply to commercial matters that which the two contracting parties have agreed upon provided that such agreement does not conflict with mandatory legislative provisions.

A sale and purchase agreement is a contract. As stated earlier, a contract is an agreement between two or more persons which creates an obligation to do or not to do a particular thing. As the agreement[10] under Islamic law is formed by the linking of an offer and acceptance which may be either express (includes writing), tacit , by conduct or by gesticulation when the party is mute but for which there is no special form, the written agreement entered into by the purchaser in *Union Eagle* case dated 1

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[8] Holy Quran IV: 29 " Oh you who believe! Squander not your wealth among yourselves in vanity, except it to be a trade by mutual consent". The Prophet is reported to have said : " It is not lawful to take the property of a Muslim except by his consent". See also Hamid, " *Mutual Assent in the Formation of Contracts in Islamic Law",* Journal Of Islamic and Comparative Law, Vol.7, 1977, at p.41.

[9] Sale is defined as " A contract of obligation by which each party transfers to the other party of something for other than simple usage or pleasure". See Abd. Rahman a- Jaziri, *Kitab al-Fiqh ala al-Mazhab al-arbaa",* 7th. Edn., Darul Ahya al-Turath al-Arabi, Cairo, Volume II, p. 147.

[10] The word agreement also means an engagement between two persons in a legally accepted, impactful and binding manner. See Ala'eddin Kharofa, " Transactions in Islamic Law", Zafar Press Sdn. Bhd., 1997 at page 6.

August 1991 with the vendor to buy a flat on Hong Kong Ireland for $4.2m is a valid agreement. Furthermore, article 132 of UAE Federal Civil Code which states " such act as are customary", or by an interchange of acts demonstrating mutual consent. Being a valid agreement, it is a contract between them which creates an obligation to do or not to do a particular thing. This can be seen in article 418 of the Egyptian Civil Law which states that the act of selling is a contract between the seller and the purchaser in which the seller takes it upon himself to transfer to the buyer the ownership of something or some other financial right in return for a monetary price. Thus, the seller's duty is to transfer the ownership of the subject of the contract to the purchaser and the purchaser's part is to hand the price to the seller.

Meaning of Deposits / Earnest Money (Arbun) in Islamic law

Islamic law defines deposit or Arbun as money paid as a guarantee that the contract shall be performed. It is established that there is no difference between a deposit and earnest money in Islamic law. [11] . Both these terms have the same meaning and effect. The general rule is that Islamic law prohibits the practice of giving a deposit or earnest money in a contract of sale. This prohibition is due to one of the prophet's tradition in which Prophet prohibits giving a deposit or earnest money as this deal amounted to a void (fasid) contract. If a the contract has been concluded, the deposit is treated as a part payment of the purchase price. But if the contract cannot be executed, such deposit must be regarded as a gift from a buyer to a seller. However, there is an exception to this general principle i.e. the deposit can still be refunded if the parties to the contract have agreed to the said refund unless the contract contains provisions to the contrary.

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[11] Wahbah Zuhaili, "*Al-Fiqh al-Islam Wa adillatuhu*", 1989, Darul Fikr. Damsyiq, Vol 4 at p. 80

The vendor however has a right under Islamic law to rescind the contract on the basis that payment of deposit by the purchaser is a fundamental term going to the root of contract. This view is also accepted by the civil law of contract in the case of *Damon Chia v Hapag Llyod SA* [1985] 1 All ER 475 where Fox LJ said

" *In my view, if the parties as in the present case actually enter into an executory agreement for sale all the terms of which are finalized, one of them being that a deposit shall be paid, and which objectively is a contractual agreement, I see no reason for inferring that no contract arises until the deposit is paid. The provision for the payment of a deposit is simply a term of the contract*".

His Lordship further stated " *It was in my view a fundamental term of the contract*".

The next question is to determine whether an advance sum paid by one party may be recoverable upon default of the other party. In this event, the intention of the parties has to be ascertained to determine the true nature of the advance payment. If the vendor is in breach of the contract, he is bound to repay the said sum to the purchaser. If the purchaser who is in breach of the contract it depends on the intention with which the payment was made; if the deposit was paid as a means of a guarantee that the contract shall be performed, then the vendor has a right to forfeit the deposit. However, in Islamic law, if the deposit was paid as a part payment of the contract price, the deposit is recoverable by the purchaser.

As regards to the case of *Union Eagle*, it is clear that the completion was to take place on or before 30 September 1991 and before 5.00 pm. on that day and clause 12 provided that if the purchaser failed to comply with any of the terms and conditions of the agreement, the deposit and any part payment of the purchase price so paid shall be absolutely forfeited. Thus, this clause is a fundamental term going to the root of the contract and it is a provision which both parties have consented to.

Moreover, even though the intention of the parties in this case was that the deposit was paid as a part payment and not as a means of a guarantee that a contract shall be performed and accordingly the deposit paid was recoverable, the clear provision as to the right of the vendor to forfeit the deposit if the purchaser failed to comply with any of the terms and conditions of the agreement clearly shows that the party in default could not recover such deposit. Therefore, the purchaser in the case of *Union Eagle* who was in breach of the contract, could not recover the deposit paid.

Equitable Relief Against Forfeiture of Deposit In Islamic Law

Islamic principles of Equity/Istihsan

Istihsan literally means to approve or to deem something preferable. Istihsan is a method of exercising personal opinion in order to avoid rigidity and unfairness that might result from the literal enforcement of the existing law. 'Juristic preference'

is a fitting description of Istihsan as it involves setting aside an established analogy in favour of an alternative ruling which serves the ideas of justice and public interest in better way.[12] The jurist who resort to Istihsan may find the law to be either too general, or too specific and inflexible. In these circumstances, Istihsan may offer a means of avoiding hardship and a solution which is harmonious with the higher objectives of the Syariah.

Istihsan therefore forms a rational method for determining decisions when particular cases are not regulated by the incontrovertible authority of the Quran, Sunnah of the Prophet or Ijma'(Consensus), or when conflicting principles, drawn from the primary sources, compete for consideration. It is an equitable concept which is based, like the concept of Qiyas (Analogy) on the determination of the course

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[12] See Hashim Kamali, " *Principles of Islamic Jurisprudence*", 1989, Pelanduk Publications, Petaling Jaya, at p. 309

underlying an existing legal rule. It therefore provides a systematic and rational process of reasoning which because it is based on equitable considerations, may override the occasionally inequitable results of legalistic analogy, however manifest.[13] Istihsan could also modify an existing or injurious custom where the application of strict Qiyas (analogy) would lead to an unnecessarily harsh result.

Unlike principle of Western equity, Istihsan does not seek to constitute an independent authority beyond the Syariah. It is an integral part of the Syariah and it differs with equity in that the latter recognizes a natural law apart from, and essentially superior to, positive law.[14]

Article 75 in the UAE Provisional Federal Constitution states that " the Supreme Federal Court is required to apply the principles of the Syariah and all Federal legislation, together with the laws in force in each Emirate, established custom and usage, and internationally recognized principles of law, equity and natural justice to the extent that none of the foregoing are inconsistent with or repugnant to the Syariah or UAE Federal law".

The only unusual feature in the case of *Union Eagle* is that the purchaser tendered payment of the purchase price ten minutes after the time for completion had passed.. The main question in this case is whether or not it was possible for a purchaser under a contract for the sale of land who had repudiated the contract to receive equitable relief against forfeiture of the deposit.

Islamic law looks first at the intention of the parties to a contract. This is clearly stated in Article 135(1) & 135(2) of the United Arab Emirate Civil Code, Article 35 of the Kuwaiti Civil Code and Article 129(9) of the UAE Federal Civil

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[13] See Rayner, " *The Theory of Contracts in Islamic Law*", 1991, Graham & Trotman Ltd., London, at 86.

[14] See John Makdisi, Legal Logic and Equity in Islamic law, The American Journal of Comparative Law, Vol.33 (1985) pp.63-92.

Code. When a contract has to be construed, it is necessary to ascertain the common intention of the parties and to go beyond the literal meaning of the words, taking into account the nature of the transaction as well as that of loyalty and confidence which should exist between the parties in accordance with commercial usage.[15]

Furthermore, Article 258 of the UAE Federal Civil Code states that in construing a contract, effect must be given to intentions and meanings, not artificial or mechanical expressions and deductions. If no such clarity exists, then the joint intention of the parties must be sought without the restriction of the literal meaning of expressions used, but taking guidance from the nature of the transaction and also taking account of the good faith and trust between the parties in accordance with current custom in such transactions.[16] Article 258(1) of the UAE Federal Civil Code also sates " That which is of consequence in contracts is intention and meaning, not expression or form".

Similarly, Article 3 of the Majallah al-Ahkam[17] states : " In contracts effect is given to the intention meaning and not to the words and phrase".[18]

Even though the stipulation as to the time for completion in the *Union Eagle* case is a valid condition in Islamic law and should be adhered to, it is of secondary importance to the main purpose of the contract. This is because Islamic law looks not at the letter but at the substance of the agreement in order to ascertain whether the parties, notwithstanding that they named a specific time within which a completion is to take place, really and in substance intended more than it should take place within reasonable time.

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[15] See also Rayner, " *The Islamic theories of Contracts In Islamic Law*", 1991, Graham & Trotman Ltd. London, at 98.

[16] See also Rayner, at page 99

[17] Commission of Ottoman Jurists (1867-1877) ,also a translation by C.A. Hooper, Jerusalem, 1933 and also a translation Haqqi Ismail, Lahore, 1967.

[18] See also Hooper,C.A, The Civil Law of Palestine and Trans-Jordan, Jerusalem, 1933.

At this point, it is material to discuss what are the effects of inserting a condition of a right of option to either cancel or rescind into the contract in Islamic law. A general rule is that a party or both parties to a contract may insert a condition into the contract giving them an option, within a fixed period of time, to either cancel or rescind the sale. In a contract of sale for example, the seller stipulates that the sale will be concluded only after payment of the price and this payment must have taken place within the permitted delay. The operation of the obligation depends here upon a conditional element, namely payment of the price within the permitted period, and not solely on the will of the contractor who stipulates the option. However, stipulation of the option (khiyar) to either cancel or rescind is precluded from :

1) contracts which are always subject to rescission for instance, contract of gift and deposit (wadiah)
2) contracts which are irrevocable for instance marriage contracts
3) contracts which become binding upon the transference of possession for example, future sale (salam).

In Islamic law of contracts, every contract clause (shart) in the agreement must comply to the Islamic rules. Any clause which does not comply exactly to the Islamic rules laid down or which introduces a modification to such rules is null and void. The narrow ambit of the term shart encompasses the general prerequisites for the validity of legal acts, as opposed to their essential elements (pillars). The wider ambit of shart covers the extrinsic clauses which are increasingly appended to modern contracts. There are 3 main types of conditions recognized by Islamic law. They are sahih (sound), Fasid (voidable) and Batil (void). Conditions in the agreement are permitted as long as the parties to the contract consented to those conditions. However, a contract containing any condition which is deemed to be advantageous or

disadvantageous to either party, or repugnant to the requisites of the contract is invalid.[19] Moreover, any stipulation concerning imprecise deferment of the consideration is invalid. The period of deferment must be absolutely determined within the knowledge of both parties for the condition to be valid. Any degree whatsoever of uncertainty in the payment of the price renders the contract null and void.

Just as it is necessary to abide by the binding contract, it is necessary to abide by all the conditions associated with it. Therefore, it should be borne in mind that in the obligation of fulfilling the condition the following matters must be observed :

a) That the condition must not be against the Holy Quran and the Prophet's tradition.

b) That the condition is not against what its very nature demands such as stipulating with the contract that one must not receive any price or rent for the goods sold or the property rented.

c) That the condition must be mentioned during the formation of contract implicitly or explicitly to indicate that the contract was based on a certain condition and tied to it. before forming the contract or because of common understanding like the condition of having the right of receiving delivery on time.

d) That the condition must be within the ability of a party if, in fact, it is discovery that it is not so, it is not even possible to formalize a binding condition.

However, in Islamic law, an invalid condition does not affect the validity of the contract in which it is set. The contract stays valid but not such condition. I find it is necessary at this stage to look at the provisions set out in Chapter III of Majallah al-Ahkam Adliyah in which Chapter III sets out the precepts classifying the conditions about and the description of the price in the contract of sale.

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[19] Hamilton, "Hedaya", 1957, Lahore at 241.

Section 237 : It is necessary that the price should be named at the time of the sale. Therefore, if the price of the thing sold is not mentioned at the time of the sale, the sale is bad (Fasid).

Section 245 : A sale for a deferred payment or for payment by installments is good.

Section 246 : It is necessary to make the time known and fixed in the case of the payment of the price being deferred or by installments.

Section 247 : A sale is good if it is agreed for any fixed delay for payment, which is fixed and known in the minds of the two contracting parties, such as, so many days, or months or years.

Section 248 : A sale is bad (Fasid) if the bargain is made for payment at a time not fixed.

Section 250 : In case the payment is deferred, or to be by installments, the time agreed upon is calculated, from the delivery of the thing sold.

Section 251 : A sale, without stipulation as to time is an agreement for ready money.

Section 313 : If the buyer and seller agree that the price shall be paid at such a time, and that if it is not paid, there is not to be any sale between them, this is a valid agreement. This is called "money option" (Khiyar Naqd).

Section 314 : If the seller cannot pay the price at the fixed time, a sale which is contracted with a money option is annulled.

It is also permissible in Islamic law to set up a condition requiring the establishment of the right of having the choice to annul the contract in favour of the seller/vendor for a certain time, simultaneous with the forming of the contract or at a time later so that he may have such choice in the case of his refunding the payment in substance if still existing or its replacement if it is lost, such deal is called deal with choice.

According to the general view of Islamic law, insertion of extra stipulations in the agreement is not allowed if such stipulations are meant to amend or adjust the original aim of those contracts. However, where one of the conditions in the agreement requires a purchaser to pay the price once the contract is concluded is valid as long as it does not contradict the original intention of the contract. This is clearly stated in Article 147(1) Egypt Civil Law 1949 (No.131). Article 75 Iraq Civil Law also makes clear that an additional conditions in a contract is permitted as long as it does not contravene with the original aim of the contract.

Based on the above discussions, it is clear that the clause 12 in the case of *Union Eagle* which provides that " If the purchaser fail to comply with any of the terms and conditions of this Agreement, the deposit money and any part payment of purchase price so paid shall be absolutely forfeited..." is a valid condition and is permitted in Islamic law. However, the above clause 12 clearly shows that the wording is clear therefore it cannot be deviated from in order to ascertain by means of interpretation the intention of the parties. Article 150 of the Egyptian Civil Code 1949 stated that " When the wording of the contract is clear it cannot be deviated from in order to ascertain by means of interpretation the intention of the parties". Article 256 of the UAE Federal Civil Code further states that where the content of a contract is clear, there is no room for abstruse construction in order to determine the intentions of the parties.

Whether time is the essence of the contract

Having found that the clause 12 in the case of *Union Eagle* is a valid condition under Islamic law, and the purchaser is bound to fulfill it, the next question is whether the time is the essence of the contract. This also depends on the intention

of the parties. Reverting first to efforts made by the vendor, where it is clear that when, shortly before noon, Ms Chow , a conveyancing clerk telephoned Ms Tin, a clerk with the purchaser's solicitors and warned that the balance of the purchase price should be paid by 5.00 pm or else her client would exercised his right to rescind and forfeit the deposit. Ms. Tin rang back to confirm that her client would complete with the contract. However, by 5.00 pm this had not taken place. Then, at 5.01 pm Miss Chow telephoned Ms Tin again. She said the money had not arrived and then the vendor reserved the right to rescind and forfeit the deposit. Miss Tin replied that a messenger was on his way. The said messenger arrived at 5.00 pm with an envelope containing the cheque for the purchase price and a letter of undertaking in a form previously agreed.

Islamic law looks at the several attempts made by the vendor's solicitor which make the time the essence of the contract. The purchaser must had been aware that he was supposed to complete the sale by 5.00 pm on that day. However, when the performance was tendered at 5.10 pm the contract was still on foot. The contract therefore remained alive for the benefit of both parties. This is due the fact that the customary practice gives the parties a period of 3 days from the date of completion to conclude the contract. Performace by 5.10 pm is performance by 5.00 pm because the purchaser was ready and willing to perform his obligations under that contract. Moreover, the messenger would have gone out from the solicitor's office before 5.00 pm and this indicates there was no breach on the part of the purchaser.

CUSTOM

Custom (Urf) is also has an extensive influence on the formulation of Islamic law. Within the sphere of civil and commercial transactions particularly, the role of

custom within Syariah has achieved gradual clarification by means of legislation. Article 45 of the Majallah Al-Ahkam states that " What is directed by custom is as though directed by law". Article 4 of the Qatari Civil and commercial Codes states : " In the absence of an applicable provision, the judge shall adjudicate according to custom . Special custom and local custom shall prevail over general custom". An identical provision is to be found in the Kuwaiti Civil Code, Article 1 where custom is given priority over the principles of the Syariah. Similarly, in Article 2(1) of the Bahraini Commercial code, custom is allotted a higher priority than that of the Syariah in the absence of any specific agreement between the parties concerned, or any relevant provision in the commercial code or any other code relating to commercial matters, the Judge is directed to apply the principles of commercial custom. Article 2(30 further states that special custom shall be preferred over general custom and principles of custom take precedence over the laws relating to civil matters, the principles of Islamic Syariah and the principle of natural law and justice. In the Commercial code of Bahrain, Law No. 7 of 1987 (Article 2) states that 'A particular custom shall be preferred to a general custom and in the absence of custom the tenets of natural law or the principles of equity and good conscience shall be applied'. Article 75 in the UAE Provisional Federal Constitution states that " the Supreme Federal Court is required to apply the principles of the Syariah and all Federal legislation, together with the laws in force in each Emirate, established custom and usage, and internationally recognized principles of law, equity and natural justice to the extent that none of the foregoing are inconsistent with or repugnant to the Syariah or UAE Federal Law".

Furthermore, the Bahrain Judicature Law 1971 states : " In the event the judge finds no provision of law capable of application he shall deduce the basis of his

judgement from the principles of the Syariah and the provisions thereof, and in the absence of any such provision, Custom shall be applied. A particular custom shall be preferred to a general custom and in the absence of Custom the tenets of natural law or the principles of Islamic equity shall be applied".

Article 1 of the UAE Civil Code also states that the custom is also a subordinate source to the Syariah and must not contravene public order or morals. Custom is now seen, therefore, as an important complementary source of law, which may be used by judges and jurists to furnish principles determining the rights and obligations of litigating parties. [20]

It is a customary practice that the period of 10 minutes is regarded as within the business transaction and therefore performance by the purchaser by 5.10 pm is also performance by 5.00 pm.

Conclusion

Based on the above discussions, the contract was still on foot when the performance was tendered at 5.10 pm. Therefore, performance by 5.10 pm is a performance by 5.00 pm. according to Islamic law.

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[20] Mustafa al-Zarqa', al-Madkhal al-Fiqh : Al-Amm Damascus, 1965 ,Part 1, page 147. See also Majallah al-Ahkam Article 36-45.

UNION EAGLE LTD v GOLDEN ACHIEVEMENT LTD [1997] 1 HKC 173

FROM ISLAMIC PERSPECTIVES[#]

By Noor Inayah Yaakub[*]

INTRODUCTION

The decision of *Union Eagle Ltd. v Golden Achievement Ltd.* [1997] 1 HKC 173 concerns the question of whether or not it was possible for a purchaser, under a contract for the sale of land who had repudiated the contract, to receive equitable relief against forfeiture of the deposit. The decision of the Privy Council illustrates the need to comply strictly with a clause providing a time for completion, particularly if the time is expressed to be "of the essence". The case therefore shows up an apparent divergence[1] between the approach of English courts and Australian courts.[2]

As it is of great academic interest the writer has taken the opportunity to discuss the case of *Union Eagle v Golden Achievement Ltd.* in light of Islamic principles of contract of sale. Throughout the discussion, the paper also examines in depth the Islamic principles of

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[1] Butt, Peter, "Strict Compliance with time for completion", The Australian Law Journal, Vol. 71, June 1997 at p. 410.

[2] See also the decisions of EEC; *Germany (Bundesamt Fur Ernahrung Una ForstWirtSchaft) v ButterAbsatz Osnabruck-Emsland eG* [1991] 2 C.M.L.R. 439, *Buitoni v Fonds D'orientation Et de Regularisation Des Marches Agricoles* [1979] 2 C.M.L.R. 665, *R v Intervention Board for Agricultural Produce, ex parte E D & F Man (Sugar) Ltd.* ALL ER May 1986 115.

equity and provisions of the laws in Islamic countries.[3] It should be stressed from the outset that the discussions of Islamic principles in this paper are as a whole and not with any particular school in Islam. Wherever the view of a school or a jurist is mentioned in the discussion, it represents the view of Islam as Islam accepts any view held by any qualified jurists.

The principles of contract in modern[4] Islamic legal systems are regarded as civil law principles and therefore are contained in the respective civil laws of the Islamic nation states.[5] The Quranic injunction "Fulfill your obligations"[6] is the fundamental principle which governs the sanctity of all contracts, whether private, user public, civil or commercial.[7] The prohibitions and limitations upon validity provided by the Islamic

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[3] For example, *The Bahrain Contracts Code* 1969, *Kuwait Civil Code* 1980, *Egyptian Code of Civil and Commercial Procedure* 1968, *Abu Dhabi Code of Civil Procedure* 1970, *Dubai Contract law* 1971, *al-Majella* (Commission of Ottoman Jurists), *Iraqi Law of Commerce* 1984, *Jordanian Civil Code* 1976, *Qatar Civil and Commercial Law* 1971, *Sudanese Civil Transactions* Act 1984, *Syrian Civil Code* 1949, *Tunisian Code of Obligations and Contracts* 1906 and *United Arab Emirates The Federal Civil Code* No 2 of 1987.

[4] Coulsen writes on pre-Islamic commercial customs in the Islamic principles of commerce "The starting point was the review of local practice, legal and popular, in the light of the principles of conduct enshrined in the Quran. Institutions and activities were individually considered, then approved or rejected according to whether they measured up or fell short of these criteria ", see N.L.Coulsen," *A History of Islamic Law* ", Edinburgh University Press, 1964, p.38. See also Nabil A. Salleh, " *The General Principles of Saudi Arabian and and Omani Company Laws*: Statutes and Shariah", London, 1981 at p. 1 where the author states the prevalent belief concerning early Muslims is of "hoardes of warrins Bedouins" and M.H.Haykal, "*Hayat Muhammad*"13th ed. at p. 115 where the writer also pointed out that the pre-Islamic Arabs were not only regarded as intermediaries exposed to the influence of passing merchants, but were themselves believed to have organized trading caravans in pursuit of profit through commerce.

[5] See S.E. Rayner "*The theory of contracts in Islamic Law*" 1991, Graham & Trotman Ltd. London, at 86. These codes are used as fundamental basis for commercial law transactions for example, Article 2 of the Kuwaiti Commercial Code (Law No. 68 of 1980) which states; " If no commercial custom is existing then the civil code provisions shall be applied".

[6] Holy Quran Al-Maidah: 1.

[7] See S.E Rayner, "The theory of Contracts in Islamic Law", 1991, Graham & Trotman, at p. 87.

sources were applicable to all contracts.[8] The word 'aqd' (contract) in the Arabic language originally means tying tightly as in tying a rope.[9] The term 'Aqd' is also used by the jurists to denote dispositions of property by will which are concluded by the offer of one party only, such as gift (hiba), guarantee (Daman), Waqf (bequest) and the remission of debts. Acts such as marriage (Nikah) and divorce (Talaq) which do not necessarily involve the concept of consideration also fall under the heading of 'Aqd'. For this reason, it can be said that the term 'aqd' can be divided into 2 notions of contracts:

I) The umbrella term to cover a large spectrum of general legal acts and obligations.
II) The bilateral act concreting the relation of privity between two interested parties.

Thus 'aqd' or contract in Islamic law is an obligation imposed on the people to adhere to the agreement that they have arrived at between themselves. The paper will explain the differences between contract, disposition and commitment. It will also examines the concept of undertaking in Islamic law in order to show that apart from being a legal duty, it is coupled with religious duties. Along with it the paper also illustrates the effect of a contract entered into between the parties. At this point, we shall see that in Islamic law, when a party to a contract promises to do a certain thing at or before a specified time, and fails to do the act at or before the specified time, the contract, or so much of it has not been performed, becomes voidable at the option of the promisee if the intention of the parties was that time should be of the essence of the contract.[10] However, as regards to the delayed performance of just 10 minutes as what happened in the case of Union Eagle, Syariah courts may well find another ground for assisting the purchaser who is only a few minutes late in offering to complete. Section 3 of al-Majella[11] for example, provides: in contracts, attention is given to the objects and meaning and not to the words and form.

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[8] Holy Quran, (IV:29) "Oh You who believe! Squander not your wealth among yourselves in vanity, except it to be a trade by mutual consent." The Prophet is reported to have said: " It is not lawful to take the property of a Muslim except by his consent". Also " Sale is by consent". See also Hamid, "Mutual Assent in the Formation of contracts in Islamic Law" Joumal of Islamic and Comparative Law, Vol.7,(1977) p.41.

[9] See Lisan al-Arab "*Tai al Arus min Jawahir al-Nufus.*", Vol.2 the entry of Aqd. See also Ali al-Razi whose definition appears in Muhammad Yusuf Musa, "*al-Amwal wa nazariyyat al-Aqd*", cairo, 1953 at p.258.

[10] See the case of *Aslam Saeed & Co. v Trading Corp. of Pakistan Ltd.*, 1985,P.L.D. SC 69. See *Ismail bin Hajl Embong v Lau Kong Han* [1970] 2 MLJ 213 where Islamic principles of contract of sale of land were applied.

[11] Introduced in 1869-1876, was a product of a reform movement in the Ottoman Empire which started in 1939 with the Gulhane Charter. It represents the earliest example of an official promulgation of the civil law principles of the Hanafi School of Islam by the authoriy of the Ottoman Empire. It has been translated into English as The Civil Law of Palestine and Trans-Jordan, by C.A.Hooper,Jerusalem, 1933.

Moreover, as the fundamental principle of Islamic law is that it looks at the substance of the agreement entered into by the parties of contract to sell real property in order to ascertain whether the parties notwithstanding that they named a specific time within which completion is to take place, really and in substance intended more than that it should take place within a reasonable time. However, Islamic law will not assist where there has been undue delay on the part of one party to the contract. Therefore performance at 5.10 pm. is substantially performance at 5.00 pm.

The paper also attempts a comparison between the Islamic principles of payment of deposit as exposed by the early jurist-consults of the four main schools, and those precepts contained within the modern codification of the independent Nation-States of Kuwait, Bahrain, and the Federal State of the UAE. Occasional comparative references are also made to Civil and common law concepts and to articles derived from the codes of other Arab constitutions.

It is hoped that the discussion may provide a wider comprehension of Islamic law contractual precepts and perhaps it may aid purchasers in eases like *Union Eagle* so that they can prevent the deposit that they have paid from being forfeited[12]

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[12] See also *Codot Development Ltd v Poffer* (1981) 1 NZLR 729. *Siah Kwee Mon v Kulim Rubber Plantations* (1979) 2 MLJ 190. *Chen Chow Lek v Tan Yew Lai* (1983) I MLJ 170. *Linggi Plantations v Jafgatheesan* (1972) 1 MLJ 89.

Singapore: Pragmatism in Equity

by Hans Tjio

Introduction

In commercial law, the arguments over certainty and flexibility have long existed, and often lean in favour of the former.[1] However, one prerequisite for achieving certainty is a pool of binding precedent, which is often lacking in developing countries. This luxury of choice allows our courts to sometimes avoid highly technical arguments and to instead adopt pragmatic solutions founded on broad, robust standards. But such an approach is not confined to developing countries; "(p)erhaps the overriding aim of all equitable principle is the prevention of unconscionable conduct."[2] We clearly see this side of equity in Canada, Australia and New Zealand. Millett LJ in the English Court of Appeal also seeks to correct the perception of over-rigidity in their application of equitable doctrine.[3] It is difficult, however, to know how his Lordship would view *Union Eagle Ltd v Golden Achievement*.[4] The Privy Council while, at first glance, reaffirming the principle that equity will not intervene in a forfeiture of deposit where time is of the essence, also appears to accept a number of broad exceptions to the principle, some of which have been more fully developed in other Commonwealth jurisdictions.[5]

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[1] Sir Peter Millett "Equity's Place in the Law of Commerce" (1998) 114 LQR 214.

[2] Hardingham, "Unconscionable Dealing" in Finn ed, *Essays in Equity* (1985) at 1. *Cf* Duggan, "Is Equity Efficient?" (1997) 113 LQR 601. Pragmatism is here used in the sense Lord Goff intended – the "professional reaction to individual fact situations, rather than the theoretical development of legal principle" "The Search for Principle" (1983) 69 *Proceedings of the British Academy* 169 at 185-6.

[3] Millett LJ, "Equity-the Road Ahead" (1995) 9 Trust Law International 35 at 36. *Compare TSB Bank plc v Camfield* [1995] 1 WLR 430 (CA) rejecting the argument that a mortgage could be set aside on terms despite recognising the "morality, perhaps the justice in an abstract sense, of the solution propounded by [counsel for the bank]"; and *Vadasz v Pioneer Concrete (SA) Pty Ltd* (1995) 130 ALR 570 (HCA), "court must look at what is practically just for both parties, not just the appellant". For the English perception of law and morality, see Phang, "Positivism in English Law" (1992) 55 MLR 102.

[4] [1997] 2 WLR 341.

[5] Heydon (1997) 113 LQR 385. Penalty, estoppel, unconscionable conduct, mortgage. None of these were present in *Union Eagle* – the deposit was only 10% of the purchase price.

Australian Influence: Relief against Forfeiture and Unconscionability

The fear in *Union Eagle* was of setting a dangerous precedent. "The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case".[6] This can be contrasted with the decision of the Singapore Court of Appeal in *Pacific Rim Investments Pte Ltd* v *Lam Seng Tiong,*[7] which involved a sale and purchase of land where payment was to be by instalments. The agreement provided that the vendors were entitled to serve a notice on the purchasers should they fail to pay an instalment, whereupon the agreement would be annulled if the moneys due were still outstanding. Time was of the essence. The vendor delayed in giving vacant possession and was liable to pay liquidated damages. After paying off 70% of the purchase price, the purchasers then failed to pay the next instalment, whereupon the vendors served a notice under the terms of the contract. The purchasers then made a part payment and sought to set off the remaining amounts against sums owing to them as liquidated damages. The vendors resisted this exercise of self-help and treated the agreement as repudiated by the purchasers. Our Court of Appeal disagreed, holding that equitable set-off was a substantive, and not just a procedural defence, despite Professor Goode's arguments to the contrary,[8] so that the purchasers were entitled to set off the sums without the intervention of the court.

Thean JA however went on to discuss the purchaser's other line of argument, which was that relief against forfeiture could be granted where there was a breach of a contractual provision as to payment, even if time were of the essence. His Honour accepted that a broader approach should be taken, despite Privy Council authorities to the contrary; authorities followed in *Union Eagle.*[9] In doing so, Thean JA approved of decisions of the High Court of Australia in *Legione* v *Hartley*[10] and *Stearns* v *McArthur*[11] which support the broad proposition that equity will relieve against an unconscionable forfeiture of rights which are not purely personal or contractual. Although seeking to restrict it to exceptional circumstances, the Court of Appeal referred to elements of "unconscionability and injustice". Here, the amount outstanding was small both in relation to the purchase price and liquidated damages. Further, the breach by the purchasers, if any, arose because of a genuine dispute over the right of set off; "(i)n the circumstances, it would be unconscionable in this case that the vendors should reap such a large windfall."[12] Specific performance was granted on terms. While different judges have ascribed different meanings to unconscionability in this context; for some, the fairness of the act of forfeiture itself is a relevant consideration.[13]

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[6] *supra* n 4 at 345.

[7] [1995] 3 SLR 1. See Soh KB, "Deposits and Reasonable Penalties" [1997] SJLS 50.

[8] *Legal Problems of Credit & Security* (1988) at 132-9.

[9] *Steedman* v *Drinkle* [1916] 1 AC 275, *Brickles* v *Snell* [1916] 2 AC 599.

[10] (1983) 152 CLR 406 at 444, where Mason and Deane JJ thought that the basis of the jurisdiction was relief against unconscionable conduct.

[11] (1988) 165 CLR 489, by a 3-2 majority, preferring still to follow *Shiloh Spinners* v *Harding* (1973) AC 691. See now *Federal Airports Corp* v *Makucha Developments Pty Ltd* (1993) 11 ALR 679 (FCA).

[12] *supra* n 7 at 24.

[13] See for example Gibbs CJ and Murphy J in *Legione* v *Hartley supra* n 10 at 429; compare *Stearns* v *McArthur supra* n 11 at 514 (Brennan J), 538-9 (Gaudron J).

As a vitiating factor, however, unconscionability is largely ignored by our courts. In *Lim Geok Hian* v *Lim Guan Chin*,[14] Thean JA, sitting at first instance, followed *Fry* v *Lane*[15] *and Cresswell* v *Potter*,[16] and held that the doctrine only applied in situations of poverty or ignorance, and rejected Lord Denning's liberal approach towards the inequality of bargaining power. Similarly in *Pek Nam Kee* v *Peh Lam Kong*,[17] in a dispute over a will, Prakash J refused to find that there was unconscionable conduct as the victim was neither poor nor ignorant, although adopting the modern meaning of these phrases in *Cresswell* v *Potter*. The learned judge was even more unequivocal in *Rajabali Jumabhoy v Ameerali R Jumabhoy* [18] where she thought the *Amadio* approach too wide.

But unconscionability was used in *Fong Whye Koon v Chan Ah Thong*,[19] Here an elderly lady of 84, who was illiterate, wanted to go back to China. She entered into a transaction with a party introduced by her agent friend at an undervalue, $245,000 when the market price was $390,000. Subsequently, she changed her mind about going back to China and sought to resist specific performance of the agreement. Warren Khoo J found that this was an unconscionable bargain, and the purchaser could not overcome the burden cast on him to show that the transaction was fair and reasonable. There was little evidence of unconscionable conduct aside from the unfair price, but Warren Khoo J thought that "fraud is presumed objectively from the nature of the bargain and the circumstances of the parties."[20] In this sense, the decision is not dissimilar to the approach Millett LJ took in *Credit Lyonnais Bank Nederland NV v Burch*[21] *where his Lordship said that unconscionability "may often be inferred from the (terms of the transaction) in the absence of an innocent explanation" where the terms of the contract "shocks the conscience of the court."*[22] *This blurs the distinction between substantive and procedural unfairness,*[23] *although unfair terms can be evidence of wrongdoing in the bargaining process,*[24] *and sometimes is the only evidence available.*

But was Fong Whye Koon an extreme case, and a sale of property not a commercial transaction? In *Union Eagle*, however, the Board stated that "(l)and can also be an article

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[14] [1994] 1 SLR 204.
[15] *(1888) 40 Ch D 312.*
[16] [1978] 1 WLR 255.
[17] [1996] 1 SLR 75.
[18] [1997] 3 SLR 802.
[19] [1996] 2 SLR 706.
[20] *ibid* at 711, relying on Fullagher J's judgment in *Blomley v Ryan*(1956) 99 CLR 362 at 405.
[21] *[1997] 1 All ER 144.*
[22] *This is substantive unfairness: Chen-Wishart [1997] CLJ 60 at 63-4, Millett LJ (1998) 114 LQR 214 at 220. Such cases have been called 'shockers': Prudential Building and Investment Society of Canterbury v Hankins* [1997] 1 NZLR 114.
[23] *Atiyah "Contract and Fair Exchange" (1985) 35 U Toronto LJ 1(reprinted as Essay 11 in PS Atiyah, Essays on Contract* (1986)); Phang, "Vitiating Factors in Contract Law" (1998) 10 SAcLJ 1 at 2-3.
[24] *See Capper "Undue influence and Unconscionability: A Rationalisation" (1998) 114 LQR 479 at 491-7, where Fong Whye Koon* is cited; "the inadequacy of the consideration may give rise to an inference of fraud if the inadequacy is so great as to make it impossible to accept that the bargain was fairly made"

of commerce and a flat in Hong Kong is probably as good an example as one could find".[25] So it is in Singapore.

Pragmatism: Personal Liability to Account and Breach of Fiduciary Duty

English courts however prefer to utilise restitution rather than notions of unconscionability. In *Union Eagle*, the Board spoke of it as an alternative remedy to specific performance for relief against forfeiture. But it has been stated that "serious difficulties arise if the law seeks to expand the law of restitution to redistribute risks for which provision has been made under an applicable contract."[26] And the forfeiture, so called,[27] is in accordance with the contract. Similarly, the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan*,[28] while rejecting unconscionability as the basis of liability in knowing receipt, stated that its nature was instead restitution-based. Subsequently, his Lordship emphasised that such liability was strict,[29] but that may be taking a greater leap than is necessary. In Canada, *in Citadel General Assurance v Lloyds Bank Canada*[30] La Forest J stated that "constructive knowledge (that is, knowledge of facts sufficient to put a reasonable person on notice or inquiry) will suffice as the basis for restitutionary liability", and that "(l)iability in "knowing receipt" cases is not strict; it depends not only on the fact of enrichment (ie receipt of trust property) but also on the unjust nature of that enrichment (ie the stranger's knowledge of that breach of trust)". This is probably the position we have reached, albeit without the benefit of either judgment. In *Yogimbikai Nagarajah v Indian Overseas Bank*[31] Lai J in the Singapore Court of Appeal held that unlike a "proprietary tracing claim", where liability is strict, "what is sought is not the recovery of the trust property but to make the knowing recipient make *restitution*... The latter liability only arises when the volunteer learns or is put on inquiry that the property was trust property."[32]

If liability is not strict, it may be asked whether there is any profit in retaining a restitutionary analysis, particularly if restitution might itself only be a response to a yet undefined cause.[33] The concern may well be more to do with the protection of equitable proprietary rights.[34]

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[25] *supra* n 4 at 345.

[26] *Pan Ocean Shipping v Creditcorp Ltd* [1994] 1 WLR 161 (HL); *cf Dies v British and International Mining and Finance Corporation Ltd* [1939] 1 KB 724 (KBD). See Soh, *supra* n 7 at 83-4.

[27] *WMC Gummow, "Forfeiture and Certainty, the High Court and the House of Lords" in Finn PD (ed) Essays in Equity* (1985) Ch 2.

[28] *[1995] 2 AC 378.*

[29] *"Knowing Receipt: Need for a new Landmark" in Cornish et al ed, Restitution: Past, Present and Future* (1998); contra Lord Browne-Wilkinson, *Westdeutsche v Islington* [1996] 2 WLR 802.

[30] *152 DLR (4th) 411 (SCC), noted L Smith (1998) 114 LQR 394. See also Gold v Rosenberg* (1997) 152 DLR (4th) 385 (SCC).

[31] *[1997] 1 SLR 258.*

[32] *ibid* at 277-8; *cf* Millett LJ, "Restitution and Constructive Trusts" (1998) 114 LQR 399 at 403.

[33] Birks, "Property and Unjust Enrichment: Categorical Truths" [1997] NZLR 623.

[34] Grantham & Rickett (1998) 114 LQR 357, "Property and Unjust Enrichment: Categorical Truths or Unnecessary Complexity?" [1997] NZLR 668; L Smith *supra* n 30.

In the context of knowing assistance, the Court of Appeal *Goh Swee Fang v Tiah Juah Kim*[35] held that, "it would appear that it is sufficient if there was lack of probity and/or moral reprehensible conduct on the part of the fiduciary, and knowing assistance by the stranger. *It is not necessary to prove a dishonest and fraudulent breach of trust."* The decision thus presages the decision in *Royal Brunei*, at least in removing the need for assistance in a dishonest and fraudulent design. Where the assistor's mens rea is concerned, however, Tan LM J in *D&C Property Pte Ltd v Four Seas Construction*[36] *acknowledged that Royal Brunei's* conception of dishonesty may have dispensed with the question of knowledge. However, the learned judge still referred to the *Baden Delvaux* states of knowledge. Some academic commentators[37] and judges[38] believe that we cannot avoid such an inquiry.

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[35] [1994] 3 SLR 881 at 894-5.

[36] *unreported 20 August 1997.*

[37] Birks [1996] LMCLQ 1; Gardner [1996] 112 LQR 56 at 67.

[38] *Brinks Ltd* v *Abu-Saleh No 3* The Times, 23 Oct 95 (Rimer J).

The fall in property values heralds the increasing importance of *O'Brien* and *South Australia* in the region. Attempts to bypass causation by framing the claim for breach of fiduciary duty failed in *Swindle v Harrison*,[39] where the English Court of Appeal limited the application of *Brickenden v London Loan Savings Co*[40] *to cases of fraud, and perhaps even further. However, it will be some time before the causation rules are fully worked out, although it is envisaged that Mummery LJ's approach would prevail.*[41] *The Singapore Court of Appeal in Ohm Pacific Sdn Bhd v Ng Hwee Cheng*[42] *dealt with this issue without referring to any of the relevant cases;*[43] *stating that "(n)o principle could be extracted from the cases that once a breach of duty was shown the burden fell on the respondent as a defaulting fiduciary to show that the loss did not result from her breach...."*

In this area of law, the element of pragmatism is perhaps best seen in Kartika Ratna Thahir v Pertamina.[44] Lai J, in holding that a recipient of a bribe held it on constructive trust, probably imposed the trust as a remedy,[45] while stating that we were not bound by *Lister v Stubbs.* There is, however, still a great deal of discomfort with the remedial constructive trust, and a mechanism for the trust to arise autonomously was provided in *Attorney General of Hong Kong v Reid*,[46] ie that equity deems the recipient so honest that the bribe is received for the principal. This was adopted by the Singapore Court of Appeal in *Pertamina*,[47] although unconscionable denial can itself sometimes appear an artificial device, and much depends on whether it can be shown that the recipient was a fiduciary prior to the relevant transfer.[48]

Following English decisions at own expense: *Barclays v O'Brien* and Illegality

Pertamina shows that our courts still follow English developments very closely. They may do so even where those developments have been criticised elsewhere. In Singapore, the doctrine of constructive notice in the context of undue influence was applied even prior to *O'Brien* in *Cheong Kim Hock* v *Lin Securities (Pte) (in liq)*.[49] Here a director convinced the plaintiff company (he had control over the other directors, who were his siblings) to purchase some property from both himself and a third party at an inflated price. The Court of Appeal

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[39] [1997] 4 All ER 705.

[40] *[1934] 3 DLR 465 at 469 per Lord Thankerton, "Once the court has determined that the non-disclosed facts were material, speculation as to what course the constituent, on disclosure, would have taken is not relevant."*

[41] *Tjio & Yeo (1998) 114 LQR 181.*

[42] *[1994] 2 SLR 576*

[43] *eg Canson Enterprises Ltd v Boughton & Co* [1991] 3 SCR 534.

[44] *[1993] 1 SLR 735.*

[45] *"when any property is declared to be the subject matter of a constructive trust, the imposition of the trust by that mere fact will give the beneficiary proprietary interests in the property" ibid* at 795.

[46] *[1993] AC 713. But see Lord Browne-Wilkinson in Westdeutsche v Islington LBC* [1996] 2 WLR 802 at 839.

[47] *[1994] 3 SLR 257.*

[48] *Halifax Building Society v Thomas* [1996] Ch 217 (CA).

[49] *[1992] 2 SLR 349. Cheong Kim Hock* is also authority for the proposition that a director can be presumed to have exercised undue influence over his company.

held that since the director and company were in a fiduciary relationship, a presumption of undue influence arose. This tainted the transaction with the third party who should have known that the director effectively controlled the company, and who, being a property owner, ought to have known of the depressed state of the property market. A rather onerous duty of inquiry was imposed. Goh Joon Seng J in the Court of Appeal said that "(t)he onus is on the party taking the benefit to rebut the presumption and no evidence has been adduced either by Lin or the second defendant to rebut this presumption."[50]

This would have suggested that a more stringent approach than that generally seen in England could have found favour here, and banks might thus have had to assume the role of surrogate debtor, having to counteract the undue influence exercised by the husband.[51] However, in *Malayan Banking Bhd v Hwang Rose,*[52] in applying *O'Brien* in a case where the guarantee was clearly not for the surety father's benefit, the Court of Appeal found that the bank had no constructive notice of any possible misrepresentation by the borrower son. What was determinative was the level of sophistication of the surety,[53] which probably reduced the observable risk of any possible wrongdoing. The Court seemed less concerned with Lord Brown-Wilkinson's guidelines or reasonable steps to take, the focus of many subsequent English Court of Appeal decisions, which in any case appears to have been diluted,[54] and which may not fit comfortably with the doctrine of notice.[55] Reacting perhaps to these decisions, Millett LJ appears to approve the use of substantive unfairness as a basis for setting aside such transactions, as against procedural or formation defects.[56]

In the context of illegality, a majority in the House of Lords in *Tinsley v Milligan*[57] held that where the claimant was relies on the presumption of a resulting trust, illegality is no bar; whereas if there is a presumption of advancement at the same time, the claimant will not be able to rebut it as that requires reliance on the illegal purpose behind the transfer.

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[50] *Ibid* at 357.
[51] *A Chandler (1995) 11 LQR 51; cf Midland Bank v Kidwai* [1995] 4 Bank LR 303 at 307.
[52] *[1997] 2 SLR 1.*
[53] *"the bank were not put on enquiry as to any possible wrongdoing ...Tan Sr was a businessman and knew the nature of the guarantee and the consequences of signing it. Given his business experience, he could have obtained independent legal advice had he wished to do so. He was not dependent on Patrick Tan. This is certainly not a case where the bank should be put on enquiry as to any possible wrongdoing by Patrick Tan.", ibid* at 26.
[54] *See eg Midland Bank plc v Massey* [1994] 1 All ER 929; *Banco Exterieur Interacional v Mann* [1995] 1 All ER 936; *Bank of Baroda v Rayarel* [1995] 4 Bank LJ 333; *Midland Bank Plc v Serter* [1995] 1 FLR 1034; *cf Royal Bank of Scotland v Etridge* [1997] 3 All ER 628, noted Price (1998) 114 LQR 186.
[55] *Mee [1995] CLJ 536; Rickett and McLaughlan [1995] NZLR 328 (O'Brien seen as imposing an equitable duty of care); cf* Tjio (1997) 113 LQR 10 at 13; *Barclays Bank Plc v Boulter* [1998] 1 WLR 1 at 10, "(both) being put on inquiry and taking reasonable steps are aspects of constructive notice."
[56] *Credit Lyonnais v Burch supra* n 21; Millett LJ, *supra* n 22 at 220; *cf Hart v O'Connor* [1985] 1 AC 1000.
[57] *[1994] 1 AC 340.*

The High Court of Australia in *Nelson v Nelson*[58] *opted not to follow the Tinsley* all or nothing solution, ie, the extremes of recovery or no recovery. The majority instead focussed on the remedial aspect and adjusted the remedy as justice demanded.[59]

But Singapore law seemed to have taken a different path anyway, in a way far more favourable to the person seeking to deny the proprietary claim. In *Suntoso Jacob v Kong*,[60] the Court of Appeal case said that "(e)ven if the appellant is relying on the resulting trust of the said shares by virtue of the transfer thereof to the respondent without any payment, the unlawful purpose of the transfer cannot be ignored." Thean JA went on to say that;

There is one further difficulty in the way of the appellant's case which is even more formidable and seems to us to be insurmountable. And it is this. The appellant's claim that the respondent held the said shares on trust for him whether on the basis of a resulting trust arising in his favour by reason of the voluntary transfer ... - is one founded on equity. In seeking the assistance of the Courts to enforce this equity, the appellant must come with clean hands.[61]

In *Shi Fang v Koh Pee Huat*,[62] however, Thean JA opted to follow the decision of the majority in *Tinsley*, without discussing his judgment in *Suntoso Jacob*, which was closer to the dissenting judgment of Lord Goff in that case.[63] Here there was a presumption of advancement between father and son which was rebutted by the son's own admission that the property was held on resulting trust for the father. The resulting trust stood despite the illegal purpose of the transfer, the evasion of estate duty by the father, as the father did not have to rely on the underlying illegality.

Canadian influence: Company Charges

It is widely believed that registration of a charge only gives notice of the registered prescribed particulars and not optional extras: *Wilson v Kelland.*[64] *Professor Farrah and Goode thus had different views about the utility of registering a negative pledge along with the floating charge. The former thought that restrictive provisions were today so common that a third party would have inferred knowledge of the provision.*[65] *Professor Goode's response then was that inferred knowledge requires some kind of Nelsonian blindness.*[66] *In Kay Hian v Jon Phua*, while declining to comment on *Wilson v Kelland* without fuller argument, the Court required a satisfactory explanation from the subsequent creditor why he did not do what the honest and reasonable man would have done, which was to search the register. In its absence, Chan SK J was convinced that the subsequent creditor had actual notice of the negative pledge. This approach is however only slightly less subtle than the conception of dishonesty in *Royal Brunei*. By treating the subsequent creditor as

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[58] *(1995) 70 ALJR 47.*
[59] See also *Tribe v Tribe* [1995] 4 All ER 236 at 250-1; Phang (1996) 11 JCL 53.
[60] [1986] 2 MLJ 170 at 173.
[61] *ibid* at 175.
[62] [1996] 2 SLR 221.
[63] *supra* n 57 at 357-8.
[64] *[1910] 2 Ch 306.*
[65] *"Floating Charges and Priorities" (1974) 38 Conv (NS) 315, at 319 et seq*
[66] *Legal Problems of Credit and Security* (2nd ed 1988) at 19.

akin to Equity's Darling, the burden is on him to explain why it did not conduct the inquiries a reasonable man would have made.[67]

Conclusion

Pragmatism is not a euphemism for parochialism. In fact, the obverse is true; cases from South Africa, Ireland, even the United States, are increasingly cited by counsel. No longer 'bound' to follow any other jurisdiction, our courts have cast their net wider in their search of legal principles that best achieves a fair solution.

It is hoped that our local decisions may also influence cases elsewhere. Some are now being reported overseas, eg *Ng Wei Teck v OCBC*[68] *(to be reported in the BCLC). This concerned an unregistered charge which was 'void against the liquidator and any creditor of the company'.*[69] *It is generally accepted that the provision only covers secured creditors.*[70] *Our Court of Appeal, however, held that once proceedings are filed, a statutory trust of the debtor's assets was created, with the unsecured creditors as the beneficiaries. This gave them sufficient locus standi to invoke section 131 of the Companies Act, and solves the problem that would have existed in the interim period between filing of a winding up petition and the making of the order. This pragmatic solution was, however, reached by relying on cases on voluntary winding up, where the liquidator was appointed on the same day that the resolution to wind up was passed.*[71]

Hans Tjio[*]

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[67] *[1989] 1 MLJ 284, following the Supreme Court of Canada in Union Bank of Halifax v Indian and General Investment Trust* (1908) 40 SCR 510; Tjio (1995) 16 Company Lawyer 32. In the context of *O'Brien,* see *Barclays Bank Plc v Boulter* [1998] 1 WLR 1.

[68] *[1998] 2 SLR 1; Lee EB (1998) 10 SAcLJ 241; Tan CH (1998) LQR (forthcoming). See also RSP Architects Planners & Engineers v Ocean Front Pte Ltd* [1996] 1 SLR 113; reported in (1998) 14 Con LR 139. Another decision which could have been of some moment was *Khushvinder Singh v Rajagopal* [1996] 2 SLR 379 where TQ Lim JC thought that it was illogical that manifest disadvantage was necessary in cases of presumed undue influence but not actual undue influence; see Phang, *supra* n 23 at 45-6; Capper, *supra* n 24 at 487-9. The decision was, however, reversed on appeal; [1996] 3 SLR 457. The Court of Appeal did not comment on this aspect of the decision.

[69] *Section 131 Companies Act (Cap 50 1994 Rev Ed), which is in pari materia with sections 395 and 396 of the English Companies Act 1985.*

[70] *Re Ehrmann Brothers Ltd* [1906] 2 Ch 697.

[71] *Re Anglo-Oriental Carpet Manufacturing Co* [1903] 1 Ch 915; *Re Resinoid & Mica Products Ltd* [1983] Ch 132n.

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ARTICLE 1338 INDONESIAN CIVIL CODE:

1. All valid contracts bind the parties like a statute.

2. The contract cannot be cancelled without parties consent or reasons stipulated in an Act.

3. The performance of the contract should be carried out in good faith.

ARTICLE 1339 Parties are bound to the substance of the contract, not only what is stipulated therein, but also what is required according to the nature of the contract, required by equity, custom, or law.

PRINCIPLES OF EQUITY DEVELOPED INTO LEGAL INSTITUTIONS: -

1. Changes of conditions
   - stipulated in statutes (Delegated Equity)
   - included in the correcting function of equity (Adapting Equity).

2. Force majeure
   - absolute
   - relative

3. Decency, considerableness, good moral in society.

4. Abuse of right.

5. Abuse of conditions.

6. Non performance of a contract.

7. Modification or alteration of imperfect contracts.

8. Error.

JUDICIAL PROCEDURE

1. Reconciliation.
2. Court's sessions

THE NEW DUTCH CIVIL CODE:

Judge shall take into account: General recognized principles, prevalent opinion, law-consciousness alive in society, and the relevant social and individual interests.

Dr. LM Gandhi-Lapian

Hong Kong 1998

The Obligations of Fiduciaries: Recent Developments in New Zealand

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Recent developments in the law of civil obligations in New Zealand have focussed on various legacies of the law-equity divide.[1] With doctrinal rationalisation as the goal, two trends, in particular, have characterised many judicial decisions. The *first* has been a willingness to analyse obligations more in terms of their nature and substance than their historical genesis.[2] The *second* has been a willingness to realise the remedial potential of wrongs by ensuring that a full range of remedies is available as appropriate whatever their historical origin.[3]

These trends have had considerable impact on fiduciary law. The first trend has exposed the fallacy that every breach of duty by a fiduciary is a fiduciary breach, thereby enabling a more refined analysis of the content of fiduciary duty to be undertaken.[4] The second trend has led to a re-examination of the role of causation in the fiduciary context, thus facilitating the development of suitable remedial rules to limit the consequences of fiduciary breaches.[5] This paper discusses these developments.

The obligations of fiduciaries

It has been well recognised recently that the broad designation of a relationship as 'fiduciary' does not describe the content of all the duties owed in that relationship. On the contrary, the characterisation of a relationship as fiduciary "only begins analysis".[6] Further investigation reveals that fiduciaries are typically subject to a spectrum of duties

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1 *National Westminster Finance NZ Ltd v National Bank of NZ Ltd* [1996] 1 NZLR 548 (note) (estoppel); *Swann v Secureland Mortgage Investment Nominees Ltd* [1992] 2 NZLR 144 (fraud); *Day v Mead* [1987] 2 NZLR 443 (equitable compensation).

2 *Mouat v Clark Boyce* [1992] 2 NZLR 559, 564-565 per Cooke P; *Attorney-General for the United Kingdom v Wellington Newspapers Ltd* [1988] 1 NZLR 129, 172 per Cooke P.

3 *Aquaculture Corp v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299.

4 *Bank of New Zealand v The New Zealand Guardian Trust Company Ltd*, CP 431/94, High Court, Auckland, 22 April 1998, Fisher J, 40; *Brownie Wills v Shrimpton* [1998] 2 NZLR 320.

5 *Bank of New Zealand v The New Zealand Guardian Trust Company Ltd*, fn 4, 31-44; *Gilbert v Shanahan Partners* CA 246/97, Court of Appeal, 30 April 1998.

6 *SEC v Chenery Corporation* 318 US 80 (1943), 86 per Frankfurter J.

which vary in scope and intensity. These duties range from those developed in the heartland of equity to those more commonly associated with tort.[7] Thus the span of the spectrum is acknowledged to include the duties of loyalty, good faith, disclosure and care.[8] Various attributes of these duties have recently been emphasised in a number of important decisions. The duty of loyalty is now regarded as the distinctive fiduciary obligation, encompassing the 'negative' obligations enshrined in the 'profit' and 'conflict' rules.[9] The duty to act in good faith, although usually regarded in fiduciary contexts as a 'positive obligation of loyalty', occasionally appears simply to encompass obligations developed at common law.[10] The duty of disclosure may not, *per se*, be fiduciary, although it will be if it transgresses the loyalty rules and is used, for example, to advance an adviser's own or a third party's interests,[11] otherwise it may be dealt with in tort (perhaps as deceit) or, in New Zealand, possibly more readily as 'misleading conduct' under the Fair Trading Act 1986.[12] The duty of care owed by a fiduciary is co-extensive with the duty of care imposed by tort.[13]

The concept of a spectrum of obligations is undoubtedly useful. By concentrating attention on the scope and policy objectives of different duties it enables compensatory principles to be developed which reflect the substance of the duties broken rather than whether the duties were first recognised at law or in equity.[14] Thus the concept allays the fear that the expansion of the fiduciary principle threatens the province of tort and prevents fiduciary law being "remedy led".[15] A significant result of this ought to be that litigants no longer seek the benefit of equitable presumptions and the efficacious remedies developed in equity unless a fiduciary breach (that is, a breach of the duty of loyalty) has occurred, as opposed to the breach of some other obligation to which a fiduciary is subject.[16]

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[7] *Bank of New Zealand v The New Zealand Guardian Trust Company Ltd*, fn 4, 34-40; *Brownie Wills v Shrimpton*, fn 4, per Gault and Blanchard JJ; *Russell McVeagh McKenzie Bartleet & Co v Tower Corporation*, CA 86/98, Court of Appeal, 25 August 1998, 22 per Thomas J.

[8] *Bank of New Zealand v The New Zealand Guardian Trust Company Ltd*, fn 4, 34-40.

[9] *Parkin v Alabaster*, CA 127/97, Court of Appeal, 8 April 1998; *Maclean v Arklow Investments Ltd*, CA 95/97, Court of Appeal, 16 July 1998, 15-17 per Richardson P, Gault and Keith JJ.

[10] *Bank of New Zealand v The New Zealand Guardian Trust Company Ltd*, fn 4, 40-42.

[11] *Day v Mead*, fn 1.

[12] Damages assessed on tortious principles may be awarded under the Fair Trading Act 1986: *Crump v Wala* [1994] 2 NZLR 331.

[13] *Mouat v Clark Boyce*, fn 2; *Bank of New Zealand v The New Zealand Guardian Trust Company Ltd*, fn 4.

[14] Ibid.

[15] *Maclean v Arklow Investments Ltd*, fn 9, 20 per Richardson P, Gault and Keith JJ.

[16] But see *Gilbert v Shanahan Partners*, fn 5, 4-5 per Tipping J (giving the judgment of the Court); *Brownie*

Despite its utility, however, the spectrum as discussed thus far is incomplete. Largely developed in fiduciary contexts other than trusts, it advances two paradigms of liability. On the one hand, is fiduciary liability, exemplified by a breach of the profit or conflict rules or by a breach of the duties of good faith or disclosure when the facts indicate that they fall within the ambit of the duty of loyalty. On the other hand, is tortious liability, usually illustrated by a breach of the duty of care or a failure to disclose information which does not amount to a breach of the duty of loyalty. It is clear from recent cases that the categorisation of a duty as fiduciary or tortious affects the consequences of a breach when compensation is in issue. It is otherwise, however, when restitution of the trust estate is sought from trustees of conventional trusts as a result of deviation from the trust instrument.[17] These trustees are subject to the full realm of duties as outlined, from loyalty to care, yet the consequences of a breach which results in loss to the trust estate are not calibrated to whether the breach in issue is a fiduciary breach or a tortious breach. Rather, the obligation of a defaulting trustee who causes loss to the trust estate stems from the trustee's assumption of another duty, a duty of strict compliance with the trust deed. This duty, breach of which demands that the trustee make restitution to the trust estate, is thus more intense than the fiduciary and tortious duties which make up the balance of the spectrum.

These three categories of liability (for breach of trust causing loss to the trust estate, for breach of fiduciary duty other than such a breach of trust and for breach of tortious duties) provide the analytical framework within which a sliding scale of causal principles are currently being refined.[18]

Causation

In a number of recent decisions New Zealand courts have considered issues of causation in the fiduciary context.[19] These cases illustrate significant doctrinal shifts which seem broadly designed to ensure that inflexible rules of causation do not contribute to over-compensation for a breach of duty. Probably the most important

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Wills v Shrimpton, fn 4, per Gault and Blanchard JJ.

17 Company directors were once subject to a similar duty insofar as they were obliged to ensure that all transactions conformed to the memorandum of association.

18 *Bank of New Zealand v The New Zealand Guardian Trust Company Ltd*, fn 4; *Gilbert v Shanahan Partners*, fn 5.

19 *Gilbert v Shanahan*, fn 5; *Everist v McEvedy* [1996] 3 NZLR 348.

recent change is the abandonment of the strict approach to causation adopted in *Brickenden v London Loan & Savings Co.*[20] In its place is an approach which permits a fiduciary, in effect, to rebut the prima facie demonstration of loss through breach of the duty of loyalty by proof that the loss would have occurred in any event despite the breach.[21] The net result of this retreat from *Brickenden* is that current approaches to causation may be analysed in three distinct categories.

First are the rules which govern losses to the trust estate through a trustee's breach of the duty of compliance with the deed at issue. Once a plaintiff beneficiary in a conventional trust has proved a causal connection in a 'but for' sense between a breach of duty and loss the general rule is that the trustee is liable for all loss to the trust estate.[22] As this prima facie liability of the trustee is not affected by the type of breach incurred (for example, fiduciary or tortious) it initially seems harsh. It may, however, be justified. It is, after all, simply the consequence of a risk which the trustee assumed by agreeing to act as trustee. Further, this rule seeks only restitution (plus interest) to the trust estate; it does not render trustees liable for consequential losses to the estate nor for breaches of duty which do not cause loss to the estate.[23] And it ought not to be overlooked that some relief from the rigours of the rule may be available through the exercise of judicial discretion.[24] Despite these justifications, however, the inescapable fact is that once a causal connection is established in the sense described a trustee in a conventional trust is faced with stringent rules as to the fact of his liability and its extent.

The *second* category concerns breaches of fiduciary duties other than breaches of trust. In respect of such breaches of loyalty, a two stage test has supplanted an "unadorned" 'but for' approach to causation.[25] The prima facie rule is that a fiduciary who breaches a duty of loyalty is liable for losses suffered by the plaintiff "arising out of a transaction or circumstance to which the breach was material".[26] However, the defendant may resist the plaintiff's claim by showing (by evidence not speculation) that the plaintiff's loss would have occurred in any event without any breach on the

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[20] [1934] 3 DLR 465.

[21] *Gilbert v Shanahan*, fn 5; *Everist v McEvedy*, fn 17; *Haira v Burbery Mortgage Finance & Savings Ltd (in receivership): Koya v Haira* [1995] 3 NZLR 396; *Witten-Hannah v Davis* [1995] 2 NZLR 141.

[22] *Bank of New Zealand v The New Zealand Guardian Trust Company Ltd*, fn 4, 37.

[23] Ibid, 41.

[24] Trustee Act 1956 s 73.

[25] *Bank of New Zealand v The New Zealand Guardian Trust Company Ltd*, fn 4, 37.

[26] *Everist v McEvedy* [1996] 3 NZLR 348, 355 per Tipping J endorsed in *Gilbert v Shanahan*, fn 5, 9-10 per Tipping J (giving the judgment of the Court of Appeal).

defendant's part.[27] This approach is innovative.[28] The low causal threshold in the first limb (which excludes reasonable foreseeability) is a direct response to the nature of the duty broken: as the relevant breach is a breach of the duty of loyalty the limited causal requirements emphasise deterrence. In this respect the test favours plaintiffs. On the other hand, the second limb of the test enables fiduciaries to escape liability for losses which are proved not to flow from their breaches of duty. In this respect the test favours defendants more than the strict *Brickenden* test did. The overall result is a considerable improvement. By modifying the template used in trust loss cases, the new two-stage test ensures that the attribution of losses more accurately reflects the risks which the parties have assumed in other fiduciary contexts. More specifically, its focus on the scope of the duty owed and the nexus between breach and loss, enables a defendant to demonstrate, for example, that the usual obligations owed by a fiduciary were altered by the facts. Thus, liability may be apportioned when it is shown that reliance on the fiduciary alone is unjustified given the nature of the dealing and the respective positions of the parties.[29] The spectre of unmeritorious compensatory awards is therefore dispelled once a technique more responsive to the modern perception of the fiduciary spectrum replaces the strict *Brickenden* test.

The *third* category limits losses which flow from breaches of duty which are essentially tortious. Here a 'but for' approach is insufficient. The onus is on the plaintiff to show that a duty is owed; that the causal nexus between breach and loss is substantial; that the kind (although not the extent) of the loss was reasonably foreseeable; and that the loss is sufficiently proximate in other respects.[30]

Conclusion

An integrated law of civil wrongs, freed from the doctrinal limitations of the past, is not yet a part of the New Zealand legal landscape. It may, however, not be too far beyond the horizon. Although many difficult questions remain to be answered, recent developments in the fiduciary field give considerable cause for confidence that a

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27 Ibid.

28 Although a similar test was advanced in *New Zealand Netherlands Society "Oranje" Inc v Kuys* [1973] 2 All ER 1222, 1227 per Lord Wilberforce.

29 *Day v Mead*, fn 1.

30 *Bank of New Zealand v The New Zealand Guardian Trust Company Ltd*, fn 4, 43.

unified approach to the recognition of duties and their remedial consequences will be the way of the future.

DUPLICATED MATERIALS

1. *Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 HKC 173

2. *Pacific South (Asia) Holdings Ltd v Million Unity International Ltd* [1997] 3 HKC 440

3. *Yap Hong Too v Wong Ah Mei* [1997] 1 MLJ 545

4. *Garcia v National Australia Bank Ltd* [1998] HCA 48

1 September 1998
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UNION EAGLE LTD v GOLDEN ACHIEVEMENT LTD

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL – PRIVY COUNCIL APPEAL NO 15 OF 1996
LORD GOFF OF CHIEVELEY, LORD GRIFFITHS, LORD MUSTILL, LORD HOFFMANN AND LORD HOPE OF CRAIGHEAD
2, 3 DECEMBER 1996, 3 FEBRUARY 1997

Equity – Jurisdiction of court to grant relief – Contract for sale of land rescinded by vendor – Relief against forfeiture – Whether court discretion unlimited and unfettered – Practical considerations of business – Certainty as to enforcement of express provision in contract – Undefined discretion a tactic employed in litigation

Land – Sale of land – Time being of essence – Late completion by 10 minutes – Contract rescinded – Party in breach not entitled to tender performance on terms other than in contract – Whether affirmation of contract be inferred on inspection of envelope containing purchase price

Land – Sale of land – Forfeiture of deposit – Whether deposit a genuine pre-estimate of damage – Vendor entitled to rescind where breach of essential condition as to time – Certainty as to right to re-sell and to all transactions without destablising normal commercial relationships

Lord Hoffmann: The conveyancing transaction which gave rise to this appeal was, save in one respect, entirely commonplace. The appellant (the purchaser) entered into a written agreement dated 1 August 1991 to buy a flat on Hong Kong Island from the respondent (the vendor) for HK$4.2m. In accordance with the contract, the purchaser paid a deposit of HK$420,000 to the vendor's solicitors, Messrs Robert CK Tsui & Co, as stakeholders. Completion was to take place on or before 30 September 1991 and before 5.00pm on that day. Time was to be in every respect of the essence of the agreement. Clause 12 provided that:

> If the Purchaser shall fail to comply with any of the terms and conditions of this Agreement the deposit money and any part payment of purchase price so paid shall be absolutely forfeited as and for liquidated damages (and not a penalty) to the Vendor who may (without being obliged to tender an Assignment to the Purchaser) rescind this agreement and either retain the Property the subject of this Agreement or any part or parts thereof or resell the same ...

The purchaser failed to complete by 5.00pm on 30 September 1991 and the vendor declared that the contract was rescinded and the deposit forfeited.

The only unusual feature was that the purchaser tendered payment of the purchase price ten minutes after the time for completion had passed. The purchaser refused to accept that so venial a lapse should result in the loss of the contract and commenced proceedings for specific performance. Cheung J dismissed the action ([1995] 2 HKC 225) and his decision was affirmed by the Court of Appeal (Litton VP and Ching JA, Godfrey JA dissenting) ([1996] 1 HKC 349).

The chief question in the case is whether the court has, and should have exercised, an equitable power to absolve the purchaser from the contractual consequences of having been late and to decree specific performance. But Mr Lyndon-Stanford QC, who appeared for the purchaser, also argued three other points, of which one was taken unsuccessfully before the Court of Appeal and the other two were new. Their Lordships can dispose of these quite shortly, but in order to explain the first two, it is necessary to give some further details about what happened on the last day fixed for completion.

The purchaser missed a morning appointment to inspect the flat. As a result, shortly before noon, Ms Chow, a conveyancing clerk with Robert CK Tsui & Co, telephoned Ms Tin, a clerk with the purchaser's solicitors, Messrs F Zimmern & Co, and warned that the balance of the purchase price should be paid by 5.00pm or else her client would exercise his right to rescind and forfeit the deposit. Under the usual Hong Kong practice, the vendor was to complete by giving a solicitor's letter of undertaking to forward the necessary documents of title. Ms Tin rang back to confirm that her client would complete in accordance with the contract. However, by 5.00pm this had not taken place and at 5.01pm Miss Chow telephoned

Miss Tin again. She said that the money had not arrived and that the vendor reserved the right to rescind and forfeit the deposit. Ms Tin replied that a messenger was on his way. The judge found that he arrived at 5.10pm with an envelope containing the cheques for the purchase money and a letter of undertaking in a form previously agreed. Mr Tsui telephoned his client for instructions and was told to rescind the agreement. At 5.11pm Ms Chow telephoned F Zimmern & Co, told them that the contract would be rescinded and returned the envelope and contents to the messenger.

Mr Lyndon-Stanford QC submitted that when performance was tendered at 5.10pm the contract was still on foot. Although failure to perform in time was a repudiatory breach, the vendor had not yet accepted the repudiation and rescinded. Meanwhile, the contract remained alive for the benefit of both parties. At 5.10pm the purchaser was still entitled to complete the contract by performance and had tendered to do so. Failure to accept his tender was a repudiatory breach by the vendor.

This argument attracted Godfrey JA but their Lordships think it is quite untenable. It is true that until there has been acceptance of a repudiatory breach, the contract remains in existence and the party in breach may tender performance. Thus a party whose conduct has amounted to an anticipatory breach may, before it has been accepted as such, repent and perform the contract according to its terms. But he is not entitled unilaterally to tender performance according to some other terms. Once 5.00pm had passed, performance of the contract by the purchaser was no longer possible. The vendor could be required to accept late performance only on the grounds of some form of waiver or estoppel.

The second point has even less merit. Mr Lyndon-Stanford QC invited their Lordships to infer from the evidence that the messenger had handed the envelope to Ms Chow and that she had opened it and examined its contents before handing it back. This, he said, was an affirmation of the contract. Cheung J made no finding of fact about what Ms Chow had done with the envelope and even if she had opened it, their Lordships do not think that this could possibly be construed as acceptance of late performance. Everything Ms Chow said and did made it clear that the tender was being rejected.

Mr Lyndon-Stanford QC's third point was that the purchaser was in any event entitled to the return of his deposit because it was not a genuine pre-estimate of damage. He accepted that, in the normal case of a reasonable deposit, no inquiry is made as to whether it is a pre-estimate of damage or not: *Howe v Smith* (1884) 27 Ch D 89; *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] AC 573. But he said that this deposit was not franked under that rule because cl 12 described it 'as and for liquidated damages (and not a penalty)'. Their Lordships do not think that these words deprived the deposit of its character as a deposit, an earnest of performance, which was liable to forfeiture on rescission.

This clears the way for the main point in the appeal. The boundaries of the equitable jurisdiction to relieve against contractual penalties and forfeitures are in some places imprecise. But their Lordships do not think that it is necessary in this case to draw them more exactly because they agree with Litton VP that the facts lie well beyond the reach of the doctrine. The notion that the court's jurisdiction to grant relief is 'unlimited and unfettered' (per Lord Simon of Glaisdale in *Shiloh Spinners Ltd v Harding* [1973] AC 691, 726) was rejected as a 'beguiling heresy' by the House of Lords in *The Scaptrade (Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana* [1983] 2 AC 694, 700). It is worth pausing to notice why it continues to beguile and why it is a heresy. It has the obvious merit of allowing the court to impose what it considers to be a fair solution in the individual case. The principle that equity will restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority (see Lord Radcliffe in *Campbell Discount Co Ltd v Bridge* [1962] AC 600, 626) but also upon practical considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be 'unconscionable' is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic.

The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case.

The considerations of this nature, which led the House of Lords in *The Scaptrade* to reject the existence of an equitable jurisdiction to relieve against the withdrawal of a ship for late payment of hire under a charterparty, are described in a passage from the judgment of Robert Goff LJ in the Court of Appeal [1983] QB 529, 540-541 which was cited with approval by the House: see [1983] 2 AC 694, 703-4. Of course the same need for certainty is not present in all transactions and the difficult cases have involved attempts to define the jurisdiction in a way which will enable justice to be done in appropriate cases without destabilising normal commercial relationships.

Their Lordships do not think that it is possible, as Mr Lyndon-Stanford QC suggested, to draw a broad distinction between 'commercial' cases such as *The Scaptrade* and transactions concerning land, which are the traditional subject matter of equitable rules. Land can also be an article of commerce and a flat in Hong Kong is probably as good an example as one could find. It is necessary to look more closely at the nature of the transaction rather than its subject matter. The jurisdiction to grant relief is well established in cases of late payment of money due under a mortgage or rent due under a lease. The principle upon which the court acts was stated by Lord Wilberforce in *Shiloh Spinners Ltd v Harding* [1973] AC 691, 722 as follows:

> Where it is possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs.

In such cases the court will, despite the express words of forfeiture in the mortgage or lease, 'mould them into mere securities': see Viscount Haldane LC in *G & C Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25, 35.

In the case of contracts for the sale of land, however, the position is rather more complicated. It appears that in the eighteenth century, there may have been a view that the vendor's right to rescind was also regarded as 'essentially to secure the payment of money' and that relief should be given as in the case of a mortgage. *Vernon v Stephens* (1722) P Wms 66 may have been such a case, although a different explanation is given by Chancellor Kent in *Benedict v Lynch* (1815) 7 Am Dec 484, 488. But such an attitude did not survive Eldon LC's famous outburst in *Hill v Barclay* (1811) 18 Ves 56, 60:

> ... the Court has certainly affected to justify that right, which it has assumed, to set aside the legal contracts of men, dispensing with the actual specific performance, upon the notion, that it places them, as nearly as can be, in the same situation as if the contract had been with the utmost precision specifically performed: yet the result of experience is, that, where a man, having contracted to sell his estate, is placed in this situation, that he cannot know, whether he is to receive the price, when it ought to be paid, the very circumstance, that the condition is not performed at the time stipulated, may prove his ruin, notwithstanding all the Court can offer as compensation.

When a vendor exercises his right to rescind, he terminates the contract. The purchaser's loss of the right to specific performance may be said to amount to a forfeiture of the equitable interest which the contract gave him in the land. But this forfeiture is different in its nature from, for example, the vendor's right to retain a deposit or part payments of the purchase price. So far as these retentions exceed a genuine pre-estimate of damage or a reasonable deposit they will constitute a penalty which can be said to be essentially to provide security for payment of the full price. No objectionable uncertainty is created by the existence of a restitutionary form of relief against forfeiture, which gives the court a discretion to order repayment of all or part of the retained money. But the right to rescind the contract, though it involves termination of the purchaser's equitable interest, stands upon a rather different footing. Its purpose is, upon breach of an essential term, to restore to the vendor his freedom to deal with his land as he pleases. In a rising market, such a right may be valuable but volatile. Their Lordships think that in such circumstances a vendor should be able to know with reasonable certainty whether he may re-sell the land or not.

It is for this reason that, for the past 80 years, the courts in England, although ready to grant restitutionary relief against penalties, have been unwilling to grant relief by way of specific performance against breach of

an essential condition as to time. In *Steedman v Drinkle* [1916] 1 AC 275 Viscount Haldane said at 279:

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

This principle has never since been questioned in any case in England or the Privy Council, although it has been criticised in academic writings and certain Australian cases as both historically inaccurate and unduly rigid. It is certainly true that in *Re Dagenham (Thames) Dock Co ex p Hulse* (1873) 8 Ch App 1022 the court declared a term providing for forfeiture of half the purchase price to be a penalty and granted relief by a decree of specific performance, despite an express provision that time was to be of the essence. The same may have happened in *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319, although the latter case was distinguished in *Steedman v Drinkle* on the ground that the parties had agreed to a new completion date of which time was not to be of the essence. It is difficult to find any trace of this ground in the judgment in *Kilmer* and the explanation has been said to be a rewriting of history, although, if this was so, Lord Atkinson, who had been a member of the Board in *Kilmer*, adhered to the revised version when delivering the judgment of the Judicial Committee in *Brickles v Snell* [1916] 2 AC 599. But their Lordships do not think it necessary to pursue these historical inquiries because it can freely be acknowledged that there have been cases, such as *Re Dagenham (Thames) Dock Co, ex p Hulse*, in which the courts appear to have considered that, first, a restitutionary form of relief would for some reason be inadequate, and secondly, that the need for commercial certainty was not so strong as to make it necessary to exclude relief by way of specific performance. A feature of the *Dagenham case* was that the purchaser had been in possession of the land pending completion for five years, during which time it had constructed a dock at its own expense. In the then state of the English law of unjust enrichment, it would not have been easy to find a restitutionary remedy which provided adequate relief against forfeiture: compare *Stockloser v Johnson* [1954] 1 QB 476.

Similar considerations informed the judgment of the High Court of Australia in *Legione v Hateley* (1983) 152 CLR 406, in which the purchasers entered into possession pending completion of a contract of which time was of the essence and built a house upon the land. They failed to complete on the due date after asking for an extension and receiving a non-committal answer from a clerk with the vendors' solicitors. Gibbs CJ and Murphy J, at 413-430, considered that the conversation estopped the vendors from relying upon the contractual date until a definite refusal had been returned and a reasonable time had then elapsed. Alternatively, the fact that the purchasers had built a house of considerable value upon the land, so that they would suffer a 'harsh and excessive penalty for a comparatively trivial breach' (p 429) made the case an exceptional one in which the principle in *Steedman v Drinkle* should not be applied and relief granted by way of a decree of specific performance. Mason and Deane JJ, at 430-451, did not accept that the conversation amounted to an estoppel, but agreed to the grant of relief by way of specific performance on the ground that the conversation had contributed to the purchaser's breach and that this, together with the other features of the case, made it unconscionable for the vendor to rescind the contract and recover the property.

The line between conduct which amounts to an estoppel and conduct which contributes to the breach so as to make it unconscionable to enforce a forfeiture is in their Lordships' view a narrow one, particularly in view of the broad modern concept of estoppel which has been developed in cases such as *Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note)* [1982] QB 133. Leaving aside the question of estoppel, both *Re Dagenham (Thames) Dock Co, ex p Hulse* and *Legione v Hateley* could be regarded as cases in which it might have been expected that the purchaser should be entitled to relief by way of restitution rather than by way of being allowed to keep the benefit of the bargain in spite of his breach of an essential term. In neither case, however, was restitutionary relief

considered; partly, no doubt, because of the state of the authorities on this branch of the law and partly because there was no suggestion that the value of the land so exceeded the purchase price as to make a practical difference between restitution and specific performance.

In the later Australian case of *Stern v McArthur* (1988) 165 CLR 489, however, the distinction emerged very clearly and sharply divided the court. The purchasers in that case bought a plot of land in 1969 for A$5,250 payable by way of a deposit of A$250 and thereafter by monthly instalments of not less than A$50. Under the contract, on default in paying instalments for more than four weeks the balance of the purchase price became due, and the vendor could then serve a notice to complete within 21 days making time of the essence. The purchasers built a house upon the land but in 1979 they defaulted and failed to comply with a notice to complete. By that time the value of the land had greatly increased. The purchasers tendered the balance of the price and claimed relief by way of specific performance. The vendor offered restitution by way of compensation for their improvements to the land. Deane and Dawson JJ said, at 528, that the instalment payments were 'essentially an arrangement whereby the appellants undertook to finance the respondents' purchase upon the security of the land'. There was accordingly a compelling analogy with a mortgage, in which relief against forfeiture of the estate would ordinarily be granted as of course despite an express term that time was to be of the essence. Gaudron J put her judgment, at 530-542, entirely upon the mortgage analogy. Mason CJ, at 493-505, and Brennan J, at 505-521, dissented, treating the contract as one of sale. They refused to accept that a purchaser, in breach of a term which expressly entitled the vendor to rescind, could claim to retain the benefit of the bargain and held that the offer of restitution disposed of any claim to relief.

Equity has always regarded the question of whether a transaction is a mortgage as depending upon substance rather than form, so that the difference of opinion in *Stern v McArthur* can be regarded as concerning the proper analysis of the nature of the transaction rather than the scope of the jurisdiction to relieve against forfeiture. But their Lordships do not think it necessary to consider these Australian developments further because they provide no help for the purchaser in this case. There is no question of any penalty, or of the vendor being unjustly enriched by improvements made at the purchaser's expense, or of the vendor's conduct having contributed to the breach, or of the transaction being in substance a mortgage. It remains for consideration on some future occasion as to whether the way to deal with the problems which have arisen in such cases is by relaxing the principle in *Steedman v Drinkle* above, as the Australian courts have done, or by development of the law of restitution and estoppel. The present case seems to their Lordships to be one to which the full force of the general rule applies. The fact is that the purchaser was late. Any suggestion that relief can be obtained on the ground that he was only slightly late is bound to lead to arguments over how late is too late, which can be resolved only by litigation. For five years the vendor has not known whether he is entitled to re-sell the flat or not. It has been sterilised by a caution pending a final decision in this case. In his dissenting judgment, Godfrey JA said that the case 'cries out for the intervention of equity'. Their Lordships think that, on the contrary, it shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene.

Their Lordships will accordingly humbly advise Her Majesty that the appeal should be dismissed. The appellant must pay the respondent's costs before their Lordships' Board.

PACIFIC SOUTH (ASIA) HOLDINGS LTD v MILLION UNITY INTERNATIONAL LTD

COURT OF APPEAL – CIVIL APPEAL NO 83 OF 1997
NAZARETH VP, GODFREY AND MAYO JJA
3, 31 OCTOBER 1997

Land – Sale of land – Tender of payment – Payment by personal cheque – Objection of payee – Whether payer deluded into believing that payee not objecting to quality of tender – Whether payee treated as having waived objection otherwise entitled to as to quality of tender – Estoppel by representation

Godfrey JA: *Introduction*

This is the defendant vendor's appeal from an order of Master Woolley (sitting as a deputy judge of the High Court), made on 9 April 1997, whereby the judge ordered, at the suit of the plaintiff purchaser, specific performance of a contract, made on 21 November 1996 for the sale by the vendor to the purchaser, for $205m, of the 20th floor of the property at 9 Queen's Road Central, Hong Kong.

The vendor had called off the contract; its case was that it had been entitled to do so, because the purchaser had failed to pay the vendor the sum of $36m which was to become payable to the vendor, under the contract, upon the signing of a 'formal sale and purchase agreement'. The vendor's case was rejected by the judge. He was of the opinion that, as the purchaser had earlier made a tender to the vendor of $36m in the form of a personal cheque drawn by one Lo Siu Fai, Louis (who happened to be, or so we were told, the purchaser's chairman and managing director), and as the vendor had not at the time of that tender expressly objected to the same on the ground of quality of the tender, the vendor had not been entitled to call off the contract.

The vendor now appeals.

The facts

On 21 November 1996, the purchaser made an offer in writing, addressed to the vendor, to purchase the property for $205m. This offer (with some amendments) was accepted by the vendor on the same day. The contract thus constituted provided for a formal sale and purchase agreement to be signed on or before 2 December 1996, and that time should be of the essence. As to terms of payment, the contract provided (by cl 4) for (a) an initial deposit in the sum of $5m, which was to be paid to the vendor's solicitors upon signing of the letter of offer; (b) a further deposit of 20% of the purchase price (inclusive of the initial deposit of $5m) to be payable to the vendor upon the signing of a formal sale and purchase agreement; and (c) the balance of the purchase price to be paid upon the completion of the sale. The letter of offer provided for the initial deposit of $5m to be paid by a cheque drawn in favour of the vendor's solicitors; however, on the vendor indicating that it would prefer a cashier order, a cashier order for that sum was substituted for the cheque originally tendered.

On 29 November 1996, Chan & Wan, the vendor's solicitors, wrote to Johnson Stokes & Master, the purchaser's solicitors, enclosing a draft of the formal sale and purchase agreement for which the contract had provided. They asked for its return 'together with *your* cheque of $36m in favour of our client being further deposit payable on signing of the agreement' (emphasis added).

On 2 December 1996, the purchaser's solicitors returned the draft amended in red and, at 2:46pm, sent the vendor's solicitors a cheque for the sum of $36m in the vendor's favour. This, however, was not a cheque drawn by the purchaser's solicitors. It was the cheque drawn by Mr Lo, to which I have already referred. The purchaser's solicitors in their covering letter wrote:

> As the Provisional Agreement provides that the further deposit is payable by our client upon signing of the formal Agreement for Sale and Purchase and such a formal Agreement for Sale and Purchase has not been made between our respective clients, the said sum of $36,000,000.00 is sent to you against your firm's personal undertaking not to release the same to your client, the Vendor herein, unless and until the formal Agreement for Sale and Purchase has been duly signed by our respective clients and thereafter strictly in accordance with the terms and conditions of the formal Agreement for Sale and Purchase.

At 4pm on 2 December 1996, the vendor's solicitors returned the draft formal agreement for sale and purchase to the purchaser's solicitors with certain further amendments, made in green; in this letter they took no objection to Mr Lo's cheque.

At 5:20pm, however, the vendor's solicitors sent the cheque back to the purchaser's solicitors. They wrote:

> We refer to your letter dated 2 December 1996 together with the purported tender of the cheque drawn by Lo Siu Fai Louis in the sum of $36,000,000.00. We must say that the purported tender is not in accordance with the Provisional Agreement. Furthermore, your client has no right to impose the undertaking on us unilaterally. In the premises, we return herewith said cheque.
>
> All our client's rights are reserved.

Finally, on 2 December 1996, the purchaser's solicitors wrote to the vendor's solicitors (the letter was delivered at 9:29am the next day) accepting, save in one respect, the re-amendments proposed by the vendor's solicitors to the draft formal agreement for sale and purchase. They added this:

> We refute strongly your allegation that our client's tender of payment is not in accordance with the Provisional Agreement ... we were instructed by our client to forward to you a cheque for the sum of $36 million today to be held by your firm pending the signing of the formal agreement.
>
> In the meantime, we send you herewith our client's cheque in the sum of $36 million drawn in favour of your Vendor client, representing the further deposit payable upon the signing of the formal Sale and Purchase Agreement. You may release the cheque to your client when your client has executed the formal agreement in accordance with the terms of the Provisional Agreement.

On 3 December 1996, at 12:19pm, the vendor's solicitors sent to the purchaser's solicitors engrossments of the formal agreement for sale and purchase (in duplicate) and asked for these to be returned duly signed. Their letter contained no reference to Mr Lo's cheque; and no reference to their earlier objection.

Later on 3 December 1996, at 2:37pm, the purchaser's solicitors returned the engrossments duly signed by the purchaser. At 5:22pm, the vendor's solicitors wrote to the purchaser's solicitors returning one copy of the agreement duly signed by the vendor. They added this:

> As your client has not tendered payment of the further deposit pursuant to Clause 4(b) of the Provisional Agreement, the receipt clause in page 16 has been deleted by us. We also take this opportunity to return the cheque drawn by Lo Siu Fai Louis to you.

In reply, the purchaser's solicitors wrote to the vendor's solicitors stating that they were astonished by the latter's statement that the purchaser had not tendered payment of the further deposit pursuant to cl 4(b) of the provisional agreement when their client's cheque was in fact first delivered to the vendor's solicitors on 2 December 1996 at 2:46pm (this was *before* both parties had signed the formal sale and purchase agreement) and re-delivered to the vendor's solicitors at 9:29am on 3 December 1996 (this was *after* both parties had signed the formal sale and purchase agreement). They added this:

> We maintain that our client's tender of payment was in accordance with clause 4(b) of the Provisional Agreement .... Since our client has duly performed and discharged its obligations under the Provisional Agreement there is no reason for your client to refuse to accept such payment and given a receipt therefor. In the circumstances, we re-tender herewith our client's cheque for the sum of $36 million drawn in favour of your Vendor client in payment of the further deposit. ... We would put it on record that our client has always been, and is, ready and willing to proceed with and complete the purchase of the property in accordance with the Provisional Agreement and any further refusal by your client to accept payment of the further deposit may be treated as a wrongful repudiation of the contract ....

On 4 December 1996, at 12:27am, the vendor's solicitors, asserting that the purchaser had failed to tender payment pursuant to cl 4(b) of the provisional agreement, informed the purchaser's solicitors that they were instructed to, and that they thereby did, rescind the sale and purchase of the property.

The judgment below

The judge accepted that a legal tender requires cash or its equivalent. However, he held that where tender of payment is made in some other form, then unless the payee has, at the time of the tender, expressly objected to the same on the ground of the quality of the tender, it will be treated as a good tender. As to the objection of the defendant's solicitors that the tender had not been made in accordance with the contract, the judge said this:

> There is no clue as to whether the objection is as to the amount, the time of payment, the form of payment, or any other provision of the agreement. They then go on to object to the imposition of an undertaking upon them, which, intentionally or not, led the Plaintiff's solicitors to assume that the objection was as to time. In any event, what is clear is that there was no express objection to the quality of the tender. The objection, such as it was, was in general terms,
>
> and no reasonable person reading the letter in which it was written would be able to tell what it was that was objected to.
>
> In my view an objection of this nature is not sufficient. ... An objection in general terms, without reference to the specific complaint as to the tender, and in particular with no complaint as to the quality of the tender, is not an objection which can be relied on later when arguing that it was not a proper tender. Mercantile dealings between parties should not be conducted as a sort of childish guessing game, which, if you get wrong, you lose. They must be on the basis of what is reasonable in the circumstances. I do not consider it reasonable to leave the other side in a state where they have been told that there is an objection but, because it has not been specific, either do not know what it is or are led into a misapprehension as to its nature.
>
> Here the misunderstanding, or misconception, was compounded by the behaviour of the Defendant's solicitors the next day. Having received the cheque again at 9.30 a.m., they proceeded with the approval of the formal agreement, returned it to the Plaintiff's solicitors for signature by their client, and received it back shortly after 2.30 p.m., all the time retaining the Plaintiff's cheque, without mentioning any objection to it, until their letter delivered at 5.22 p.m., again, as the day before, after banking hours, and again without being specific. Indeed, it is not until after 5 p.m. on 4th December, after they had purported to rescind the agreement, that they finally explained that their objection was to the cheque, and that payment should have been by cash or cashier order. ....
>
> What is abundantly apparent is that the Plaintiff was at all times ready and willing to perform the obligations of the agreement, and, had their solicitors been told in certain terms what the objection was, and in time to rectify the matter, instead of being presented with general objections at a time after banking hours when nothing could be done, there would have been no obstacle to this agreement being performed. I accordingly hold that the Defendant cannot now rely on the nature of the tender at the time to support rescission of the agreement.

Was the judge right?

So the judge held, as I have indicated, that a tender will be treated as a good tender unless the payee at the time of the tender had 'expressly' objected to the quality of the tender.

For my part, I think this goes too far. In my judgment, it is only when the payee, by his words or conduct, has misled the payer into thinking that he objects to the tender, not on the ground of its quality but on some other ground, that he will be treated as having waived any objection he would otherwise have been entitled to take as to the quality of the tender. This is the true basis, in my judgment, for the decision in *Polglass v Oliver* (1831) 2 Cr & J 15, on which the judge relied. There the tender was not a good tender, but the only objection to it which was taken by the payee was that he was entitled to a greater sum than had been tendered. Bayley B put the matter thus (at pp 17-18):

> To make a tender good, it should be made in the coin of the realm, and the money ought to be produced; but the party to whom the tender is made, may make good what would otherwise be insufficient, by relying on a different objection. If he claim a larger amount, and give that as a reason for not accepting the money, he cannot afterwards object that the money was not produced ... nor can he object that it was offered in paper. If he object to accept the sum tendered because it is in paper, which he is not bound to receive, he

> gives the party tendering an opportunity to make his tender in coin; but if he puts his refusal upon a different ground, he waives the objection as to the quality of the tender ... if you objected expressly on the ground of the quality of the tender, it would have given the party the opportunity of getting other money and making a good and valid tender; but, by not doing so, and claiming a larger sum, you delude him.

The principle is that the payee is not to 'delude' the payer into believing that, whatever else he is complaining about, he is not complaining about the quality of the tender. If he has acted so as to 'delude' the payer into entertaining such a belief, he will not be permitted, having deprived the payer of an opportunity to make a good tender in place of the bad tender, to object subsequently to the quality of the original tender.

So the question here becomes: was the conduct of the vendor's solicitors such as to 'delude' the purchaser's solicitors into believing that the vendor's ground of objection was, not as to the quality of the tender, but some other ground of objection?

I am of the opinion that it was.

It is clear that the purchaser's solicitors did not, until it was too late, understand the vendor's unparticularised objection to the tender to be an objection as to the quality of the tender; they believed that the objection was as to its prematurity. That this was their belief they made clear to the vendor's solicitors; but the vendor's solicitors made no attempt to disabuse the purchaser's solicitors of their belief. When the purchaser became obliged, for the first time, to tender the $36m to the vendor, which was not until after the formal sale and purchase agreement had been signed by both parties, it was given no chance to do so. The vendor's solicitors, without ever having made clear what their objection to the tender had been, called off the contract.

What the vendor's solicitors thought they were playing at I do not know; but in the absence of any explanation otherwise, it seems to me that the only possible inference to be drawn from their conduct is that they deliberately set up the purchaser's solicitors, with a view to enabling the vendor to call off the contract without giving the purchaser any real opportunity to make a proper tender.

The judge took a dim view of the vendor's solicitors' conduct. So do I. They led the purchaser's solicitors into a trap. Their failure to particularise any grounds for their objection to the tender led the purchaser's solicitors into thinking that the tender was objected to on the grounds of prematurity. The purchaser's solicitors so informed the vendor's solicitors. At this stage, when there was time for the vendor's solicitors to put the purchaser's solicitors right upon this point so as to enable the purchaser to make an acceptable tender, the vendor's solicitors made no attempt to do so. We do not know if the vendor's solicitors would have come clean if the purchaser's solicitors had asked them to state precisely what the grounds of objection to the tender were. The purchaser's solicitors were entitled to expect that the vendor's solicitors would have corrected them if their belief as to the vendor's objection to the tender was mistaken. Where one party to a transaction perceives that the other party is labouring under a mistake as to some essential matter, he comes under an obligation to undeceive the other party if his omission to do so will 'foster and perpetuate the delusion' (as it is put in Spencer Bower & Turner *Estoppel by Representation* (3rd Ed. 1977) at para 59). In such a case silence is in effect a misrepresentation that the facts are indeed as the other party mistakenly believes them to be; and the first party is estopped from asserting otherwise. In our case, the vendor's solicitors, knowing that the purchaser's solicitors believed that the objection to the tender was on the ground of its prematurity, came under an obligation to undeceive the purchaser's solicitors, an obligation which, disgracefully, they failed to discharge.

Conclusion

For these reasons, I would dismiss this appeal, with costs.

Mayo JA: In my view this appeal should be allowed. Mr Edward Chan SC adopted the reasoning of Deputy Judge Woolley at p 5 of his judgment where he stated on the authority of *Polglass v Oliver* (1831) 2 Cr & J 15 that where a tender of payment is made otherwise than as required by law, the recipient must expressly object to the same on the ground of the quality of the tender complained of. Having regard to the agreed factual background this analysis of the law was inappropriate.

It must have been apparent to the solicitors acting for the purchaser that a cheque drawn by their client or some other person would be considered in a wholly different way to a bankers' draft or a cheque drawn on their own client account. The solicitors could not have laboured under any illusion that Mr Lo's cheque was likely to be accepted as legal tender for the moneys which were payable under the provisional agreement.

The vendor did object to the payment of the moneys being effected by the cheque drawn by Mr Lo. They were consistent in maintaining their objection and nothing in the correspondence which was placed before us persuades me that the vendors made any unequivocal representation to the contrary along the lines envisaged by Lord Goff at p 398 of *The Kanchenjunga* [1990] 1 Lloyd's Rep 391.

What is also clear is that by their letter of 3 December 1996 Johnson Strokes and Master were still maintaining that their tender of the payment conformed with the requirements of cl 4(b) of the provisional agreement. It did not.

In these circumstances it was open to the vendors to rescind the contract and in my view the purchasers should not be granted the relief they are seeking.

Nazareth VP: From the facts, which Godfrey JA has concisely stated in his judgment, I am satisfied that the following conclusions are inescapable. The parties entered into a binding *albeit* provisional agreement on 21 November 1996 to enter into a formal sale and purchase agreement for the purchase of the property. There is no reason to doubt that the vendor at that time intended to carry out its part of the agreement. But that plainly could not have been the position on 3 December 1996, when the vendor's solicitors were clearly bent upon suppressing their real reason for rejecting the purchaser's tender of the further deposit of $36m and rescinding the contract at the first possible moment, to the point of keeping someone at their office well past midnight to fax their letter rescinding the contract for non-tender of the deposit at 12:27am on 4 December 1996. It is inconceivable that the vendor's solicitors would have done so without instructions. In that light, the overwhelmingly probable reason for their studious suppression of their reason for rejecting the purchaser's tender of the cheque sent at 4pm on 2 December, was the vendor's objective apparently not merely to escape its obligations under the contract, but to do so while forfeiting the purchaser's first deposit of $5m and at the same time denying the purchaser its bargain. It is perhaps not without significance that the vendor's solicitors took no objection to the purchaser's cheque in their 4pm letter on 2 December 1996. But what is undoubtedly of significance is that their letter of 5:20pm returning the cheque sent by the purchaser contained no hint of the nature of their objection, for which the situation cried out.

I agree with Godfrey JA that there was no duty or obligation on the vendor's solicitors to stipulate the nature of the objection to the tender, and the judge was wrong upon the authorities, to take the view he did. But the absence of such an obligation in no way justified the conduct of the vendor and its solicitors.

In viewing that conduct, it is pertinent first of all to note that 'the due completion of a conveyancing transaction requires cooperation between vendor and purchaser. The vendor, like the purchaser, must also be ready, willing and able to complete his part of the contract, in accordance with the terms and at the time and place fixed for completion. The contract is to be construed so that each party agrees to do all that is necessary to be done on his part for the carrying out of the contract' (*China Pride Investment Ltd v Silverpole Ltd* [1994] 2 HKC 341, 342G-I).

To return to the vendor's solicitors' conduct, they received the purchaser's solicitors' letter of 2 December 1996 returning the cheque for $36m, on 3 December 1996 at 9:29am. At that time, it could not have been other than perfectly clear to them that the purchaser's solicitors were labouring under a misapprehension as to the reason for the rejection of the tender — moreover, a misapprehension leading to the deposit not being tendered in time. Had there been the slightest desire on the vendor's part to complete the sale and purchase agreement, it is inconceivable that the vendor's solicitors would not then or even earlier have told the purchaser's solicitors of the nature of their objection to the cheque. There was always time enough for a cheque that was acceptable to have been procured and tendered if the vendor wishes to complete, as the vendor must have been aware.

Needless to say, in that regard, I reject the facile submission that the request made by the vendor's solicitors in their letter of 29 November 1996 to the purchaser's solicitors for 'your cheque' should have been seen to be a request for a cheque drawn by the purchaser's solicitors. Likewise, I am not persuaded that the word 'Furthermore' in the vendor's solicitors' letter sent at 5:20pm on 2 December should have indicated to the purchaser's solicitors that the objection was something other than the undertaking sought by the vendor's solicitors that they would not release the cheque to the vendor. The fact of the matter is that the purchaser's solicitors were in fact misled and that this could not have been other than apparent to the vendor's solicitors, who nonetheless deliberately refrained from correcting that misapprehension, as they should have done. True the purchaser's solicitors could have asked what the objection was, and their obstinate insistence that the tender of payment was in accordance with the agreement does them little credit; it does not however excuse the vendor's conduct.

Mr Edward Chan SC submitted that such conduct of the vendor was not merely unconscionable, but constituted sharp practice and trickery. Mr Griffiths SC resisted those submissions making a powerful submission against reliance upon unconscionability as the basis of relief in sale and purchase agreements, given particularly its uncertain nature which he likened to the Chancellor's foot by analogy with Selden's well known comment. He relied particularly on Lord Hoffmann's analysis in *Union Eagle Ltd v Golden Achievement Ltd* (PC) [1997] AC 514, [1997] 1 HKC 173 of the relevant equitable jurisdiction and his general disapproval of unconscionability as the basis of relief particularly with reference to specific performance of contracts of sale and purchase of land (178I-179I (HKC)). Those are matters to which I shall return. Suffice it to say here that having regard to them, I am content to rest my conclusion that the appeal should be dismissed primarily upon the reasons, concisely given by Godfrey JA, with which I fully agree. They plainly rest upon estoppel by representation and not conduct that is regarded as unconscionable.

Returning then to unconscionability, it is significant that their Lordships, in *Union Eagle*, did not find it necessary to go so far as to reject unconscionability altogether as an acceptable basis of equitable relief, even specific performance of a contract for the sale and purchase of land. The latter, it is well to recall, is the relief that is claimed by the purchaser here, and in circumstances that restitution would not suffice (180D-F (HKC)).

The conduct of the vendor and its solicitors cannot in my view be other than unconscionable. Had it been necessary I would have upheld the decision below upon that basis, resort to which is warranted in my view by the circumstances being exceptional (see *Stern v McArthur* (1988) 165 CLR 489, 502-503, and also special (see *Stockloser v Johnson* [1954] 1 QB 476, 501, [1954] 1 All ER 630, 644) by reason of the aspects of sharp practice. I would add that the system in Hong Kong of binding provisional agreements of sale and purchase, not known in England, produces a constant flow of litigation in which the ingenuity of parties and range of circumstances may well require resort to unconscionable conduct not amounting to a representation to provide the basis for equitable relief that justice may demand. Nonetheless it is now clear from the *Union Eagle* case that estoppel should be the preferred basis for such relief; that must mean that specific performance upon the basis of unconscionable conduct in cases of the sale and purchase of land will be granted in increasingly exceptional and special circumstances.

I also agree with Godfrey JA that the respondent should have its costs.

By a majority, therefore, the appeal is dismissed, and there will be an order nisi that the respondent purchaser is to have its costs.

Yap Hong Too & Anor v Wong Ah Mei & Anor

FEDERAL COURT (KUALA LUMPUR) — CIVIL APPEAL NO 02-745 OF 1993
CHONG SIEW FAI CJ (SABAH & SARAWAK), PEH SWEE CHIN AND MOHD DZAIDDIN FCJJ
1 NOVEMBER 1996

Land Law *— Sale of land — Sale by order of court — Strict compliance with sale and purchase agreement — Time was of essence of contract — Contract provided that payment of purchase price must be made within seven days after receipt of order of court by purchaser — Vendor failed to send order of court to purchaser directly as provided in contract — Instead, order was sent to purchaser's solicitors — Such non-compliance resulted in delay in payment of balance of purchase price — Whether vendor could insist that the purchaser comply strictly with the provision as to time*

Contract *— Sale and purchase of land — Time — Strict compliance with sale and purchase agreement — Time was of essence of contract — Contract provided that payment of purchase price must be made within seven days after receipt of order of court by purchaser — Vendor failed to send order of court to purchaser directly as provided in contract — Instead, order was sent to purchaser's solicitors — Such non-compliance resulted in delay in payment of balance of purchase price — Whether vendor could insist that the purchaser comply strictly with the provision as to time*

Peh Swee Chin FC J (delivering the judgment of the court): We have earlier allowed the appeal of the appellants, setting aside the order of the court below dated 28 December 1993 and granting specific performance with consequential directions, with costs here and below. We indicated that we would give our grounds of judgment and we hereby do so now.

The appellants ('the purchasers') and the respondents ('the vendors') entered into a sale and purchase agreement dated 28 December 1979 in respect of a piece of land, and relevant for the purpose of this appeal are cll 3, 11 and 16 thereof which are set out below:

> 3 The purchaser shall deposit the balance of the purchase price amounting to Ringgit Malaysia eighty-six thousand two hundred and fifty six (RM86,256) with the vendors' solicitors Dr Stephen Goh & Partners, Advocates & Solicitors of 6th Floor, Pudu Building, Pudu Road, Kuala Lumpur as stakeholders ('the vendors' solicitors') within seven days of receipt of the order of court approving the sale of the said land.
>
> ...
>
> 11 Time wherever mentioned shall be deemed to be of the essence of this agreement.
>
> ...
>
> 16 Any notices required to be given under the provisions of this agreement shall be deemed to have been sufficiently served on the other party if such notice is left at the usual or last known place of residence or at the address abovestated or sent by registered letter to any such address and in the last mentioned case the service shall be deemed to be effected at the time when the registered letter would in the ordinary course of post be delivered.

With reference to the 'order of court' approving the sale of the land as mentioned in cl 3, it is to be noted that the vendors signed the said agreement as administrators of the estate of the registered proprietor of the land ('the deceased').

The statement of claim of the purchasers sets out the material facts of this case which we will mention or summarize later. It also refers to cll 3, 11 and 16 of the said agreement set out above, in particular, by para 4(i) of the statement of claim, it states:

> 4(i) The address of the plaintiffs was stated in the long title of the said agreement as 'No 2, Jalan Merak, Off Jalan Ipoh, Kuala Lumpur'. That address was the address referred to as 'the address abovestated' in the said cl 16 as the address of the plaintiffs.

In this connection, para 15 would be relevant and is set out below:

> Neither the defendants nor their solicitors sent the sealed copy of the said court order dated 4 November 1982 to any of the addresses of the plaintiffs envisaged in cl 16 of the said agreement dated 28 December 1979. If time had continued to be of the essence of the agreement contrary to the denial thereof in para 14 above, the plaintiffs plead that the seven days stipulated in cl 3 of the said agreement commenced running from the actual date on which the plaintiffs received the said sealed copy of the order of the court. The plaintiffs actually received the sealed copy of the said order of the court on 19 January 1983. There was no variation of the said cl 16. No antecedent authority was conferred by the plaintiffs on Sykt Tan Ah Lak either: (a) to receive the court order so as to vary cll 16 or 3 of the said agreement so as to make a receipt of the court order by M/s Tan Ah Lak into a simultaneous receipt by the plaintiffs of the court order; or (b) to receive the court order.

We now set out the material and undisputed facts. A deposit or earnest money was paid and by cl 3 aforesaid, the balance of the purchase price in the sum of RM97,038 (increased apparently by consent of both parties from RM86,256 mentioned in the same cl 3) was to be paid 'within seven days of receipt of the order of court approving the sale of the land', bearing in mind that time would be of the essence in this connection.

The said agreement was signed on 28 December 1979 and the court order granting leave to sell the said land was obtained on 4 November 1982. By this time, the vendors had changed their solicitors, and the new solicitors were M/s Cheang Lee & Ong of Ipoh in place of Dr Stephen Goh & Partners, Kuala Lumpur.

M/s Cheang Lee & Ong sent, on 11 January 1983, the order of the court dated 14 November 1982 to M/s Tan Ah Lak, solicitors for the purchasers and M/s Tan Ah Lak received it on 15 January 1983. On the same day they received the court order, M/s Tan Ah Lak sent it on to the purchasers who received it on 19 January 1983.

On the instructions of the purchasers, M/s Tan Ah Lak sent the balance of the purchase price on 24 January 1983, by hand, this time, to M/s Cheang Lee & Ong who received it with the covering letter on 24 January 1983.

By letter dated 31 January 1983, M/s Cheang Lee & Ong wrote to M/s Tan Ah Lak as follows:

> We regret to inform you that our client cannot now accept payment from your client as your client is in breach of cl 3 of the sale and purchase agreement. In the circumstances, we hereby enclose the cheque.

The court below was of the view that there was a breach of cl 3 of the sale and purchase agreement in view of time being made the essence of contract, because the time of receipt of the order of the court by the purchasers would be time when it was received by their solicitors, viz M/s Tan Ah Lak on 15 January 1983 and payment of the balance of the purchase price on

24 January 1983 was outside the seven day's period mentioned in the said cl 3, ie two days late.

It was the contention of the purchasers that they actually received the court order on 19 January 1983, and therefore they paid on 24 January 1983, the balance of the purchase price within time, ie within the seven days' period. This contention was rejected by the learned trial judge.

A court of equity can grant relief against forfeiture when circumstances justify it. Similarly by extension of this rule, in an action for specific performance, for a purchaser who comes to court with clean hands, a court of equity can relieve the purchaser against a failure to comply with such a condition as to time in sale and purchase agreement where circumstances justify it. In the instant case, such circumstances could be found in the conduct of the vendors who sent the court order in question to M/s Tan Ah Lak instead of sending it to the purchasers directly at the address stated in the sale and purchase agreement, as clearly indicated by cll 3 and 16. If the vendors were not strict in compliance with cl 3, it would be quite inequitable for them to insist on the purchasers to comply strictly as to time with cl 3. The actual delay in sending the balance of the purchase price correspond to more or less, or was caused by the actual delay in the court order reaching the purchasers. The actual delay in the court order reaching the purchasers was caused by the indirect transmission of it to the purchasers' solicitors and not to the purchasers directly at the address stated in the sale and purchase agreement, notwithstanding the fact that the transmission to the purchasers' solicitors would be imputed to the purchasers as principals because of the correspondence between the parties hitherto being conducted by their respective solicitors. The purchasers and their solicitors had been vigilant in doing their respective parts of sending the order and making the payment respectively, and in no way could their conduct be considered reprehensible. See *Hughes v Metropolitan Rly Co* (1877) 2 AC 439.

We find an echo in a relevant passage in *Cheshire, Fifoot & Furmston's Law of Contract* (11th Ed) by Prof Furmston at p 609 as set out below:

> It is clear at least that equity, where warranted by the circumstances, will relieve the buyer to the extent of giving him further time within which to complete the contract, even though the parties have agreed that time shall be essential. In other words, the forfeiture will be suspended, provided that the buyer expresses himself ready and willing to pay the balance of the price within the extended time fixed by the court.

The court was of the view that relief should be granted to the purchasers against the forfeiture of their bargain for their failure to comply with cl 3 as to time by allowing the purchasers to pay the said balance of the purchase price late by two days as they had done.

We therefore allowed the appeal as stated above.

Appeal allowed.

HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, GUMMOW, KIRBY, HAYNE AND CALLINAN JJ

JEAN BALHARRY GARCIA APPELLANT

AND

NATIONAL AUSTRALIA BANK LIMITED RESPONDENT

Garcia v National Australia Bank Limited [1998] HCA 48

6 August 1998

S18/1997

ORDER

1. *Appeal allowed with costs.*

2. *Set aside paragraphs 1 to 8 of the orders made on 3 July 1996 by the Court of Appeal of New South Wales and in lieu thereof dismiss the appeal to that Court with costs.*

CATCHWORDS

Garcia v National Australia Bank Limited

Equity – Wife guaranteed debts of husband's company as a volunteer – Wife did not fully understand effect of guarantees – Whether guarantees liable to be set aside – Bank did not explain document to wife – Bank not on notice of unconscionable dealing between husband and wife – Principle in *Yerkey v Jones* explained.

Precedent – Binding effect of previous decisions of High Court – Ascertainment of binding rule.

Yerkey v Jones (1939) 63 CLR 649, explained and followed.

Barclays Bank Plc v O'Brien [1994] 1 AC 180, not followed.

1. GAUDRON, McHUGH, GUMMOW AND HAYNE JJ. In August 1979, the appellant and her then husband, Fabio Garcia, executed a mortgage over their home in favour of the Commercial Banking Company of Sydney Ltd (a bank with which

the respondent later merged and to the rights of which the respondent succeeded). The mortgage secured all moneys which the mortgagors might owe the mortgagee, including moneys owing under future guarantees given by either of them to the mortgagee. It was given to secure a loan of $5,000 made to the husband for use in his business and was later used as security for a personal loan made to the appellant and her husband.

2. The appellant's husband conducted a number of businesses of which we need to refer only to one - a business of buying and selling gold conducted through a company called Citizens Gold Bullion Exchange Pty Ltd ("Citizens Gold").

3. Between 1985 and 1987 the appellant signed four guarantees in favour of the respondent. Three of the guarantees guaranteed repayment to the bank of debts owed by Citizens Gold; the fourth guaranteed debts owed by another company but the details of that transaction do not now matter. Of the three guarantees which related to debts of Citizens Gold, one dated 25 November 1987 was limited to $270,000 plus interest, costs and charges. It is convenient to refer to this guarantee as the November 1987 guarantee.

4. On 1 September 1988, the appellant and her husband separated. The appellant told the bank of this and asked that "the bank account" (presumably of Citizens Gold) be kept within limits. After this, the balance of the Citizens Gold account fluctuated: in December 1988 and January 1989 it was in credit but by May 1989 it was again in debit. On 13 October 1989, an order was made for the winding up of Citizens Gold. On 30 November 1989, the appellant obtained a decree nisi for dissolution of her marriage; that decree became absolute on 1 January 1990.

5. In June 1990, the appellant commenced proceedings in the Supreme Court of New South Wales seeking declarations that the mortgage which we have mentioned and the guarantees she had given of the indebtedness of Citizens Gold are of no force or effect and are void. In August 1990, the respondent demanded payment under the November 1987 guarantee and under the mortgage of amounts owing to it by Citizens Gold. It then made a cross-claim in the proceedings commenced by the appellant to claim possession of the mortgaged property and the sum which it had demanded (together with interest). No demand was made under the other guarantees.

6. The trial judge, Young J, granted the declaration that none of the guarantees which the appellant had given bound her. A further declaration was made that there were no moneys owing by the appellant to the respondent under the mortgage in respect of that interest which the appellant had in the mortgage property immediately prior to the making of an order in the Family Court of Australia. The Family Court had ordered that, subject to the mortgage in favour of the respondent, the appellant's husband transfer to her his interest in that property.

7. He found that although the appellant was a director of Citizens Gold and was recorded as being a shareholder of the company he was not satisfied, on the whole of the evidence, that the companies were "anything more than Mr Garcia's creation and that he was in complete control of them" and he accepted the appellant's evidence that she was not directly involved in Citizens Gold (or the other companies associated with her husband).

8. The trial judge found that the appellant signed the November 1987 guarantee following requests by her husband to do so in order that (as he told her) he might deal in larger amounts of gold than he had been. There was, so the appellant's husband told her, no danger because "if the money isn't there the gold is there". The appellant agreed to sign the guarantee and she did this at a different branch of the bank from the branch at which Citizens Gold conducted its account.

9. Although the bank officer who witnessed the appellant's signing of the November 1987 guarantee gave evidence that she would have explained the provisions of the guarantee to the appellant, the appellant gave a different account. She described signing the document, at the places to which the bank officer pointed, in a process which took less than a minute and included no explanation of the transaction. The trial judge accepted the appellant's account in preference to the evidence of the bank officer.

10. From 1975 to 1979 the appellant worked part-time as a physiotherapist; in 1979 she set up practice as a physiotherapist at Hornsby on her own account and was still conducting that practice at the time of the trial. In the words of the trial judge she "presented herself [at trial] as a capable and presentable professional". He found that she understood at the time she signed the November 1987 guarantee that she was executing a guarantee and that she believed it was a guarantee of Citizens Gold's overdraft. He also found, however, that she did not understand that the guarantee was secured by the all moneys mortgage which she had signed in 1979 and that she signed the guarantee thinking that it was quite safe to do so or was "risk proof" because there would either be money there or gold.

11. The trial judge granted relief to the appellant on the basis of the principles referred to in *Yerkey v Jones* . He held that the appellant's alternative case founded on *Commercial Bank of Australia Ltd v Amadio* was not made out. He found that, even if the behaviour of the appellant's husband towards her in relation to the execution of the November 1987 guarantee had been unconscionable, the respondent had no notice of that unconscionability when "an intelligent articulate lady with a professional position called at the bank, appeared to be voluntarily signing a guarantee in respect of an account of which she was a director of the company concerned, and there was nothing to give the bank even suspicion ... [T] here was nothing to show that the disability of the plaintiff was sufficiently evidenced to the bank to make it unconscientious that it accept the plaintiff's assent to the impugned transaction."

12. Although the appellant had pleaded a case of actual undue influence by her husband, the trial judge made no positive finding that the appellant's execution of the November 1987 guarantee had been procured by actual undue influence. He did find that "the husband pressured the wife to sign the document" and that "[s]he appeared to have done so because her husband consistently pointed out what a fool she was in commercial matters whereas he was an expert, and because she was trying to save her marriage". But it was not contended (whether in the Court of Appeal or in this Court) that this was a positive finding of actual undue influence by the husband such that the appellant's execution of the guarantee was not the exercise of her "independent and voluntary" will because it was overborne.

13. The trial judge rejected an alternative case which the appellant put forward under the *Contracts Review Act* 1980 (NSW).

14. The respondent appealed to the Court of Appeal and the appellant cross-appealed. The appeal was allowed; the cross-appeal was dismissed.

15. Sheller JA, who gave the leading judgment in the Court of Appeal, considered the decision of the House of Lords in *Barclays Bank Plc v O'Brien* and, in several respects, found difficulty in accepting the reasoning therein. The New Zealand Court of Appeal has said that "the jurisprudential basis of *O'Brien* remains uncertain". After referring to the English authorities decided after *O'Brien* , Sir Anthony Mason has observed that "[t]he plethora of cases may suggest that all is not well with the *O'Brien* principle". It is unnecessary for us to enter upon the

matter, beyond noting that in *O'Brien* the House of Lords discounted what it understood was the "special equity theory" supported by Dixon J in *Yerkey v Jones* .

16. The Court of Appeal held that it was not bound to follow *Yerkey v Jones* .

Sheller JA concluded that what had been said to be the principle in *Yerkey v Jones* is "a principle to which one judge only adhered", namely Dixon J, and "at its heart ... is based upon general assumptions about the capacity of married women rather than upon evidence of the circumstances of the particular case". He identified in some recent cases an expression of "doubts about a principle founded on the assumption that a married woman is ipso facto under a special disadvantage in any transaction involving her husband and that the husband is in this context the stronger party." Accordingly, Sheller JA concluded that "the so-called principle in *Yerkey v Jones* should no longer be applied in New South Wales."

17. We consider the better view to be that the reasons for decision of Dixon J in *Yerkey v Jones* were not significantly different from the reasons of the other members of the Court. It should be emphasised that it is for this Court alone to determine whether one of its previous decisions is to be departed from or overruled.

18. However, we do not base our decision upon some confined analysis of the case intended to identify its ratio decidendi. Rather, we consider that the principles spoken of by Dixon J in *Yerkey v Jones* are simply particular applications of accepted equitable principles which have as much application today as they did then.

19. *Yerkey v Jones* was said, in argument, to reflect outdated views of society generally and the role of women in society in particular. It was submitted that changes in Australian society since 1939, when *Yerkey v Jones* was decided, require that equitable rules move on to meet these changed circumstances.

20. That Australian society, and particularly the role of women in that society, has changed in the last six decades is undoubted. But some things are unchanged. There is still a significant number of women in Australia in relationships which are, for many and varied reasons, marked by disparities of economic and other power between the parties. However, the rationale of *Yerkey v Jones* is not to be found in notions based on the subservience or inferior economic position of women. Nor is it based on their vulnerability to exploitation because of their emotional involvement, save to the extent that the case was concerned with actual undue influence.

21. So far as *Yerkey v Jones* proceeded on the basis of the earlier decision of Cussen J in *The Bank of Victoria Ltd v Mueller* , it is based on trust and confidence, in the ordinary sense of those words, between marriage partners. The marriage relationship is such that one, often the woman, may well leave many, perhaps all, business judgments to the other spouse. In that kind of relationship, business decisions may be made with little consultation between the parties and with only the most abbreviated explanation of their purport or effect. Sometimes, with not the slightest hint of bad faith, the explanation of a particular transaction given by one to the other will be imperfect and incomplete, if not simply wrong. That that is so is not always attributable to intended deception, to any imbalance of power between the parties, or, even, the vulnerability of one to exploitation because of emotional involvement. It is, at its core, often a reflection of no more or less than the trust and confidence each has in the other.

22. It may be that the principles applied in *Yerkey v Jones* will find application to other relationships more common now than was the case in 1939 - to long term and publicly declared relationships short of marriage between members of the same or of opposite sex - but that is not a question that falls for decision in this case. It may be that those principles will find application where the husband acts as surety for the

wife but again that is not a problem that falls for decision here. This case concerns a husband and wife and it is to that relationship that the present decision relates, just as it is concerned only with the circumstance of the wife acting as surety for her husband. The resolution of questions arising in the context of other relationships may well require consideration of other issues. Thus to take one example, if cohabitation is taken as a criterion, what should a lender know or seek to find out about the nature of the relationship between the parties? But those issues did not arise and were not debated on the hearing of this appeal.

23. In his reasons for decision in *Yerkey v Jones* , Dixon J dealt with at least two kinds of circumstances: the first in which there is actual undue influence by a husband over a wife and the second, that dealt with in *Mueller* , in which there is no undue influence but there is a failure to explain adequately and accurately the suretyship transaction which the husband seeks to have the wife enter for the immediate economic benefit not of the wife but of the husband, or the circumstances in which her liability may arise. The former kind of case is one concerning what today is seen as an imbalance of power. In point of legal principle, however, it is actual undue influence in that the wife, lacking economic or other power, is overborne by her husband and goes surety for her husband's debts when she does not bring a free mind and will to that decision. The latter case is not so much concerned with imbalances of power as with lack of proper information about the purport and effect of the transaction. The present appeal concerns circumstances of the latter kind rather than the former.

24. In *Yerkey v Jones* Dixon J said:

"But it is clearly necessary to distinguish between, on the one hand, cases in which a wife, alive to the nature and effect of the obligation she is undertaking, is procured to become her husband's surety by the exertion by him upon her of undue influence, affirmatively established, and on the other hand, cases where she does not understand the effect of the document or the nature of the transaction of suretyship. In the former case the fact that the creditor, on the occasion, for example, of the actual execution of the instrument, deals directly with the wife and explains the effect of the document to her will not protect him. Nothing but independent advice or relief from the ascendancy of her husband over her judgment and will would suffice. If the creditor has left it to the husband to obtain his wife's consent to become surety and no more is done independently of the husband than to ascertain that she understands what she is doing, then, if it turns out that she is in fact acting under the undue influence of her husband, it seems that the transaction will be voidable at her instance as against the creditor."

Of the second of the two cases that we have referred to earlier, Dixon J said:

"In the second case, that where the wife agrees to become surety at the instance of her husband though she does not understand the effect of the document or the nature of the transaction, her failure to do so may be the result of the husband's actually misleading her, but in any case it could hardly occur without some impropriety on his part even if that impropriety consisted only in his neglect to inform her of the exact nature of that to which she is willing blindly, ignorantly or mistakenly to assent. But, where the substantial or only ground for impeaching the instrument is misunderstanding or want of understanding of its contents or effect, the amount of reliance placed by the creditor upon the husband for the purpose of informing his wife of what she was about must be of great importance.

If the creditor takes adequate steps to inform her and reasonably supposes that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or, indeed, the significance of what she is

doing, cannot, I think, in itself give her an equity to set it aside, notwithstanding that at an earlier stage the creditor relied upon her husband to obtain her consent to enter into the obligation of surety. The creditor may have done enough by superintending himself the execution of the document and by attempting to assure himself by means of questions or explanation that she knows to what she is committing herself. The sufficiency of this must depend on circumstances, as, for example, the ramifications and complexities of the transaction, the amount of deception practised by the husband upon his wife and the intelligence and business understanding of the woman. But, if the wife has been in receipt of the advice of a stranger whom the creditor believes on reasonable grounds to be competent, independent and disinterested, then the circumstances would need to be very exceptional before the creditor could be held bound by any equity which otherwise might arise from the husband's conduct and his wife's actual failure to understand the transaction: Cf per *Cussen* J. If undue influence in the full sense is not made out but the elements of pressure, surprise, misrepresentation or some or one of them combine with or cause a misunderstanding or failure to understand the document or transaction, the final question must be whether the grounds upon which the creditor believed that the document was fairly obtained and executed by a woman sufficiently understanding its purport and effect were such that it would be inequitable to fix the creditor with the consequences of the husband's improper or unfair dealing with his wife."

25. Thus, Dixon J was dealing with two kinds of case. In the former, the case of actual undue influence, as Dixon J says, explaining the effect of the document to the surety will not protect the creditor and "[n]othing but independent advice or relief from the ascendancy of her husband over her judgment and will would suffice". In the latter, "[i]f the creditor takes adequate steps to inform [the wife] and reasonably supposes that she has an adequate comprehension of the obligations she is undertaking and an understanding of the effect of the transaction, the fact that she has failed to grasp some material part of the document, or, indeed, the significance of what she is doing" cannot give her an equity to set the instrument aside.

26. The term "unconscionable" does not appear in any of the judgments in *Yerkey v Jones* . In *The Commonwealth v Verwayen* , Deane J said:

"I prefer the word 'unconscientious' to 'unconscionable' in this and other areas where equity has traditionally intervened to vindicate the requirements of good conscience.

In deference to the generally accepted usage of 'unconscionable' and 'unconscionability' in this area by judges and writers however, I have thought it preferable to use those words in this judgment."

In *Amadio* , Mason J said:

"Historically, courts have exercised jurisdiction to set aside contracts and other dealings on a variety of equitable grounds. They include fraud, misrepresentation, breach of fiduciary duty, undue influence and unconscionable conduct. In one sense they all constitute species of unconscionable conduct on the part of a party who stands to receive a benefit under a transaction which, in the eye of equity, cannot be enforced because to do so would be inconsistent with equity and good conscience. But relief on the ground of 'unconscionable conduct' is usually taken to refer to the class of case in which a party makes unconscientious use of his superior position or bargaining power to the detriment of a party who suffers from some special disability or is placed in some special situation of disadvantage ... Although unconscionable conduct in this narrow sense bears some resemblance to the doctrine of undue influence, there is a difference between the two. In the latter the will of the innocent party is not independent and voluntary because it is overborne. In the former the will of the innocent party, even if independent and voluntary, is the result of the disadvantageous position in which he is placed and of the other party unconscientiously taking advantage of that position."

27. It was submitted that *Yerkey v Jones* has been overruled by *Amadio* or that the principles applied in *Yerkey v Jones* had been subsumed in principles applied in *Amadio* .

28. There are several answers to this contention. First, there is nothing in *Amadio* that suggests that it was intended to overrule *Yerkey v Jones* or to subsume the rules applied there in some broader principle enunciated in *Amadio*

29. Secondly, far from anything said in *Amadio* suggesting that it was intended to mark out the boundaries of the whole field of unconscionable conduct, as Mason J said:

"It goes almost without saying that it is impossible to describe definitively all the situations in which relief will be granted on the ground of unconscionable conduct."

30. Thirdly, *Amadio* was a case of unconscionable conduct very different from the cases considered in *Yerkey v Jones* . In *Amadio* there was actual misconduct on the part of the son of the respondents which affected their entry into the mortgage and guarantee and the bank was on notice of that misconduct. There was no allegation of undue influence by the son with notice on the part of the bank (a situation corresponding to that in *Bank of New South Wales v Rogers*), nor was the alleged case of undue influence on the part of the bank made out. What Mason J identified as "[t]he critical issue" was whether the plaintiffs were entitled to relief on the ground of unconscionable conduct. The transaction was not enforced against the respondents because it would have been unconscionable for the bank to do so. And it was unconscionable for the bank to enforce it because the bank's employee had shut his eyes to the vulnerability of the respondents and the misconduct of their son.

31. The principles applied in *Yerkey v Jones* do not depend upon the creditor having, at the time the guarantee is taken, notice of some unconscionable dealing between the husband as borrower and the wife as surety. *Yerkey v Jones* begins with the recognition that the surety is a volunteer: a person who obtained no financial benefit from the transaction, performance of the obligations of which she agreed to guarantee. It holds, in what we have called the first kind of case, that to enforce that voluntary transaction against her when in fact she did not bring a free will to its execution would be unconscionable. It holds further, in the second kind of case, that to enforce it against her if it later emerges that she did not understand the purport and effect of the transaction of suretyship would be unconscionable (even though she is a willing party to it) if the lender took no steps itself to explain its purport and effect to her or did not reasonably believe that its purport and effect had been explained to her by a competent, independent and disinterested stranger. And what makes it unconscionable to enforce it in the second kind of case is the combination of circumstances that:

(a) in fact the surety did not understand the purport and effect of the transaction;

(b) the transaction was voluntary (in the sense that the surety obtained no gain from the contract the performance of which was guaranteed);

(c) the lender is to be taken to have understood that, as a wife, the surety may repose trust and confidence in her husband in matters of business and therefore to have understood that the husband may not fully and accurately explain the purport and effect of the transaction to his wife; and yet

(d) the lender did not itself take steps to explain the transaction to the wife or find out that a stranger had explained it to her.

32. To hold, as *Yerkey v Jones* did, that in those circumstances the enforcement of the guarantee would be unconscionable represents no departure from accepted principle. Rather, it "conforms to the fundamental principle according to which equity acts, namely that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct".

33. It will be seen that the analysis of the second kind of case identified in *Yerkey v Jones* is not one which depends upon any presumption of undue influence by the husband over the wife. As we have said, undue influence is dealt with separately and differently. Nor does the analysis depend upon identifying the husband as acting as agent for the creditor in procuring the wife's agreement to the transaction. Rather, it depends upon the surety being a volunteer and mistaken about the purport and effect of the transaction, and the creditor being taken to have appreciated that because of the trust and confidence between surety and debtor the surety may well receive from the debtor no sufficient explanation of the transaction's purport and effect. To enforce the transaction against a mistaken volunteer when the creditor, the party that seeks to take the benefit of the transaction, has not itself explained the transaction, and does not know that a third party has done so, would be unconscionable.

34. We acknowledge that the statement that enforcement of the transaction would be "unconscionable" is to characterise the result rather than to identify the reasoning that leads to the application of that description. But that the description of "unconscionable" can and should be applied in these circumstances is supported by reference to other circumstances in which that description has been applied.

35. Thus, in *Mueller* , Cussen J drew support for his conclusion that a guarantee should be set aside in circumstances such as those now under consideration from a comparison with equity's treatment of gifts made by a mistaken donor. He said:

    "In the first place, it is obvious that a large benefit is conferred both on the creditor and the debtor, which, so far as any advantage to the guarantor is concerned, is voluntary, though no doubt 'consideration' exists so far as the creditor is concerned, so soon as forbearance is in fact given or advances are in fact made. It is, I think, to some extent by reference to the rule or to an extension of the rule that, in the case of a large voluntary donation, a gift may be set aside in equity if it appears that the donor did not really understand the transaction, that such a guarantee may be treated as voidable as between the husband and wife."

36. In addition, some comparison can be drawn between the refusal to permit enforcement of the guarantee in the circumstances identified in *Yerkey v Jones* and the equally well recognised and long established principles which would preclude enforcement of a guarantee in some cases where the creditor has not disclosed to the intending surety some features of the transaction.

37. We do not pause to attempt to specify what features of such a transaction should be identified by the creditor to the surety and we are not to be taken as suggesting that the principles dealt with in *Yerkey v Jones* are to be seen as no more than some particular application of these rules. Nevertheless, the intervention of equity in cases of that kind may also be seen as rooted in the conclusion that to permit enforcement of the guarantee against a mistaken surety (mistaken in that kind of case because the creditor should have, but did not, inform the surety of some particular fact) would be unconscionable.

38. No doubt these cases are no more than analogies. They are not to be treated as defining what is meant by "unconscionable" or as, in some way, governing the present circumstances. They are, however, useful illustrations of why the enforcement of the guarantee in this case would be unconscionable.

39. As is implicit in what we have said, we prefer not to adopt the analysis made by Lord Browne-Wilkinson in *Barclays Bank Plc v O'Brien* which proceeded from identifying "the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction". Sir Anthony Mason has pointed out that:

> "constructive notice in *O'Brien* is used in order to ascertain whether a transaction about to be entered into is impeachable, not so as to fix a person who acquires an interest in the property with knowledge of an antecedent interest in property, that being the traditional function of constructive notice".

Such an analysis may be required in ordering the priority of competing interests in property but in the present context it may well distract attention from the underlying principle: that the enforcement of the legal rights of the creditor would, in all the circumstances, be unconscionable.

40. We consider that the only question of notice that arises is whether the creditor knew at the time of the taking of the guarantee that the surety was then married to the creditor. Other questions of notice do not intrude.

41. As is apparent from what was said in *Yerkey v Jones* the creditor may readily avoid the possibility that the surety will later claim not to have understood the purport and effect of the transaction that is proposed. If the creditor itself explains the transaction sufficiently, or knows that the surety has received "competent, independent and disinterested" advice from a third party, it would not be unconscionable for the creditor to enforce it against the surety even though the surety is a volunteer and it later emerges that the surety claims to have been mistaken.

42. What then of the present case? The trial judge found that the appellant did not understand the purport or effect of the transaction. She knew it was a guarantee but she thought it was a guarantee of limited overdraft accommodation to be applied only in the purchase of gold. Nor did she understand that her obligations under the guarantee were secured by the mortgage which she had given over her home. It being found that the bank took no step to explain the transaction to her and knew of no independent advice to her about it (there having been no such independent advice) the conclusion that the appellant was entitled to succeed in her claim to set the transaction aside was inevitable if she was a volunteer.

43. The trial judge found that the appellant was not "directly involved" in Citizens Gold. And he made this finding notwithstanding that the surety was shown in records held by the Australian Securities Commission to be both a director of, and a shareholder in, the company. The records of Citizens Gold held at the Australian Securities Commission presented, however, a confusing picture of movements in shareholdings over the years: so confusing that the trial judge said that it could be "seen from the records that the exact beneficial holding in the various companies [including Citizens Gold] is quite obscure". Although the trial judge found that from time to time some benefit flowed to the family from the companies, he found that they were companies that were in the "complete control" of the appellant's husband. Taken as a whole, those findings demonstrate that the appellant in fact obtained no real benefit from her entering the transaction; she was a volunteer. The fact that she was a director of the company is nothing to the point if, as the trial judge's findings show, she had no financial interest in the fortunes of the company.

44. We would therefore allow the appeal.

45. The parties agreed that, if the appeal were allowed, the orders made by the trial judge should be reinstated. Having succeeded in this Court the appellant should have her costs in this Court and the costs of the appeal to the Court of Appeal. The order dismissing her cross-appeal to the Court of Appeal (with costs) should stand.

46. Accordingly, we would order that:

1. The appeal be allowed with costs.

2. Paragraphs 1 to 8 of the orders made by the Court of Appeal of New South Wales on 3 July 1996 be set aside and in lieu there be orders that the appeal to that Court be dismissed with costs.

47. KIRBY J. We have it on the authority of Lord Radcliffe that judges, holding to the "conviction of Galileo", know that "somehow, by some means, there is a movement that takes place" in the exposition of legal principle. The movement may be readily perceived at a distance. Yet, although we may sometimes be unable to say how the law gets from one point to another, no one doubts that movement occurs or that it is "in response to the developments of the society in which [the law] rules". Gummow J has pointed out that the principles and doctrines of equity never pretended "like the rules of the Common Law ... to have been established from time immemorial". Rather, they were "established from time to time - altered, improved, and refined from time to time". So it is in this case.

The issues

48. The threshold question is whether the New South Wales Court of Appeal erred in holding that the primary judge was mistaken in applying to the facts as found the principle stated by Dixon J in *Yerkey v Jones* . The Court of Appeal held that, when *Yerkey* was properly analysed, it disclosed that Dixon J's principle had not been adopted by this Court, although it is commonly attributed to it. The principle therefore amounted to an opinion of Dixon J alone. Having so concluded, the Court of Appeal determined that the later decision of this Court in *Commercial Bank of Australia Ltd v Amadio* properly described the jurisdiction of equity to relieve a surety against unconscionable dealings:

"Once the principles of ... *Amadio* were applied to the facts of the case there should be no room for resort to the special rule in *Yerkey v Jones* ."

The primary judge had held that the principles in *Amadio* did not give rise to relief. A cross-appeal challenging that finding was dismissed. No other ground for relief was upheld. Accordingly, the Court of Appeal refused the claim for equitable and other relief. It was from that outcome, but particularly to challenge the view taken of the authority and application of the supposed principle in *Yerkey,* that special leave was granted to permit an appeal to this Court.

49. The issues arising are therefore:

1. Does the principle stated by Dixon J in *Yerkey* express a special rule of equity applicable to a case where a wife gives a guarantee of a debt for the benefit of her husband (or entities controlled by him) and where the wife's agreement to give the guarantee was obtained by undue influence, pressure or misrepresentation on the part of the husband or without an adequate understanding of the nature and effect of the transaction? Does that principle represent the holding of this Court or simply an opinion of Dixon J, never specifically endorsed by the Court as a binding rule? (The *Yerkey v Jones* point).

2. Whatever the status of the opinion of Dixon J in *Yerkey* , should any rule which *Yerkey* may have stated in 1939 now be regarded as obsolete and subsumed in the principles expressed in later decisions such as *Amadio* ? Should this be done having regard to changes in society affecting married women, their legal status, the expansion of the availability of financial credit to them and the desirability of avoiding reliance upon discriminatory criteria for the provision of equitable relief

and the development of equitable doctrine? (The *Commercial Bank of Australia Ltd v Amadio* point).

3. If the equitable principle expressed by Dixon J in *Yerkey* is revealed as his individual opinion, is overruled as obsolete or now treated as absorbed in the broader doctrines of equity, does the exposition of such doctrine in *Amadio* sufficiently meet the particular problem of sureties who are emotionally vulnerable or dependent on the debtor? Or is a broader statement of equitable principle required than that expressed in *Amadio* ? In particular, should this Court follow the decision of the House of Lords in *Barclays Bank Plc v O'Brien* or some modified version of the principles there stated? (The *Barclays Bank Plc v O'Brien* point).

The facts

50. The facts of this case, and the history of the litigation, are set out in the reasons of the other members of this Court. I will not repeat what is said. Let me state the features of the evidence which appear to me to be most telling when considering the invocation of equitable doctrine to protect the interests of Mrs Jean Garcia (the appellant) ("the wife"). I start this review with three holdings of the primary judge, which were not disturbed by the Court of Appeal, and which were adverse to the wife's various claims for relief:

1. That she had failed to establish that she executed the relevant guarantee as a result of the exercise of actual undue influence on the part of Mr Fabio Garcia ("the husband").

2. That if the suggested principle in *Yerkey* had been absorbed in, or subsumed by, the principles stated in *Amadio* , the latter would not entitle the wife to relief because, unless it arose from her then relationship of marriage to her husband, there was no other basis upon which it could be established that National Australia Bank Limited (the respondent) ("the Bank") knew of the unconscionability of the husband's conduct. Specifically, there was no evidence that the Bank had knowledge of his deceptive conduct, or had wilfully shut its eyes to what a reasonable lender in its position would have perceived as fraud.

3. That there was no basis upon which the wife was entitled to relief under the *Contracts Review Act* 1980 (NSW).

51. It was in this way that the primary judge was obliged to consider the authority of *Yerkey*. He made it abundantly clear that, were it not for what he took to be the "exceptional case" established by that decision (which he did not regard as having been absorbed in, or superseded by, *Amadio*), he would have rejected the wife's claim. But for *Yerkey* he would have held the wife to the legal obligation which she assumed when she signed the guarantee.

52. Amongst the facts which the primary judge found which tend to support the provision of equitable relief were the following:

1. As between the wife and the husband: That he pressured her to sign the guarantee. He constantly pointed out what a fool she was in financial matters. Her relationship with him was at risk and this was relevant both to her future and to the welfare of the two children of the marriage. He assured her that there was no real risk to her interests because transactions with the Bank were covered by purchases of gold. She did not understand that the guarantee to the Bank was secured by an "all moneys" mortgage which put in danger the matrimonial home which had been built on a block of land originally acquired in her own name with financial support from her father. Such land had only later been transferred to be owned jointly by the

wife and the husband when the Bank insisted on having a "breadwinner" on the title to permit a loan to be authorised for the purpose of building a house which, when built, became the matrimonial home.

2. As between the wife and the Bank: The Bank knew that she was the borrower's wife for she was so described in its documents. It took no steps to explain the extent of the obligations under the guarantee nor to recommend, or insist, that she obtain independent advice concerning the new obligations which she was assuming. As found, the whole transaction in which the wife signed the guarantee was concluded in less than a minute. The Bank's officer put some documents down and indicated with her finger where the wife should sign. She duly did so.

53. On the other hand, the chief factual considerations which suggest that equity might not provide relief to the wife are as follows:

1. As between the wife and the husband: The wife was fully aware that she was guaranteeing her husband's transactions and those of Citizens Gold, the company through which he operated. She was herself involved in Citizens Gold, both as a shareholder and director. The wife was not deluded nor coerced by the husband into signing the guarantee. Nor was her will overborne in a technical sense. Had the husband's investments prospered, in ordinary circumstances this would have secured economic advantages for the wife, or at least the children of the marriage. She was therefore not entirely a volunteer, in the sense of having no economic interest in the success of his business ventures. The couple lived together in a jointly owned home. By inference, the reason for her accepting an office of director in Citizens Gold, and for providing the guarantee, was that the husband's economic position was, however indirectly, bound up in the economic position of the whole family. If the financial transactions in which Citizens Gold was involved had proved profitable, and if the personal relationships of the husband and wife had improved, it scarcely seems likely that the wife would have disclaimed the economic benefits as vigorously as she has now sought to escape the economic burdens.

2. As between the wife and the Bank: The wife presented in court as "a capable and presentable professional". It was specifically found that she would have appeared to the Bank as "an intelligent articulate lady with a professional position calling at the bank, appear[ing] to be voluntarily signing a guarantee in respect of an account of which she was a director of the company concerned, and there was nothing to give the bank even suspicion". The wife knew what a guarantee was. She knew that the document she was executing was a guarantee. If the transaction at the Bank took only a minute, this was, at least in part, because the wife asked no questions. She sought no information or advice. She gave the appearance of knowing what she was doing. She had previously set up her own professional business as a physiotherapist. Whilst it is true that the Bank did not interrogate her about her relationship with her husband and her awareness that his transactions, and those of the company in which they were both apparently involved, might put her own interests in the matrimonial home at risk, such questions might have appeared intrusive or irrelevant. At least they might have done so, having regard to the assurance, which the wife appeared to demonstrate, that she knew what she was doing. In this case, the Bank did not leave it to the husband to procure the wife's execution of the guarantee. The primary judge did not find that, when the guarantee was given by the wife, the husband intended to use the overdraft differently from the way he had represented to the wife or that the Bank ought to have known that he or his company might do so. So far as the Bank was concerned, there was nothing on the face of the transaction which was to the disadvantage of the wife. On the contrary, the Bank knew that she was an officer of Citizens Gold. The suggestion for the wife (later withdrawn) that the Bank had no basis for such knowledge flies in the face of findings of the primary judge for which there was ample supporting evidence. This was material provided by the couple to the Bank, confirmed by the public record, concerning the officers and shareholding of Citizens Gold maintained by the Australian Securities Commission. It showed the wife's involvement in that company.

54. Assembled in this way, the respective factual assertions of the parties can be adequately understood. The wife submits that, like other wives and persons in similar positions of vulnerability and dependence, she has been misled by her husband. She submits that she could have been protected by the Bank ensuring that she was provided with rudimentary information about the serious risks which she was running, especially to the family home. She asks for reaffirmation of the authority of *Yerkey* . If, for any reason, that decision is regarded as overtaken by later, more general and non-discriminatory principles, the wife asks that those principles be clarified so that they require a credit provider to give basic information as to the risks assumed by sureties such as herself and to ensure that they are advised about, or secure independent information concerning, the obligations which they are assuming, given that emotional dependence might sometimes overwhelm rational economic decisions.

55. The Bank submitted that *Yerkey* did not establish a special equity for surety wives. If it ever did so, it should now be overruled or re-expressed in terms less discriminatory in ambit and more rational in operation. The doctrine of notice lies at the heart of equity. The only foundation for the Bank to have notice of the alleged vulnerability of the wife was her status as a wife. Such status is not now sufficient, or relevant, to put a credit provider on notice of the needs of the wife to secure independent advice and information. The imposition of any such obligation should be left to the self-regulation of the banks or to legislation. It is not the province of the courts to require the provision of independent advice under the guise of adapting equitable doctrine. So went the Bank's submissions.

Deriving the rule in *Yerkey v Jones*

56. It is fundamental to the ascertainment of the binding rule of a judicial decision that it should be derived from (1) the reasons of the judges agreeing in the order disposing of the proceedings; (2) upon a matter in issue in the proceedings; (3) upon which a decision is necessary to arrive at that order. Thus, the opinions of judges in dissent are disregarded for this purpose, however valuable they may otherwise be. Judicial remarks of a general character upon tangential questions or issues not necessary to the decision are likewise discarded, however persuasive the reasoning may appear. In this sense, the rules governing the ascertainment of binding precedent observe principles which are at once majoritarian and precise. Even so great a Justice of this Court as Dixon J cannot speak for the Court unless his reasoning attracts the support, express or implied, of a majority of the participating Justices (disregarding for this purpose any who did not agree in the order of the Court disposing of the proceedings on the point in question). Even then, the remarks will not be part of a binding rule unless they relate to an issue in contention which had to be decided by the Court to reach its order.

57. It was with these principles in mind that the Court of Appeal approached the analysis of the reasoning of the Justices who participated in *Yerkey*. They were Latham CJ, Rich, Dixon and McTiernan JJ. As all of the Justices concurred in the order of the Court allowing the appeal in that case, the reasoning of none could be discarded. As none of the Justices expressly concurred in the reasoning of another, the analysis depends upon a comparison of the reasons which each gave. A question having arisen as to the precise nature of the rule established by the decision, the course followed by Sheller JA in the Court of Appeal was not only proper, it was essential. Nothing in his Honour's reasons suggested that he or the Court of Appeal were usurping the entitlement of this Court to decide that a binding rule, established by it, is to be departed from or overruled. Rather, what the Court of Appeal was endeavouring to do, with appropriate technical accuracy, was to ascertain what the holding in *Yerkey* was which was binding on them and whether it had any application to the facts of the present case.

58. Given the relatively small number of cases about the general law which this Court can accept, it would be unreasonable and undesirable to extend the ambit of dutiful obedience beyond the holdings of the Court to everything said by majority Justices in every decision. That would not only amount to a departure from settled principles governing the doctrine of binding precedent. It would also constitute a departure from the recent encouragement given by this Court to the appellate courts of Australia to play their part in the refinement, development and re-expression of legal principle which cannot, in the nature of things, be wholly left to this Court.

59. Whilst Courts of Appeal and Full Courts throughout Australia may be expected to pay close attention to the opinions on legal principle of individual Justices of this Court, particularly where they are part of a majority on a given issue, those courts are not bound in law by such observations or by obiter dicta or analysis that is not essential to the holding of the Court sustaining its orders. We should not seek to impose a precedential straight-jacket at a time when, because of social and other changes, refinement and development of legal principle is often more important than it was in the past. The present case is a good illustration of that need.

60. In *Yerkey* the reasons of Rich J and of McTiernan J were very brief. McTiernan J contented himself, "with some doubt", with the remark that the facts did not "raise an equity" entitling the wife there to be relieved of her covenant. Rich J likewise felt that the case turned on its facts. However, he endorsed the opinion of Cussen J in *Bank of Victoria Ltd v Mueller* . But that was a case where, as Latham CJ pointed out, the husband had procured his wife's assent to the guarantee by making a material misrepresentation as a result of which she did not understand the true nature of her liability. She was given no explanation by the bank. Missing from the analysis of the applicable principle in the reasons of Latham CJ, Rich J and the short statement of McTiernan J, was any endorsement of the notion that the law adopted a universal presumption that a wife as such, because she was a married woman, was under a special disadvantage needing the protection of a special equity. Far from accepting that principle, Latham CJ recognised that the wife's case in *Yerkey* had to depend:

"upon some special rules applying to a wife who becomes a surety for her husband. The rule relied upon is a rather vague and indefinite survival from the days when a married woman was almost incapable in law and when the courts of equity gave her special protection in relation to transactions affecting her separate property".

61. The most that Latham CJ was willing to accept in *Yerkey* was that a special rule applied where a lender had depended upon the wife's signature being obtained "through the agency of the husband". This was the way the principle had been stated in *Halsbury's Laws of England,* 2nd ed, vol 15, at 282. Even then, Latham CJ was able to assume that principle but to distinguish the case on the facts.

62. As Sheller JA demonstrated in the Court of Appeal, the result is, that as a matter of technicality, none of the other Justices constituting this Court in *Yerkey* expressly agreed in the opinion of Dixon J. Nor did they do so by implication in reasons suggesting the adoption of the same legal analysis. Yet for a long time the case has been regarded as standing for the principle stated in the separate reasons of Dixon J. In the New South Wales Court of Appeal, I have myself assumed that it was so. So have other Australian courts and courts overseas. Even where some of the reasoning, and expression of the rule, in Dixon J's opinion in *Yerkey* was thought to be anomalous or inappropriate to modern circumstances (as was increasingly the case in recent years), the course was generally taken of distinguishing *Yerkey* or regarding it as having been overtaken by the broader refinement of principles stated in *Amadio* . This was eventually the course followed by the New South Wales Court of Appeal.

63. Certainly, the reasons of Dixon J in *Yerkey* contain the lengthiest and most detailed analysis of the facts, legal authority and principles in question. But because the analysis was not adopted expressly, or by necessary implication, by any of the other Justices, it is not (unless later endorsed in a holding of this Court) binding as such on the courts subject to this Court's authority. It was not until these proceedings, and because of different opinions in New South Wales courts about the state of authority, that the Court of Appeal undertook the detailed analysis of the opinions expressed in *Yerkey,* in order to derive the precise rule that was binding on it.

64. I appreciate that the other members of the Court expressly refrain from basing their decision in this appeal on "some confined analysis" of *Yerkey,* designed to identify its ratio decidendi. However, I have thought it proper to undertake the same analysis as Sheller JA for three reasons. First, to dispel any suggestion of disobedience to authority on the part of the Court of Appeal which I regard as quite unjustified. Secondly, because such analysis cuts away the binding authority of what was said by Dixon J, leaving it as a judicial statement worthy of the greatest of respect but not commanding obedience as a matter of binding precedent. Never having thereafter been expressly endorsed by this Court, Dixon J's opinion is more vulnerable to revision when the law moves from protection of a single category to protection of defined relationships of which that category was, at one time, considered to be an illustration. Thirdly, it removes any impediment to this Court's reviewing the issue as one of legal principle rather than of long-standing authority of the Court. Were it the latter, one would be hesitant to disturb it where it had stood as a rule for 60 years. Upon this analysis, the opinion of Dixon J in *Yerkey* is neither expressly nor impliedly a statement of a holding of this Court. Should it nonetheless, in light of its provenance, apparent durability and suggested continuing applicability now be accepted by the Court, as the majority think? In my opinion, it should not.

Reasons for rejecting Justice Dixon's *Yerkey* principle

65. The equitable presumption expressed by Dixon J in *Yerkey* was stated in these terms:

"[I] f a married woman's consent to become a surety for her husband's debt is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima-facie right to have it set aside".

This means that, if there is any doubt and the credit provider has relied on the husband to arrange the guarantee, the onus is on the credit provider to show that the guarantee was obtained fairly and with the free consent of the wife. The principle has two limbs:

"[I]t is clearly necessary to distinguish between, on the one hand, cases in which a wife, alive to the nature and effect of the obligation she is undertaking, is procured to become her husband's surety by the exertion by him upon her of undue influence, affirmatively established, and on the other hand, cases where she does not understand the effect of the document or the nature of the transaction of suretyship."

In the former case nothing but independent advice or relief from the ascendancy of the husband would suffice. In the latter case if the credit provider reasonably supposes that the wife has an adequate comprehension she may have no equity to have the document set aside notwithstanding that at an earlier stage the credit provider relied on the husband to obtain her consent.

66. Assuming that the plaintiff is entitled to rely on this presumption, why should this Court, in 1998, endorse a principle expressed to apply specifically to one class of

citizens only, namely "married women"? For several reasons it should not. It should instead search for, and identify, a broader principle which is not confined to one group whose members have attributed to them particular needs and vulnerabilities which are certainly not confined to that group and which, in many cases, will not be present in members of that group. The classification is at once too narrow and too broad. Too narrow, for "[i]t is not based on and it inhibits a more developed understanding ... of the broad features of social inequality in Australia". Too broad, for it ignores "the diversity of the experiences of women in Australia". It may have accommodated a perceived problem when Dixon J wrote his opinion in *Yerkey* in 1939. It is inappropriate to Australian circumstances today. It should not now receive the endorsement of this Court.

1. *Historical anachronism:* The first reason for rejecting Dixon J's supposed principle in *Yerkey* is that, even in 1939, it represented an historical anachronism. This was pointed out by Latham CJ. His Honour explained that the cases invoked by the wife in that appeal would place her in an advantageous position that she would not have enjoyed had she not been married to the principal debtor. Central to Dixon J's statement of principle in *Yerkey* are the equitable doctrines that arose out of the inability of married women to deal with property at common law. Even prior to the abolition by the series of *Married Women's Property Acts* of the prescribed legal disabilities of married women, the apparent rigour of the common law was mitigated by the development of equitable doctrines which recognised a separate equitable estate in married women in certain circumstances. Equity did not prohibit married women from advancing a separate estate which its principles secured to them in cases involving guarantees of their husband's business or other obligations. However, "courts of equity examine[d] every such transaction between husband and wife with an anxious watchfulness and caution, and dread of undue influence".

In *Yerkey* , Dixon J confirmed that although equity would not presume undue influence in the case of husband and wife, it still preserved a general watchfulness in guarantee transactions. According to Dixon J, the relationship of wife and husband had "never been divested completely of what may be called equitable presumptions of an invalidating tendency". These equitable principles established for the benefit of married women prior to the *Married Women's Property Acts* , and not, as such, the trust and confidence between marriage partners, form the true basis of the supposed rule in *Yerkey* . Today, the capacity of a married woman to deal with her property freely as a feme sole is long established. I would therefore conclude in the language of O W Holmes:

"It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past."

One particular need for deriving a new principle rather than following the supposed rule in *Yerkey* is that, since Dixon J expounded the latter in 1939, there have been enormous social changes relevant to women, married women and domestic relationships more generally. The anomalous character of the supposed rule in *Yerkey* is clear when it is remembered that the presumption does not, as stated, protect other classes of sureties in arguably analogous positions. For example, it gives no protection to a de facto spouse, an unmarried child in a position of dependence, a parent who is vulnerable to pressure from a child or a companion of either sex having a long-term domestic relationship with the borrower, the existence of which might easily have been elicited by acceptable questioning by the credit provider. The recognition of these changes has eventually led to a growing chorus of judicial opinion critical of the supposed *Yerkey* principle as discriminatory and outmoded. That chorus became a clamour after the House of Lords, in *O'Brien* , unanimously rejected the rule stated by Dixon J in *Yerkey* and disapproved of earlier authority on which it had been based. That authority, a decision of the Privy Council of 1902, was described as providing only "unsure foundations" for a correct

approach. Lord Browne-Wilkinson gave a warning which is, I believe, applicable to this Court when expressing a legal principle binding throughout Australia:

"Like most law founded on obscure and possibly mistaken foundations it has developed in an artificial way, giving rise to artificial distinctions and conflicting decisions. ... [Y]our Lordships should seek to restate the law in a form which is principled, reflects the current requirements of society and provides as much certainty as possible."

A similar issue faced this Court in *Gronow v Gronow* . Remarking upon the principle or presumption that a young child, especially a girl, should remain in the custody of her mother, Stephen J observed that:

"The increase in the proportion of working mothers in the community has no doubt led to significant changes in the respective roles of husband and wife in family life: family life itself has much changed ... a full investigation of the relevant circumstances must necessarily provide a much more accurate assessment of the suitability of each parent than will any arbitrary presumption or rule, applied regardless of the infinite variability of human beings."

2. *Rejecting discriminatory stereotypes:* A principle which accords to *all* married women a "special equity" based on their supposed need for protection rests upon a stereotype of wives to which this Court should give no endorsement. All persons of full capacity, including married women, should ordinarily conform to commercial transactions which they enter unless statute or judicial law affords relief. Marriage, and being the female member to a marriage, is not, as such, a relevant reason for relief from legal obligations. Some additional or different basis is required if relief is to be afforded. Whatever may have been the position in Australian society of 1939, it is offensive to the status of women today to suggest that all married women, as such, are needful of special protection supported by a legal presumption in their favour. Other cohabitees of a borrower may, in particular circumstances, be in a position at least as vulnerable as some wives. Some may be more so. Given the very significant number of Australians who now live in relationships of potential dependence and vulnerability outside marriage, it is inappropriate to affirm as a binding principle of Australian law a rule expressed to derive from the married relationship itself and then to apply it only to one party to that relationship, namely the wife. Adopting that approach reinforces outdated assumptions without addressing the problem of people in vulnerable and dependent relationships which are only sometimes illustrated by the case of a married woman.

Defenders of the supposed *Yerkey* principle have referred to the need to maintain it for the occasional assistance which it provides to married women who could not otherwise bring themselves within the *Amadio* principle. Such an approach is unprincipled. It depends on gender loyalty or sympathy rather than on principle. It implies that because a guarantor is female and is married to the debtor, she has necessarily lost her own capacity to safeguard her own interests in a way that all male sureties and all unmarried female sureties are deemed by the law capable of doing. It is legitimate to test the supposed principle in *Yerkey* by such criteria. For this Court to accept that principle is to accord legitimacy to a discriminatory rule expressed in terms which are unduly narrow, historically and socially out of date and unfairly discriminatory against those who may be more needful of the protection of a "special equity" but who do not fit within the category of married women.

3. *Marriage is not a suspect category:* Given the rejection by our law of the notion that a presumption of undue influence arises from the relationship of marriage, it is inconsistent to persist with a presumption which rests upon the "invalidating tendency" by which a court will be more ready to find that a husband

had exercised undue influence over his wife than in other cases. There are several reasons, apart from those of legal theory, for rejecting this notion. I have already mentioned the changing nature of domestic relations in modern Australia which are as true in this country as in England, New Zealand and elsewhere. Why should undergoing the ceremony of marriage make only a female partner to the relationship more needful of protection from equity than an unmarried female partner? The opposite might often be the case.

To select marriage as a criterion of vulnerability also appears inappropriate at this stage in the evolution of personal relationships in this country. Rather than choose the fact of marriage and the sex of one party to it as an objective indication of vulnerability for legal purposes, it would seem more rational to look at all of the facts of the relationship between the surety and the borrower. So long as married women, as such, are treated as necessarily vulnerable, whatever the facts of their particular relationship, the focus of the law will remain upon a consideration which, in most cases, is simply irrelevant.

4. *Economic arguments:* In *O'Brien,* the House of Lords, after rejecting the reasoning of Dixon J in *Yerkey* , referred to an additional economic argument:

"Wealth is now more widely spread. Moreover a high proportion of privately owned wealth is invested in the matrimonial home. Because of the recognition by society of the equality of the sexes, the majority of matrimonial homes are now in the joint names of both spouses. Therefore in order to raise finance for the business enterprises of one or other of the spouses, the jointly owned home has become a main source of security. The provision of such security requires the consent of both spouses. ... [There is a] need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile. ... It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions."

The desirability of protecting vulnerable persons from loss of their assets, particularly their homes, must therefore be balanced against the undesirability of economically sterilising those assets. Ironically, any judicial response which imposes upon lenders an unrealistic standard would also be tantamount to a judicial divestiture of a married woman's legal capacity to execute a guarantee. With capacity comes obligation.

There is yet another economic reason which Professor Cretney has mentioned. He described it as a "more disturbing implication" of affording a specially protected status to married women, whatever the facts of their vulnerability or lack thereof. This is, that such a principle is likely to encourage a particular category of borrowers, and those associated with them, to seek to escape their lawful obligations by challenging the adequacy of the explanations given to their wives for the documents they have signed, beyond the protection now amply provided by statute. An indication that this problem may not be wholly theoretical is found in the large number of cases of the present kind coming before the courts, both in Australia and England. To the extent that the law encourages an endeavour to escape apparently binding obligations (the profits from which borrowers would gladly have reaped) necessarily adds a cost, and a disincentive, to the provision of capital to the class artificially singled out for special protection. Instead of requiring that vulnerability be ascertained in a rational way by an inquiry that elicits real considerations pertinent to the grant of equitable relief, this Court will endorse a presumption of vulnerability by reference to considerations of sex and matrimonial status which may be completely irrelevant in the particular case.

5. *Unacceptable discrimination:* There is a final reason for rejecting the special equity found by Dixon J in *Yerkey.* Since 1939, Australian society and its legal systems have moved away from irrelevant discrimination, whether on the ground of

sex, matrimonial status or otherwise. Any modern expression of a "special equity" by this Court should similarly avoid unprincipled discriminatory categories. The stereotype underlying *Yerkey* may hold true for some, perhaps even a significant number of, wives. But this Court should, where possible, refuse to "classify unnecessarily and overbroadly by gender when more accurate and impartial" principles can be stated. The Court should not be misunderstood as endorsing or upholding such discrimination where so much legislative and judicial effort in Australia has been directed at removing it. When an opportunity is presented legitimately to refashion an equitable principle so that it is not expressed, irrelevantly, in discriminatory terms, this Court should accept that opportunity, as the House of Lords did. In *O'Brien* , their Lordships rejected the suggestion that equity provided a special protection to wives, as such, in relation to surety transactions. Their Lordships accepted that the position of some wives was vulnerable. But they reconceptualised the vulnerability. It was a species of a wider genus which exists where there is an "emotional relationship between cohabitees". Lord Browne-Wilkinson explained:

> "The 'tenderness' shown by the law to married women is not based on the marriage ceremony but reflects the underlying risk of one cohabitee exploiting the emotional involvement and trust of the other. Now that unmarried cohabitation, whether heterosexual or homosexual, is widespread in our society, the law should recognise this. Legal wives are not the only group which are now exposed to the emotional pressure of cohabitation. Therefore if, but only if, the creditor is aware that the surety is cohabiting with the principal debtor, in my judgment the same principles should apply to them as apply to husband and wife."

This Court, in a series of cases, has also rejected the unnecessary compartmentalisation of equitable principle. It should not hold back now. Nor should it content itself with the possibility that, in the future, the *Yerkey* principle may find application to other "long term and publicly declared relationships short of marriage". In my respectful view, to say this is to suggest that other relationships that give rise to risk of vulnerability are but pale shadows of marriage. For some citizens marriage may not be an available option. For others it may not be desired. Like their Lordships, we should search for the causes which occasion the protection of equity and the indications which do, or should, bring those causes to the notice of the credit provider.

Although it is suggested that *Yerkey* may sometimes provide an appropriate means to afford protection to a vulnerable person who happens to be a wife, its expression is in my view completely unacceptable as a principle of contemporary Australian law. It should be rejected not because (as the Bank put it) it is demeaning to women but because it lends the authority of this Court, and thus of Australian law, to an exposition of principle which is completely inappropriate. As this Court has done of late in many other areas of the law, it should progress from species to genus: from category to concept. Most especially should it do so when, once examined, the species and the category are seen as discriminatory and as failing to reflect the requirements of contemporary society.

67. If it is true that some (but not all) wives continue to need the protection of a special rule of equity, the duty of a court such as this, absent applicable statutory provisions or judicial authority accepted as binding, is to "restate the law in a form which is principled, reflects the current requirements of society and provides as much certainty as possible". That may involve seeking out and stating a new and more apposite principle. And then asking whether that principle gives rise to relief in the particular case on a foundation which is not susceptible to criticism as an historical anachronism or impermissibly discriminatory.

68. With respect to those who are of the contrary view, I could not agree to endorsing the principle stated by Dixon J in *Yerkey* , limited as it is to married women. This

Court should not adopt such criteria. As a matter of legal authority, it is not bound to do so. As a matter of legal principle, it should not do so.

The authority of *Amadio* and *O'Brien*

69. The primary judge rejected the wife's application for relief based on *Amadio* . Having found that *Yerkey* had "no sure foundation in Australian law", the Court

> of Appeal treated *Amadio* as describing the "jurisdiction in equity to relieve against unconscionable dealing". The difficulty presented to the wife, deprived of the *Yerkey* presumption, was that *Amadio* requires that the disability of the weaker party should be "sufficiently evident to the stronger party to make it prima facie unfair or 'unconscientious' that he procure, or accept, the weaker party's assent to the impugned transaction in the circumstances". This rule took the Court of Appeal to an examination of the knowledge which the Bank had concerning the wife's situation. Once the special rule in *Yerkey* was excluded, there was no foundation in the facts to give rise to equitable relief on the basis of *Amadio* . That claim therefore failed. Having regard to the facts found and the matters argued in the appeal, I would not disturb that conclusion.

70. Nevertheless, by her notice of appeal, the wife raised a case alternative to that of reliance on *Yerkey*. She contended, as she had in the Court of Appeal, that she was entitled to relief on the basis of the equity described in the House of Lords in *O'Brien* . That argument was rejected in the Court of Appeal on the basis that, for Australian courts, the applicable principle was, and was only, that stated in *Amadio* .

71. What approach should this Court adopt? The principle stated by Dixon J in *Yerkey* is outmoded. Nonetheless, while "society's recognition of the equality of the sexes has led to a rejection of the concept that the wife is subservient to the husband in the management of the family's finances. ... The number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands."

72. The majority in their reasons have shown that *Amadio* was not intended, or aptly expressed, to cover the whole field of unconscionable conduct. The fact that the *Amadio* principle is incapable of protecting volunteers who, because of the vulnerability of their personal relations with a borrower, and the lack of advice and information, bind themselves to a potentially prejudicial transaction,

73. has been demonstrated several times. Suggestions, including some that I have made myself, that *Amadio* covered the field of available equitable relief must now be regarded as incorrect. There is, it seems to me, no difficulty in recognising that the same set of facts might give rise to two types of liability in the credit provider: one coming from the credit provider's own wrongful conduct and the other from the credit provider's notice of someone else's wrongful conduct. However, the two are analytically distinct. Constructive notice should not be sufficient for unconscientious dealing.

74. I favour a re-formulation of the principle expressed by Lord Browne-Wilkinson in *O'Brien* . It is my view that the principle should be stated thus: Where a person has entered into an obligation to stand as surety for the debts of another and the credit provider knows, or ought to know, that there is a relationship involving emotional dependence on the part of the surety towards the debtor: (1) the surety obligation will be valid and enforceable by the credit provider unless the suretyship was procured by the undue influence, misrepresentation or other legal wrong of the principal debtor; (2) if there has been undue influence, misrepresentation or other legal wrong by the principal debtor, unless the credit provider has taken reasonable

steps to satisfy itself that the surety entered into the obligation freely and in knowledge of the true facts, the credit provider will be unable to enforce the surety obligation because it will be fixed with notice of the surety's right to set aside the transaction; (3) unless there are special exceptional circumstances or the risks are large, a credit provider will have taken such reasonable steps to avoid being fixed with constructive notice if it warns the surety (at a meeting not attended by the principal debtor) of the amount of the surety's potential liability, of the risks involved to the surety's own interests and advises the surety to take independent legal advice. Out of respect for economic freedom, the duty of the credit provider will be limited to taking reasonable steps only.

75. In this way, equity is capable of affording a principle for relief in cases of this kind which (1) is expressed in non-discriminatory terms; (2) is addressed to the real causes of the vulnerability; and (3) recognises the credit provider's superior powers to insist that volunteers in a vulnerable position are afforded access to relevant information and, where necessary, independent advice. The House of Lords concluded in this general way in *O'Brien.* This Court should follow and adopt that decision. It is applicable to the circumstances of this case. The Court can properly do so without procedural unfairness to the Bank. The point was reserved and argued below. It was also debated at some length on the hearing of this appeal. No different evidentiary foundation is suggested by the wife. She merely sought the application of the applicable equitable principles to the facts as found by the primary judge.

The modified *O'Brien* principle

76. In *Wilkinson v ASB Bank Ltd* the New Zealand Court of Appeal observed:

"When it is said that undue influence has been exercised by the principal debtor on a guarantor (either positively by application of pressure or by taking advantage of the guarantor's dependency) or that the principal debtor has persuaded the guarantor to enter into the transaction by a misrepresentation, the guarantor is not asking the Court to set the transaction aside because of any unconscionable behaviour *by the creditor* . The guarantor does so, rather, because the creditor has taken the benefit of the guarantee with actual or constructive knowledge of what has occurred, or is presumed to have occurred, between the principal debtor and the guarantor."

Thus the credit provider will be fixed with constructive notice if it knows facts sufficient to put it on inquiry as to the possibility of wrongdoing by the debtor and it fails to inquire. In *Bank of New South Wales v Rogers* , for example, the debtor was the surety's uncle with whom she was in a long- standing relationship of dependency. It was held that the credit provider knew enough about their relationship to put it on inquiry as to the circumstances in which the guarantee was given. Judges have warned against the extension of the equitable doctrine of constructive notice to commercial transactions. However, once the doctrine of constuctive notice is understood as a principle which is wider and more flexible than the strict conveyancing standard, there is no reason why it should not give rise to liability. The key is to identify the circumstances in which the credit provider will be taken to have notice of the surety's equity to set aside the transaction.

77. A credit provider will be put on inquiry by a combination of two factors: (1) the transaction is not on its face to the personal financial advantage of the party offering the security; and (2) there is a relationship which is known, or which ought to be known, by the credit provider involving an emotional dependency on the part of the surety towards the debtor. The relationship of emotional dependency is singled out because of the possible effects of the sexual and/or relationship ties between the parties, on their financial dealings with each other. The "fear of destroying or

damaging the wider relationship" between persons makes these ties "a ready weapon for undue influence". Moreover, the informality of business dealings raises a "substantial risk" of misrepresentation as to the nature of the liability concerned. A credit provider will therefore be put on inquiry if it is aware that the surety reposes trust and confidence in the debtor in relation to his or her financial affairs. Cohabitation, as such, may alert the credit provider to the need for further inquiry. So may marriage, de facto marriage, or long term relationships with respect to sureties and borrowers of either sex. So may other information as to the relationships of the parties which comes to the notice of the credit provider or which it, out of prudence, requests and obtains. A rudimentary question as to the address of the parties and the discovery that they are (or have been) cohabitees would ordinarily be enough to set alarm bells ringing. This is because of the added vulnerability which cohabitation may bring to a relationship, otherwise unexplained, under which one person guarantees the debt of another by assuming their risks if things go wrong.

78. In *O'Brien* the House of Lords proceeded to offer some practical guidance to credit providers. In the absence of known facts suggesting that influence is not only possible but probable, the duty of inquiry will be satisfied if the credit provider explains to the surety, at a meeting not attended by the debtor, the extent of liability he or she is undertaking and the risk which he or she is incurring, and advises him or her to take independent advice. In cases where the influence is not only possible but probable or where the risks are large, the credit provider will only be safe if independent advice is taken.

79. The wife submitted in this case that the principle stated in *O'Brien* was simply an extension of the *Yerkey* principle. In terms of operation, although not of history, that may be so. However that may be, it is an extension freed from most, if not all, of the disadvantages which attend the 1939 language of Dixon J in *Yerkey.* It is not based on out-dated stereotypes. Nor does it perpetuate a paternalistic approach to women in relation to their financial dealings. It does, however, recognise the fact that in a substantial proportion of marriages or analogous relationships it is still the husband (or the principal male partner) who has the business experience and the wife (or subordinate partner) who is willing to follow his advice without bringing a truly independent mind and will to bear on such financial decisions. The principle has a wider application in that it applies to all other cases where there is a relationship of emotional dependence between the debtor and the person conferring the advantage. It may apply to the situation where the husband guarantees his wife's debts, or where parents guarantee a debt of their child, where the credit provider is, or ought reasonably to be, aware that the surety reposes trust and confidence in the debtor in relation to his financial affairs. And it provides clearer guidance to the credit provider as to what it should do to avoid being fixed with constructive notice.

80. Under the stimulus of legislation such as the *Contracts Review Act* and self-regulation, credit providers in Australia have already adapted their procedures to circumstances where volunteers, in family or other relationships, enter into surety and like transactions not ostensibly to their personal advantage. Although the adapted *O'Brien* principle which I favour would add a marginal cost to financial transactions and deprive some potential borrowers and their family businesses of the provision of capital, if it were to improve the quality of decisions of great importance to individual sureties, discourage the improvident assumption of risk, ill-advised (or unadvised) arrangements and diminish the number of litigious challenges when such arrangements go bad, the cost would be justified.

81. To the argument that this re-expression of equitable doctrine should be left to Parliament, there are two answers. First, the refinement has already taken place at the highest judicial level in England, a large financial market and a major legal jurisdiction from which Australian law originally derived its equitable doctrines.

Secondly, as mentioned at the outset of these reasons, equitable principles are themselves in a constant state of evolution in response to the developments of society. Borrowing against the family home to support a business venture is one such development which was not prevalent in earlier times. The changing nature of domestic relationships is another such development. Equitable doctrine is perfectly capable of adjustment to such changes. It does not need to use outmoded concepts, or anachronistic language, which pretend that things have remained the same as they were in 1939 when *Yerkey* was decided.

Application of the modified *O'Brien* principle and conclusion

82. When I turn to apply the principle in *O'Brien* , modified in the way that I have re-expressed it, I consider that (although for reasons different than he expressed), the orders of the primary judge were correct. The Bank knew, or could readily have discovered, that Mrs Garcia reposed trust and confidence in her husband in relation to her financial affairs. Mrs Garcia was thus in a position of potential vulnerability to demands that she should act as a surety, even if the Bank had no reasonable means of knowing the details of the particular stresses of her personal relationship. Breakdown of personal relationships is sufficiently common in Australia to have alerted a credit provider, such as the Bank, to the potentiality of this surety's vulnerability. This is particularly so where (as here) a domestic home in which the borrower lived was put at risk by the surety arrangements. The Bank could readily, without unduly intrusive questions, have discovered the nature of the parties' relationship. It was already aware that they were cohabitees. Formalities and public declaration of their relationship (assuming the latter to be possible and appropriate) would not be necessary. Sufficient that basic questioning disclosed a transaction on its face of little or no specific advantage to the proposed surety and that such party stood at high risk in relation to the roof over her head.

83. Misrepresentation by Mr Garcia to his wife being established, together with constructive notice of the potential vulnerability of the wife, the Bank is unable to enforce the surety obligation against her because it is fixed with constructive notice of her right to set aside the transaction having regard to its failure to take reasonable steps to satisfy itself that she entered the obligation freely and with knowledge of the relevant facts. It is here that the principal weakness in the Bank's case is obvious. As the primary judge found, in this case the Bank's ordinary procedures were not followed. Mrs Garcia was given no advice or explanation of the documents which she was signing. Still less was she told to seek independent advice or that such evidence would be a pre-condition to the Bank's acceptance of her guarantee. The fact that she was a director of the company and that she presented as an "intelligent articulate lady" in a professional position is certainly relevant. But it is not ultimately determinative. To the knowledge of the Bank, the home in which she lived was being placed in jeopardy. The Bank failed to insist that she was made fully aware of that risk. In such circumstances, there being no exceptional reasons to hold otherwise, the Bank was unable to enforce the surety obligation. Although the case is not clear cut and some of the evidence supported the Bank's arguments, I have concluded that the primary judge was right to hold as he did. Banks and other credit providers can protect themselves from this result. Most already do so.

84. The result to which I have come flows not from the fact that Mrs Garcia was a married woman in need of special protection, as such, from the law of equity. It flows from a broader doctrine by which equity protects the vulnerable parties in a relationship and ensures that in proper cases they have full information and, where necessary, independent advice before they volunteer to put at risk the major asset of their relationship for the primary advantage of those to whose pressure they may be specially vulnerable.

Orders

85. I agree in the orders proposed.

86. CALLINAN J. The appellant is a physiotherapist who married Fabio Benjamin Garcia on 30 January 1970 in California; she was an Australian, he was a Colombian national living in the United States. They had two sons born on 5 November 1970 and 1 June 1973. They separated in September 1988 and were divorced on 30 November 1989. The decree became absolute on 1 January 1990.

87. In 1971 the appellant purchased a block of land at Wahroonga, Sydney, in her own name with financial assistance from her father. She and her husband and their first child moved permanently to Australia in the next year. They resided with her mother.

88. The appellant transferred the property to herself and her husband as joint tenants. A loan was then obtained to finance the construction of a house on the land. The lender insisted that the husband be registered as a proprietor on the title to the land.

89. The appellant's husband went into business on his own account as a foreign exchange broker in about 1977.

90. On 9 August 1979 the appellant and her husband signed an "all moneys" mortgage in favour of the respondent to secure loans made to her and her husband. Those loans were repaid, but the mortgage was not discharged.

91. In the period 1985-1987 the appellant signed guarantees in favour of the respondent on four occasions -

(i) on 11 February 1985, in respect of advances to Citizens Gold Bullion Exchange Pty Ltd ("Citizens Gold") for an amount of $100,000;

(ii) in September 1985 in respect of advances to Citizens Finance Corp Pty Ltd for an amount of $150,000;

(iii) on 17 November 1986 in respect of advances to Citizens Gold for an amount of $400,000;

(iv) on 25 November 1987, in respect of advances to Citizens Gold for an amount of $270,000.

92. The last guarantee was signed in the presence of a bank officer but in circumstances in which an explanation of it was not and could not have been given.

93. On 31 May 1990, after the divorce, an order was made by the Family Court transferring to the appellant the husband's interest in the property at Wahroonga subject to the mortgage to the respondent.

94. The appellant commenced proceedings to have the guarantees set aside on 28 June 1990. On 23 August 1990 the respondent made demand on the appellant for $327,189.69 under the guarantee dated 25 November 1987.

95. The trial judge held that the guarantees of the liabilities of Citizens Gold executed in 1985 and 1986 could not be relied on by the respondent because the demand required pursuant to them had not been made. The respondent does not seek to enforce the 1985 and 1986 guarantees in these proceedings and accordingly the Court is concerned only with the guarantee given in 1987.

96. At first instance Young J in the Equity division made these statements and determined to apply *Yerkey v Jones* :

"Accordingly we have here a situation where Mrs Garcia was informed by her husband that there would be no risk, she signed the guarantee on that basis and were it not for something that happened thereafter, there would have been no problem. The bank seeks to enforce the guarantee in the problem circumstances and the onus is on it because of the special tenderness equity shows to wives, to show that the transaction was not unconscionable. In my view it has failed to satisfy me on that score. Accordingly in my view the plaintiff is entitled to relief setting the guarantees aside.

... Were I not of the view that the plaintiff is entitled to invoke the *Yerkey v Jones* principle, I do not think she would be entitled to relief under the unconscionability principle. That principle seems to apply in the present situation only if the plaintiff can satisfy two tests, viz (1) was the conduct of the plaintiff's husband

unconscionable; and (2) if the answer to (1) is yes, did the bank know, or at least be in a position where knowledge would be imputed to it, of such unconscionability. Unless the plaintiff can satisfy both limbs, she cannot succeed: *Contractors Bonding Ltd v Snee* ."

97. His Honour therefore set aside the guarantee given in 1987 on the basis of *Yerkey* but rejected the unconscionability case founded on *Commercial Bank of Aust Ltd v Amadio* . His Honour also rejected the case the appellant sought to make on the *Contracts Review Act* 1980 (NSW).

98. In the Court of Appeal (Mahoney P, Meagher and Sheller JJA) their Honours differed in their reasoning and in the result from the trial judge. They effectively held that *Yerkey* no longer stated the law in Australia in a case of this kind and that the relevant tests were now to be found exclusively in *Commercial Bank of Australia Ltd v Amadio* . The Court of Appeal therefore allowed the appeal of the respondent and dismissed a cross-appeal by the appellant.

99. The primary judge thought that the appellant presented herself in court as intelligent and articulate. He found that she had lied in the past for her own economic interest. It was also established that she had previously invested $130,000 in a motel in Dorrigo with her husband and others, that she had been involved with other companies of which she had been a director and that she had been earlier warned by the Registrar in Equity in 1984 not to sign documents without reading them. Furthermore, she conducted her own physiotherapy practice using a trustee service company to buy her equipment. It seems also to be the case that the appellant was, and held herself out to be, a director of the principal debtor from whom some minor financial benefits had been received by her or her family. In view of these matters it is somewhat surprising that his Honour made the critical findings to which I have referred and others that I will refer to below.

100. In *Yerkey* , members of the Court acknowledged the assistance that they obtained from the judgment of Cussen J in *The Bank of Victoria Limited v Mueller* . Dixon J expressly adopted his Honour's exposition of earlier cases in *Mueller* :

"For myself I fully accept the exposition by *Cussen* J of *Howes v Bishop* and *Talbot v Von Boris* . That exposition, I think, shows that these cases are consistent with and recognize the proposition that, if a married woman's consent to become a surety for her husband's debt is procured by the husband and without understanding its effect in essential respects she executes an instrument of suretyship which the creditor accepts without dealing directly with her personally, she has a prima-facie right to have it set aside. This is contained within the proposition stated by *Cussen*

J as the minimum necessary for the decision of *Bank of Victoria Ltd v Mueller* , subject to the qualification he expresses in the introductory condition which speaks of the husband's plight as a debtor."

His Honour explained the rationale for the rule in this case:

"... the basal reason for binding the creditor with equities arising from the conduct of the husband is that in substance, if not technically, the wife is a volunteer conferring an important advantage upon her husband who in virtue of his position has an opportunity of abusing the confidence she may be expected to place in him and the creditor relies upon the person in that position to obtain her agreement to become his surety. Misrepresentation as well as undue influence is a means of abusing the confidence that may be expected to arise out of the relation."

101. I do not read the judgments of the other members of the Court, Latham CJ, Rich J and McTiernan J as dissenting from the views and statements of principle of Dixon J.

102. The starting point for the Court of Appeal in this case was to question whether *Amadio* , a case concerned with specially disabled persons, had overruled *Yerkey* or in some way subsumed it. Their Honours concluded that it had. I do not think it has. The majority (Mason, Wilson and Deane JJ) in *Amadio* , which was an unconscionability case, applied *Blomley v Ryan* in which McTiernan J said:

"His weakness was of the kind spoken of by Lord *Hardwicke* in defining the fraud characterised as taking surreptitious advantage of the weakness, ignorance or necessity of another. The essence of such weakness is that the party is unable to judge for himself."

103. Plainly his Honour was not there speaking of a presumed weakness arising out of a particular legal relationship or status. Mason J in *Amadio* quoted passages from the judgments of Fullagar J and Kitto J in *Blomley v Ryan* :

"The circumstances adversely affecting a party, which may induce a court of equity either to refuse its aid or to set a transaction aside, are of great variety and can hardly be satisfactorily classified. Among them are poverty or need of any kind, sickness, age, sex, infirmity of body or mind, drunkenness, illiteracy or lack of education, lack of assistance or explanation where assistance or explanation is necessary. The common characteristic seems to be that they have the effect of placing one party at a serious disadvantage *vis-à-vis* the other."

"This is a well-known head of equity. It applies whenever one party to a transaction is at a special disadvantage in dealing with the other party because illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affect his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands."

104. None of these passages is directed to the relationship and financial dealings between husband and wife. In *Amadio* , Deane J (with whom Wilson J generally agreed) discussed *Mueller* . His Honour said this:

"Cussen J's above analysis was made in the context of a guarantee procured by a husband from his wife in favour of the husband's bank. There is, however, no basis in principle or in policy for confining the process of reasoning therein contained to cases of the relief of female spouses. It is appropriate to the circumstances of the present case."

105. I do not take his Honour to be saying other than that the approach and reasoning

applicable to cases of husband and wife may be equally applicable to other relationships, in the context however, of the facts of the case before the court there, a case of a special disability.

106. Accordingly, the majority in *Amadio* held that the special disability of the exploited parents was sufficiently evident to the bank to make it prima facie unfair or unconscionable for it to be permitted to enforce the guarantee; and that the bank had not discharged the onus which lay upon it to rebut the prima facie unfairness or unconscientiousness of the giving of the guarantee.

107. In the Court of Appeal in this case Sheller JA, who wrote the principal judgment, undertook an analysis of the reasons of all of the judges in *Yerkey* . His Honour concluded that the reasoning of the other judges did not support the broad principles expounded by Dixon J, and cast doubt upon the genesis of those principles themselves. Sheller JA referred to a criticism of *Yerkey* by Rogers J in *European Asian of Australia Ltd v Kurland* and quoted with apparent approval what his Honour said there to the effect that the retention of a specific immunity of married women in a case of this kind is an anachronism.

108. For myself I would take the view that the principles stated by Dixon J have now stood and been accepted for so long as the law in Australia, and that during that time they have served the ends of justice so well, they should be taken as the law unless and until this Court has held or should now hold to the contrary. That point was not reached in or by the decision in *Amadio* . Mason J and Deane J there clearly accepted the correctness of *Mueller* , (upon which Dixon J relied in *Yerkey*) and Dawson J expressly accepted *Yerkey* as authority for the special position of a wife whose guarantee has been procured by the husband.

109. *Yerkey* was recently considered by the House of Lords in *Barclays Bank Plc v O'Brien* in which Lord Browne-Wilkinson discussed policy considerations of the kind debated before us, particularly by the *amicus* Consumer Credit Legal Centre (NSW) Inc to whom the Court gave leave to appear:

"The large number of cases of this type coming before the courts in recent years reflects the rapid changes in social attitudes and the distribution of wealth which have recently occurred. Wealth is now more widely spread. Moreover a high proportion of privately owned wealth is invested in the matrimonial home. Because of the recognition by society of the equality of the sexes, the majority of matrimonial homes are now in the joint names of both spouses. Therefore in order to raise finance for the business enterprises of one or other of the spouses, the jointly owned home has become a main source of security. The provision of such security requires the consent of both spouses.

In parallel with these financial developments, society's recognition of the equality of the sexes has led to a rejection of the concept that the wife is subservient to the husband in the management of the family's finances. A number of the authorities reflect an unwillingness in the court to perpetuate law based on this outmoded concept. Yet, as Scott LJ in the Court of Appeal rightly points out, although the concept of the ignorant wife leaving all financial decisions to the husband is outmoded, the practice does not yet coincide with the ideal. In a substantial proportion of marriages it is still the husband who has the business experience and the wife is willing to follow his advice without bringing a truly independent mind and will to bear on financial decisions. The number of recent cases in this field shows that in practice many wives are still subjected to, and yield to, undue influence by their husbands. Such wives can reasonably look to the law for some protection when their husbands have abused the trust and confidence reposed in them.

On the other hand, it is important to keep a sense of balance in approaching these cases. It is easy to allow sympathy for the wife who is threatened with the loss of her home at the suit of a rich bank to obscure an important public interest viz, the need to ensure that the wealth currently tied up in the matrimonial home does not become economically sterile. If the rights secured to wives by the law renders vulnerable loans granted on the security of matrimonial homes, institutions will be unwilling to accept such security, thereby reducing the flow of loan capital to business enterprises. It is therefore essential that a law designed to protect the vulnerable does not render the matrimonial home unacceptable as security to financial institutions."

110. As extensive as the changes - perhaps more apparent than real - in sexual and matrimonial relationships may in recent times have been, I would not wish in this case to attempt to state a principle to encompass all cases. Indeed, given the diversity of human relationships, it would not only be imprudent but probably also impossible to do so. I would not, with respect, adopt the principle settled by the House of Lords in *Barclays Bank Plc v O'Brien* , that any exceptional rules formerly applicable to guarantees by wives of husbands' obligations should be extended to co-habitees in cases in which the creditor is aware of an emotional relationship between the co-habitees. Such a principle might, in some circumstances (leaving aside potential difficulties associated with the proof and definition of an emotional relationship) narrow the range of people deserving of protection by reason of their occupation of a special position, or the suffering of a special disability of the kind considered by the Court in *Amadio* . Indeed, this may, in any event, be an area more fit for legislative than judicial intervention.

111. The trial judge in this case made two critical findings in favour of the appellant:

"In the instant case, the husband pressured the wife to sign the document. She appeared to have done so because her husband consistently pointed out what a fool she was in commercial matters whereas he was an expert, and because she was trying to save her marriage."

"Accordingly we have here a situation where Mrs Garcia was informed by her husband that there would be no risk, she signed the guarantee on that basis and were it not for something that happened thereafter, there would have been no problem."

112. These two findings as to pressure and misrepresentation are almost precisely within the language used by Dixon J in *Yerkey* :

"If undue influence in the full sense is not made out but the elements of pressure, surprise, misrepresentation or some or one of them combine with or cause a misunderstanding or failure to understand the document or transaction, the final question must be whether the grounds upon which the creditor believed that the document was fairly obtained and executed by a woman sufficiently understanding its purport and effect were such that it would be inequitable to fix the creditor with the consequences of the husband's improper or unfair dealing with his wife."

113. I was impressed by the submissions of the respondent that on the evidence the findings of pressure and want of understanding on the part of the appellant were not open, but not sufficiently so to reach a different conclusion on those basic factual findings. Very rarely will such findings as were made here, be open in the case of a wife with the qualifications, experience and other attributes possessed by this appellant. One aspect of the change that has occurred in the enhancement of women's opportunities and relief from discrimination is that in practice, wives may find it more difficult to satisfy a court that they have succumbed to pressure or have been misled by their husbands in financial matters.

114. I do not doubt however that there are likely today to be many married women still in need of the special protection that *Yerkey* offers. Furthermore I do not think that there is any injustice to a lender in requiring it to be diligent in the way in which *Yerkey* prescribes in the case of married women who enter into transactions advantageous to husbands or legal personalities controlled by them, but which are disadvantageous or potentially so to the wife. No occasion arises in this case to express any different principles from those stated in *Yerkey* . On his findings the learned trial judge was bound to apply *Yerkey* and correctly did so. I would uphold the appeal and agree with the orders of Gaudron, McHugh, Gummow and Hayne JJ.

THE ROWDGETT YOUNG FELLOWSHIP LECTURE

given by

DATUK GOPAL SRI RAM
JUDGE
COURT OF APPEAL
MALAYSIA

12th September 1998

Convocation Room
Main Building
University of Hong Kong
HONG KONG

JUDICIAL INTERFERENCE WITH CONTRACTUAL RELATIONS: HAS THE EAGLE REALLY LANDED?

Object and purpose

The object of this paper is to examine the basis, if any, of a power in the court to insist, in the absence of any special circumstances or relationship, that parties to a contract must, when exercising a contractual power of termination, act reasonably and in good faith. In the context of special circumstances, the exercise of a contractual right in the nature of a power may be mentioned. The very nature of a power to forfeit a right or benefit accruing under a contract results in the law requiring that the power should be exercised reasonably or in good faith. (See, **Godfrey Constructions Pty. Ltd. v. Kanangra Park Pty. Ltd. (1972) 128 C.L.R. 529**; **Quennell v. Maltby (1979) 1 W.L.R. 318**.) The conduct of a party who seeks to enforce or avoid a contractual obligation is an equally relevant special circumstance and may bring into play the doctrine of estoppel as an avenue for curial intervention.

In the context of special relationships, fiduciaries may be mentioned. The proposition that parties to a contract who stand in a fiduciary position to each other must act in good faith when exercising their contractual rights is well-settled and it is not proposed to regale the reader with authorities upon the subject. Suffice it also to state that the categories of fiduciary relationships are not closed. The policy of the

courts, in keeping with flexibility of approach that is the hallmark of equity jurisprudence, is to critically examine each emerging fact pattern and determine whether a fiduciary duty should be declared to exist. Indeed, that is the approach we have adopted in Malaysia. In **Tengku Abdullah ibni Sultan Abu Bakar & Ors v. Mohd Latiff bin Shah Mohd & Ors (1996) 2 M.L.J. 265**, the Court of Appeal said (at p. 294):

> "The flexible approach adopted by the courts when according recognition to a particular relationship as being fiduciary in nature is, of course, one of judicial impression dependent upon the fact pattern of a given case. Flexibility of approach is the hallmark of equity, for when we deal with the principles governing equitable intervention, we enter a domain comprising not rigid rules but broad and liberal doctrines that are aimed at achieving a just result according to the facts of a particular case.
>
> Equity has, in keeping with the purpose of its origin, therefore refrained from laying down any strict rules for determining whether a particular relationship is fiduciary in nature or gives rise to fiduciary obligations, leaving the development of its jurisprudence to a case by case basis. The maxim 'the

> categories of fiduciary relations are never closed' exemplifies the approach that a court of equity adopts in this sphere of human activity. See *English v. Dedham Vale Properties Ltd* (1978) 1 All ER 382."

The *status quo* reveals a marked reluctance, whether at common law or in equity, to insist, in the context of performance of contractual obligations, that a contractual power of termination should be exercised reasonably or in good faith. The reluctance at common law is exemplified by the observation of Upjohn L.J., in **Financings Ltd. v. Baldock (1963) 2 Q.B. 104, at 115**:

> "The learned master reached the same result, but he did so by a rather different route, because he considered that the notice of termination had been given unreasonably. This appears to introduce some principle whereby damages may vary according to some test whether it was reasonable to give a notice of termination. I should be sorry to find a new concept introduced that a man may unreasonably exercise his right of termination, which was clearly given to him by the contract into which he has entered with the hirer, and thereby alter his rights and liabilities."

Equity's reluctance is demonstrated by the fairly recent decision of the Privy Council in **Union Eagle Ltd v. Golden Achievement Ltd. (1997) 2 All E.R. 215** where a general equitable jurisdiction to interfere with the performance of contractual obligations was declared to be non-existent. Lord Hoffmann who delivered the advice of the Board said (at p. 218):

> "The boundaries of the equitable jurisdiction to relieve against contractual penalties and forfeitures are in some places imprecise. But their Lordships do not think that it is necessary in this case to draw them more exactly because they agree with Litton V-P that the facts lie well beyond the reach of the doctrine. The notion that the court's jurisdiction to grant relief is 'unlimited and unfettered' (per Lord Simon of Glaisdale in *Shiloh Spinners Ltd v Harding* [1973] 1 All ER 90 at 104, [1973] AC 691 at 726) was rejected as a 'beguiling heresy' by the House of Lords in *Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade* [1983] 2 All ER 763 at 766, [1983] 2 AC 694 at 700). It is worth pausing to notice why it continues to beguile and why it is a heresy. It has the obvious merit of allowing the court to impose what it considers to be a fair solution in the individual case. The principle that equity will

> restrain the enforcement of legal rights when it would be unconscionable to insist upon them has an attractive breadth. But the reasons why the courts have rejected such generalisations are founded not merely upon authority (see Lord Radcliffe in *Campbell Discount Co Ltd v Bridge* [1962] 1 All ER 385 at 397, [1962] AC 600 at 626) but also upon practical considerations of business. These are, in summary, that in many forms of transaction it is of great importance that if something happens for which the contract has made express provision, the parties should know with certainty that the terms of the contract will be enforced. The existence of an undefined discretion to refuse to enforce the contract on the ground that this would be 'unconscionable' is sufficient to create uncertainty. Even if it is most unlikely that a discretion to grant relief will be exercised, its mere existence enables litigation to be employed as a negotiating tactic. The realities of commercial life are that this may cause injustice which cannot be fully compensated by the ultimate decision in the case."

Whether the position that now obtains, supported as it is by high authority, may be safely departed from forms the purpose of this paper.

The policy behind non-interference

Of all doctrines that the common law holds most dear unto itself in the area of voluntary private obligations is that of freedom of contract. So jealously is this freedom guarded that even statutory intrusions upon it are not readily countenanced in the absence of clear language. That the unwillingness persists even when the statute in question is a legislative attempt to codify the law of contracts is illustrated by **Ooi Boon Leong v. Citibank N.A. (1984) 1 M.L.J. 222**, It was there contended that section 1(2) of the Contracts Act, 1950 of Malaysia (the provisions of which are drawn from the Indian Contract Act, 1872) which says that "nothing herein contained shall affect ... any incident of any contract, not inconsistent with this Act" had the effect of negating an express term in a guarantee that provided for consequences different from those stipulated by the Act. The argument was rejected by the Privy Council, Lord Brightman saying (at p. 226):

> "It would indeed be surprising if so devastating an inroad into the common law right of freedom of contract were introduced by the legislature in a section which is primarily devoted to expressing the short title to the Act and which moreover appears in a part of the Act which is merely headed 'Preliminary'".

In tandem with the concept of freedom of contract there operates another and equally important doctrine: the sanctity of contracts. The

gist of the latter is that contractual obligations freely entered into must be performed. Mere hardship or inconvenience in performance is no excuse. (See, **Davis Contractors Ltd v Fareham UDC [1956] AC 696**, *per* Lord Radcliffe at p. 729.)

The joint operation of the two doctrines was stated in **Printing & Numerical Registering Co. v. Sampson L.R. 19 Eq. 462, 465** by Jessel M.R. in language that merits recall:

> "...men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore, you have this paramount public policy to consider-that you are not lightly to interfere with this freedom of contract."

Accordingly, the role of the court is merely to interpret the contract entered into between parties. And it is no part of the court's function to discover loopholes through which a party may seek to extricate himself from the burden of an obligation solemnly undertaken by him.

Curial interference with the freedom to undertake contractual obligations is therefore rare. When it does occur it is generally to be found at two levels — the point of formation or at the point of performance.

At the level of formation, cases of interference fall within the well-established categories of capacity, consent and illegality. In the case of a natural person, incapacity occasioned through a contracting party being a minor, or of unsound mind or in a state of intoxication prevent the formation of a contract. Consent that is the product of either misrepresentation, mistake, fraud or undue influence is no consent at all. A contract induced by any of these elements is vitiated by the lack of true consent. Contracts that are either illegal as formed or performed are void, although in the case of illegal performance it is necessary that the illegality complained of must go to the root of the contract. See, **St. John Shipping Corp v Joseph Rank Ltd [1957] 1 Q.B. 267**. Absent these infirmities, a promise made for consideration holds good.

At the point of performance, excuses for non-performance are limited to those instances recognised by the law as discharging a promisor from the burden of his obligation. Frustration of the bargain by a supervening event not occasioned by the default of either party to the contract or a failure on the part of the promisee to fulfill his part of the bargain are accepted by the courts as valid reasons for excusing-performance. The permissible tolerance limit of intervention in this context is the curial power to imply a term in a contract. However, decided cases make it clear that it is a power that calls for restraint in its exercise. (See, for example, **Reigate v. Union Manufacturing Co (Ramsbottom) Ltd [1918] 1 KB 592**, *per* Scrutton L.J., at p 605.)

That the power to imply a term forms part of the court's interpretative jurisdiction is made clear by the following observation of Mason J., in **Codelfa Construction Pty Ltd v. State Rail Authority of New South Wales (1982) 149 C.L.R. 337 at p 345**:

> "The appellant's case is that a term has to be implied in the contract to give it business efficacy, to make it workable. Consequently, there is no contest as to what constitutes the contract; rather the contest is as to its meaning and effect.
>
> When we say that the implication of a term raises an issue as to the meaning and effect of the contract, we do not intend by that statement to convey that the court is embarking upon an orthodox exercise in the interpretation of the language of a contract, that is, assigning a meaning to a particular provision. Nonetheless, the implication of a term is an exercise in interpretation, though not an orthodox instance."

In the context of performance of contractual obligations, it is settled that a court will be quite prepared to imply a term that the parties shall co-operate to ensure the performance of their bargain. In the words of Lord Blackburn in **Mackay v. Dick (1888) 6 App. Cas. 251, at p. 263**:

> "I think I may safely say, as a general rule, that where

> in a written contract it appears that both parties: have agreed that something shall be done, which cannot effectually be done unless both concur in doing it, the construction of the contract is that each agrees to do all that is necessary to be done on his part for the carrying out of that thing, though there may be no express words to that effect. What is the part of each must depend on circumstances."

But even here the power is limited. Devlin J., in **Mona Oil Equipment & Supply Co Ltd v. Rhodesia Railways Ltd. (1949) 2 All E.R. 1014**, after referring to a passage in the speech of Lord Wright in **Luxor (Eastbourne) Ltd v. Cooper (1941) 1 All E.R. 33, 60** put it in this fashion:

> "...except possibly in the rare cases where the wrongful act alleged is independent of the contract, the allegation of prevention is only circumlocution. Where the wrongful act is a breach of the contract, it can stand alone. There is no advantage in alleging an implied term not to break another term. Indeed, it is absurd, since it is implicit in this form of allegation that the breach of the second term is objectionable only if it prevents the performance of a condition. Plainly no pleader would allow himself to get

involved in this form of allegation if the second term was express, so that the proposition of law on which this form of pleading rests may be stated thus: 'It is an implied term of a contract that a party will not by breaking a second implied term prevent the other party from fulfilling a third term.' Clearly, everything except the central allegation of breach is confusing verbiage. It is confusing because it distracts attention from the heart of the matter, which is to ascertain whether there is a proper basis for the implication of the second term. It suggests that the principal, if not the only, criterion by which this implication should be judged, is whether, in the absence of the proposed term, the performance of a condition by the other party, generally the one involving his right to payment, could be prevented with impunity. In truth, the proposed term, like all other implied terms, must be judged by the test whether or not it is necessary for the business efficacy of the contract. The fact that an act, if not prohibited by the contract, is one which would result in a party being robbed of the benefits which otherwise the contract would give him is certainly an important matter to be considered in relation to the business efficacy of the contract, but it

> is not necessarily the most important, and it is certainly not the only matter. There are many decided cases in which it has not prevailed."

Not all contracts may impose an obligation upon a party that cannot be performed without the co-operation of the other. In such cases, nothing may be implied in favour of the party against whom a power of termination is invoked. And **Union Eagle** (*supra*) makes it abundantly clear that lateness in fulfilment of a contractual term whether by hours or days forms no basis for impugning a termination. The facts may reveal a clear injustice. Yet, if one accepts the *status quo*, the law is powerless to act save upon very limited grounds.

The solution

It is submitted with respect that the confession of impotence overlooks the fundamental principle of equity that good faith in the performance of obligations is implied in every contract. It is a principle which at one time formed part of equity jurisprudence but has been forgotten by English Courts. The contagion of amnesia has unfortunately spread through the Courts of other jurisdictions within the Commonwealth who act upon the principle of uniformity, that is to say, that save in cases dictated by circumstances that are special to the particular locality, the common law and equity jurisprudence of countries within the Commonwealth should be uniform.

The doctrine of good faith is to be found in the judgment of Sir William Page Wood V-C., in **Blisset v. Daniel (1853) 68 E.R. 1022**, where at p. 1034-5, he says:

> "Good faith is unquestionably of the essence of all contracts. Sir Fitzroy Kelly has said that I could not introduce any new words into this contract. The Court does not do so, but **the Court presupposes in every contract**, and if there can be a difference, more especially in every contract of partnership, **a basis of good faith, upon which all the, stipulations contained in the deed must rest**. This power would never be allowed to be exercised by this Court in a manner against what I may call the truth and honour of these articles, borrowing an expression which has been applied to another description of contract." (Emphasis added.)

Blisset v. Daniel was undoubtedly a partnership case. But it is equally without doubt that what fell from the learned Vice Chancellor upon that occasion was with reference to all contracts. Further, the use of the expression "unquestionably" in the passage above-quoted reveals the firmness of the then existing jurisprudence.

Although forgotten by the equity jurisprudence of the Commonwealth, the principle has taken root in the United States of America. Section

205 of the American Restatement on Contracts, second edition, contains the following statement of the doctrine:

> "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

The Restatement quotes the definition of good faith in the Uniform Commercial Code as "honesty in fact in the conduct or transaction concerned". The commentary goes on to state under the title "Good faith performance" (at p. 100):

> "Subterfuges and evasions violate the obligation of good faith. in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible..."

And at page 102, the Restatement states that judicial decisions have recognised a violation of good faith to include the "abuse of a power to determine compliance or to terminate the contract".

The case for incorporation

It is respectfully submitted that there no legitimate reason stands in the way of incorporating the doctrine of good faith as settled by the Courts

of the United States into the equity jurisprudence of Commonwealth jurisdictions. In the first place, as already demonstrated, the requirement of good faith in the performance and termination of contracts is not an American concept at all, but English in origin and content. Second, even if the doctrine is to be treated in its fully developed state as American in origin, it may yet be adopted by English law. For, it is not uncommon for an English Court to incorporate as part of its municipal jurisprudence a principle or concept that is of foreign origin. It has been done before. Three instances may be cited.

First, in the field of commercial law. In **Edward Owen Engineering Ltd v. Barclays Bank International Ltd. (1978) 1 All E.R. 976**, Lord Denning M.R., after recognising a performance bond to be "a new creature" and placing it on the same footing as a confirmed letter of credit, went on to provide an exception to its enforcement on the ground of fraud. This is what he said (at p. 981):

> "To this general principle there is an exception in the case of what is called established or obvious fraud to the knowledge of the bank. The most illuminating case is of *Sztejn v J Henry Schroder Banking Copn* ((1941) 31 NY Supp 2d 631 at 633) which was heard in the New York Supreme Court in 1941. After citing many cases Shientag J said this:

> 'It is well established that a letter of credit is independent of the primary contract of sale between the buyer and the seller. The issuing bank agrees to pay upon presentation of documents, not goods. This rule is necessary to preserve the efficiency of the letter of credit as an instrument for the financing of trade.'

He said that in that particular case it was different because ((1941) 31 NY Supp 2d 631 at 634)—

> '... on the present motion, it must be assumed that the seller has intentionally failed to ship any goods ordered by the buyer. In such a situation, where the seller's fraud has been called to the bank's attention before the drafts and documents have been presented for payment, the principle of the independence of the bank's obligation under the letter of credit should not be extended to protect the unscrupulous seller.'

That case shows that there is this exception to the strict rule; the bank ought not to pay under the credit if it knows that the documents are forged or that the request for payment is made fraudulently in circumstances

when there is no right to payment."

The other two members of the Court of Appeal (one of whom later became Lord Chief Justice of England) agreed with the law as stated by the Master of the Rolls. Here, then is a case directly in point. A principle that is entirely American in origin was accordingly introduced into English jurisprudence.

Second, in private international law. It was once accepted that the plea of *forum non conveniens* was no part of the common law of England, although it formed part of the law of so foreign a jurisdiction as Scotland. In the **Atlantic Star (1973) 2 All E.R. 175**, the House of Lords by a majority flatly refused an invitation to import the doctrine into English law. Lord Reid said (at p. 181):

> "The appellants' counsel first referred to the law of Scotland, where for a very long time the plea of forum non conveniens has been recognised as valid. No doubt it is a desirable objective to diminish remaining differences between the laws of the sister countries. But we must proceed with all due caution. That plea is particularly important in connection with the peculiar Scottish method of founding jurisdiction by arrestment ad fundandam jurisdictionem. I cannot foresee all the repercussions of making a fundamental change in English law and I am not at all satisfied that

> it would be proper for this House to make such a fundamental change or that it is necessary or desirable."

However, after the passage of some thirteen years later, and after an exercise in semantics which may have been avoided, the House came to the conclusion "that it can now be said that English law has adopted the Scottish principle of *forum non conveniens*" (**The Spiliada (1986) 3 All E.R. 843**, *per* Lord Goff of Chieveley at p, 854.)

Third, the doctrine of unjust enrichment in equity jurisprudence. In **Reading v. Attorney General (1951) 1 All E.R. 617**, Lord Porter said of the doctrine (at p. 619):

> "My Lords, the exact status of the law of unjust enrichment is not yet assured. It holds a predominant place in the law of Scotland, and, I think, of the United States, but I am content for the purposes of this case to accept the view that it forms no part of the law of England and that a right to restitution so described would be too widely stated."

A year earlier, in **Boissevain v Weil (1950) 1 All E.R. 728, 730**, Lord Simonds referred to the doctrine as "the so-called principle of unjust enrichment" and said that "such a procedure cannot be justified."

The views of Lord Porter and Lord Simonds were echoed some twenty

seven years later by Lord Diplock in **Orakpo v. Manson Investments Ltd. (1977) 3 All E.R. 1**. He said (at p. 7) that:

> "....there is no general doctrine of unjust enrichment recognised in English law. What it does is to provide specific remedies in particular cases of what might be classified as unjust enrichment in a legal system that is based on the civil law. There are some circumstances in which the remedy takes the form of 'subrogation', but this expression embraces more than a single concept in English law."

However, in **Kleinwort Benson v. Glasgow City Council (1997) 4 All E.R. 641**, the House of Lords appear to have taken quite a different view of the matter: for one finds Lord Goff of Chieveley referring (at p. 649) to claims "founded simply upon the principle of unjust enrichment."

In **Union Eagle** (*ibid*) there is a reference by Lord Hoffmann (at p. 221 of the report) to "the then state of the English law of unjust enrichment". This strongly suggests that a change in the law upon the subject has now taken place.

Finally, in **Banque Financière de la Cité v Parc (Battersea) Ltd (1998) 1 All E.R. 737**, Lord Steyn, after referring to the "established principles of unjust enrichment", went on to set out the basic features

of the doctrine. (See p. 740 of the report.) These are: (1) the defendant must have benefited or been enriched; (2) the benefit or enrichment must have been at the expense of the plaintiff; (3) the enrichment must be unjust; and (4) there must be no available defences.

An examination of the authorities reveals the methodology of the English Courts in the development of the common law or doctrines of equity. It commences with an initial declaration that a particular concept is alien to English law and culminates, after the passage of time, with an incorporation of that concept. Lord Diplock in his speech in **The Abidin Daver (1984) 1 All E.R. 470, at p. 473** refers to it as:

> "...the step-by-step technique that is typical of the way in which principles that have informed the common law of England undergo development by judicial decision so as to enable justice to be done in the changing circumstances in which the common law falls to be applied."

Based upon the arguments advanced thus far, it is submitted with respect that even adopting the "step by step" approach, the time has arrived for the Courts of England and other common law jurisdictions of the Commonwealth to reactivate the doctrine of good faith in the performance of contracts. If inspiration is required it may drawn from

judicial observations in two cases.

The first is the decision of the High Court of Australia in **Esanda Finance Corporation Ltd. v. Plessnig (1988) 166 C.L.R. 131** where Brennan J., (at p. 147-8) recognised that the exercise of a contractual power might, depending upon the circumstances, be oppressive and referred to equity's jurisdiction to grant relief.

The second is **Panchaud Feres S.A. v. Establissements General Grain Co. (1970) 1 Lloyd's Rep. 53, at p. 57** where Winn L.J., when expressing his agreement with the Master of the Rolls said:

> "I respectfully agree with my Lord that what one has here is something perhaps in our law not yet wholly developed as a separate doctrine which is more in the nature of a requirement of fair conduct - a criterion of what is fair conduct between the parties. There may be an inchoate doctrine stemming from the manifest convenience of consistency in pragmatic affairs, negativing any liberty to blew hot and cold in commercial conduct."

The certainty factor

In **Union Eagle** (*ibid*), the Board advanced the need for certainty as its principal reason of policy for rejecting the existence of a general equitable jurisdiction to strike down the exercise of a contractual power

to terminate on grounds of unconscionability. Thus, in the case of a contract where time is of the essence, delay by the promisor in performance, even by a few minutes, would entitle the promisee, on the ground of certainty, to legitimately exercise his contractual power of termination. The only exception admitted by the Board to this strict approach is the "broad modern concept of estoppel".

However, an application of the broad modern concept of estoppel demands an examination of the conduct of the parties to a controversy and an investigation into the substantial merits of a particular case. This is the way in which the Courts of Malaysia, acting upon English precedent, have approached the doctrine. In **Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd. (1995) 3 M.L.J. 331** the Federal Court (our apex court) said (at p. 344):

> "The time has come for this court to recognise that the doctrine of estoppel is a flexible principle by which justice is done according to the circumstances of the case. It is a doctrine of wide utility and has been resorted to in varying fact patterns to achieve justice. Indeed, the circumstances in which the doctrine may operate are endless."

It is well-settled that whenever a litigant invokes an equitable doctrine in support of his case or in answer to his opponent's case, it is incumbent upon the court to critically examine the facts and determine

where the justice of the particular case lies. As Lord Scarman said in the context of another concept invented by the Court of Chancery: "There is no substitute in this branch of the law for a 'meticulous examination of the facts'". (See, **National Westminster Bank plc v. Morgan (1985) 1 All E.R. 821, at p. 830**.)

Consequently, an investigation of the nature demanded by the modern doctrine of estoppel, does not therefore ensure certainty in commercial transactions with which the Board in **Union Eagle** was concerned. As in all cases where a challenge is taken on equitable grounds certainty diminishes to vanishing point. The only certainty is that each case will be decided according to its own facts.

The recognition of a jurisdiction in a Court of Equity to examine whether a contractual power to terminate has been exercised in good faith will not, it is submitted with respect, involve any more uncertainty in commercial transactions than would a plea of estoppel. An allegation that a contract was terminated in bad faith would, as in all cases in Equity, demand a meticulous examination of the objective facts surrounding the exercise of the power. And if the exercise of the power is found to be unconscionable the court would be able to say so and grant (in the words of Lord Denning M.R., in **Amalgamated Investment & Property Co. Ltd. (In Liquidation) v. Texas Commerce International Bank Ltd. (1981) 3 All E.R. 577, 584**) "such remedy as the equity of the case demands". Accordingly, the

practical difficulties which the advice of the Board in **Union Eagle** (*ibid*) found to stand in the way of admitting a general equitable jurisdiction to intervene on grounds of unconscionability would not form an obstacle to the implementation of the good faith doctrine.

Further, it is unlikely that any real difficulty may be encountered in determining what amounts to good faith. It is a standard of behaviour that is well known to equity. It already forms part of the law relating to fiduciaries. Cases of rejection of performance on grounds other than those earlier advanced by a contracting party (see, **Panchaud Feres** (*ibid*)) would then fall squarely within the scope of the doctrine of good faith thereby rendering unnecessary the search for an inchoate doctrine. Neither unfamiliarity nor vagueness are therefore available as policy reasons for refusing to re-inject the doctrine into the bloodstream of equity.

It is also significant to note that the Courts of the several jurisdictions of the United States have encountered little practical difficulty in applying the doctrine of good faith in the performance of contracts. Neither does there appear to be any complaint that the doctrine has led to uncertainty in commercial transactions. (See, for example, **Fortune v. National Cash Register Co. (1977) 364 N.E. 2d 1251**.)

Conclusion

The very reason for the advent of equity jurisprudence was to do

justice according to facts and circumstances of a particular case. And attempts to place doctrines of equity in a straightjacket have met with singular lack of success. (See, **Habib Bank Ltd. v. Habib Bank AG Zurich (1981) 2 All E.R. 650**, *per* Oliver L.J., at p. 665-666.) The re-admission of the doctrine of good faith into its proper place in equity jurisprudence will prevent the wringing of judicial hands in hopelessness caused by an inability to intervene where intervention is called for, if not demanded by particular circumstances. It will, apart from strengthening the judicial armoury, enable justice to be done. After all, courts exist to do justice.

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