余若薇立法會議員辦事處
Office of Audrey Eu, Legislative Council Member

2nd May 2002

The Hon Margaret Ng
Chairman
Bills Committee on Statute Law (Miscellaneous Provisions) Bill 2001
Legislative Council
Hong Kong

Dear Margaret

Return of deposit

I see that the Administration is still insisting on a wide discretion being given to the court to return a deposit to the purchaser. I do not wish to argue about this at length and will merely state my views for the record.

In my view, a distinction should be drawn between:

(a) cases where the transactions fall through because of a dispute on title and
(b) cases where the transactions were not completed because the purchasers' solicitors' messengers were late in delivering the cheques.

In the latter case, I disagree most strongly that the court should be given a wider discretion than it now has under the current law to order a return of the deposit.

Under the current law, the court already has a power to order the return of the deposit when the vendor's (or his agent's) conduct was unconscionable. But the present proposal is to give the court an even wider discretion.

I wholeheartedly support the Administration's wish to want to do justice. Unfortunately justice is a concept easy to define but difficult to achieve in absolute terms. The pursuit of justice itself costs time and expense and it is often questionable whether the outcome, taking into account the time and expense, is just.

We must not lose sight of the time and expense that is involved in the litigation process. The Administration proposes to give the court a wide power to consider the justice of the case even though the purchaser has failed to meet the completion deadline. In order to exercise this discretion, the court has to consider *all* the circumstances. This will often mean resolving factual disputes between the witnesses including, the vendor, the vendor's

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solicitors (from the handling solicitor, his/her secretary to the conveyancing clerk to the receptionist at the front desk), the purchaser, the purchaser's solicitors (from the handling solicitor to the clerk to the messenger who was supposed to deliver the cheque on time). Sometimes the factual dispute also involves the estate agents. Quite apart from these factual disputes, the court may also have to decide between conflicting surveyor's evidence as to whether there has been any change in the market. The new section gives no indication as to the extent of the delay that may be excused. If 5 minutes delay is excusable, how about one day, two days, one week and so on. What is the outer limit? Does it depend on whether the market has moved in the meantime? The Administration keeps saying that the delay should not give the vendor a "windfall", if the market remains stable for a month, is a month delay alright?

More importantly, this proposal only favours the purchaser. There is no corresponding relaxation to the vendor. The vendor is also bound by contract to complete on time. If he is late in clearing the premises and leave some furniture there, if he is late in delivering up some title documents, or in getting some clarification for the requisition on title that the purchaser has put forward, can he also be excused and in effect granted an extension of time to complete? If we starting moving the goalpost for the purchaser, why not for the vendor as well?

Certainty is a very important aspect of justice. I am not prepared to give up certainty for the sake of a more free-ranging discretion. The Administration relies on the dissenting judgment of Godfrey JA in *Union Eagle Ltd. v. Golden Achievements*, [1997] 1 HKC 173 I can do no better than rely on the speech of Lord Hoffmann (unanimously agreed to) in the same case in the Privy Council:

> "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

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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." (p. 178i - 179c)

"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 sterilized 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." (p. 183 C - E)

Yours sincerely,

Audrey Eu

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A **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
B 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
C **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
D **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
E **without destablising normal commercial relationships**

衡平法 – 法院給予濟助之司法管轄權 – 賣方撤銷售賣土地之合約 – 寬免沒收按金 – 法院是否有不受限制與約束之酌情權 – 考慮業務之實際情況 – 履行合約中明訂條款之確定性 – 未有界定之酌情權為訴
F 訟時採用之策略

土地 – 售賣土地 – 時間為要素 – 成交時間延誤十分鐘 – 合約撤銷 – 違約之一方不可以合約條款以外之方式履行合約 – 檢視載有成交款項之信封可否推論為確認合約

G 土地 – 售賣土地 – 沒收按金 – 按金是否真實的預計損害 – 若違反有關時間之重要條款賣方有權撤銷合約 – 在不破壞正常商業關係之情況下應確定賣方之重售權利

The appellant purchaser entered into a written agreement dated 1 August 1991
H with the respondent vendor to buy a flat on Hong Kong Island for $4.2m. A deposit of $420,000 was paid to the respondent's solicitors 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 failed to comply with any of the terms
I and conditions of the agreement, 'the deposit and any part payment of the 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 the agreement'. Shortly before noon on 30 September 1991, a conveyancing clerk of the respondent's solicitors telephoned

her counterparty with the appellant's solicitors and warned that the balance of the purchase price should be paid by 5.00pm or else her client would exercise its right to rescind and forfeit the deposit. The clerk of the appellant's solicitors rang back to confirm that her client would complete in accordance with the contract. Completion did not take place by 5.00pm but the respondent's solicitors were told that a messenger was on his way. The messenger arrived at 5.10pm with an envelope containing the cheques for the purchase money and a solicitor's letter of undertaking to forward the title deeds. The respondent however, instructed its solicitors to rescind the agreement and returned the envelope and its contents to the messenger. The appellant commenced proceedings for specific performance but was unsuccessful both in the High Court and the Court of Appeal (dismissing the appeal by a majority) ([1995] 2 HKC 225 and [1996] 1 HKC 349 respectively). The appellant appealed to the Privy Council. Counsel for the appellant contended that the appellate court should have exercised its equitable power to absolve the appellant from the contractual consequences of having been late and to have decreed specific performance. He argued that the appellant was still entitled to complete the contract by performance at 5.10pm while the contact 'was still on foot', and had already done so; and that the court should have accepted the inference that the conveyancing clerk of the respondent's solicitors had examined the contents of the envelope which act amounted to an affirmation of the contract by late performance; and in any event, the appellant was entitled to the return of its deposit because it was not a genuine pre-estimate of damage.

Held, dismissing the appeal:

(1) This case showed the need for a firm restatement of the principle that equity would not intervene in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time (at 183E).

(2) Courts of Equity which look at the substance 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, 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. *Steedman v Drinkle* [1916] 1 AC 275 applied (at 180H).

(3) Performance of the contract by the appellant was no longer possible once 5:00pm had passed. The appellant's conduct amounted to an anticipatory breach of the contract, but before it was accepted as such, he was not entitled unilaterally to tender performance according to some other terms (at 178A-B).

(4) Even if the conveyancing clerk of the respondent's solicitors had opened the envelope and examined its contents, this could not possibly be construed as acceptance of late performance since what she said and did make it clear that the tender was being rejected (at 178C-D).

(5) The court's discretion to grant restitutionary relief against forfeiture by ordering the repayment of all or part of the retained purchase price had no objectionable uncertainty, so far as these retentions exceeded a genuine pre-estimate of damage or a reasonable deposit which amounted to a penalty. But the words 'as and for liquidated damages (and not a penalty)' did not deprive the deposit of its character as a deposit, an earnest of performance, which was liable to forfeiture on rescission (at 178F, 180D-E).

A (6) The purpose of the vendor's right to rescind the contract, upon a breach of an essential term, was to restore his freedom to deal with his land as he pleased. A vendor should be able to know with reasonable certainty whether he was able to re-sell his land or not. For this reason, courts in England for the past 80 years had been unwilling to grant relief by way of specific performance against breach of an essential condition as to time (at 180F-G).

B (7) In the present case, there was no question of any penalty imposed by the vendor 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, which would have caused the court to intervene through a restitutionary form of relief against forfeiture or on C the basis of an estoppel. *Dagenham (Thames) Docks Co ex p Hulse, Re* (1873) 8 Ch App 1022, *Steedman v Drinkle* [1916] 1 AC 275 and *Legione v Hateley* (1983) 152 CLR 406 distinguished (at 183A-B).

(8) The fact that the appellant was late, any suggestion that relief could be obtained on the ground that he was only slightly late was bound to lead to arguments over how late was too late, which could only be resolved by litigation. D For five years the respondent vendor would not be able to know whether he was entitled to re-sell the flat or not (at 183C-D).

Per curiam

(1) The notion that the court's jurisdiction to grant equitable relief is 'unlimited E and unfettered' was rejected as a 'beguiling heresy' by the House of Lords in *The Scaptrade* [1983] 2 AC 694. 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 F the courts have rejected such generalisations are founded not merely upon authority but also upon practical considerations of business (at 178G-I).

(2) 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 G 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 (at 178I-179B).

H (3) It is not possible 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 I subject matter (at 179E).

Cases referred to

Benedict v Lynch (1815) 7 Am Dec 484

Brickles v Snell [1916] 2 AC 599
Campbell Discount Co Ltd v Bridge [1962] AC 600, [1962] 1 All ER 385
Dagenham (Thames) Docks Co, ex p Hulse, Re (1873) 8 Ch App 1022
G & C Kreglinger v New Patagonia Meat and Cold Storage Co Ltd [1914] AC 25
Hill v Barclay (1811) 18 Ves 56
Howe v Smith (1884) 27 Ch D 89
Kilmer v British Columbia Orchard Lands Ltd [1913] AC 319
Legione v Hateley (1983) 152 CLR 406
Scandinavian Trading Tanker Co AB v Flota Petrolera Ecuatoriana, The Scaptrade [1983] QB 529 (CA), [1983] 2 AC 694 (HL), [1983] 2 All ER 763
Shiloh Spinners Ltd v Harding [1973] AC 691, [1973] 1 All ER 90
Steedman v Drinkle [1916] 1 AC 275
Stern v McArthur (1988) 165 CLR 489
Stockloser v Johnson [1954] 1 QB 476, [1954] 1 All ER 630
Taylor Fashions Ltd v Liverpool Victoria Trustees Co Ltd (Note) [1982] QB 133, [1987] 1 All ER 897
Vernon v Stephens (1722) P Wms 66
Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd [1993] AC 573, [1993] 2 All ER 370

Appeal

This was an appeal from the judgment of the Court of Appeal (Litton VP and Ching JA, Godfrey JA dissenting): see [1996] 1 HKC 349, affirming the dismissal by Cheung J ([1995] 2 HKC 225) of the appellant's action for specific performance of an agreement for sale and purchase of land. The facts appear sufficiently in following judgment.

Michael Lyndon-Stanford QC and Amanda Tipples (Sin, Wong & Mui) for the appellant.
Mark Hapgood QC and Roger Masefield (Yip, Tse & Tang) for the respondent.

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 ...

A 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 B 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 C 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 D 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, E 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 F 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 G 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.

H 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 I 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

A 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
B 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
C *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
D 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
E 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
F 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
G 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
H 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,
I 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. A

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. B C D

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. E F G H

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 I

A 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
B 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
C 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
D 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
E 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
F before their Lordships' Board.

Reported by PY Lo

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