INTRODUCTION

The existence of the equitable jurisdiction to relieve against forfeiture of a proprietary interest following rescission of a contract for breach of an essential time stipulation has attracted significant controversy over the past three centuries. In Australia, the recent decision of the High Court of Australia in Tanwar Enterprises Pty Ltd v Cauchi (‘Tanwar’)\(^1\) attempts to put this controversy to rest by holding that equity will intervene where the vendor has, by some unconscientious conduct, caused or contributed to the purchaser’s breach of the essential time stipulation. By contrast, the position in England remains to be settled, although there are intimations that fortification of the doctrine of estoppel will be preferred over development of a discrete jurisdiction to relieve against forfeiture. This article considers the equitable jurisdiction to relieve against forfeiture in both Australia and England (which will include analysis of Privy Council decisions). In Australia, particular emphasis is placed on the decision of the High Court in Tanwar.\(^2\) The position in England is considered having regard to three authorities of critical importance, one of which is the recent decision of the Privy Council in Union Eagle Ltd v Golden Achievement Ltd (‘Union Eagle’).\(^3\) Following adumbration of the respective approaches, some observations are made on the state of the law as it exists in each jurisdiction. First, the article investigates the need for equity to provide commercial certainty to contracting parties by analysing the undesirable ambiguity inherent in the term ‘unconscientious conduct’ as it is employed by the High Court in Tanwar.\(^4\) It then considers whether an approach based on equitable estoppel acts as a satisfactory emollient to this uncertainty by identifying explicit criteria by which the court may discover whether the requisite element of unconscientious conduct is present on the facts. Finally, it discusses the question of the appropriate point at which to strike a balance between the competing virtues of dynamism and certainty in the equity court.

\(^1\) (2003) 201 ALR 359.
\(^2\) Ibid.
\(^3\) [1997] AC 514.
II THE AUSTRALIAN POSITION: TANWAR

In Australia, the law relating to relief against forfeiture of a proprietary interest has been clarified by the judgment of the High Court in Tanwar.5

The facts in Tanwar6 may be shortly stated. In October 1999, the respondent vendors entered into contracts for the sale of three parcels of land to the appellant purchaser for the combined price of $4 502 526.90. The completion date of each contract was stipulated, but time was not expressly stated to be of the essence of any of the contracts. The contracts were subsequently amended by deeds which extended settlement. The purchaser subsequently paid two sums of $225 126.32 as deposits. Later, the purchaser paid a further $397 473.40 as part of the purchase price, and then made a final payment of $80 000.00 in consideration of the vendors’ prior agreement to extend the date of completion. The purchasers failed to complete on the settlement date. The vendors issued notices of termination of each contract. Despite this, the parties subsequently negotiated further deeds, whereby a new completion date of 25 June 2001 was inserted into the contracts. Time was expressly stated to be of the essence of each contract. The funds for the purchase of the property were to come from a financier in Singapore, and were not cleared until 26 June 2001. On that date, the purchaser’s solicitors informed the vendors’ solicitors that the purchaser was ready, willing and able to settle. In response, the vendors’ solicitors informed the purchaser’s solicitors that it was too late. The vendors had issued instructions to their solicitors the previous day to terminate each of the contracts after the purchaser failed to effect timely settlement. In accordance with these instructions, notices of termination of each of the contracts were given by the vendors on the afternoon of 26 June 2001.7

On the following day, the purchaser instituted proceedings against the vendors in the Equity division of the Supreme Court of New South Wales, claiming relief against forfeiture of its interest in each contract as preliminary to orders for specific performance.8 Windeyer J dismissed the proceedings.9 The purchaser subsequently appealed to the Court of Appeal, constituted by Handley and Beazley JJA sitting with Matthews AJA.10 The leading judgment of the Court was delivered by Handley JA. His Honour’s reasons involved a survey of recent authority on relief against forfeiture of a proprietary interest in Australia, including the pivotal decisions of the High Court in Legione v Hateley (‘Legione’)11 and Stern v McArthur (‘Stern’).12 His Honour lamented that these

5 Ibid.
7 Ibid, 360–364 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).
8 Ibid.
9 Ibid.
two cases ‘lacked a clear ratio’ capable of application by the Court. Reference was also made to the decision of the Privy Council in *Union Eagle*, his Honour finding that relief against forfeiture was more readily available to an applicant in Australia compared to England. Ultimately, his Honour held that the appellants were obliged to point to ‘unconscionable conduct [on the part of the vendors] and … exceptional circumstances’ in order to obtain relief against forfeiture as preliminary to orders for specific performance. In his Honour’s view, the appellants could not do so, and the appeal was dismissed. The purchaser sought and obtained special leave to appeal to the High Court.

**A The Main Reasons**

The main reasons of the High Court were delivered by Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ (‘main reasons’). Their Honours thought that the real issue in the appeals was as follows:

> Wherein lies the alleged unconscientious use by the vendors of their legal right to terminate upon failure by [the purchaser] to complete in accordance with the essential time stipulation imposed by the 2001 deeds?\(^1^8\)

Before turning to this question, their Honours thought it necessary to deal with one issue of primary significance: the Court’s distaste for irresponsible and inaccurate use of the phrase ‘unconscionable conduct’. The ventilation of this issue will be considered later in this article.

In order to deal with the ‘real issue’ in the proceedings, their Honours thought it necessary to give detailed consideration to the earlier decisions of the Court in *Legione*\(^2^2\) and *Stern*. Reference was made to the statement of Mason and Deane JJ in *Legione* that, in order to obtain relief against forfeiture, the purchasers were obliged to point to some ‘unconscionable conduct’ on the part of the vendors. In discussing *Stern*, their Honours noted the judgment of Gaudron J, who considered whether an instalment contract was part of a security transaction analogous to a mortgage. TheirHonours recognised that, in *Stern*,

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4. Ibid [35].
5. Ibid [36]–[37].
Gaudron J looked at all the circumstances of the case, determining that, having regard to the events which transpired, it would be unconscionable for the vendor to insist on his strict legal rights. As noted by their Honours, Gaudron J did not think in Stern that there was a need to point to some unconscionable conduct on the part of the vendor causing or contributing to the purchaser’s breach of the time stipulation as a prerequisite to a grant of relief against forfeiture. After considering the views of Gaudron J, their Honours felt that the better view of the law in Stern was that stated in dissent by Mason CJ, for whom it was necessary to identify some unconscientious conduct on the part of the vendor causing or contributing to a purchaser’s breach before relief against forfeiture would be granted. Although approving of this view, their Honours in Tanwar did not think that the purchaser was obliged to show unconscientious conduct of ‘an exceptional kind’ to obtain relief against forfeiture. Following Mason CJ in Stern, their Honours found that the primary criterion for obtaining relief against forfeiture was the identification of some unconscientious conduct on the part of the vendor causing or contributing to the purchaser’s breach of an essential time stipulation. As the purchaser in the appeal could not point to any such unconscientious conduct on the part of the vendors, the appeal was dismissed.

B Kirby J

Perhaps surprisingly, Kirby J delivered reasons in Tanwar which did not diverge markedly from those of his Honour’s colleagues. His Honour agreed with the order proposed in the main reasons, and concurred in the identification of the relevant principles.

Notwithstanding, his Honour’s reasons differed in two respects. First, his Honour embarked upon an exegesis of the history of relief against forfeiture in England in an effort to place recent Australian authority in its appropriate context. Secondly, his Honour thought it necessary to elaborate on the matters which would be relevant considerations for a Court involved in the search for the requisite element of unconscientious conduct on the part of the vendor founding a grant of relief against forfeiture. These included:

1. the character of the contract in which the time stipulation appears (that is, whether it is of a commercial, domestic or personal kind);

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38 Ibid 386–388 (Kirby J).
2. the relevant background facts explaining any special significance of the stipulation as to time;

3. whether the parties have access to appropriate independent legal advice; and

4. any degree to which the party in default may be regarded as disadvantaged, vulnerable or in need of equity’s protection from the insistence on its rights of a party in a superior economic or other position, equity being more solicitous for the plight of the vulnerable.\(^{39}\)

The value of this elaboration will be considered later in this article.

\(C \ Callinan \ J\)

In similar fashion to the main reasons, Callinan J disapproved of the view of Gaudron J in \textit{Stern} that an ordinary instalment contract for the sale of land was analogous to a mortgage. His Honour referred to the fact that the law’s tolerance toward mortgagors owed its existence to the ‘probably correct’ assumption that mortgagees were in an especially powerful and superior position in relation to mortgagors, and had the ability to employ their powers in unconscionable ways.\(^{40}\) A vendor in a simple contract for the sale of land was not similarly advantaged. His Honour held that it was not the function of equity to lightly override the freely-negotiated terms of contracts between commercial actors, as to do so would create much uncertainty and compromise freedom of contract to an unacceptable extent.\(^{41}\) Six conditions were stated as preliminary to a grant of relief against forfeiture, each of which largely reflected the statement of the main reasons that the purchaser was obliged to point to some unconscientious conduct on the vendor’s part causing or contributing to the purchaser’s breach of the essential time stipulation.\(^{42}\) The conditions were stated as follows:

1. the purchaser must be able to explain the default;

2. the purchaser must show that default occurred as a result of an event for which he or she is not responsible, or by accident;

3. the purchaser must produce evidence of real hardship if relief were not to be granted;

4. the purchaser must be prepared and able to compensate the vendor for any loss that may have been caused;

\(^{39}\) Ibid 387 (Kirby J).
\(^{40}\) Ibid 395 (Callinan J).
\(^{41}\) Ibid 395 (Callinan J).
\(^{42}\) Ibid 395-396 (Callinan J).
5. there must be something in or about the vendor's conduct which goes beyond reliance on contractual rights and involves an element of oppression or imposition such that it can be described as unconscionable; and

6. the purchaser must show that the circumstances are exceptional.43

As the purchaser could not meet these conditions, his Honour agreed that the appeal should be dismissed.

D After Tanwar: The Applicable Principles

Following Tanwar,44 the principles applicable in Australia to a court's consideration of whether to grant relief against forfeiture of an interest in land as preliminary to an order for specific performance may be conveniently summarised as follows:

1. to obtain relief, the purchaser must demonstrate that it is against conscience for the vendor to maintain its rescission of the contract pursuant to an essential time stipulation;

2. the purchaser will only be able to do so where it can point to some unconscientious conduct on the part of the vendor causing or contributing to the purchaser's breach of the essential time stipulation;

3. fraud, mistake, accident or surprise are criteria by which it may be adjudged that it is inequitable for the vendor to maintain its rescission of the contracts; and

4. so far as accident is concerned, the court will not relieve where the possibility of the accident may be considered fairly within the contemplation of the parties.

III ENGLAND: STEEDMAN, SHILOH AND UNION EAGLE

As noted by Kirby J in Tanwar,45 the present position in England on the issue of relief against forfeiture of a proprietary interest is less than certain. Early authorities such as Steedman v Drinkle ('Steedman')46 and Brickles v Snell47 tended toward the view that relief against forfeiture of a proprietary interest would not be granted under any circumstances. This rigid view was eschewed by Lord Wilberforce in Shiloh Spinners Ltd v Harding ('Shiloh'),48 a case involving forfeiture of an interest in leasehold property, where certain 'special

46 [1916] 1 AC 275.
47 [1916] 2 AC 599.
heads’ of relief were identified. Recent guidance was provided by the Privy Council in *Union Eagle*, a decision which may point the way forward in England.

**A Steedman: No Relief**

Because *In re Dagenham (Thames) Dock Co; Ex parte Hulse* seemed to establish that relief against forfeiture of a proprietary interest was available in the face of breach of an essential time stipulation, in *Steedman*, Viscount Haldane sparked a storm of controversy by declaring:

> 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 statement of Viscount Haldane built on the following famous outburst of Eldon LC in *Hill v Barclay*, made in an attempt to explode the view that specific performance following relief against forfeiture would fulfill the expectations of a contracting vendor:

> 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.

Notwithstanding the views of Eldon LC, as recognised by the Privy Council in *Union Eagle*, the decision of the Privy Council in *Steedman* has attracted significant academic criticism from equity scholars for its rigidity and supposed ignorance of the prior decision in *In re Dagenham*. In addition, Dixon J, as he then was, expressed doubt as to the correctness of *Steedman* in *McDonald v*

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50 (1873) LR 8 Ch App 1022.
52 *Steedman* [1916] 1 AC 275, 279 (Viscount Haldane).
53 (1811) 18 Ves Jun 56.
54 Ibid 60 (Eldon LC).
57 [1916] 1 AC 275.
Dennys Lascelles Ltd.\textsuperscript{58} Nevertheless, Steedman\textsuperscript{59} managed to cling to authority in England until the early 1970s.

B Shiloh: The "special heads" of Relief

The winds changed in the celebrated decision in Shiloh\textsuperscript{60} in which Lord Wilberforce (with whom Lords Dilhorne, Pearson and Kilbrandon agreed) emphasised the 'special heads' upon which equity might relieve against forfeiture, namely 'fraud, accident, mistake or surprise'.\textsuperscript{61} In deciding whether such 'special heads' would enliven the equitable jurisdiction to relieve against forfeiture, Lord Wilberforce stated that a court should have regard to the conduct of the parties, the nature and gravity of the relevant breach of contract, and the value of the property involved.\textsuperscript{62}

This 'beneficent role'\textsuperscript{63} of equity in intervening was not as wide as that postulated by Lord Simon of Glaisdale, who held in Shiloh\textsuperscript{64} that equity has an 'unlimited and unfettered' jurisdiction to relieve against contractual forfeitures and penalties.\textsuperscript{65} As recognised in the latest edition of Meagher, Gummow & Lehane's Equity: Doctrines and Remedies,\textsuperscript{66} Lord Simon's sweeping statement marked a return to a dynamic equity jurisprudence thought to be lost following the primacy of Lord Eldon LC's rigid views as reflected in Steedman.\textsuperscript{67} Nevertheless, it may well have been too sweeping a statement; it was dismissed by the House of Lords in The Scarptrade (Scandinavian Trading Tanker Co A.B. v Flota Petrolera Ecuatoriana) ('The Scarptrade'),\textsuperscript{68} where it was declared that the statement was apt to engender much uncertainty and confusion in commercial life.\textsuperscript{69}

In Union Eagle\textsuperscript{70} the Privy Council provided advice which may indicate the future direction of the law in England.

C Union Eagle: will Australia be followed?

The facts of Union Eagle\textsuperscript{71} were straightforward. The appellant purchaser contracted with the respondent vendor for the sale of a flat on Hong Kong island...
for HK$4.2 million. A deposit was paid, and completion was to take place before 5.00pm on 30 September 1991. Time was expressly stated to be of the essence. On the morning of the settlement date, the vendor informed the purchaser that the funds due to be paid would have to be paid by 5.00pm, or the vendor would terminate the contract for fundamental breach. The purchaser assured the vendor that timely settlement would take place. However, the purchaser did not settle on time, and the vendor telephoned the purchaser at 5.01pm and reserved its right to rescind the contract. The purchaser replied that a messenger was on his way with the cheque. The messenger arrived with the cheque at 5.10pm and declared that the purchaser was ready to settle. The vendor refused to settle and rescinded the contract.\(^{72}\)

On behalf of the Privy Council, Lord Hoffmann advised that the decision of the Court of Appeal of Hong Kong refusing relief against forfeiture did not warrant interference. Perhaps unfortunately, their Lordships found that it was not appropriate to attempt to redraw the boundaries of the equitable jurisdiction to relieve against forfeiture of a proprietary interest, as it was held that the facts lay ‘well beyond the reach’ of the doctrine.\(^{73}\) Notwithstanding, the case presents some hints as to how this exercise will be conducted by English courts in the future.

First, it is apparent that the views of Lord Simon in *Shiloh*\(^{74}\) will not be followed. Lord Hoffmann agreed with the House of Lords in *The Scarprade*\(^{75}\) that Lord Simon’s views presented a ‘beguiling heresy’, by reason of the practical considerations of business.\(^{76}\) These considerations demanded some certainty for commercial actors in knowing that rigorous contractual terms will be enforced.\(^{77}\)

Secondly, from this it can be discerned that certainty in commercial dealings will be of primary significance. Lord Hoffmann was at pains to emphasise the fact that, at least in a rising property market, a vendor should be entitled to know with reasonable certainty whether he or she may re-sell the land or not. In the view of his Lordship, to achieve this end, the parameters of the equitable jurisdiction to relieve against forfeiture of a proprietary interest must be clearly stated.\(^{78}\)

Thirdly, it is clear that the Australian position will be carefully scrutinised before it is adopted. Both *Legione*\(^{79}\) and *Stern*\(^{80}\) attracted attention in *Union Eagle,*\(^{81}\)

\(^{72}\) *Union Eagle* [1997] AC 514, 517–518 (Lord Hoffmann).

\(^{73}\) *Union Eagle* [1997] AC 514, 519 (Lord Hoffmann).

\(^{74}\) [1973] AC 691.

\(^{75}\) [1983] 2 AC 694.

\(^{76}\) *Union Eagle* [1997] AC 514, 519 (Lord Hoffmann).

\(^{77}\) Ibid 519 (Lord Hoffmann).

\(^{78}\) Ibid.

\(^{79}\) (1983) 152 CLR 406.

\(^{80}\) (1988) 165 CLR 489.

\(^{81}\) [1997] AC 514.
although little was said by way of evaluation of those decisions. Notwithstanding, one fascinating statement made by Lord Hoffmann in *Union Eagle* 82 is the following:

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*, 83 as the Australian courts have done, or by development of the law of restitution or estoppel. 84

Thus, it may be discerned that one possibility is for the English courts to decide that relief against forfeiture of a proprietary interest following breach of an essential time stipulation will be available, but only if the purchaser can demonstrate that existing equitable doctrines, such as estoppel or 'accident', provide the foundation for relief. Such an approach will amount to an important divergence from the Australian position following *Tanwar*, 85 where the High Court has decided that proving an accident or an estoppel is not essential; the purchaser is only obliged to point to some 'unconscientious' conduct on the part of the vendor causing or contributing to the breach of the essential stipulation as to time.

IV SOME OBSERVATIONS

The differing approaches to this area of the law evinced by the courts in the cases discussed above present some intriguing issues for further consideration. In particular, the authorities invite attention to the search for certainty in the equity court, and the extent to which that search ought to proceed at the expense of a dynamic jurisprudence.

A 'Unconscientious' Conduct: Conceptual Difficulties

Apart from the nebulous foundation of the grant of relief against forfeiture, it may be argued that the main reasons in *Tanwar* 86 do not sufficiently address the circumstances in which it will be appropriate to grant relief against forfeiture. As stated above, the main reasons declare that relief against forfeiture will be available where the purchaser can point to some unconscientious conduct on the part of the vendor causing or contributing to the purchaser’s breach of the condition as to timely payment. Unfortunately, however, little guidance is provided as to what will constitute ‘unconscientious’ conduct. Having regard to the fact that, earlier in the main reasons, their Honours explicitly decry the invocation of abstract notions of ‘unconscionable conduct’, 87 this lack of guidance as to what will constitute ‘unconscientious’ conduct is curious.

82 Ibid.
84 *Union Eagle* [1997] AC 514, 523.
86 Ibid.
In an attempt to provide such guidance, their Honours refer to cases involving breach of fiduciary duty and breach of trust, which both usually provide examples of 'unconscientious conduct' by the defaulting party. Their Honours emphasise that such cases involve consideration of well-established principles concerning whether a relevant fiduciary duty has been breached, and that the analysis proceeds on the identification of established principles to decide the point rather than mere reference to 'loose' notions of 'unconscientious' conduct.88

Yet, when one considers the ratio of Tanwar90 in the main reasons, the Australian lawyer is left with little alternative but to advise clients based on reference to such 'loose notions' of unconscientious conduct. Unlike the cases involving breach of fiduciary duty or breach of trust referred to by their Honours, Tanwar90 and its Australian predecessors do not present clearly defined principles for consideration in determining the availability of relief, other than whether the vendor has engaged in 'unconscientious conduct' causing or contributing to the vendor's breach. One is left wondering exactly what sort of behaviour this ambiguous term encompasses.

It is in this context that there is much to recommend the approach adopted by Kirby J, who accepts the challenge of providing guidance as to what will constitute 'unconscientious' conduct.91 It is fair to say that his Honour’s statement that the unconscientious conduct must be of an 'exceptional kind' to justify the grant of relief against forfeiture does not appear to aid the analysis.92 What is of assistance, however, is the list of factors enumerated by his Honour as being of significance in determining whether the vendor has acted unconscientiously.93 This list of factors (set out earlier in this article) provides guidance of incalculable value to practitioners engaged in the business of advising clients facing what may otherwise appear to be the esoteric vagaries of the equity jurisdiction. Having said that, however, even if the reasons of Kirby J are to hold the floor, the process remains plagued by ambiguity: 'what is “unconscionable” in the eyes of one may not be in the eyes of another'.94 The challenge for the equity court is to identify with sufficient certainty the point at which conduct will be held to be ‘unconscientious’.

This challenge has attracted significant attention from many prominent legal theorists, who have argued that equity’s conceptual apparatus should not be allowed to become so abstruse as to leave the layperson mystified as to the basic principles being applied. At least two commentators have argued that greater clarity may result from a cross-disciplinary analysis involving consideration of

88 Ibid 364 (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).
90 Ibid 386.
91 Ibid 386–388.
92 Ibid 379 (Kirby J).
the theories of cognitive scientists, who seek to categorise events by reference to
'basic-level concepts' and more specific, 'superordinate' concepts.\textsuperscript{95} Cognitive
scientists hold that human beings are more attuned to basic-level concepts, and
indeed are largely incapable of comprehending superordinate concepts until the
requisite basic-level concepts are properly comprehended.\textsuperscript{96} Thus, for example,
it is far easier to picture a chair ('basic-level concept') in the mind's eye than it is
to picture 'furniture' ('superordinate concept') in the abstract. So it is with
legal concepts; in the present context, it is far easier for a layperson to
comprehend what is meant by 'unconscientious conduct' as an abstract
'superordinate' concept where specific, 'basic-level' examples of
'unconscientious conduct' are apparent. In this regard, as Birks has recognised,
exemplifying what is meant by the term 'unconscientious conduct' is a
taxonomic enterprise fraught with difficulty.\textsuperscript{97}

Nevertheless, if, as Lord Hoffmann states in \textit{Union Eagle},\textsuperscript{98} certainty is an
important goal for which the equity court ought to strive, it may be that there is
no principled justification for the court to engage in the abstract exercise of
determining whether a vendor has engaged in 'unconscientious' conduct as
preliminary to a grant of relief against forfeiture, unless such an exercise can be
conducted by reference to a clear and stable taxonomy. In the absence of specific
criteria by which to form an opinion, one may indeed question why a court of
equity should, as a matter of certainty, leave itself to conduct abstract
examinations of whether a vendor's behaviour can be characterised as
'unconscientious' conduct. To the extent that they abandon the equity court in a
thicket of uncertainty as to how to decide whether the vendor has indeed acted
'unconscientiously', such examinations may be seen to derogate from
transparency in decision-making and are apt to leave a trail of bewildered
litigants and, indeed, lawyers, scratching their heads outside the courtroom.

B Estoppel: A More Certain Alternative?

The problems which attend the language of 'unconscientious conduct' were
robustly adverted to in the powerful dissenting reasons of Brennan J in \textit{Legione}\textsuperscript{99}
and \textit{Stern}.\textsuperscript{100}

In \textit{Stern},\textsuperscript{101} his Honour took the view that relief against forfeiture should be
limited to appropriate circumstances of 'fraud, accident, mistake or surprise' as
referred to by Lord Wilberforce in \textit{Shiloh}.\textsuperscript{102} Although he recognised that he was

\textsuperscript{96} Penner, above n 95.
\textsuperscript{97} Peter Birks, 'Equity in the Modern Law: An Exercise in Taxonomy' (1996) 26 \textit{University of Western Australia Law Review} 1, 16–17.
\textsuperscript{98} [1997] AC 514, 519.
\textsuperscript{100} (1988) 165 CLR 489, 505–521.
\textsuperscript{101} Ibid 518, 527 (Brennan J).
\textsuperscript{102} [1973] AC 691, 723.
bound by the earlier authority of *Legione*[^103], Brennan J enlisted two English authorities, *Maynard v Moseley*[^104] and *Campbell Discount Co Ltd v Bridge*[^105], in support of his view that equity had to strive for certainty. In the latter case, Lord Radcliffe stated:

> '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 ... Even such masters of equity as Lord Eldon and Sir George Jessel, it must be remembered, were highly skeptical 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 ...

Building on this statement, Brennan J in *Stern*[^107] made reference to *Muschinski v Dodds* ('*Muschinski*'),[^108] in which Deane J approved of the fact that 'undefined notions of what is fair' had given way in the equity jurisdiction to the rule of 'ordered principle', stated to be the 'essence of any coherent system of rational law'.[^109]

In *Muschinski*,[^110] Deane J sought to apply 'ordered principle' in equity by carefully considering a series of cases concerning partnership dissolutions in order to solve the problem of how to divide the assets from a de facto relationship which had, in his Honour's memorable words, crumbled 'under the yoke of inauspicious stars'.[^111] His Honour thought it necessary to employ this process of analogical reasoning as the appropriate alternative to deciding the case based on what was 'fair and just as a matter of abstract morality'.[^112] In so doing, Deane J was at pains to recognise that the equity court is not a place where emotive invocations of fairness or conscientiousness should be indulged at large. As his Honour stated, general notions of what is fair and just are relevant, but only in the confined context of determining whether conduct should, by reference to processes of legitimate legal reasoning, be characterised as 'unconscientious' for the purposes of specific equitable doctrines.[^113]

The need for meaningful principle identified by Brennan and Deane JJ provides much food for thought when one considers that the problematic concept of 'unconscientious conduct' is likely, in most cases, to involve some positive act

[^103]: [(1983) 152 CLR 406, 451–459.](#)
[^104]: [(1676) 3 Swans 651.](#)
[^105]: [(1962) AC 600.](#)
[^106]: *Campbell Discount Co Ltd v Bridge* [1962] AC 600, 626.
[^107]: [(1988) 165 CLR 489, 514.](#)
[^108]: [(1985) 160 CLR 583.](#)
[^109]: Ibid 616.
[^110]: [(1985) 160 CLR 583.](#)
[^112]: Ibid 620–621.
[^113]: Ibid.
on the part of the vendor, which may give rise to an equitable estoppel. It is for this reason that, in *Union Eagle*, Lord Hoffmann was minded to state:

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 Lordship's view a narrow one ... 

It may be thought that limiting the examination to whether an estoppel is made out appears far more attractive from the point of view of promoting certainty in the law, as, following *Waltons Stores (Interstate) Ltd v Maher ('Waltons'),* such an examination appears to proceed on a more solid foundation.

In this regard, an estoppel analysis may be guided by the criteria laid down by Brennan J in *Waltons.* These criteria constitute a useful checklist by which it may then be adjudged, at a higher level of abstraction, that the requisite element of 'unconscientious' conduct is present. By contrast, as stated above, the relief against forfeiture analysis propounded by the main reasons in *Tanwar* enters at the higher level of abstraction, requiring the court to simply analyse whether conduct is 'unconscientious', without stating any definitive criteria by which to conduct that analysis. It is for this reason that the main reasons in *Tanwar* may attract the criticism that they 'lack definition and sharpness of focus, leading to some degree of uncertainty'.

No doubt, the approach espoused by the main reasons in *Tanwar* will appear seductive to those who place a low value on certainty in the equity court because they decry the rigidity associated with sharp doctrinal definition. Clearly, however, as recognised by Lord Hoffmann in *Union Eagle,* it may be argued that by applying the guiding principles of equitable estoppel as opposed to proceeding on an undefined notion of 'unconscientious' conduct in deciding whether to relieve against forfeiture, a court of equity will more actively encourage the amelioration of uncertainty in the exercise of its jurisdiction. Certainly, if one accepts that the test stated by Brennan J in *Waltons* is authoritative in determining the existence of the requisite 'unconscientious' conduct, a legal adviser in Australia is in a reasonably strong position from which to advise a potential litigant as to whether the facts of a dispute give rise to an equitable estoppel. By comparison, entering the analysis at the higher level of abstraction in determining whether the facts lead to the conclusion that one party has engaged in 'unconscientious' conduct militating toward a grant of relief against forfeiture is a perilous exercise fraught with complexity, as no

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115 Ibid 522.
117 Ibid 428–429.
119 Ibid.
definitive test by which the issue can be resolved manifests itself for
collection. For these reasons, it may be seen that in the former case, the
insertion of the Lord Chancellor’s foot into the waters of commerce creates a
ripple; in the latter, a wave. As recognised by Lord Radcliffe,¹²⁴ and also by
Deane¹²⁵ and Brennan JJ,¹²⁶ a court of equity ought to encourage smooth sailing.

C Striking the Balance

It is of course important to recognise that if one assumes that equity is a
jurisdiction which depends upon the flexibility of judicial discretion for its utility
(which may be a brave assumption), its principles should not be allowed to
ossify and thereby prevent its salutary fluidity from taking effect. In this regard,
if equity is to retain its dynamism, the categories of cases in which the
jurisdiction of the court will be enlivened should not become encrusted with
myopic rigour. In other words, the relevant test for equitable relief must not be
unduly severe in its aim for certainty. Importantly, however, as emphasised by
Deane J in Muschinski,¹²⁷ equity should only embark on a rescue mission where
such a rescue is based on clear principles which lend themselves to confident
application. Kirby J puts it succinctly in Tanwar:

The task of the courts in individual cases, and the role of judges in responding
to them, is to attempt to impose on the imprecision of the applicable criteria
identified categories and a specific judicial approach … designed to promote
consistency and reduce unpredictability …¹²⁸

Simply stated, the challenge is to identify an appropriate equilibrium point
between dynamism and certainty in the evolution of doctrinal principle in the
equity court. As stated above, by relying on the application of a vague notion of
‘unconscientiousness’ without much guidance being given as to the definition of
that term, it may be argued that the primacy of the main reasons of the High
Court in Tanwar¹²⁹ will derogate from certainty in their quest for a dynamic
approach. By contrast, in hinting at reliance on the more elaborately defined
doctrine of equitable estoppel, the decision of the Privy Council in Union
Eagle¹³⁰ may well be a harbinger of an approach by the Law Lords which
promotes greater certainty for those petitioning a court of equity compared to
that which prevails in Australia. This development may well unfold at the
expense of a dynamic jurisprudence. The question of which approach best
strikes the balance between competing virtues in the equity court remains to be
answered.

¹²⁴ Campbell Discount Co Ltd v Bridge [1962] AC 600, 626.
¹²⁵ Muschinski (1985) 160 CLR 583, 616.
¹²⁷ (1985) 160 CLR 583, 616.
¹²⁸ Tanwar (2003) 201 ALR 359, 381.
V CONCLUSION

Following the decision of the High Court in *Legione*,¹³¹ Spry was moved to remark that the majority’s identification of ‘unconscionable conduct’ as the foundation for relief against forfeiture of a proprietary interest was a questionable one. Spry thought that it was necessary for the Court to go further and determine what conduct would be regarded as ‘unconscionable’ for this purpose, and this exercise would demand a ‘more careful examination of equitable doctrines’.¹³² As we have seen, the main reasons of the High Court in *Tanwar*,¹³³ state simply that relief against forfeiture of a proprietary interest will be available where a purchaser can point to ‘unconscientious’ conduct causing or contributing to the purchaser’s breach, without any real guide being given as to the particular circumstances in which equity will see fit to infiltrate the law of contract. To this extent, it may be argued that in *Tanwar*,¹³⁴ Spry’s call for clarity in the evolution of equitable principle may have gone unheeded in the search for a suitable degree of flexibility. By contrast, the position in England, although yet to be determinatively settled, seems to point to an approach which pays closer attention to more definitive equitable doctrines as providing the foundation for relief against forfeiture, such as estoppel. Although it may be seen to frustrate the cause of dynamism in equity jurisprudence, such an approach may militate toward greater certainty and, as such, may be seen to place lawyers in a better position to reject the allegation that equity suffers for being a truly ‘amorphous and unruly thing’.¹³⁵

¹³⁴ Ibid.