Relieving Against Forfeiture: Windfalls and Conscience

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It has been strongly argued that the basis of the jurisdiction to grant relief against forfeiture is that 'equity will not permit a vendor to abuse his legal rights unconscionably'. This article challenges that view. In the first part of the article an examination is made of various meanings that have been given to the term 'unconscionability'. There is then an analysis of how the reasoning in the various authorities which have considered relief against forfeiture lacks a consistent and sensible approach. In the conclusion the author advances a more coherent basis for relief.

In a very helpful article entitled 'Relief against Forfeiture and the Purchaser of Land', Mr Charles Harpum concluded that 'the basis of the jurisdiction to grant relief against forfeiture is that equity will not permit a vendor to abuse his legal rights unconscionably'.† He further applauded the 'logically coherent' approach adopted by the High Court of Australia in Legione v Hateley which he suggests confirms that view. But the term 'unconscionable', including its variants, is a much over-used word.

In our paper, 'On the Nature of Undue Influence', Professor Peter Birks and I identified three different uses of the term and demonstrated the muddle which results when they are not sorted out. We also showed how that muddle has helped to blur the conceptual distinction between undue influence and unconscious conduct; a distinction which we defended and argued that developed law must respect. In relief against forfeiture of

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3. Undue influence, in our view, is 'plaintiff-sided'. That is, relief is given because of the impairment of the integrity of the plaintiff's decision to enter into the transaction. It is unnecessary to point to fault or 'shabby' behaviour on the part of the other party. Relief
proprietary and possessory interests, one sees the same indiscriminate use of the term.

The aim of this article is to show that 'improper' or 'shabby' behaviour on the part of the party against whom relief is sought has much less to do with the relief than is believed. There is in this area, as in other areas, at least a mismatch between what is said about unconscionability and what is done in its name. This alone is a compelling reason not to hold unconscionability out as the 'unifying theme' that runs through relief against forfeiture and other doctrines. One may say that notions of good conscience traverse equity's responses and provide a theme in that sense. But little is to be gained by such a general abstraction. On the contrary much can be lost. This paper begins by recalling what we said about the uses of unconscionability and, for ease of reference, I shall simply call the applicant for relief 'the plaintiff'. In the conclusion I offer another basis for the relief and indicate how it can help shape our treatment of the term intended to enable a defendant to forfeit a proprietary or possessory interest.

'UNCONSCIENTIOUSNESS' OR UNCONSCIONABILITY

There are three main uses of the term. A fourth may need to be added later. First there is 'unconscientiousness' in acquisition which involves 'shabby' or 'bad' behaviour at the time the transaction is entered into. This is the sense in which the word is most commonly understood. It is associated with reprehensible behaviour in the lead up to the transaction; perhaps even with some notion of fault on the part of the defendant. One can say that its disapproval is based mainly on moral explanations associated with the idea of good conscience. In the United States this is the concept which has facilitated the development of specific principles to review the quality of conduct where the social propositions that support the bargain principle of contract have broken down. Secondly, there is unconscientiousness

4. This kind of mismatch is frequent in our case law: see M Chen-Wishart Unconscionable Bargains (Wellington, 1989). The leading Australian cases on relief against forfeiture of proprietary interests are Legione v Hateley (1982) 152 CLR 406 and Stern v McArthur (1988) 165 CLR 489. See also Ciaverella v Balmer (1983) 153 CLR 458; CSS Investments v Lopiron (1987) 76 ALR 463.
5. Eg Neville Owen J proposes unconscionability as the unifying theme and suggests that it allows relief against forfeiture to be approached on the same basis as estoppel: see N Owen 'Relief against Forfeiture' in Business Opportunities (Perth. WA Law Society, 1994) 6. 'If the courts approach an application on the basis that relief against forfeiture is applicable only where the defaulting party can establish unconscionable conduct on the part of the person seeking to enforce the breach, much of the uncertainty is removed. In this respect the doctrine can be approached on the same basis as can ... a claim for estoppel.'
consisting only in attempts to enforce or retain the benefit of a transaction which was not entered into unconscionably. Thirdly, it describes the objective fact that the transaction sought to be set aside was highly disadvantageous to the party seeking relief, and correspondingly, highly favourable to the other. This may be likened to what is sometimes called in the United States ‘substantive unconscionability’, which describes the ‘lop-sidedness’ of contractual terms, in contrast to ‘procedural unconscionability’.

The second and third, unlike the first, do not in fact indicate any kind of ‘shabby’ conduct on the part of the defendant. We called the second, ‘unconscientiousness ex post’ or ‘unconscientiousness in retention’ and it is not really a species of unconscientiousness at all. The only reason why the defendant’s behaviour may be said to be ‘shabby’ is that there is an antecedent reason why he should forgo the benefit in question. We demonstrated this with mistake in Kelly v Solari7 where it was clear that the unconscientiousness was inferred from the right to relief, which right was justified on the antecedent mistake. It is useful to set out the case again briefly. An insurer claimed to be entitled to recover a mistaken payment on the ground of mistake. One of counsel’s arguments was that the defendant, a widow who honestly believed that her husband’s life had been insured, had made her demand in good faith, so that her conscience could not be affected. The court’s view was that, despite her innocent acquisition, she would be acting unconscionably in seeking to retain the payment. Rolfe B said:

With respect to the argument, that money cannot be recovered back except where it is unconscientious to retain it, it seems to me, that wherever it is paid under a mistake of fact, and the party would not have paid it if the fact had been known to him, it cannot be otherwise than unconscientious to retain it.8

The unconscientiousness in Kelly v Solari is clearly inferential. It is unconscientiousness ex post or in retention. But when the relief is attributed to unconscionability, as is often done, the antecedent reason which justifies it recedes into the background. It also causes the impression that the relief in question is ‘defendant-sided’ — that is, it is given because of the ‘shabby’ or ‘improper’ conduct on the part of the defendant. This invites confusion.

The third use is also to be discouraged. It has appeared in undue influence where transactions have been described as ‘hard and inequitable’, ‘immoderate or irrational’, or said to involve sales at undervalue.9 In England one sees it in the notion of a ‘manifest disadvantage’10 which was taken to

8. Id, 59.
10. Ibid.
new heights and made a requirement in actual undue influence in *Bank for Credit & Commerce International v Aboody* 11 only to be given a much reduced evidentiary role in presumed undue influence by the House of Lords in the twin cases of *Barclays Bank plc v O’Brien* 12 and *CIBC Mortgages plc v Pitt.* 13 It seems to be in relief from unconscionable bargains too which puts the onus on the defendant to show that the impugned transaction is ‘fair, just and reasonable’ as set out in *Commercial Bank of Australia Ltd v Amadio.* 14 This diluted use of unconscionability may have some use as a pragmatic inhibitor to relief in circumstances not as yet clearly defined. 15 But one cannot draw a final inference of unconscionable behaviour from the mere fact that the terms of the transaction are highly favourable to the defendant and correspondingly disadvantageous to the plaintiff. To suggest otherwise is to fictionalise unconscionable behaviour.

**THE EQUITY OF REDEMPTION: AN ESTABLISHED HEAD OF RELIEF**

Although the High Court of Australia has departed from its English counterpart in some regards in relieving against forfeitures of proprietary and possessory interests, it has generally endorsed the House of Lords’ decision in *Shiloh Spinners v Harding.* 16 In this case, which is considered to be the locus classicus, Lord Wilberforce saw little difficulty with the two established heads of relief. The first he explained 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. 17

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12. [1994] AC 180. The House of Lords held that manifest disadvantage is only relevant to presumed undue influence as part of the factual matrix which gives rise to the presumption. It also alluded to the need to review this role of manifest disadvantage. In Australia the notion has never been particularly welcomed: see *Johnson v Buttress* (1936) 56 CLR 113; *Baburin v Baburin* [1990] 2 QdR 101, Kelly SPJ aff’d [1991] QLR 143. Cf *James v ANZ Banking Group* (1986) 64 ALR 347, 390; *Farmers’Co-op Executors & Trustees Ltd v Perks* (1989) 52 SASR 399; *Webb v Aust Agricultural Machinery Pty Ltd* (1991) 6 WAR 305.
15. Possibly in the same way as the notion of a manifest disadvantage may be an inhibitor in undue influence.
16. [1973] AC 691. In *Stern v McArthur* supra n 4, 525 Deane & Dawson JJ observed that the relief may be developing along ‘divergent lines’.
17. Id, 722.
The equity of redemption in the 'classical mortgage of common law' is, according to Lord Wilberforce, and Deane and Dawson JJ in *Stern v McArthur*, an application of this head of relief. A fuller explanation of this is perhaps as follows. In equity's view, the right to forfeit is, one may say, a design feature of the mortgage as a security. The purpose of the mortgage is after all primarily to secure the payment of money, not the ultimate and final transfer of ownership in the asset, as suggested by its legal form. Thus the equity of redemption is consistent with the tacit intention of the parties to secure the repayment of money and completes, as it were, the transaction as conceived by the parties but for which the tools at common law are ill-suited. And notwithstanding technical fault, the mortgagor's equity of redemption includes a contractual right and a proprietary interest in land. As a matter of legal history, most would accept that the equity of redemption was prompted initially by the more wholesome and flexible approach of equity based on good conscience. But it is clear that fraud, mistake, surprise or, a fortiori, unconscientious conduct is not necessary to give rise to the equity. By the seventeenth century proof of hardship had already ceased to be a requirement for a decree for reconveyance after forfeiture.

In *Stern v McArthur*, Deane and Dawson JJ explained that, as the object of the mortgage is achieved by the payment of money with appropriate compensation, it would be unconscientious for the other to seek to take advantage of the forfeiture. Any hint of exploitative or 'shabby' behaviour was quickly dispelled, for their Honours stated that:

No proof of fraud, mistake, accident or surprise is required to establish the equity because the very nature of the transaction is such that the court, acting upon conscience, will grant relief.

It is clear that unconscientiousness in acquisition is irrelevant to the equity of redemption. Like unconscientiousness ex post or unconscientiousness in retention there is an antecedent justification and the unconscientiousness is only inferential. However, in the case of forfeiture, the defendant does not wish to retain the benefits of a (completed) bargain but to rely on its strict legal rights to bring the bargain to an end and to retain and/or recover that which flows from its legal rights. It is this insistence on its legal rights which may be unconscientious. For our purpose one may consider the unconscientiousness illustrated by the equity of redemption as a variety of unconscientiousness ex post. Neither variety of unconscientiousness ex post is a species of unconscientiousness at all. The

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18. Id, 527. An 'obvious application' which may have 'emerged separately'.
antecedent justification for the equity of redemption is the substantial, if not complete, achievement of the very object of the mortgage by the payment, by a repentant plaintiff, of moneys due together with appropriate compensation. For this reason the variation of the mortgagee’s literal expectations at law is considered to be acceptable. Nevertheless, it is conceivable that in different circumstances payment of moneys due even with compensation may be unacceptable. Thus Lord Wilberforce acknowledged the force of Lord Eldon’s argument in *Hill v Barclay*\(^\text{22}\) that there may be cases where to oblige acceptance of a stipulated sum of money, even with interest at a date when receipt had lost its usefulness, might represent an unjust variation for what had been contracted.\(^\text{23}\) Seen in this light the equity of redemption is only a technical departure from the bargain principle of contract because it squares with it substantively. The bargain as intended by the parties is in fact enforced fully and meaningfully, the defendant/promisor being entitled to, and getting the value of, the promised performance.

There is a related point. Lord Wilberforce in *Shiloh Spinners v Harding* spoke specifically about the object of the transaction. It has just been noted that with the equity of redemption the bargain principle of contract is not violated unduly when equity intervenes to uphold the purpose of the mortgage as conceived originally by the parties. But the object of the defendant/promisor has been substituted for the object of the transaction.\(^\text{24}\) It is a matter of experience and observation that, putting aside the common aspiration of contracting parties that the transaction will proceed as intended, each getting what it wants, the objects of the individual parties are typically different. Even in the case of the mortgage, the object of the credit provider is different from that of the debtor. The substitution of the defendant’s objective for that of the transaction induces one to accept that every contract in which the object of the defendant is the receipt of money from the plaintiff may be the subject of relief under this head. And it may seem ‘appropriate’ to disallow the defendant’s reliance on a contractual right to forfeit so long as the plaintiff is ready and able to make the payment due with any interest and costs because, as the argument goes, the defendant’s object is being upheld. If we accept the substitution, this first head of relief becomes instantly an exceedingly large one.

But one can think of many transactions in which, although the defendant’s object is primarily if not solely the receipt of money, the description of the object of the transaction in such terms will not capture its purpose satisfactorily. This kind of slippery substitution is best avoided

\(^{22}\) (1811) 18 Ves Jun 56.
\(^{23}\) *Shiloh Spinners* supra n 16, 722.
\(^{24}\) Eg CJ Rossitor *Penalties and Forfeiture* (Sydney: Law Book Co, 1992).
thus keeping the focus firmly on the antecedent justification for the equity of redemption. The object of a lease of land, or even of chattels, for example, cannot be readily viewed as the payment of money without losing some significant and important sense of its purpose. The same can be said of time charter parties. As Lord Diplock explained:

> In the case of a time charter it is not possible to state that the object of the insertion of a withdrawal clause, let alone the transaction itself, is essentially to secure the payment of money. Hire is payable in advance in order to provide a fund from which the shipowner can meet those expenses of rendering the promised services to the charterer that he has undertaken to bear himself under the charterparty.  

It is noteworthy that in *Scandinavian Trading v Flota Ecuatoriana* the House of Lords was at pains to reject a ‘more general proposition’ facilitated by this substitution of the defendant’s object for that of the transaction. It is that ‘whenever a party to a contract was by its terms given a right to terminate it for a breach which consisted only of non-payment of a sum of money and the purpose of incorporating the right of termination in the contract was to secure the payment of that sum, there was an equitable jurisdiction to grant relief against the exercise of the right of termination’. Lloyd J had attempted to extract it in *The Afovos* from Lord Wilberforce’s reference to the first head of jurisdiction.

**ANALOGOUS TRANSACTIONS**

Even if one accepts the proposition just advocated, there remains this question: does this head of relief extend to a transaction which in substance secures the payment of money but where the plaintiff has no proprietary interest at law that may be forfeited? Irrespective of the mode of forfeiture, there is in the typical case some interest or property of the plaintiff’s that is lost as a result of forfeiture. In a mortgage, the mortgagee is given the legal title. The forfeiture occurs when the legal title is not re-transferred to the mortgagor. In a lease of premises the lessee has a proprietary interest which the lessor may forfeit by, for instance, re-entering and re-taking the premises. Even a lessee of chattels loses his possessory interest when the lessor repossesses them. But where a vendor of land reserves title in the land to himself until the complete payment of the purchase price in an agreement where he is also the buyer’s financier, his right to terminate the contract (even if one were to call it a right to forfeit) does not involve the forfeiture

26. Id, 701-2.
28. In *Esanda v Plessnig* (1989) 166 CLR 131, Brennan J suggested that a court would intervene to protect the possessory or proprietary interests of the hirer of goods against
of a proprietary interest or possessory interest at law in the buyer. Unlike the mortgagor who transfers his legal title to the mortgagee, the title reserved by the vendor was never the buyer's to begin with. Nonetheless, the 'close and obvious parallel' between the two transactions did not escape Deane and Dawson JJ's attention in Stern v McArthur. They relieved against the vendor's 'forfeiture' in that case of an equitable interest in the land.

In Stern under a contract for the sale of land the buyers paid a small deposit and were obliged to pay the balance of the purchase price by monthly instalments of no less than $50 with interest at a commercial rate. The buyers were to have possession upon completion and until then the vendors were entitled to all rents and profits and were liable to pay rates and taxes. Upon the buyers' default in payment the balance of the purchase price would become due and payable. Notwithstanding the terms of the contract, the buyers went into possession and to the vendors' knowledge built a house on the land. They lived in the house and paid the rates. Upon the buyers' default the vendors gave notice for payment of the balance of the purchase price within three weeks. When the contract was not completed in the given time the vendors terminated the contract.

In Deane and Dawson JJ's view, the agreement for sale was analogous to a mortgage and the plaintiff was entitled to relief against the forfeiture which was the consequence of termination. Their Honours found that the parties' conduct showed that they themselves regarded the transaction as an arrangement whereby the vendors financed the purchase upon security of the land. The vendors had 'retained the legal estate as security for the payment of the instalments and the provision for forfeiture was by way of further assurance'. Deane and Dawson JJ pointed out that had the parties chosen to achieve their purpose with the use of a mortgage, the plaintiff would certainly have been entitled to an equity of redemption. It is therefore a necessary implication of this analogy that fraud, mistake, surprise and a fortiori unconscientious conduct in acquisition were irrelevant and immaterial. There is an analytical point to be made about the nature of the equitable interest which is said to be forfeited.²⁹ But for now the point is that 'shabby' or improper conduct was irrelevant.

²⁹. It seems that the equitable interest arose because the court granted relief: Stern v McArthur supra n 4, 521-523: see Deane & Dawson JJ's discourse on the nature of the equitable interest. It 'exists only so long as the contract is specifically enforceable'. The circularity in argument is not new and has been the subject of comment: see eg Colbeam Palmer v Stock Affiliates (1968) 122 CLR 25, 34; Chang v The Registrar of Titles (1976) 137 CLR 177, 181, 184, 190. In Legione v Hateley supra n 4, 445, Mason & Deane JJ thought the buyer's interest is commensurate with the equitable relief which may not be specific performance.
RELIEF ON THE GROUND OF UNCONSCIENTIOUSNESS

There is another, separate justification for the relief in the judgment of Deane and Dawson JJ in *Stern v McArthur*. It appears that quite independently of the heads of relief already discussed there is a more general basis for relief, namely that it would be unconscientious for the vendor to ‘take advantage by forfeiting’ when the object of the transaction can be achieved by payment and appropriate compensation. The meaning of this is not entirely clear. It is most unlikely that they meant reprehensible conduct as they took care to put the agreement to sell on the same footing as the mortgage. We have already seen that one does not need to show fraud or other unconscionable conduct to enjoy the same benefit as a mortgagor in the equity of redemption. It would be ludicrous in any event to infer such conduct simply from the fact of reliance on the contractual right to terminate. Brennan J (dissenting) was at pains to point out that the exercise of the contractual right to terminate cannot, without more, be unconscionable even if forfeiture does result.30 His Honour clarified that it was not unconscionable for the vendors to take the benefit of the forfeiture which was thereby effected. There was also no suggestion that the inclusion of the right to terminate in the first place was unconscionable.

The unconscientiousness is clearly ex post. There is a thinly veiled view that in the circumstances the court should come to the plaintiff’s aid. But why? The specific reason lies partly concealed in the peculiar facts of the case, namely that the dramatic appreciation in the value of the land would be lost to the plaintiff if relief was not granted. The contract price for the land was $5,250 and its value was estimated to be about $120,000 when the dispute was before the Supreme Court some 10 years later. Deane and Dawson JJ considered this windfall to be ‘rightfully’ the plaintiff’s because if she had not breached the contract but completed it the benefit would have been hers.31 The purchasers, they said, were the ones who had a ‘reasonable’ expectation of benefiting from any increase in the value of the land over time. This was a ‘further justification’ for relief. Justification it may be but it is not easy to appreciate its logic or substance. Why would the appreciation in value still be ‘rightfully’ the plaintiff’s when she had breached the contract? The contract was after all unaffected by any unconscionability in acquisition and the defendant had in no way ‘contributed’ to the breach. The opposite view is surely less sentimental. A natural appreciation in the value of land would ordinarily be the vendor’s if the buyer fails to complete the contract as agreed. As Mason J (dissenting) pointed out, the appreciation was fortuitous and occurred after the event and, in his view, nothing ought to

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31. Id, 529.
The third judge in the majority, Gaudron J, was more candid in holding that it was unconscionable for the vendors to insist on their contractual rights "in the circumstances." Those circumstances related to the fact of the sizeable appreciation in value — the "windfall". In this judgment one cannot detect any unconscientiousness in acquisition. Gaudron J deplored the vendors’ exercise of a legitimate and unobjectionable contractual right and admonished their "unconscientious" behaviour which took its colour from a fortuitous event. The vendors’ commendable conduct had already been judicially noted. There was no "shabby" behaviour on the part of the vendors who, on the contrary, conducted their affairs with rectitude. They did not contribute to the plaintiff's breaches which occurred over a long period of time. They gave her ample opportunity to make good the breaches, extra time to complete the contract and offered to compensate her for the house. Yet they were by Gaudron J's position obliged to adopt the course of action least beneficial to themselves. Not having done so they had, according to her, acted unconscionably. One has to conclude that that view is prompted by the conviction that the plaintiff should have relief. In contrast, Mason and Brennan JJ insisted that relief may only be granted on the ground of the vendors' unconscionable conduct of which they could find no evidence.

If one teases out the threads of unconscionability in *Stern v McArthur* one gets a clearer view of what motivated the majority's decision. There was no unconscionability in acquisition in the case. There was simply no improper conduct at the time the transaction was entered into. The unconscionability touted by the majority was clearly a product of the fortuitous and dramatic appreciation in the value of the land. This is not unconscientiousness at all and should not even be considered unconscionability ex post. The grant of relief in the case was clearly result-driven: the outcome to the plaintiff, in the majority’s mind, would have been most unfortunate and regrettable, if relief was denied. Even the unconscionable conduct which the minority looked for but could not find was not "shabby" behaviour at the time of the contract but "shabby" conduct on the part of the defendant in the performance of its contractual promises or "shabby" conduct which affected the plaintiff's performance or non-performance. This last notion of unconscionability may be grouped under unconscionability ex post but I shall keep it separate as the fourth meaning of the word because it is a development to reckon with.

The effects of *Stern v McArthur* come into sharper focus when compared with the earlier decision in *Legione v Hateley*. The facts in that case are very similar although there are some telling differences. In a contract for

32. *Id*, 540-541.
33. *Supra* n 4.
the sale of land a deposit was paid with the balance of the purchase price payable about a year later. Interest at eight per cent per annum was payable each quarter on the balance of the price. Time was stated to be of the essence. The purchasers took vacant possession upon payment of the deposit and erected a dwelling house on the land without the vendors’ knowledge. When the purchasers failed to settle on the due date the vendors served the required notice of default and stated its intention to rescind the contract under ‘Condition 5’ of the contract if they did not settle in 14 days. Before the expiry of the notice the purchasers’ solicitor had enquired of the vendors’ solicitors and spoken to the secretary of the partner of the firm who was looking after the transaction. The substance of the enquiry by Mr Gardiner on behalf of the plaintiff was whether they could settle a few days later because the bank extending the bridging finance needed the time to conduct the usual title searches. The secretary, Ms Williams, had expressed the view that it would be all right but she would have to get instructions. This exchange became the basis for the purchasers’ unsuccessful argument that the vendors were estopped from treating the contract as rescinded.

The majority of the High Court confirmed that it had jurisdiction to grant the purchasers relief against forfeiture. Gibbs and Murphy JJ could see no reason why specific performance should not be ordered where no injustice would be caused but would, on the contrary, prevent injustice even though an essential term had been breached.34 Mason and Deane JJ resorted to the language of unconscionable conduct. These two views have since been said by Deane and Dawson JJ in Stern v McArthur to be the same, hinging on unconscionable conduct which need not be exceptional.35 This merger of the two approaches is inadvisable as there are significant differences between them. In the rest of the discussion I shall keep them separate.

Among the circumstances which made it ‘unjust’, in Gibbs and Murphy JJ’s view, for the vendors to insist on the forfeiture of the purchasers’ interest in the land were: (i) a house of considerable value had been erected and the vendors would receive an ‘ill-merited windfall’; (ii) the purchase moneys were tendered with a written explanation only four days after the notice expired; and (iii) the purchasers’ breach was neither wilful nor apparently serious. In their judgment, they stated that:

To enforce the legal rights of the vendors … would be to exact a harsh and excessive penalty for a comparatively trivial breach. However, an opportunity should be given to the vendors to establish whether they have suffered damage as a result of

34. Id, 429. The breach of an essential term posed no difficulty. The Privy Council decisions in Steedman v Drinkle [1916] 1 AC 275 and Brickles v Snell [1916] 2 AC 599 were not followed.
35. Id, 526.
These circumstances do not include ‘shabby’ behaviour on the part of the vendor either at the time of the transaction or afterwards. If at all, Gibbs and Murphy JJ satisfied themselves that the plaintiffs had not behaved poorly in the way they breached the contract. Even the description of the windfall as ‘ill-merited’ cannot be interpreted to cast any aspersion on the defendant’s conduct. It is a matter for conjecture just why it is ill-merited. The description may be a comment on Ms Williams’ statement which, although not reprehensible, had unfortunate consequences. In *Ciavarella v Balmer*, the High Court thought Ms Williams’ statement had ‘helped lull the purchaser into a belief that the vendor would accept completion provided it took place within a few days … and it was unconscionable of the vendors to rescind in these circumstances where the consequence of rescission was that the vendor would reap the benefit of the valuable improvements.’ Or it may be a comment on the defendant’s rescission ‘triggering’ the incidence of the windfall. The latter would be anathema to our contract law if it were anything more than an observation of fact. The windfall put the outcome of rescission to the plaintiff in focus. But it should not have any relevance to the decision to relieve against forfeiture. As Brennan J pointed out in *Stern v McArthur* adjustments can be made at least for permanent improvements with the defendant’s consent. Our growing understanding of unjust enrichment would facilitate such adjustments.

In Deane and Mason JJ’s view, on the other hand, where the vendors’ conduct though not creating an estoppel or waiver has ‘effectively caused or contributed’ to the purchasers’ breach, there are grounds for exercising the jurisdiction to relieve. If it also appeared they had rescinded not to safeguard themselves from adverse consequences which they might suffer if the contract was kept on foot, but ‘merely to take unconscientious advantage of the benefits which will fortuitously accrue to him on forfeiture of the purchaser’s interest’ there will be even stronger grounds for the exercise of the jurisdiction. The first of these two situations does not have to involve improper conduct as *Legione v Hateley* itself shows clearly. Mr Gardiner had understood Ms Williams’ statement to mean that settlement would take place on the requested date or such earlier date, being a reasonable time, as might be advised if the vendors were not prepared to extend the time as requested. Deane and Mason JJ accepted that Ms Williams’ statement was capable of being so understood, although they would not put the same construction on it. The significance of Ms Williams’ statement really lies in the fact that the purchasers’ breach was inadvertent and not wilful. This

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36. Id, 429.
38. Id, 449.
is of course lost when their Honours employed the defendant-oriented language of unconscionable conduct. The second situation too has little to do with bad behaviour. It is unfortunate that it suggests that poor motives and ill intentions are in the firing line and even more unfortunate when they are imputed from mere reliance on legitimate contractual rights. The so-called unconscionable exercise of legal rights is unconscionable only because of the peculiar circumstances of *Legione v Hateley*. Thus even this fourth kind of unconscionability does not really involve fault on the part of the defendant after the formation of the contract.

**RESTATING THE BASIS FOR RELIEF**

Under the bargain principle of contract the expectations of the promisor/defendant are upheld to the full value of the promised performance. This principle has never been so sacrosanct as to be inviolable. There are well accepted exceptions based on, for example, notions of fault and lack of capacity in contract formation. As Professor Melvin Eisenberg showed recently, limits of cognition explain more satisfactorily various other limits in the law of contract than traditional justifications which are often spurious.39 In particular, he argued that ‘the best justification for giving special scrutiny to liquidated-damages provisions is not that such provisions lend themselves to blameworthy exploitation and one-sidedness in a way that other types of contract provisions do not, but that such provisions lend themselves to defective cognition in a way that performance terms — terms that specify the performance each party is to tender — do not.’

Relieving against forfeiture is neither threatening nor abhorrent. But it must not be pursued on the ground of unconscionable behaviour which exists more in the imagination than in reality and which is precipitated by fortuitous events. We should not perpetuate the idea that unobjectionable reliance on valid and legitimate contractual rights to forfeit or terminate can somehow be contrary to good conscience depending on the setting against which the tale unfolds. Judicial rhetoric about unconscionability inevitably focuses the mind on oppression, exploitation, unfair dealing and generally ‘shabby’ behaviour on the part of the defendant as justification for the departure from the bargain principle of contract.

The justification for relieving against forfeiture beyond the two established heads of relief is, in my opinion, similar in kind to that for the equity of redemption. That is to say, the expectations of the defendant as reflected in the full value of the promised performance is not unduly violated

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when the parties are compelled to continue with their agreement inspite of
the plaintiff's breach. The importance of the defendant's expectations in
the event of due performance is thus still primary and not to be underrated.
The departure from the letter of the contract resulting from relief against
forfeiture must still respect the substantive integrity of the promised
performance. This point is to be found in expressions such as 'the object of
the transaction can be achieved by payment and appropriate compensation'.
It explains why the defendants must be given the opportunity to establish
any damage, detriment or loss suffered as a result of the plaintiff's breach, and makes it important to ask if specific performance with any appropriate
compensation is an adequate safeguard for the defendant. The same
considerations were stated more fully by Deane and Mason JJ in the following
questions: '(1) What damage or other adverse consequences did the vendor
suffer by reason of the purchaser's breach? (2) What is the magnitude of
the purchaser's loss and the vendor's gain if the forfeiture is to stand? (3) Is
specific performance with or without compensation an adequate safeguard
for the vendor?' Inevitably the severity of the plaintiff's breach is an
important consideration because one needs to assess if the substantive
integrity of the promised performance can be attained through relieving
against forfeiture.

Gibbs and Murphy JJ's approach in *Legione v Hateley* is consistent
with this basis as I have just explained it. There is also support for it from
another quarter. In *Sunbird Plaza Pty Ltd v Maloney*, on the issue of
breaches of essential terms, Mason CJ referred to *Brien v Dwyer* and
suggested that it may be appropriate to grant relief against termination for
breach of an essential term where the breach is trivial and insignificant. In
*Brien v Dwyer*, a vendor of land sought to terminate the contract for breach
of an essential term, namely the late payment of the deposit, of which he
was not aware until an attempt to terminate on another ground had been
unsuccessful. Mason CJ suggested that an attempt to take advantage of
such a trivial and inconsequential breach may amount to unconscionable
conduct and give rise to relief in accordance with *Legione v Hateley*. Although the Chief Justice's comment was couched in the terminology of
unconscionable conduct, it condenses into the view that where the substantive
integrity of the performance promised to the defendant (as measured by its
full value) can be attained there is a compelling reason to allow the defaulting
party to complete the bargain.

40. See Gibbs & Murphy JJ in *Legione v Hateley* supra n 4, 429
42. (1978) 141 CLR 378.
43. I note with great interest the relevance of various observations made by Professor
Eisenberg supra n 39 regarding relief against forfeiture. Briefly, it is impossible or at
least extremely difficult to conceive of every contingency under which breach may occur.
As a corollary to that we must ask of the plaintiff at least good faith and diligent effort. That is to say, the plaintiff's conduct must come under scrutiny. For example, a plaintiff who repeatedly breaches its contractual obligations with little regard for the defendant's rights and interests must not then be enabled by the court to defeat the defendant's reliance on its legitimate rights. Thus, the High Court had asked if the plaintiff's breach was wilful, and the House of Lords had declared that it would be a rare case where relief would be granted for a wilful breach. In this regard, *Sanders v Pope* is still useful and appropriate: a wilful breach is a conscious breach or where the term is broken not by surprise, accident or in ignorance. An apt illustration on the point is Lord Wilberforce's conclusion in *Shiloh Spinners v Harding* that:

All this material establishes a case of clear and wilful breaches of more than one covenant, which if individually not serious, were certainly substantial: a case of continuous disregard by the respondent of the appellants' rights over a period of time, coupled with a total lack of evidence as to the respondent's ability speedily and adequately to make good the consequences of his default.

The defendant's conduct after the conclusion of the contract is largely relevant to an assessment of the nature of the plaintiff's breach. A plaintiff who has, for example, been misled, obstructed or hampered in the performance of its obligations cannot be said to have wilfully breached the contract. Charles Harpum suggests that the 'purchaser's conduct in the broadest sense' should be considered before granting relief. This fact assists us to determine the element of good faith and diligent effort which we ask of the plaintiff. The defendant's conduct is not the justification for the grant of relief. In other words, this head of relief is not fault-based. Thus it is inappropriate to suggest that reliance on legitimate and unobjectionable legal rights without more can be an unconscionable exercise of such legal rights. In a few cases, the defendant's conduct may lead a court to consider it right to relieve against forfeiture where there has been a wilful breach. For example, Viscount Dilhorne suggested in *Shiloh Spinners v Harding* that a

It is also an inherently complex task to work out the application of a provision that protects the defendant's interest in the event of every possible breach. The resulting provision inevitably reflects various kinds of defective cognition which have been identified and analysed extensively by researchers in other disciplines. To a plaintiff who is typically optimistic and intends to perform such a provision will seem relatively unimportant especially when the rate of contract performance is exceedingly high. These considerations, which are not fault-based, arguably also justify judicial scrutiny of a provision that provides for the forfeiture of a proprietary or possessory interest.

44. (1806) 12 Ves Jun 282.
45. Supra n 16, 725.
46. Supra n 1, 143.
47. Unless it falls within the second of the two established heads of relief identified in *Shiloh Spinners v Harding* supra n 16, namely fraud, accident, mistake or surprise.
court may do so where the defendant's conduct has been 'wholly unreasonable and of a rapacious and unconscionable character'.

Once the basis for relief is understood it becomes clear that fortuitous events such as the dramatic appreciation in the value of the land in *Stern v McArthur* should play no part in the decision to grant relief. Fortuitous events, whether potentially to the advantage or disadvantage of the defendant must in their nature be 'neutral'. The reference to 'reasonable expectations' of appreciation in property values by Deane and Dawson JJ in *Stern v McArthur* should be no more than an observation on a common phenomenon. It follows that it is also inappropriate to use fortuitous events as additional justification for a decision to grant relief.

The facts of *Stern v McArthur* are particularly testing. It appears that the vendor could still, in theory, receive the value of the promised performances, namely the purchase price if the contract was reinstated. But arguably the buyer's repeated inability to pay $50 a month, even if not wilful, makes it unacceptable to force the vendors in the circumstances to continue with the contract. Clearly, *Stern v McArthur* raises the problem in the grey area where the reach of equity will be most contentious. A reason for restraint, in what is unashamedly interventionist relief, is in fact the propensity of real property to fluctuate in value. In choosing the particular form of transaction in *Stern v McArthur* the parties effectively provided for the vagaries of these fluctuations. If one is to respect the neutrality of fortuitous appreciations in value, one ought not to re-define the transaction as Deane and Dawson JJ did.

One further matter needs comment. Should we relieve against the forfeiture of non-proprietary and non-possessory interests? In this regard logic is unlikely to give much direction. My own tentative view is that the answer may need to be pragmatic. It is sometimes said that there is more at stake with proprietary and possessory interests which justifies singling them out for the relief. One suspects that this view is based more on the historical propensity to rate certain kinds of interests more highly than others.

The stakes may be equally high with some contractual rights not involving land. The loss of these expectations may be terribly painful to a plaintiff who has made them the subject of a further transaction. Sir Anthony

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48. Id, 726.

Mason has suggested that the relief should be extended to the forfeiture of a contractual right, at least when it ‘if enforced, results in the acquisition of estate or interest in land’. This was the effect of the decision in Westminster Properties Pty Ltd v Comco Construction Pty Ltd. This extension of relief will allow us to minimise the use of circular argument to find a proprietary interest in equity as discussed in Stern v McArthur.

There is a cost to a more liberal approach. It exacts from us acceptance of a greater judicial role in holding parties to the completion of their bargains and potentially acceptance of judicial scrutiny of every termination of a contract. The High Court has already set the pace in this regard in its crusade against so-called unconscionable conduct and its treatment of two related matters. The first is its refusal to allow the breach of an essential term to hamper its discretion to grant specific performance. The second is the lack of distinction between the loss (of proprietary interest) flowing from termination and the loss which results when a contractual right to forfeit is exercised. The two may have led Neville Owen J to declare that ‘relief against forfeiture presupposes a breach of an essential condition of the contract. If there has been no breach, no question of forfeiture arises and consequently there is no occasion to seek relief’. The role of the essential term is really in the nature of an inhibitor, not a prerequisite of equity's jurisdiction. The difference between an essential and non-essential term in this context is likely to be relevant in the subsequent decision to grant or refuse relief. It would be odd if a court would particularly assist a defaulting party who has breached an essential term but not one who has defaulted more modestly.

51 Supra n 5, 4