

THE EQUITABLE DOCTRINE OF RELIEF AGAINST FORFEITURE: A COMMENT ON FOUR RECENT ENGLISH AND AUSTRALIAN DECISIONS

LEGIONE v. HATELEY
SCANDINAVIAN TRADING TANKER CO. A.B. v. FLOTA
PETROLERA ECUATORIANA
SPORT INTERNATIONAL BUSSUM B.V. v. INTER-FOOTWEAR LTD
B.I.C.C. PTY. LTD. v. BURNDY CORPORATION AND ANOR.

The law of contract is based upon the notion of freely contracting parties, who strike a bargain as between themselves and incorporate the aspects of their agreement into contractual terms. In enforcing the bargain, the court may look to these terms in order to ascertain the intentions of the parties. As a response to the inadequacies of this approach, Equity looks to the substance rather than the form of such agreements. Where it becomes apparent that the formal agreement does not accurately represent the bargain struck, Equity may give effect to the true intention of the parties. Furthermore, Equity may intervene to prevent one party from using the form of the agreement to achieve purposes not within the original contemplation of the parties, namely, by some unconscionable conduct.

It is the purpose of this paper to outline the limits of such equitable intervention in the area of relief against forfeiture, where one party has breached an essential condition of the contract and the other seeks to rescind it. At present it appears that the High Court is willing to allow and expand equitable jurisdiction here, while the English courts tend to limit it. However, by placing a recent English decision, *Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana*,¹ in the context of the High Court's expansion of the jurisdiction in *Legione v. Hateley*,² it is possible to show that the general trend could be in favour of greater availability of relief.

THE HISTORY OF THE JURISDICTION

Prior to *Legione v. Hateley*, it seems to have been generally settled that specific performance of an agreement would not be possible where

¹ Court of Appeal: [1983] 2 W.L.R. 248; [1983] Q.B. 529; House of Lords: [1983] 2 A.C. 694.

² (1983) 57 A.L.J.R. 292; (1983) 46 A.L.R. 1.

the parties had expressly made time of the essence and there was a breach of such a condition.³ In *Steedman v. Drinkle*, a contract provided for the purchase of land by the payment of a \$1,000 deposit upon signing and annual payments for the balance of \$15,000. An express term of the contract provided that in the event of default by the purchaser, the vendor could 'cancel' the contract and retain any payments made as 'liquidated' damages. When the first payment was not made on time, the vendor gave notice of cancellation. The Privy Council held that the vendor could effectively terminate the contract and thereby forfeit the purchaser's interest in the land since Equity's jurisdiction to grant specific performance would never be exercised where the parties had expressly intimated that time was to be of the essence.⁴

It is true that prior to 1916, there was "consistent authority"⁵ to the effect that Equity would relieve the purchaser in situations similar to those of *Steedman v. Drinkle*, including one decision of the Privy Council.⁶ These were cited by Mason and Deane, JJ. in *Legione v. Hately* as providing the basis for an expansive view of the equitable jurisdiction to relieve against forfeiture. It may be argued, however, that each of these cases may be distinguished on the basis that the party not in default waived his right to determine the contract by granting an extension of time to the defaulting purchaser. In this way, time ceased to be of the essence in the contract, and the court could grant relief. This position was reflected in Australia in the decision in *Petrie v. Dwyer*,⁷ where the High Court said:

Here time was expressly made of the essence of the contract, and the contract must be regarded as effectively rescinded both at law and in equity . . . unless it is established that before [rescission] . . . the defendants had elected not to exercise the right given by cl. 9 [of the contract] to rescind for non-completion on the due date.

This, however, was not the case in *Shiloh Spinners Ltd. v. Harding*,⁸ in which Lord Wilberforce (with whom Lords Dilhorne, Pearson and Kilbrandon agreed) returned Equity to a broader basis for relief against forfeiture. While subsequent attempts have been made to limit this case,⁹ it remains as the basis for the jurisdiction to grant relief against forfeiture where an essential time stipulated has been breached. In fact, Lord Simon of Glaisdale went so far as to say that the jurisdiction exists as a separate head, beyond the scope of the special heads of fraud, accident, mistake or surprise.¹⁰

³ See generally, *Steedman v. Drinkle* [1916] 1 A.C. 275; *Brickles v. Snell* [1916] 2 A.C. 599; *United Scientific Holdings Ltd. v. Burnley B.C.* [1978] A.C. 904 and *Raineri v. Miles* [1981] A.C. 1050.

⁴ *Supra* n. 3 at 279.

⁵ *Legione v. Hately*, *supra* n. 2 at 299 per Gibbs, C.J. and Murphy, J.

⁶ See generally *Vernon v. Stephens* (1722) 2 P.Wms. 66; 24 E.R. 642; *In re Dagenham (Thames) Dock Co.*; *Ex parte Hulse* (1873) L.R. 8 Ch. App. 1022 and *Kilmer v. British Columbia Orchard Lands Ltd.* [1913] A.C. 319. The last case was decided by the Privy Council.

⁷ (1954) 91 C.L.R. 99 at 105.

⁸ [1973] A.C. 691 at 723.

⁹ *Sport International Bussum B.V. v. Inter-Footwear Ltd.* [1984] 1 All E.R. 376.

¹⁰ *Supra* n. 8 at 726-1.

The High Court: *Legione v. Hateley*

The majority in *Legione v. Hateley*¹¹ rejected the idea that specific performance would not be available when an essential time stipulation had been breached, and provided that relief would be available when the conduct of the vendor, while not going so far as to create a waiver or estoppel, nevertheless caused or contributed to the purchaser's breach. The case involved a contract for the sale of land, under which the purchasers were allowed to go into possession upon acceptance of title. Upon exchange of contracts, 17 per cent of the purchase price changed hands, and the balance was fixed to be paid twelve months later. The purchasers moved into possession and constructed a house on the land. A notice to complete was issued to them, to expire on 10 August. They tendered settlement moneys some four days after the expiry of the notice, and the vendors refused to complete. Importantly, the forfeiture would mean the loss of the purchaser's house to the vendor (valued at some \$35,000), as the contract made no provision for compensation.

In deciding to grant relief, the High Court endorsed the "expansive" view of the jurisdiction which they said had been recognized in *Kilmer v. British Columbia Orchard Lands Ltd.* Mason and Deane, JJ. rejected the idea that that case had involved a waiver by the purchaser¹² and cited it as an example of the exercise of the jurisdiction. In addition, *Steedman v. Drinkle* and *Brickles v. Snell* were explained to deny "the exercise, rather than the existence, of jurisdiction to relieve against forfeiture."¹³ Their Honours also pointed out that those cases involved relief against the payment of penalties under contract, not relief against forfeiture. Whereas penalties are of the nature of punishments for non-observance of contractual stipulations, and involve the imposition of additional or different liability upon breach, forfeiture simply involves the loss or determination of an estate or interest in property. From this point it may be concluded that the jurisdiction to relieve against forfeiture is separate from the jurisdiction to relieve against penalties.

More importantly, however, the fact that their Honours emphasised the presence of a property interest has meant that the jurisdiction has effectively been restricted to cases in which proprietary or possessory rights are involved. That is, the High Court granted relief to the purchaser not because of the unjust enrichment of the vendor or the loss of moneys paid by the purchaser, but on the basis that the purchaser held an equitable interest in the land which forfeiture would extinguish.

In addition to the requirement that the purchaser hold an equitable interest in the property, the High Court re-affirmed the necessity of exceptional circumstances in which the vendor contributes to the purchaser's breach. In the opinion of Mason and Deane, JJ. ". . . when the equitable jurisdiction is invoked to relieve against a forfeiture which

¹¹ Gibbs, C.J., Mason, Deane and Murphy, JJ. Brennan, J. dissenting.

¹² *Supra* n. 2.

¹³ *Id.*, 308.

is not in the nature of a penalty, equity looks to unconscionable conduct . . . especially when unconscionable conduct is associated with fraud, mistake, accident or surprise."¹⁴ This view approaches that of Lord Simon in *Shiloh Spinners*, since it proposes that the jurisdiction is a separate head, independent of other forms of unconscionable conduct. To this extent it is wider than the initial jurisdiction proposed by Lord Wilberforce in that case.

Whether there has been unconscionable conduct on the part of the vendor sufficient to attract equitable intervention will depend on a number of factors, the most important of which Mason and Deane, JJ. outlined:¹⁵

- (1) Did the conduct of the vendor contribute to the purchaser's breach?
- (2) Was the purchaser's breach (a) trivial or slight, and (b) inadvertent and not wilful?
- (3) What damage or other adverse consequences did the vendor suffer by reason of the purchaser's breach?
- (4) What is the magnitude of the purchaser's loss and of the vendor's gain if the forfeiture is to stand?
- (5) Is specific performance with or without compensation an adequate safeguard for the vendor?

Importantly, their Honours did not state whether these conditions were necessary or sufficient to the exercise of the jurisdiction, and no indication was given as to the relative weight which each carries. On the evidence before them, the Court found themselves only able to answer the first two questions, which they answered in favour of the purchaser. They remitted the case back to the Supreme Court of New South Wales to determine the purchaser's claim for relief, but the case was settled out of court before such a determination could be made.

The House of Lords: *Scandinavian Trading Tanker v. Flota Petrolera Ecuatoriana*

*Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana*¹⁶ was decided only a month after *Legione v. Hateley*, but while Gummow notes that "the House (led by Lord Diplock) sailed on in ignorance of what the High Court has said on the subject of forfeitures and penalties",¹⁷ it is unlikely that the House of Lords would have decided any differently *had* they known of the earlier case. This will become apparent as the case is examined in terms of the criteria for equitable relief outlined in *Legione*.

¹⁴ *Id.*, 307.

¹⁵ *Id.*, 209.

¹⁶ *Supra* n. 1. Hereafter, *The Scaptrade*.

¹⁷ W. M. C. Gummow "Forfeiture and Certainty: The High Court and the House of Lords" in P. D. Finn (ed.) *Essays in Equity*, Canberra, Law Book Co., 1985.

The owners of *The Scaptrade* let it to the appellant charterers under a time charterparty, Clause 8 of which allowed for monthly payments of the hire and provided that "in default of such payment owners may withdraw the vessel from the service of the charterers, without prejudice to any claim owners may have on charterers on this charter." When the charterers failed to pay an instalment on time, the owners sent a telex withdrawing the vessel. The owners then applied to the Commercial Court for a declaration that they had been entitled to withdraw the vessel, and the charterers asked for relief against forfeiture.

In the Court of Appeal, it was held that there is no jurisdiction to relieve a charterer from withdrawal of a vessel due to the breach of an essential time stipulation in the charterparty.¹⁸ Upon appeal to the House of Lords, the Court of Appeal decision was upheld in the leading judgment of Lord Diplock, with the concurrence of Lords Keith, Scarman, Roskill, and Bridge.

Lord Diplock began by stating that the instant case was not an example of a penalty. Utilizing reasoning similar to the High Court in *Legione v. Hately*, his Lordship suggested that the issue was whether the withdrawal of the ship constituted the loss or determination of an interest; that is, whether or not there was a forfeiture. As a result, the jurisdiction to grant relief against forfeiture was construed to be limited to contracts involving the transfer of possessory or proprietary rights, as was outlined by Lord Wilberforce in *Shiloh Spinners v. Harding*.¹⁹ Furthermore, his Lordship pointed out that relief against forfeiture can only be achieved by a decree of specific performance, and since Equity does not as a matter of jurisdiction grant specific performance of contracts to render services, such contracts could not be subject to relief against forfeiture.

In the fact situation before the court, the House of Lords did not therefore find it difficult to agree that a time charter gives no interest to the charterer which could constitute a right of ownership in or even possession of the vessel. Since there was no such interest transferred by the contract, there could be no real forfeiture against which relief would act. In addition, the fact that time charterparties are contracts to render services meant that specific performance would not be available even if some interest could be found. To compound this, Lord Diplock noted, by way of addition, that the breach of an essential time stipulation entitled the owner to treat the contract as discharged and this it had done. This meant that the contract was at an end and there was effectively nothing left to protect against forfeiture.²⁰

¹⁸ *Per* Donaldson, M.R., May and Goff, L.JJ.

¹⁹ *Supra* n. 1 at 702.

²⁰ Charles Harpum, however, proposes an alternate view by arguing that relief against the use of a forfeiture clause involves the erasure of the purchaser's breach as a preliminary to specific performance. That is, the breach is forgotten by the court, which then decrees specific performance of a contract which is deemed to still exist. Harpum cites *Starside Properties Ltd. v. Mustapha* [1916] 2 A.C. 599 at 604 as authority for this proposition. See, generally, Charles Harpum "Relief Against Forfeiture and the Purchaser of Land" (1984) 43 *Cambridge L.J.* 134 at 144. Furthermore, Gibbs, C.J. and Murphy, J. appear to use this two stage analysis in their judgment in *Legione v. Hately*. *Supra* n. 1 at 300: "No doubt, where the parties have chosen to make time of the essence of the contract the grant of relief against forfeiture as a preliminary to an order for specific performance will be exceptional." (Emphasis added.)

The principal reason for the restriction of jurisdiction to grant relief in this way seems to have been the necessity of certainty in commercial contracts. The development of time as essential has led to greater certainty in commercial dealings, and the jurisdiction to relieve against such stipulations militates against this certainty. In this respect, Lord Diplock agreed with the judgment of Robert Goff, L.J. in the Court of Appeal:

It is of the utmost importance in commercial transactions that, if any particular event occurs which may affect the parties' respective rights under a commercial contract, they should know where they stand. The court should as far as possible desist from placing obstacles in the way of either party ascertaining his legal position . . . because it may be commercially desirable for action to be taken without delay.²¹

THE REQUIREMENT OF PROPRIETARY OR POSSESSORY INTERESTS

It should be kept in mind that the House of Lords made their decision in *The Scaptrade* at about the same time as the High Court decision in *Legione v. Hately*. It is therefore very tempting to reconcile the decisions thus: *Legione* establishes a jurisdiction to relieve against forfeiture where proprietary interests are involved, and *The Scaptrade* represents an example of a contract where there was no such interest and so no relief. However, despite the tendency which has grown with successive decisions to interpret the cases in just this way,²² the restriction of the scope of the jurisdiction to the granting of proprietary or possessory rights is not correct.

It is often said that when a vendor enters into a contract of sale of land, he becomes a bare trustee of the estate for the purchaser.²³ As a result, the vendor has an obligation to take reasonable care of the property until completion, and the risk of destruction of the property passes to the purchaser. However, while this trust-like relationship has important implications with respect to the disposition of property upon death or to third parties, it has little or no proprietary effect between vendor and purchaser. Rather, as Harpum notes, the proprietary nature of the vendor-purchaser relationship derives from the payment of the purchase price, not from the existence of a specifically enforceable contract and the acceptance of title.²⁴ As Sir Edward Sugden, L.C. noted in *Baldwin v. Belcher*:

though the purchaser has neither a legal nor an equitable right as against the seller, until he pays the purchase money, yet for all

²¹ *Supra* n. 1.

²² *Sport International Bussum B.V. v. Inter-Footwear Ltd.* [1984] 2 All E.R. 321 and *B.I.C.C. Pty. Ltd. v. Burndy Corporation and Anor.* [1985] 2 W.L.R. 132.

²³ See, for example, *Shaw v. Foster* (1872) L.R. 5 H.L. 321 at 356 *per* Lord Hatherley.

²⁴ Charles Harpum, *supra* n. 20 at 136-137.

purposes of disposition, the equitable estate which he obtained under the contract for sale, is subject to his control.²⁵

An examination of the facts in *Legione* indicates that at the time of breach, the purchasers had only paid a deposit against the contract of sale. Such consideration had not been paid in full, and because of the unconditional nature of a deposit (the contract usually provides that it be forfeited on default by the purchaser), it cannot be said that the purchasers in *Legione* acquired a proprietary interest. There was thus no loss of an interest in land against which Equity might relieve. It is not surprising that Gummow notes: ". . . confusion is the only result of the introduction of the notion of relief against forfeiture as the source of equity to repel the vendor . . ." ²⁶

Rather, the real issue in *Legione* was whether the vendor, in a specific performance suit bought by the purchaser, could claim by way of defence that the contract is already discharged at law and that the purchaser thus has no legal rights left which Equity could act on in its auxiliary jurisdiction. The equity is not located in a separate head of relief against forfeiture, but under the existing heads of fraud, accident, mistake or surprise, which also underpin relief against forfeiture, but are by no means as restricted as it.

The confusion which the emphasis on proprietary rights introduces into the discussion of relief is evidenced by the finding of the trial judge in *B.I.C.C. Pty Ltd v. Burndy Corporation and Anor*. Falconer, J. there held, on the basis of a misrepresentation of *The Scaptrade*, that there was no jurisdiction *at all* in situations similar to that case. However, as the English Court of Appeal pointed out,²⁷ it is not a question of the availability of jurisdiction, but of whether the jurisdiction is exercised on the facts in question. The Court there granted equitable relief against the termination of a contract involving patent rights, and said that possessory or proprietary rights should not be restricted to 'real property', but should include interests in personal property. Hence, the existence of the interest in the patents gave jurisdiction, and the unconscionable nature of the other party's conduct would allow the exercise of that jurisdiction. What, then, has become of the issue of whether the contract remains specifically enforceable (as discussed by the House of Lords in *The Scaptrade*)? One may only conclude that the Court has interpreted the jurisdiction as a "machine" which is activated—as one might turn on a light—by the existence of an interest.

It may be concluded, then, that the basing of the decision in *Legione* in the jurisdiction to relieve against forfeiture goes too far, and thereby justifies the important limitations which have been formulated in *The Scaptrade*. By proving that the decision does not rely on the presence of a violated interest, provision can be made for the extension of relief to

²⁵ (1844) 1 Jo. & Lat. 18 at 26. Approved by Lord O'Hagan in *Shaw v. Foster*, *supra* n. 23 at 349.

²⁶ Gummow, *supra* n. 17 at 34.

²⁷ *Supra* n. 22.

cases in which non-proprietary interests are involved. To begin, it should be noted that the High Court made substantial reference to the United States decision in *Cheney v. Libby*²⁸ as a case similar to the facts of *Legione*, but concluded that the relief in question in that case was relief against forfeiture. In fact, *Cheney v. Libby* does not concern such relief. Instead, it deals with a plaintiff who seeks the aid of Equity to obtain a conveyance of the legal title to property he contracted to buy, but who is faced with the possibility that the vendor may point to the breach of an essential time stipulation and say that the contract has ended. It is thus not a question of an equity to restrain by injunction an action at law, but of whether in an Equity suit for specific performance it is a good defence for the vendor to plead discharge of the contract sued upon. Equity does this whenever a party in default at law under the contract obtains specific performance. In *Legione v. Hateley*, even a specific agreement as to the essentiality of time was overridden.

Of course, this raises the question of whether the Court will decree specific performance even after the purchaser has committed a breach of contract that entitles the vendor to end the contract. But it is proposed here that this is the real issue in *Legione v. Hateley*, *The Scaptrade*, and *Sport International*. In *Legione*, the High Court was prepared to discount the effect of the purchaser's breach against the unconscionable conduct of a vendor who was attempting to take advantage of the breach. In *The Scaptrade* and *Sport International*, no such unconscionable conduct was present.

This also explains the decision in *B.I.C.C. Pty Ltd v. Burndy Corporation and Anor.*, where relief was granted in the case of patents. Dillon, L.J. noted that, while the actions of *B.I.C.C.* were not raised as a waiver or in equitable estoppel, the company nevertheless has "slept on its rights" of termination. In fact, at the time the termination clause was invoked, there had been no communication between the parties for some two months. Furthermore, the court noted that *B.I.C.C.* owed more under the contract at the time of termination than did *Burndy*. Clearly, then, *B.I.C.C.*'s conduct was unconscionable under the criteria laid down by Mason and Deane, J.J. in *Legione*.

The effect of this discussion is to reduce the emphasis placed upon the existence of proprietary or possessory rights, and to affirm the importance of unconscionable conduct on the part of the vendor as the basis upon which Equity will prevent him from pleading that the contract is ended.

²⁸ 134 U.S. 68 (1890). The case actually applies to the situation in which the failure of the purchaser is caused by an act or default of the vendor, such as failing to promptly make title. Closer to the situation the High Court was dealing with are *Triton Realty Co. v. Freeman* 123 A. 2d 290 at 294 (1956); *Rymland v. Berger* 219 A. 2d. 7 (1966) and *Mound Mines Co. v. Hawthorn* 173 F. 882 at 887 (1909). In the last case, which involved a fact situation very similar to that of *Legione v. Hateley*, the court said that it would grant relief where "circumstances surrounding failure to perform make it inequitable to deny the defaulting party his right to the remedy."

A POLICY CONSIDERATION: CERTAINTY IN CONTRACT

The placing of the decision in *Legione v. Hateley* in the context of the unconscionable conduct of the party claiming termination indicates that it might be possible for the High Court to grant "relief against forfeiture" in situations where non-proprietary interests are involved. This would necessarily involve a widening of the number of cases in which the "form" of the contract would be superseded by Equity's view of the "substance". It becomes important to ask, therefore, whether it might be necessary to limit relief for reasons of commercial certainty. The need for certainty was pointed out by Robert Goff, L.J. in *The Scaptrade*.²⁹ His Lordship pointed out that commercial contracts involve parties dealing "at arm's length", who are aware of the binding nature of the contract, and who rely on the fact that the breached contract may be terminated at short notice. Therefore, to allow the existence of a jurisdiction which works against certainty is to make the position of commercial parties hopelessly difficult. However, leases are often entered into between commercial organisations acting at arm's length, yet there is little question about the lessee's right to relief in appropriate circumstances. Why situations involving, for example, charterparties should be excluded from the scope of the doctrine is not then a question of policy but of inconsistent logic. While the consideration of certainty is important, there is no reason why it should be absolute in determining the availability of relief in all circumstances.

CONCLUSION

The interpretation of the decision in *Legione v. Hateley* as an example of relief against forfeiture of an equitable interest in land is incorrect, and leads to the belief that *Scandinavian Trading Tanker Co. A.B. v. Flota Petrolera Ecuatoriana* provides a limitation of the jurisdiction to proprietary or possessory interests. Re-interpreting the case in terms of the inability of a party to plead that the contract is ended (because of some unconscionable conduct on his part) avoids this problem, and thereby allows the expansion of the jurisdiction into contracts of a commercial nature. In doing this, the importance of the interest involved is reduced in favour of the circumstances in which the party not in breach invokes his right to terminate. That this view is consistent with the principles of Equity is confirmed by Holdsworth, *A History of English Law*, which notes that the jurisdiction:

. . . rests upon the idea that it is not fair that a person should use his legal rights to take advantage of another's misfortune, and still less that he should scheme to get legal rights with this object in view.³⁰

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²⁹ *Supra* n. 1 at 257. See, also, J. Carter, *Breach of Contract* (1984), p. 359.

³⁰ Holdsworth, *A History of English Law*, Vol. 3, 3rd Edition, 1945, p. 330.