

EQUITABLE RELIEF AGAINST FORFEITURE

Introduction

The past two years have been fruitful years for the courts of equity. The Courts have, in a number of cases over these two years asserted the right to relieve against the forfeiture of property. The Courts, not only in England, but also in Malaysia, Australia and New Zealand have thus demonstrated that 'equity has an unlimited and unfettered jurisdiction to relieve against contractual forfeitures and penalties.'¹

The purpose of this article is not so much to discuss the historical development of the courts' powers to grant equitable relief against forfeiture but to discuss and state the law in the light of these recent decisions. The discussion will be limited to the following decisions from the various jurisdictions: *Chen Chow Lek v Tan Yew Lai*² (Federal Court of Malaysia); *Umarkandha Rajah v Magness*³ (the Federal Court of Malaysia); *Legione and Another v Hateley*⁴ (High Court of Australia) and the Privy Council decision of *United Malayan Banking Corporation Berhad and Johore Sugar Plantation and Industries Berhad v Pemungut Hasil Tanah, Kota Tinggi*⁵ (on appeal from Malaysia).

Equitable relief against forfeiture in relation to land may arise under a number of circumstances. In relation to the sale and purchase of land, a purchaser may seek such relief in any one of the following circumstances:

- a) for the recovery of a deposit paid to the vendor;
- b) for the recovery of part of the purchase price which the purchaser may have paid to the vendor by way of advance payment, part payment or instalments; and
- c) for the protection of the purchaser's equitable interest in the land which had arisen under the contract for the sale of land pending registration of the transfer.

Besides the purchaser of land, equitable relief may also be sought by certain classes of persons who have an interest in the land under the National Land Code:

¹ Per Lord Simon of Glaisdale in *Shiloh Spinners Ltd v Harding* [1973] AC 691, 726 HL.

² [1983] 1 MJL 170.

³ [1984] 23 CLJ

⁴ (1983) 56 ALJR 292.

⁵ [1984] 2 MLJ 87.

- a) a lessee under a lease created by the provisions of the National Land Code, may seek such a relief against the forfeiture of the lease by the lessor as a consequence of any breach committed by the lessee; and
- b) by a person to whom land has been alienated by the State under the National Land Code in any proceedings by the State to forfeit the land for any breach committed by such a person.

In a number of recent cases in Malaysia, England and Australia, the Courts' powers to grant equitable relief against forfeiture has been reconsidered. In this article, some of these cases will be discussed to determine the extent to which the Courts have such powers and to state the present position of the law. For convenience, the power of Courts to grant such relief will be considered under each of the four circumstances spelt out above. As there are no recent cases on forfeiture of a lease this is not discussed in this article. However, before these five situations are considered in detail, the following principles should be emphasised:

The Courts have an inherent jurisdiction to grant any equitable relief. Such powers have been exercised by the Courts since the fusion of the common law and equitable remedies. In all common law jurisdictions, including Malaysia, the powers to grant equitable relief rests in all Courts.

There is however, one important limitation to the exercise of the Courts' powers to grant equitable relief. The jurisdiction to grant such relief may be taken away from the Courts by any statutory provision to the contrary. Therefore where any written law modifies or abrogates any equitable principle, such statutory provision will override the said principle of equity. It must be pointed out that it is not an easy task to determine whether in fact the statutory provision intends to modify or abrogate the particular equitable principle in question. It is essentially a question of construction. It is further submitted that the legislature must use clear terms to exclude the application of any equitable principle of law. Where there is any uncertainty as to the effect of the statutory provision, the construction to be placed should be in favour of the continued application of the equitable principle.

The other important factor to bear in mind is that where a particular statute purports to embody the law on a particular subject, (for example, the National Land Code attempts to contain all the provisions relating to land tenure in Malaysia), it cannot always be said that such a statute must be interpreted so as to exclude the application of all equitable principles relating to that particular branch of the law. The mere fact that a particular law has been codified cannot preclude the application of *all* equitable principles. The very nature of equitable principles is such that it co-exists with any legal rules embodied in a statute. Whenever a legal remedy is not available, the Court must be able to administer equitable principles which may be relevant. Proponents of the view that equitable principles are inapplicable when there is a statute governing a certain branch of the law fail to appreciate the very basis upon which the Courts obtained the inherent power to grant equitable relief. Equitable relief was granted by the

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Court when the common law or statute law was unable to provide an adequate remedy to the injured party.⁶ Furthermore it is often forgotten that the granting of equitable remedies are discretionary and as such it does not necessarily follow that the Courts will make an order for such relief in every case where equitable relief was available. The Courts, in exercise of their discretion may only grant such a relief if the circumstances of the particular case warrant the exercise of their discretion to grant the relief sought.

In brief, it may be said that only in cases where there are express statutory provisions in any statute which either modifies an existing equitable remedy or if the equitable remedy is in conflict with the statutory provision will the said remedy cease to apply as an equitable remedy. Thereafter, whatever remedy available will only be the statutory remedy.

Recovery of Deposits

The Privy Council in *Linggi Plantations v Jegatheesan*⁷ held that sections 65 and 75 of the Contracts Act cannot be invoked to obtain relief against forfeiture of a proper deposit.⁸

The question, however as to whether equitable relief may be granted for the recovery of a deposit paid has not been clearly established. Though there were some suggestions in an earlier case that such relief may not be granted,⁹ the recent decision of the Federal Court seems to lend weight to the view that the Malaysian Courts may in certain exceptional cases grant such relief. In *Umarkandha Rajah v Magness*¹⁰ the Federal Court granted relief against forfeiture of a deposit paid. This appears to be the first reported case in Malaysia where the Courts had actually granted the purchaser relief against forfeiture of a deposit on equitable grounds.

In this case, the respondent, a registered proprietor of land agreed to sell to the appellant/plaintiff his undivided share of ten lots. The respondent was to retain the ownership of the three remaining lots. On June 5, 1973, the parties executed a sale agreement at the agreed purchase price of \$45,000. The land was to be sold free from all encumbrances. The appellant paid the respondent a sum of \$5,000 by way of deposit and part payment of the purchase price. The balance of the purchase price was to be paid in three instalments as follows: (a) First instalment of \$10,000; (b) Second instalment of \$15,000 which was to be paid on or before January

⁶See generally Spry, *Equitable Remedies*, (2nd edn), Law Book Company, Australia Chapter 1; Meagher, Gummow and Lehane, *Equity, Doctrines and Remedies* 2nd edn, (1984) Butterworth, Australia, Chapters 1 and 2).

⁷[1972] 1 MLJ 89.

⁸See generally Sinnadurai, *Sale and Purchase of Real Property in Malaysia*, (1984) Butterworth, pages 361-369.

⁹See *Siah Kwee How v Kulim Rubber Plantations* [1979] 2 MLJ 190.

¹⁰[1984] 2 M.L.J. See also *Chen Chow Lek v. Tan Yew Lai* [1983] 1 MLJ 170, a case not dealing with forfeiture of deposit but instalment, discussed below.

2, 1974 and (c) Third and Final instalment of \$15,000 to be paid on the date of the sub-division and transfer of titles of the said land on or before July 2, 1974, whichever was the later.

The sale and purchase agreement further provided that out of the payment of the first instalment a sum of \$6,500 would be paid by the appellant on behalf of the vendor to a bank for the discharge of the whole of the said land which had been charged by the respondent to the Bank. After the discharge of the said charge from the Bank, the appellant was to retain in his custody the title deed of the land until sub-division and separate titles were issued. Among the other provisions of the sale and purchase agreement, Clause 8 provided that in the event of the purchaser failing to pay the balance of the First Instalment after deduction of the \$6,500 to the Bank for the discharge of the charge, before July 2, 1974, the sum of \$15,000 paid by him shall be forfeited by the respondent by way of liquidated damages and that the agreement shall then become null and void.

The appellant was allowed to retain the title deed after the discharge from the Bank so as to enable him to obtain sub-division of the land and also to commence development of the land even prior to the final settlement of the purchase price and the transfer of the land. The respondent agreed to grant the appellant all assistance on this matter.

The appellant paid the first instalment of \$10,000 directly to the respondent before July 2. He did not pay part of it to the Bank to discharge the charge. The respondent, however did not deliver the title deed to the appellant. The appellant refused to pay the second instalment of \$15,000 to the respondent, except for \$1,000 which he paid on November 1983. After the date when the Second Instalment fell due, that is January 2, 1974, the appellant paid another \$1,000. The respondent then served a notice on the appellant demanding payment of the balance \$13,000 due for the second instalment. Receiving no response from the appellant, the respondent served another notice terminating the agreement and forfeiting the sum of \$5,000 deposited under the agreement. The respondent also returned the balance of \$7,500 to the appellant. The appellant returned the said cheque to the respondent and denied that there was any breach of the agreement on his part. The appellant then instituted the present action claiming specific performance of the agreement.

The Court considered the question as to whether the handing over of the title deeds by the respondent to the appellant was a condition precedent to the payment of the second and third instalments and whether the appellant by making the two payments of \$1,000 after the respondent had failed to deliver the title deeds had waived the said condition precedent.

The Federal Court held that the handing over of the title deed to the appellant was a condition precedent to the payment of the second instalment by the appellant. The Court further held that though the appellant had waived this condition by paying part of the second instalment, the waiver did not exonerate the respondent of his obligation completely. The Court also found that the refusal of the appellant to pay the second instalment even after the expiration of the extended time granted to him by the

respondent showed an indication on the part of the appellant not to perform his own obligation under the agreement. Syed Agil Barakbah FJ in delivering the judgment of the Federal Court said:

He [the appellant] had at no time shown any readiness and willingness to perform his own obligation under the agreement which apart from any question of time was to pay the balance of the second and thereafter the third and final instalments both of which amounted to \$28,000 i.e. more than half of the total purchase price. He had also not made any arrangements to ensure that the respondent should eventually receive the whole of the purchase money. In short he was not ready and willing to "put the money on the table" (*Tay Say Geok & Ors v HG Warren* (1963) 29 MLJ 179, 184.)¹¹

The Court, therefore refused to grant the decree of specific performance in favour of the appellant.

On the question as to whether the respondent was entitled to forfeit the deposit of \$5,000 paid by the appellant, the Federal Court held that though under the common law, a deposit is irrecoverable by the purchaser when he commits a breach of the agreement, in the instant case, the deposit could not be forfeited on equitable grounds. The importance of the decision of the Federal Court lies in its holding that equitable relief may be granted in such a situation under certain circumstances. Syed Agil Barakbah FJ said,

Equity however will only interfere and invoke the aid of its jurisdiction if the appellant shows that it will be unconscionable to allow the respondent to retain the money he has forfeited.¹²

His Lordship relied on the Privy Council decisions in *Kilmer v British Columbia Orchard Lands Limited*¹³ and *Steedman v Drinkle*¹⁴ and said,

The ratio decidendi in both the cases was that the forfeiture clause being a penalty it was unconscionable to allow the vendor to forfeit the sum deposited as part payment of the purchase price.¹⁵

His Lordship further relied on the views expressed by Denning LJ in *Stockloser v Johnson*.¹⁶ Syed Agil Barakbah FJ observed:

¹¹At page 25

¹²At page 26

¹³[1913] AC 319.

¹⁴[1916] AC 275.

¹⁵At page 26

¹⁶[1954] 1 QB 476.

Denning LJ on page 637 also expressed the view that where there is a forfeiture clause or the money is expressly paid as a deposit the buyer who is in default cannot recover the money at law at all. He may however have a remedy in equity but two things are necessary:

- (1) the forfeiture clause must be a penalty i.e. the sum forfeited must be out of all proportion to the damage, and
- (2) it must be unconscionable for the seller to retain the money.¹⁷

In the instant case, applying the principles from these three decisions, the Court held that though the deposit of \$5,000 merely amounted to 12% of the purchase price and was therefore 'not disproportionate' to the purchase price, the conduct of the respondent in failing to fulfil his obligation amounted to a 'sharp practice'. The Federal Court held,

Having had the said land discharged from the bank at the expense of the appellant, he committed a breach of the agreement by not handing the title deed to enable the appellant to apply for sub-division of the land and thereafter to commence development.

... we are satisfied in the circumstances that it would be unconscionable to allow the deposit to be forfeited by the respondent and that it is just and equitable for the money to be returned to the appellant.¹⁸

The importance of this decision, as pointed out earlier lies in the willingness of the Federal Court to grant, under certain circumstances the equitable relief against forfeiture of a deposit. This decision lays to rest the uncertainty as to whether the Malaysian Courts will ever grant such a relief. Until this decision of the Federal Court, the only authority for the proposition that equitable relief against forfeiture of a deposit may be granted was the observation of Lord Hailsham in the Privy Council decision in *Linggi Plantation v Jegathesan*.¹⁹ Lord Hailsham had said:

No doubt, as Cotton LJ says in *Howe v Smith* at page 95, there may be cases when equity would relieve a purchaser who has paid a deposit and then defaulted, although it is to be said that the last word is probably not yet spoken on this subject. See *Stockloser v Johnson*. It is also no doubt possible that in a particular contract the parties may use language normally appropriate to deposit properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to render forfeit something which is in truth part payment.

Lord Hailsham, however, restricted the possibility of the intervention of equity to grant relief only in cases where the deposit paid was an

¹⁷At page 26.

¹⁸*Ibid.*

¹⁹[1972] 1 MLJ 89 at p. 94.

unreasonable one. In fact, the Privy Council itself in *Linggi Plantation* held that the mere fact that the provision in the agreement relating to the forfeiture of the deposit was penal in effect is no ground for granting the equitable relief. The Privy Council accepted the views of Jessel MR in *Wallis v Smith*²⁰ that the rules governing relief against penalties had no application to the forfeiture of deposits. For the same reason, section 75 of the Contracts Act was also held to be inapplicable as the provision relating to the forfeiture of the deposit was not a stipulation by way of penalty.²¹

The Federal Court decision in *Umarkandha Rajah*, however appears to support the view that the Malaysian Courts will not limit their powers to grant equitable relief against forfeiture of deposit only to cases where the deposit is unreasonable: equitable relief may be available in cases where it would be 'unconscionable' to allow the deposit to be forfeited. They will exercise their jurisdiction in favour of the purchaser whenever they consider it to be 'just and equitable'. Though the Federal Court did not spell out the circumstances under which it would be considered to be unconscionable for the vendor to forfeit the deposit, it is clear that the Courts will grant the purchaser relief against forfeiture if the vendor himself was not free from blame.

The decision also seems to suggest that if the enforcement of the forfeiture clause results in penal consequences, relief against forfeiture may be granted. Though it is true that section 75 of the Contracts Act draws no distinction between penalties and liquidated damages and as such relief against forfeiture clause is not a stipulation by way of a penalty, the section itself does not prevent the Courts from exercising their equitable jurisdiction to grant the purchaser such a relief.²² So long as the forfeiture of the deposit is unconscionable or the forfeiture clause is penal in nature, the Malaysian Courts should, in the exercise of their equitable jurisdiction grant the purchaser relief against forfeiture of the deposit.²³ Clearly an unreasonable deposit would be penal in nature.²⁴

Relief Against Forfeiture Of Instalments

There is less doubt as to whether relief against forfeiture may be granted for the recovery of instalments paid by a purchaser than that concerning the recovery of a deposit.

²⁰(1882) 21 Ch D 243.

²¹See criticism of the Privy Council decision by Harpum in (1984) 43 CLJ 153-163.

²²See however, views of Abdoocader J in *Siah Kwe Mow v Kullm Rubber Plantations* [1979] 2 MLJ 190.

²³See Harpum, (1984) 43 CLJ at page 164.

²⁴See *Linggi Plantation* and the New Zealand case of *Codet Development Ltd v Potter* [1981] 1 NZLR 722. See also Lord Denning in *Stockloser v Johnson* [1954] 1 QB 476; *Windsor Securities Ltd v Loreldal Ltd*, *The Times*, September 10, 1975; and Goff and Jones, *The Law of Restitution*, (2nd edn) at pages 382-4.

Where a purchaser pays a deposit and agrees to pay the balance of the purchase price by instalments, the typical contract will provide that in the event of non-payment of any one of the instalment payment, the vendor shall be entitled to terminate the contract and forfeit all the instalments paid. If the purchaser then defaults on any one of the instalments and the vendor exercises his right under the contract to terminate the contract and forfeit the instalment payment, the purchaser may either seek to affirm the contract or accept the termination. In the former situation, the purchaser must show that he is ready, able and willing to complete the contract. He will, therefore request for an extension of time for the payment of the moneys and seek relief against forfeiture by seeking a decree of specific performance. As to whether he can obtain such a decree is discussed in the following part of this article. Of concern to us at this stage is the question as to whether the purchaser may seek equitable relief against forfeiture of the monies paid by way of instalment. Though generally it appears that the courts will more readily grant a purchaser equitable relief against forfeiture of instalments than deposits, the exact basis upon which such relief is granted is unclear. There appears to be three views as to this basis:

- (a) It is said that if the forfeiture clause is penal in nature and that it would be unconscionable for the vendor to retain the instalment payments, relief should be granted.²⁵
- (b) Relief may only be granted if it can be shown that the purchaser is willing and able to perform the contract.²⁶
- (c) Relief may be granted only if it can be shown that there was fraud, accident or sharp practice and that it would be unconscionable for the vendor to retain the instalment.²⁷

The third view, of course is the narrowest of the three. It is said that the reason for the reluctance of the Courts to intervene is that the sanctity of contracts should be maintained.

Which of these three views was preferred by the Malayisan courts was unclear. It is often said that the Privy Council decision in *Mayson v. Clouet*, on appeal from the Straits Settlements²⁸ establishes the rule that instalment payments were recoverable. But a careful reading of the case will indicate that the Judicial Committee did not say anything about the recovery

²⁵Denning and Somervell L 33 in *Stockloser v Johnson* [1954] 1 QB 476, applied in *Smyth v Jessop* [1956] VR 230. See Harpum, "Relief against Forfeiture and the Purchaser in Land" (1984) 43 CL pages 156-166; Hinde, *Land Law* (1979) Butterworths, New Zealand, para 10.080. Harpum cites the Australian case of *Real Estate Securities Ltd v Kew Golf Links Estate Pty Ltd* [1935] VLR 114.

²⁶See generally Treitel, *The Law of Contract*, (6th edn) page 757; Meagher, Gummow and Lehane, *Equity, Doctrine and Remedies* (1975) Butterworths, Australia, para 1827 and the cases cited therein. See also Farewell J in *Mussen v Van Diemen's Land Company* [1938] Ch 253.

²⁷Romer LJ in *Stockloser v Johnson*, *supra*.

²⁸[1924] AC 980.

of instalments. On the facts of the case, their Lordships held that the deposit could be forfeited by the vendor but not the instalment payments because the intention of the parties was that only the deposit and not the instalments were to be forfeited.

The recent decision of the Federal Court in *Chen Chow Lek v Tan Yew Lai*²⁹, however suggests that the Malaysian Courts may prefer the first of the three views spelt out above.³⁰

In *Chen Chow Lek v Tan Yew Lai*³¹ the purchaser had paid all of the purchase price of \$12,000 except for \$100. The vendor, on the failure on the part of the purchaser to pay this small sum, purported to terminate the agreement and in exercise of his power, under the said agreement purported to forfeit all of the purchase price which had already been paid by the purchaser. The purchaser applied to the Court for relief against forfeiture of the sums paid by him.

Salleh Abas FJ in granting the purchaser the relief sought agreed with the views expressed by Lord Wilberforce in *Shiloh Spinners Ltd v Harding*³² that in certain cases the Courts have the power to grant relief against forfeiture. The following dictum of Lord Wilberforce in *Shiloh Spinners'* case was adopted by Salleh Abas FJ:

I would fully endorse this: it remains true today that equity expects men to carry out their bargains and will not let them buy their way out by uncovenanted payment. But it is consistent with these principles that we should reaffirm the right of courts of equity in appropriate and limited cases to relieve against forfeiture for breach of covenant or condition where the primary object of the bargain is to secure a stated result which can effectively be attained when the matter comes before the court, and where the forfeiture provision is added by way of security for the production of that result. The word 'appropriate' involves consideration of the conduct of the applicant for relief, in particular whether his default was wilful, of the gravity of the breaches and of the disparity between the value of the property of which forfeiture is claimed as compared with the damage caused by the breach.³³

In the Federal Court, Salleh Abas FJ in holding that the facts of the instant case justified the intervention of the Court in granting the relief sought by the purchaser observed:

On the basis of the amount paid by him, the appellant (the purchaser) should be entitled to the relief, because otherwise the forfeiture would become a penalty as the appellant by almost fully paying up for the house had in the words

²⁹[1983] 1 MLJ 170.

³⁰But see the views of Abdoocader J in *Seah Kwee Mow v Kutum Rubber Plantations* [1979] 2 MLJ 190, a case dealing with the recovery of deposit.

³¹*Supra*.

³²[1973] 1 All ER 90

³³At page 101. The same dictum was also referred to by Gill CJ in *United Malayan Banking Corp v Pemungut Hasil Tanah, Kota Tinggi* [1979] 2 MLJ 202.

of Lord Denning LJ in *Stockloser v Johnson*, *supra* acquired an equity of restitution.³⁴

The approach taken by Salleh Abas J in this case is commendable. It should, however, be noted that in *Chen Chow Lek's* case, the purchaser did not apply for equitable relief against forfeiture by way of specific performance³⁵ neither did he seek relief under section 75 of the Contracts Act.³⁶

Relief Against Forfeiture of Purchaser's Interest Under a Contract of Sale

Generally it is said that under a contract for the sale of land, the purchaser acquires the beneficial interest in the land whereas the vendor whilst being a 'trustee' for the purchaser has a lien over the unpaid purchase price.³⁷

Most sale and purchase agreements will provide that the purchaser is under an obligation to pay the purchase price within a specified date. The agreement will further provide that the time for payment of the purchase price by the purchaser will be of the essence of the contract and that in the event of non-payment within the stipulated time, the vendor will be at liberty to terminate the contract and to forfeit all sums of money already paid by the purchaser. Where a purchaser commits a breach of this fundamental term, and the vendor in pursuance of the agreement exercises his right to terminate the contract and forfeit all the sums already paid by the purchaser, the purchaser will usually seek the assistance of the court to grant him relief against forfeiture of the sums paid. Whether the purchaser may obtain such a relief has been considered in a number of cases.³⁸

One crucial issue which has, however, not been fully considered by the Courts is whether the purchaser may seek relief against forfeiture not of the sums of money paid by him by way of instalments or deposits but as to his equitable interest in the land under the sale and purchase agreement. The purchaser will seek to obtain such relief by way of a decree of performance. In other words, the question is whether even though the purchaser has committed a fundamental breach of the contract (usually non-compliance with a stipulation as to time) the Court may still decree specific performance in the purchaser's favour.

Prior to the decision of the Australian High Court in *Legione v Hately*,³⁹ there were a number of conflicting decisions. On the one hand

³⁴*Supra*.

³⁵See discussion below on such a relief.

³⁶See Sinnadurai, *Sale and Purchase of Real Property in Malaysia* (1984) Butterworth, at pages 361-369.

³⁷See Sinnadurai, *Sale and Purchase of Real Property* (1984) at pages 199-220.

³⁸See discussion above and any leading text on Contracts for the Sale of Land.

³⁹(1983) 56 ALJR 292.

were cases like the *Dagenham (Thames) Dock Co. ex parte Hulse*⁴⁰ and the Privy Council decision of *Kilmer v British Columbia Orchard Lands Ltd*⁴¹ which held that specific performance may be granted in such circumstances. On the other hand, the two other Privy Council decisions of *Steedman v Drinkle*⁴² and *Brickles v Snell*⁴³ established the rule that specific performance may not be granted.⁴⁴ The High Court of Australia considered all these cases in detail and arrived at the conclusion that in certain circumstances specific performance may be granted to a purchaser who had not complied with the stipulation as to time in a contract for the sale of land. Therefore, a purchaser who wishes to go on with the contract, even though he had failed to comply with a provision of which time was of the essence, is not barred from obtaining relief against forfeiture of his interest in the land by way of specific performance.

In this case, the purchasers, Mrs Hately and her husband entered into a contract for the purchase of certain land from Legione, the vendor for a price of A\$35,000. A deposit of A\$6,000 was paid and the contract provided that the balance of the purchase price was to be paid 'on the 1st July 1979 or such earlier date as shall be agreed between the parties.' Clause 3 of the agreement provided that if the purchasers defaulted in the payment of the purchase price or interest they were to pay a higher rate of interest. Time was made the essence of the contract and that neither party could enforce any of the said rights and remedies unless he gave the other written notice specifying the default and stating his intention to enforce his rights and remedies. The agreement further provided that if such a notice also stated that the contract would be rescinded on default of compliance with it, then the contract should become rescinded upon expiry of the period of the notice.

The purchasers went into possession of the land and erected a house on it. On June 29, the vendors' solicitors replied that the vendors would not extend the date for completion and suggested that the purchasers should obtain bridging finance. On July 26 the vendors' solicitors sent to the purchasers' solicitors a notice of default requiring the purchasers to complete by August 10 and to pay 14 per cent interest for the quarter ending July 1, 1979, and indicating the vendors' intention to rescind the contract failing completion. On August 9, a member of the purchasers' solicitors' firm spoke over the telephone with the secretary of the vendors' solicitor, asking whether the matter could be completed on August 17, when the purchasers' bank would be ready to provide bridging finance. The secretary

⁴⁰(1873) LR 8 Ch App 1022.

⁴¹[1913] AC 319.

⁴²[1916] 1 AC 275.

⁴³[1916] 2 AC 599.

⁴⁴See also *Starside Properties Ltd v Mustapha* [1974] 1 WILR 816. See generally discussion on these cases in (1984) CLJ pages 146-156 and (1984) LQR 434-440.

said words to the effect "I think that'll be all right, but I'll have to get instructions," On August 14 the vendors' solicitors delivered to the purchasers' solicitors a letter indicating that the vendors had rescinded the contract.

The purchasers commenced the present action claiming specific performance of the contract of sale. The vendors counter-claimed for a declaration that the contract had been validly rescinded. One of the two main arguments raised by the purchasers on appeal to the High Court of Australia was that they were entitled to relief against forfeiture. (The other argument was based on estoppel on the part of the vendors). On the question of relief against forfeiture, the High Court held by a majority (with Brennan J dissenting) that the purchasers were entitled to the relief sought.

Gibbs CJ and Murphy J were to a great extent influenced by the views expressed by Lord Willberforce and Lord Simon of Glaisdale in *Shiloh Spinners v Harding*.⁴⁵ In that case, Lord Wilberforce said:

There cannot be any doubt that from the earliest times courts of equity have asserted the right to relieve against the forfeiture of property. The jurisdiction has not been confined to any particular type of case. The commonest instances concerned mortgages, giving rise to the equity of redemption, and leases, which commonly contained re-entry clauses; but other instances are found in relation to copyholds, or where the forfeiture was in the nature of a penalty. Although the principle is well established, there has undoubtedly been some fluctuation of authority as to the self-limitation to be imposed or accepted on this power. There has not been much difficulty as regards two heads of jurisdiction. First 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 (*Peachy v Duke of Somerset* (1921) 1 Stra 447 and cases there cited) . . . Secondly, there were the heads of fraud, accident, mistake or surprise, always a ground for equity's intervention, the inclusion of which entailed the exclusion of mere inadvertence and a fortiori of wilful defaults.⁴⁶

Lord Simon, in fact took a wider view and said that:

equity has an unlimited and unfettered jurisdiction to relieve against contractual forfeitures and penalties.⁴⁷

Applying these statements, Gibbs CJ and Murphy J held:

. . . it is difficult to see any reason why the power of courts of equity to relieve against forfeiture should not be available in a case such as the present.⁴⁸

⁴⁵[1973] AC 691.

⁴⁶At page 722.

⁴⁷At page 726.

⁴⁸At page 298.

Their Lordships also held that the power to grant relief against forfeiture is not limited only to cases where the forfeiture provision was penal in nature:

It is true that in some cases concerning relief against forfeiture the courts have spoken of relief against penalty. That may have been because 'penalty' and 'forfeiture' were regarded as synonymous or because a forfeiture for breach of a covenant or condition may be regarded as a penalty for the breach. But except in the sense that a provision for forfeiture can be described as a penalty it is unnecessary that the condition which provides for forfeiture should be a penal one before the jurisdiction of equity can be invoked. From early times the courts of equity granted relief against forfeiture of a lease where the breach was for non-payment of rent. No additional penal element was required.⁴⁹

In any case, their Lordships held that Clause 5 of the sale and purchase agreement in the present case was penal in nature as the purchaser who failed to comply with the notice was 'punished by forfeiture'.⁵⁰

Mason and Deane JJ said that the difference between penalty and forfeiture was as follows:

A penalty, as its name suggests, is in the nature of a punishment for non-observance of a contractual stipulation; it consists of the imposition of an additional or different liability upon breach of the contractual stipulation. On the other hand, forfeiture involves the loss or determination of an estate or interest in property or a proprietary right, for example, a lease, in consequence of a failure to perform a covenant. When non-payment of rent or a fine is made the occasion for forfeiture of an estate or interest in property it may be proper to treat the forfeiture as being similar in character to a penalty because it is designed to ensure payment of the rent or fine. There is, however, a real distinction between 'penalty' and 'forfeiture' and it is unfortunate that the terms have been frequently used in a way which blurs it.⁵¹

However, in cases where the vendor is permitted to 'forfeit' instalments of purchase money,⁵²

despite the use of the word 'forfeit', relief is granted on the footing that the contractual provision entitling the vendor to retain the instalments is in substance a penalty, or in the nature of a penalty, because it is designed to ensure payment of the entire purchase price and it exceeds the damage which he suffers by reason of the purchaser's default.⁵³

⁴⁹At page 299.

⁵⁰*Ibid.*

⁵¹At page 307.

⁵²As in *Steedman v Drinkle*, *supra* and *Brickies v Snell*, *supra*.

⁵³*Ibid.*

In the present case, the purchasers' claim was different to these cases where the purchaser sought the recovery of instalment payments: the purchasers in the present case was seeking relief against forfeiture of her equitable interest as purchaser under a binding contract for sale:

Forfeiture of the purchaser's interest, usually the consequence of the vendor's rescission for breach of an essential term, occurs under the general law regulating the rights of vendor and purchaser. Such a forfeiture is to be distinguished from a contractual forfeiture which is designed to ensure performance of a principal obligation.⁵⁴

Their Lordships added

True it is that condition 5 expressly regulated the vendor's right of rescission in the present case and provided for rescission on non-compliance with the prescribed notice on expiration of the time limited. However, the presence of this contractual stipulation, which merely regulates the vendor's common law right to rescind, does not alter the essential character of the forfeiture of the purchaser's interest which occurs when rescission takes place. No doubt the risk of forfeiture is strong inducement to completion of the contract, that being the primary intention of the parties, but it is incorrect to describe the rescission for which condition 5 provides and the forfeiture of the purchaser's interest which it entails as a penalty or as being in the nature of a penalty.⁵⁵

It is therefore clear that the basis for the intervention of equity in cases where a purchaser seeks relief against forfeiture of his interest under a contract of sale is not so much that the forfeiture clause is penal but rather that it is unconscionable for the vendor, in the circumstances of the case to deprive the purchaser of his interest. As Mason and Deane JJ said:

when the equitable jurisdiction is invoked to relieve against a forfeiture which 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.⁵⁶

As to what may amount to unconscionable conduct was not spelt out by the Court. Mason and Deane JJ observed:

It is impossible to define or describe exclusively all the situations which may give rise to unconscionable conduct on the part of a vendor in rescinding a contract for sale. None the less it may be said that where the conduct of the vendor, though not creating an estoppel or waiver, has effectively caused or contributed to the purchaser's breach of contract there is ground for exercising the jurisdiction to relieve. And if it also appears that the object of the rescission

⁵⁴At page 307.

⁵⁵*Ibid.*

⁵⁶At page 307.

is not to safeguard the vendor from adverse consequences which he may suffer as a result of the contract remaining on foot, but merely to take unconscientious advantage of the benefits which will fortuitously accrue to him on forfeiture of the purchaser's interest under the contract, there will be even stronger ground for the exercise of the jurisdiction.⁵⁷

Their Lordships then spelt out certain questions which should be considered in deciding whether relief should be granted to the purchaser:

- (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 the vendor's gain if the forfeiture is to stand?
- (5) Is specific performance with or without compensation an adequate safeguard for the vendor?⁵⁸

In *Ciavarella v Balmer*,⁵⁹ the High Court of Australia refused to grant the purchaser relief against forfeiture, as it has done in *Legione v Hately* on the grounds that the facts of the case were

outside the area of exceptional circumstances in which, in accordance with *Legione v Hately* relief against forfeiture of the purchaser's estate will be granted after an otherwise valid rescission of a contract of sale.⁶⁰

The Courts, therefore will have to consider each case on its merits to determine whether to relieve the purchaser against forfeiture of his interest in the land.

Much of the decision of the High Court of Australia in *Legione v Hately* centred on the issue as to the nature of the relief which a purchaser may obtain, that is whether specific performance may be granted after the rescission of the contract by the vendor. This issue was considered by the High Court in great depth. As pointed out earlier, there was a conflict of views amongst the judges in the earlier cases, particularly the Judicial Committee of the Privy Council as to whether specific performance may be decreed in favour of the purchaser when the purchaser himself had failed to perform an essential term of the contract within the time stipulated when time was of the essence of the contract. The High Court took the oppor-

⁵⁷At page 309.

⁵⁸*Ibid.*

⁵⁹[1983] 57 ALJR 632.

⁶⁰At page 638.

tunity to consider all these cases in detail and arrived at the view that specific performance may still be granted in favour of the purchaser. The Court held that the law was correctly stated in *Kilmer v British Columbia Orchard Lands Ltd*⁶¹ and *In re Dagenham*.⁶² The Court doubted the correctness of the principles adopted in *Steedman v Drinkle*⁶³ and *Brickles v Snell*.⁶⁴ On this point the High Court agreed with the views expressed by Dixon J in the earlier Australian case of *McDonald v Dennys Lascelles Ltd*.⁶⁵ In that case Dixon J had said:

Although the parties might by express agreement give the vendor an absolute right at law to retain the instalments in the event of the contract going off, yet in equity such a contract is considered to involve a forfeiture from which the purchaser is entitled to be relieved (see the judgment of Long Innes J in *Pitt v Curotta* (1931) 31 SR (NSW) 477, at pages 480-8). The view adopted in *In re Dagenham (Thames) Dock Co.; Ex parte Hulse supra* seems to have been that relief should be granted, not against the forfeiture of the instalments, but against the forfeiture of the estate under a contract which involved the retention of the purchase money: and this may have been the ground upon which Lord Mouton proceeded in *Kilmer v British Columbia Orchard Lands Ltd, supra*, notwithstanding the explanation of the case given in *Steedman v Drinkle, supra* and *Brickles v Snell, supra*. However, these cases establish the purchaser's right to recover the instalments, other than the deposit, although the contract is not carried into execution.

Gibbs CJ and Murphy J held that a court of equity will grant specific performance in favour of the purchaser notwithstanding a failure to make a payment within the time specified by the contract so long as it was not inequitable to do so. Though generally it is inequitable to grant specific performance if time is made the essence of the contract, yet,

... if it is just to relieve against the forfeiture which is incurred when the vendor retains payments already made under the contract, it is difficult to see why it should be unjust to relieve the purchaser against the forfeiture of the interest in the property that results in exactly the same circumstances. 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. Nevertheless on principle we can see no reason why such

⁶¹ *Supra*.

⁶² *Supra*. See also *Starside Properties Ltd v Mustapha* [1974] 1 WLR 816.

⁶³ *Supra*.

⁶⁴ *Supra*. The Court also held that *Mehmet v Benson* (1965) 113 CLR 295 and *Petrie v Dwyer* (1954) 91 CLR 99 did not support the view that specific performance of a contract could be obtained by a purchaser once the contract has been rescinded in consequence of his breach of an essential term. The Court held that this proposition was not in issue in either of these two cases — see at page 306.

⁶⁵ (1933) 48 CLR 457.

an order should not be made if it will not cause injustice but will on the contrary prevent injustice. If relief against the forfeiture is granted, the objection to the grant of specific performance is removed.⁶⁶

Their Lordships held that from the evidence in the present case 'it would be unjust' for the vendors to insist on the forfeiture of the purchaser's interest in the land:

Important among those circumstances is the fact that the purchasers have erected on the land a house of considerable value and if the contract is rescinded the vendors will receive an ill-merited windfall. Further there are the facts that the purchase moneys were tendered only four days after the notice expired, and that the late payment was explained by the terms of the letter from the vendors' solicitors. The breach by the purchasers was neither wilful nor apparently serious. To enforce the legal rights of the vendors in these circumstances would be to exact a harsh and excessive penalty for a comparatively trivial breach.⁶⁷

Mason and Deane JJ pointed out that *Steedman v Drinkle and Brickles v Snell* did not deny the *existence* but rather the *exercise* of the Court's jurisdiction to relieve against forfeiture of the purchaser's interest under a contract when the purchaser is in breach of an essential term and the contract has been brought to an end by the vendor. Their Lordships observed:

If the purchaser in this situation fails to obtain relief it is because he is unable to bring himself within the principles according to which relief is granted or refused, not because there is an absence of jurisdiction to grant him relief.⁶⁸

Their Lordships also expressed some doubts as to the correctness of the principle that the purchaser's interest under a contract of sale is only capable of protection to the extent to which the purchaser is able to obtain specific performance.⁶⁹ Their Lordships said

A competing view — one which has much to commend it — is that the purchaser's equitable interest under a contract for sale is commensurate, not with her ability to obtain specific performance in the strict or primary sense, but with her ability to protect her interest under the contract by injunction or otherwise . . . If this view were to be adopted and applied, the respondent's inability to obtain specific performance in the primary sense would not entail the loss of her equitable interest. She would retain that interest so long as she was entitled to make out a case for relief against forfeiture.⁷⁰

⁶⁶At page 300.

⁶⁷*Ibid.*

⁶⁸At page 308.

⁶⁹See *Brown v Heffer* (1967) 116 CLR 344.

⁷⁰At page 308.

Mason and Deane JJ then considered the basis upon which it had been held in the earlier cases that specific performance should not be granted in favour of the purchaser if he has been in breach of an essential condition. The main argument for so refusing specific performance was that it would be unjust to the innocent party to require him to complete the contract notwithstanding the breach of an essential term by the purchaser. Their Lordships, whilst agreeing that as a general rule this proposition was a correct statement of the law, observed that it should not be interpreted to mean that it was an inflexible rule such that specific performance can never be granted where there is a breach of an essential term so as to deprive the court of equity the power to grant relief against forfeiture of the purchaser's interest under a contract for sale in certain exceptional cases. In this regard they were critical of the views of the Judicial Committee in *Steedman v Drinkle and Brickles v Snell*. Their Lordships observed that in these two decisions, the Judicial Committee

... gave more weight to the value of enforcing contracts according to their strict terms and less attention to the fundamental principle which underlies the exercise of the equitable jurisdiction to relieve against forfeiture than we are disposed to give them. That the Judicial Committee did so is readily understandable because in the early part of this century overriding importance attached to the concept of freedom of contract and to the need to hold parties to their bargains. These considerations, though still important, should not be allowed to override competing claims based on long standing heads of justice and equity. The result of the two decisions was to enunciate an inflexible rule that specific performance will never be granted where there is a breach of an essential condition, thereby diminishing the utility of the remedy in cases of relief against forfeiture.⁷¹

The Lordships held that

A preferable course is to adjust the availability of the remedy so that it becomes an effective instrument in situations in which it is necessary to relieve against forfeiture of the purchaser's interest under a contract for sale. The rule would then be expressed by saying that it is only in exceptional circumstances that specific performance will be granted at the instance of a purchaser who is in breach of an essential condition.⁷²

The decision of the High Court in *Legione v Hateley* once again highlights the refusal of the Courts of equity to condone any unconscionable conduct of a party to a land transaction. If to allow the innocent party to exercise his legal rights strictly would result in the vendor gaining an undue advantage, equity will intervene to relieve the purchaser.

⁷¹ At page 309. But see Section 23(b) of the Specific Relief Act 1950.

⁷² *Ibid.*

Relief Against Forfeiture of State Land

The National Land Code contains express provisions for the forfeiture of land which has been alienated by the State for failure to pay rent to the State. Section 97 of the Code provides that where any rent payable in respect of any alienated land is in arrears, the Collector may serve a notice of demand on the proprietor. Section 100 provides that on the failure on the part of the proprietor to pay the rent in pursuance to the notice, the Collector 'shall thereupon by order declare the land forfeit to the State Authority'. In the recent Privy Council decision of *United Malayan Banking Corporation Bhd v Pemungut Hasil Tanah, Kota Tinggi*⁷³ the Judicial Committee considered the question as to whether on forfeiture of the land by the State Authority, the proprietor could seek the assistance of the Court for equitable relief against forfeiture.

Before a discussion of the case, it should, perhaps be emphasised that unlike the earlier cases discussed above where a purchaser of land was seeking such relief against a private individual, (for example, the vendor) so as to protect his rights under a contract, the relief sought by the proprietor of a land, as in the *UMBC* case arose not under a contract of sale but against the State in whom is vested all land. As such, until alienation and registration of his interest, no individual has any right to the land. In exercising its powers of disposal, the State may alienate any land to an individual upon certain specified conditions.⁷⁴ The Code then makes express provisions for forfeiture of the land which had been alienated for non-fulfilment of the said conditions. Such right to forfeit the land so alienated exists with the State for non-payment of any rents⁷⁵ or for breach of any condition to which the alienated land was subject to.⁷⁶ Such a forfeiture under the Code must be distinguished from forfeiture under section 234. The forfeiture provisions contained in the section does not relate to forfeiture by the State but by the proprietor of the land who had granted a lease to another in exercise of the proprietor's powers to deal with the land. The forfeiture in such a case is similar to a forfeiture by the vendor of the purchaser's interest under a contract of sale. Both arise under a contractual relationship and as seen from the discussion above, the Courts have asserted their right to grant equitable relief to protect the contractual rights of the party so claiming the relief. The issue as to whether the Courts will similarly exercise their equitable jurisdiction to grant relief against a State by a proprietor was not clear until the decision of the Privy Council in *UMBC's* case.

⁷³[1984] 2 MLJ 87.

⁷⁴See section 76.

⁷⁵Section 100.

⁷⁶Sections 127-134.

In *UMBC*, the State Authority of Johore alienated to the second appellant certain land for a period of 99 years in consideration of a stipulated annual rent and other conditions. The second appellant developed the land for the purposes of a sugar plantation and expended a large sum of money for this purpose. The second appellant also granted a number of charges over the land in favour of the first appellant for the purpose of securing a number of loans. The second appellant fell into arrear over the payment of the said rent and the Collector of Land Revenue, accordingly served a notice of demand under section 97(1) of the Code. A similar notice was also served on the first appellant as chargees, so as to give them an opportunity of paying the rent themselves if they chose to do so. Owing to misunderstandings between the first and second appellants, the rent was not paid within the stipulated period. The Collector then made an order declaring the land to be forfeited to the State Authority. The appellants then instituted the present proceedings under section 418 of the Code and sought relief against forfeiture.

In the High Court, Gill CJ gave judgment in favour of the appellants by granting relief against forfeiture.⁷⁷ The learned Chief Justice relied on the dicta of Lord Wilberforce in *Shiloh Spinners*⁷⁸ and certain other cases dealing with the Court's power to grant equitable relief against forfeiture and concluded:

Having carefully considered the above authorities, I am of the view that in dealing with an appeal under section 418 of the National Land Code this court in the exercise of its inherent equitable jurisdiction has the power to grant relief against the forfeiture, notwithstanding the fact that the only provision in the National Land Code regarding relief against forfeiture is contained in section 237 which clearly is not applicable in the present case.⁷⁹

The decision of Gill CJ was reversed by the Federal Court on appeal by the Collector. Abdoolcader J in delivering the judgment of the Federal Court observed that the power to grant equitable relief is vested in the State Authority and not in the Courts. His Lordship relying mainly on sections 133(1), (2) and (3) of the Code said,

It is therefore abundantly clear that the Code does not contemplate any power or right in the court to grant equitable relief against forfeiture in the light of the several provisions we have adumbrated. There is no statutory provision giving such a right in marked contrast to the provisions of section 237 which relate to the grant or refusal of relief against forfeiture by the court of any lease of alienated land granted by the registered proprietor thereof of lessee or tenant.⁸⁰

⁷⁷[1979] 2 MLJ 202.

⁷⁸Cited above.

⁷⁹At page 204.

⁸⁰At pages 268-9.

His Lordship further held that by virtue of section 6 of the Civil Law Act, the Courts did not have the power to grant equitable relief in the present case as the application of the laws of England, including the rules of equity were precluded by the said section. The matter of forfeiture in the present case was held to fall within the scope of the term 'tenure' in the section. His Lordship added,

The relevant provisions of the Code provide a complete code regulating the respective rights, duties and liabilities of the State Authority and its agents on the one hand and the registered proprietor of alienated land on the other in relation to the rent payable in respect thereof and no recourse can legitimately be had to look beyond their specific terms to seek any relief for the alleviation of any complain of hardship.⁸¹

The Court also rejected the argument of counsel for the appellants (respondents in the Federal Court) that the Courts had inherent jurisdiction to grant relief against unconscionable action. On this question, Ab-doolcader J said,

We cannot see how the courts can exercise their inherent jurisdiction to override expressly enacted legislative provisions. . . . To countenance the injection of the inherent jurisdiction of the court into matters regulated and governed by the Code would be nothing short of negating and eradicating the very concept of certainty which the Code was enacted to introduce, reflect and preserve, and would well perhaps also evolve into reconstituting the court as a third legislative chamber.⁸²

Finally his Lordship added,

The court cannot be moved by compassion and sympathy for the bank and the company, and is bound and must abide by and apply the expressly enacted provisions of the Code.⁸³

The proprietors appealed to the Privy Council.⁸⁴

The Privy Council upheld the decision of the Federal Court. Their Lordships were of the view that on the interpretation of certain provisions of the National Land Code, it was clear that a proprietor could not be relieved of the forfeiture by the State. Their Lordships held that under these circumstances, the Courts' power to grant relief against forfeiture was excluded. Lord Keith of Kinkel in delivering the judgment of the Board said,

⁸¹ At page 269.

⁸² At page 270.

⁸³ *Ibid.*

⁸⁴ [1984] 2 M.J.J. 87.

. . .their Lordships are of the opinion that the relevant provisions of the Code evince an intention that the English rules of equity relating to relief against forfeiture should not be available to proprietors of alienated land.⁸⁵

The provision of the National Land Code which was considered by their Lordships to arrive at this conclusion was mainly section 134. Section 134(1) provides,

The validity of any forfeiture under this Act shall not be challenged in any court except by means of, or in proceedings consequent upon, an appeal under section 418 against the order of the Collector under section 100 or, as the case may be, 129; . . .

whereas subsection (2) of section 134 provides,

No order of the Collector under section 100 or 129 shall be set aside by any court except upon the grounds of its having been made contrary to the provisions of this Act, or of there having been a failure on the part of the Collector to comply with the requirements of any such provisions; . . .

Their Lordships held that an application for relief against forfeiture constituted the 'setting aside' of the order for forfeiture and as such was excluded by subsection (2).

Furthermore, the Board was of the opinion that sections 133(1) and (2)⁸⁶ and subsection 3 of section 133,⁸⁷

evinced an intention that the Authority should have complete control over whether or not a proprietor who has incurred forfeiture should be reinstated, and if so upon what terms.⁸⁸

Lord Keith further added:

[S]ection 237 provides for application to the court for relief against forfeiture by lessees and others whose tenure is exempt from registration. The absence of any similar provision in favour of proprietors of alienated land is a strong indication of an intention that in their case no such right of application was to be available.⁸⁹

⁸⁵At page 90.

⁸⁶Which provides for any proprietor of alienated land who has incurred a forfeiture to apply to the State Authority for annulment of it and gave the Authority absolute discretion the refuse the application or to allow it conditionally or unconditionally.

⁸⁷Which provides that notwithstanding the refusal of the State Authority to annul the forfeiture, the Authority may reallocate the land to the same proprietor upon such term as it may determine.

⁸⁸At page 90.

⁸⁹At page 90.

The Privy Council also rejected the argument of counsel for the proprietor that the Court had power to grant equitable relief by virtue of section 418 of the National Land Code or section 3(1) of the Civil Law Act 1956. Lord Keith said that the words 'the Court shall make such order thereon as it considers just' in section 418(2) merely meant that the Court could only make

... any order considered to be just having regard to the substantive law, written or unwritten⁹⁰

whereas section 3(1) of the Civil Law Act which provides for the application of the English common law and equity was inconsistent with the provisions of the National Land Code in question.

The Privy Council, therefore without stating so, appears to have agreed with the views of Abdoolcader J in the Federal Court.

The following comments may be made of the decision of the Privy Council: The decision appears to be correct insofar as the powers of the Courts to set aside the order of forfeiture was concerned. An order of the Collector under section 100⁹¹ may only be challenged for the reasons provided in section 134(2). Except on the grounds spelt out in the section, the Courts therefore cannot exercise their equitable jurisdiction. However, as to whether the courts may exercise such powers under section 418(2) is less clear. It would appear that as section 418(2) is a general section, it has to be read in the light of other specific provisions of the Code dealing with relief by the Courts. It is unfortunate that the Judicial Committee did not discuss the scope of section 418(2) in any detail except to say that the Court in making any order under the section must have 'regard to the substantive law, written or unwritten'.

It is also unfortunate that the Judicial Committee did not discuss the scope of the Court's powers to grant equitable relief. The basis or the circumstances under which such relief may be granted was not discussed. Indeed the Board made no comments as to the application of the relief in cases when it is sought not against a contracting party but against the State. It would seem to suggest that in the absence of any specific provisions in any legislation, such a relief may be sought against the State. The Board in comparing the granting of equitable relief against forfeiture in tenancy matters with a relief sought against the State seems to suggest that there is no difference in the application of such relief in cases arising out of a contract and those which do not. Will the Courts grant such a relief in other cases where it is sought against the State or any other body in circumstances arising from a transaction which is not contractual? As there is no established authority to say that equitable relief may be sought other than in a contractual situation, especially proprietary or possessory rights

⁹⁰At page 90.

⁹¹Relating to forfeiture for non payment of rent due to the State.

in property, the Board could have held that such a relief was inappropriate against the State. The English Courts in recent years have held that relief against forfeiture is not applicable in cases dealing even with time charter,⁹² nor even to the granting of a mere contractual licence.⁹³ The English Courts have confined the application of the relief only to the transfer of proprietary or possessory rights.⁹⁴ In *Sports International v Inter-Footwear*⁹⁵, Lord Templeman in the House of Lords when considering whether relief against forfeiture may be granted of a contractual licence unconnected with interest in land said:

I do not believe that the present is a suitable case in which to define the boundaries of the equitable doctrine of relief against forfeiture. It is sufficient that the appellant cannot bring itself within the recognised boundaries and cannot establish an arguable case for the intervention of equity. The recognised boundaries do not include mere contractual licences and I can see no reason for the intervention of equity.

A further important point which needs to be commented upon arising from the decision of the Privy Council relates to the application of 'English rules of equity' and the application of English law in land matters generally. Having decided that by virtue of the provisions of the Code, equitable relief against forfeiture was not available, the Board went further to comment upon section 6 of the Civil Law Act. Their Lordships rejected the argument of the appellants that the English equitable rules as to relief against forfeiture were not excluded by section 6 as these rules did not relate to 'tenure of immovable property'. Lord Keith of Kinkel said:

'Tenure', so it was maintained, meant only the mode of holding land, and the rules of equity were something different. But, in their Lordships' opinion, laws relating to the tenure of land must, applying the ordinary and natural meaning of these words, embrace all rules of law which govern the incidents of the tenure of land, and among these incidents is the right, in appropriate circumstances, to the grant of relief against forfeiture.⁹⁶

His Lordship further added,

The National Land Code is a complete and comprehensive code of law governing the tenure of land in Malaysia and the incidents of it, as well as other im-

⁹²See *The Scaptrade* [1983] 2 AC 694 HL.

⁹³See *Sports International Bussum BV and others v Inter-Footwear Ltd* [1984] 2 All ER 321 HC.

⁹⁴See the two recent House of Lords decisions referred to in the note above.

⁹⁵[1984] 2 All ER 321

⁹⁶At page 90.

portant matters affecting land there, and there is no room for the importation of any rules of English law in that field except in so far as the Code itself may expressly provide for this.⁹⁷

There has been much uncertainty as to the scope of section 6 of the Civil Law Act. The extent to which English law is excluded by the said section is not clear. It is therefore unfortunate that the Judicial Committee did not seize upon this opportunity to consider the full scope of section 6. Therefore, the observations made by the Board on the scope of section 6 in the instant appeal is wholly obiter. The non-application of the rules of equity relating to relief against forfeiture in the instant appeal was not based on section 6 but on an interpretation of the relevant provisions of the National Land Code. The observation by the Board on section 6 was only made in passing after the Board has arrived at its decision to dismiss the appeal. The main reason as to why equitable relief against forfeiture was inapplicable in the present case was clearly spelt out by Lord Kinkel:

[T]heir Lordships are of opinion that the relevant provisions of the Code evince an intention that the English rules of equity relating to relief against forfeiture should not be available to proprietors of alienated land.⁹⁸

One final point which deserves comment is the reference to equitable rules generally as 'English equitable rules'. As pointed out earlier, when the Malaysian Courts administer justice and grant equitable relief, they do not apply *English* equitable rules but rather apply general equitable rules in exercise of their inherent jurisdiction. The very basis of the Courts' inherent jurisdiction is that it is not derived from any particular source. It is a power which is vested in them. Therefore, when Malaysia Courts apply equitable rules they do not as such apply English equitable rules. To speak of the application of English equitable rules by the Malaysian Courts is a misnomer which encourages confusion.

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⁹⁷At page 91.

⁹⁸*Ibid.*

