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## Union Eagle: Then and Now

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*The certainty required in conveyancing transactions is not to be lightly compromised. However much circumstances of unconscionability may, in appropriate cases, warrant equity's intervention on behalf of a purchaser, the role of equity in rescuing a purchaser late with payment, even by only a few minutes, must be carefully circumscribed. The author argues for a cautious and pragmatic approach to such cases. A balance must be struck between the competing considerations of commercial certainty on the one hand, traditionally safeguarded through rigorous rules of the common law, and that of fair play and conscionability on the other.*

### Introduction

Generally speaking, in the performance of contracts there is 'no elasticity in punctuality'.<sup>1</sup> These words were adopted by Litton JA in the Hong Kong Court of Appeal to illustrate the principle that a court does not construe a contract by way of contradicting it.<sup>2</sup> So when a contract provides for essentiality of time, that is what the court will enforce. However, when the purchaser commits 'a venial lapse' by being ten minutes late for completion, it is now apparent that some courts will be prepared to excuse the purchaser's repudiation, and to grant relief against forfeiture of the deposit, simply because the vendor was said to have acted unconscionably.

Why would a court, in the circumstances described, enable recovery of the deposit or even award specific performance? How did unconscionability get to the stage of being used to override a consensual agreement? Why should equity protect a purchaser who was not merely in breach but who has repudiated the contract? How was traditional Hong Kong conveyancing practice altered by 'new equity' remedies? These and other questions will be considered in this article.<sup>3</sup>

### The background to, and the decision in *Union Eagle Ltd v Golden Achievement Ltd*<sup>3</sup>

#### *The new equity*

The 'new equity' is a term used to refer to the developments of equitable relief in recent decades, not only in the High Court of Australia, although perhaps

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<sup>1</sup> *Maclaine v Gatty* [1921] 1 AC 376, 393, per Lord Shaw of Dunfermline.

<sup>2</sup> *World Ford Development Ltd v Ip Ming Wai* [1993] 1 HKC 98 at 108.

<sup>3</sup> *Union Eagle Ltd v Golden Achievement Ltd* [1997] 1 HKC 173.

the initiative and major thrust came from there. This relief crosses the barriers of contract, tort and equity, and often takes the place of a nominate remedy, such as common law damages, where that relief is not available.<sup>4</sup> Probably the first decision that characterised the new equity was that of *Commercial Bank of Australia v Amadio*,<sup>5</sup> where the High Court of Australia granted relief by way of rescission to two guarantors on the basis that the guarantee represented an unconscionable bargain. This was because they suffered from a disability<sup>6</sup> (namely, illiteracy in the language of the document) that was known to the lender at the time of contracting and the lender took a benefit under the guarantee (namely the reduction in a third party's overdraft). The taking of an unconscientious or unfair advantage is the core of the defence because equity is required to act to prevent the lender retaining the benefit he would have received had the contract proceeded. Emotive, equitable words such as 'gross inequality of bargaining power', 'unconscientious advantage', 'contrary to equity and good conscience' and 'wilful ignorance' were some of the phrases used to describe the conduct of the lender. Perhaps these days the term 'unconscionable behaviour' alone would be used. The finding that the defendants could resist enforcement because of the presence of an unconscionable bargain did not have the effect of destroying the equitable defence of undue influence. Undue influence continues to be available where a defendant has not exercised free will in contracting, but in *Amadio* the presence of the disability had the effect of removing the guarantors' ability to exercise or form free will, and enabled the lender to knowingly take advantage of the weaker position of the guarantors. *Amadio* did not invent the concept of an unconscionable bargain which has been established at least since the nineteenth century.<sup>7</sup>

The advancement of munificent equity continued after *Amadio*'s case but in a different direction. In 1987 a more radical step was taken in *Pavey & Matthews v Paul*<sup>8</sup> with the introduction of the remedy of restitution in its modern form. From at least the sixteenth century, the common law had granted relief through the writ of *indebitatus assumpsit*, in the form of quantum meruit,<sup>9</sup> where the contract was void, or where it was defective in setting a price, or whilst the contract was enforceable but there had been no express promise to

<sup>4</sup> See for example the use of restitution as an 'account of profits' in *AG v Blake* [2000] UKHL 45.

<sup>5</sup> (1983) 51 CLR 447.

<sup>6</sup> As in *Blomley v Ryan* (1956) 99 CLR 362.

<sup>7</sup> *Fry v Lane* (1888) 40 Ch D 312; *Earl of Aylesford v Morris* (1873) LR 8 Ch 484; see now *Lo Wo v Cheung Chan Ka Joseph* (2000) HCA No 618/97.

<sup>8</sup> (1987) 162 CLR 221.

<sup>9</sup> Although there has long been confusion between the terms quantum meruit [a reasonable price] and quasi-contract, the better interpretation is that quantum meruit was either contractual or non-contractual. In its contractual form it was based on an implied promise to pay a reasonable price for goods delivered or reasonable remuneration for services rendered: see for example s 10 Sale of Goods Ordinance (Cap 26). Quasi-contractual quantum meruit was based on unjust enrichment, ie the taking of a benefit without paying compensation; the court will award compensation for work done under a void contract. *Craven-Ellis v Cannons* [1936] 2KB 403 is a good example where compensation was ordered for services rendered where the contract turned out to be void.

pay for goods or for services rendered. The courts would invent an implied promise to pay thereby enabling resort to quantum meruit or quasi contract. By the twentieth century this relief was beset with exceptions and uncertainties. Although there had been some discrete mention of a general common law remedy of unjust enrichment from time to time in England 'as a third category of common law which is called quasi-contract or restitution' it was not well developed and was not popularly accepted.<sup>10</sup>

Through most of the life of quantum meruit and quasi contract, equity had been able to grant a parallel remedy, namely unjust enrichment, which sought to reverse improperly retained benefits. General equitable relief, said to be subservient to the maxims of equity, still tended to confer unjust enrichment relief in the ad hoc manner which characterized its jurisprudence. Unjust enrichment required proof of three factors: first, that the defendant had obtained a benefit to which he was not entitled; second, that that benefit belonged to the plaintiff; and third, that the defendant would be unjustly enriched if he retained the benefit without paying compensation for it. If these factors were proved equity would order the removal of the benefit from the defendant and give it to the plaintiff through a variety of nominate remedies, such as account, constructive trust, and equitable compensation.

In *Pavey* a builder contracted to construct and supply a pre-fabricated house to the defendant. In due course the house was delivered and accepted by the defendant who then refused to pay for it because, although the builder had obtained a statutory licence to construct such houses, the contract was not in writing as required by the statute. This made the contract unenforceable and consequently it would not have been possible to grant quantum meruit because of the presence of an express — albeit unenforceable — promise to pay, and probably also because to do so may well have been a fraud under the Statute of Frauds. But the High Court of Australia focused on two simple facts: that the plaintiff had performed his part of the bargain; and that the defendant had received and retained the benefit of this performance. So unless compensation was awarded to the builder, the purchaser would have been unjustly enriched. Thus the purchaser was ordered to reverse the unjust enrichment by paying an amount for the work done. The fact that the contract was at least ultra vires, if not illegal, mattered not. Apparently, a court of equity was bound to overlook this vitiating, common law factor because otherwise the defendant would have been guilty of equitable fraud.

This decision freed quantum meruit and quasi contract from the tortuously convoluted approach of the common law by the finding of the court that quantum meruit was no longer dependent on an implied promise. Instead a simple formula was enough for relief. That formula was the receipt and

<sup>10</sup> *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32, 61, per Lord Wright.

retention of a benefit belonging to the plaintiff. The relief was no longer 'common law' relief but in a new form which may have been considered part of the law of contract, or within the third area of relief. The classification and placement of restitution are irrelevant for purposes of discussion here, but it should be borne in mind that the classification of the law of obligations (for better or worse) as contract, tort and restitution remains a matter of disparate views.

Following *Pavey*, it was possible to rely on a somewhat undefined unconscionable behaviour when seeking equitable relief. When the factor was that of unconscionability, there was a blurring of the lines between a defence and a cause of action. Generally, it could be used as a defence along the lines of the other vitiating factors, but sometimes it was used as a cause of action. By and large it became accepted that unconscionability could not function alone, that something extra was needed. The added something could be a variety of nominate complaints, for example: a total failure of consideration;<sup>11</sup> recovery of money paid under mistake of law and fact, where two possible defences were available to the recipient, namely estoppel and change of position;<sup>12</sup> and constructive notice of improper behaviour by a third party to an inferior party to a contract.<sup>13</sup> At the same time that unconscionability was influencing the High Court of Australia, the ambit of promissory estoppel was also being reconsidered. What resulted was 'estoppel', an amalgam of elements of promissory and proprietary estoppel.<sup>14</sup> The new estoppel was revolutionary if one considers its modern antecedent in *Central London Property Trust Ltd v High Trees House Ltd*.<sup>15</sup> estoppel as a shield not a sword; suspensory, not permanent; the equivalent of consideration in the variation; waiver or forbearance of existing contractual relations. In its new form estoppel became a sword, 'permanent' in the sense that it produced a contract, and was being used in support of proof of intention to be legally bound. This form allowed it to be used negatively to prevent a party denying the existence of a contract.<sup>16</sup> But the new equity was not restricted to particular types of contracts. With the estoppel decisions the ambivalence of the new equity became clear: its tools could be used defensively or aggressively.

<sup>11</sup> *Goss v Chilcott* [1997] 2 All ER 110.

<sup>12</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (1992) 66 ALJR 768; *Kleinwort Benson v Lincoln CC* [1998] 1 Lloyd's LR 138.

<sup>13</sup> *Barclays Bank v O'Brien* [1993] 4 All ER 417.

<sup>14</sup> *Legione v Hateley* (1983) 152 CLR 406; *Stern v McArthur* (1988) 165 CLR 489.

<sup>15</sup> [1947] 1 KB 130.

<sup>16</sup> *Walton's Stores (Interstate) Ltd Maher* (1988) 165 CLR 489. In this case the parties negotiated for the lease of land. One term required the lessor to demolish the existing building on the land and to build a new structure to comply with the lessee's needs. Although the formal deed of lease was sent to the lessee it delayed executing it. The lessor commenced his obligations in relation to the building, by demolishing the old and starting construction on the new. Eventually, after much correspondence and enquiries as to when the lessee would sign, the lessee announced it would not go ahead with the lease. Overcoming the question of the absence of a deed, as required in NSW for a lease of 7 years, the lessor was successful in suing for breach of the lease which had come into existence because the lessee was unable to resile from an implied promise that a formal lease would be executed. Hence there was a binding contract.

*Traditional Hong Kong conveyancing practice*

As a general principle, the parties to a Provisional Agreement (PA) or a Sale and Purchase Agreement (SPA) are bound by an express contractual term that time in the performance of their obligations is 'of the essence'.<sup>17</sup> In rare cases it will be only the purchaser who is bound by such terms.<sup>18</sup> Where there is no express term, one will be implied for reasons of essentiality.<sup>19</sup> The effect of obligations being of the essence is that default is not merely treated as a breach of the contract, but more seriously as repudiation. Any breach of a contract will lead to damages, unless the contract provides to the contrary. If that breach is of a warranty (or interpreted by the court as a less serious breach of an innominate term) no further relief is available. But if the breach is that of a condition (or is interpreted as a serious breach of an innominate term) the innocent party has the choice of affirming or terminating the contract.<sup>20</sup> However, when the breach is of a term which 'goes to the root of the contract', that is, a term that 'but for' the defendant's promise that he would perform this obligation the plaintiff would not have contracted, then the contract can be terminated, enabling the plaintiff to recover damages for loss of the bargain, not merely damages as assessed by reference to remoteness and mitigation.<sup>21</sup> This means that the failure to perform is not merely a breach (ie non-performance); rather, it involves an intention to destroy what the plaintiff considers to be the substance of the bargain. Failure to perform is thus abandonment of the bargain rather than non-performance or breach of the obligations. Damages accompany breach of a contract, but compensation for abandonment of the bargain must place the plaintiff in exactly the same position he was in prior to the non-performance without any need on his part to mitigate. This type of termination requires observance of a formal structure of the *offer* of breach by the defaulting party and the *acceptance* of that offer by the innocent party. Once accepted, the breach is no longer a breach but evidence that the defaulting party has refused, without lawful excuse, to perform the contract. In other words he has abandoned the bargain he made.<sup>22</sup>

The party who usually repudiates the SPA in Hong Kong is the purchaser who is late for completion, often by only a few minutes. But as Litton JA observed, 'there is no elasticity in punctuality'<sup>23</sup> and lateness by even one minute causes the purchaser to be treated as having repudiated the contract because his failure to tender the balance of the purchase money on time amounts to an offer to repudiate. And acceptance is swift, taking effect with the refusal of the vendor to accept that tender. However, if office time-pieces have

<sup>17</sup> *Fong Yee Lan v Yiu* [1992] 2 HKLR 167.

<sup>18</sup> *Ng Chek Kok v Kiu Wai Ming* [1992] 1 HKLR 5.

<sup>19</sup> *Chong Kai Tai v Lee Gee Kee* [1997] 1 HKC 359.

<sup>20</sup> *Luna Park (NSW) Ltd v Tramways Advertising Pty Ltd* (1938) 61 CLR 286.

<sup>21</sup> *Decro-Wall v Marketing* [1971] 2 All ER 216.

<sup>22</sup> *Johnstone v Milling* (1886) 16 QBD 460; *McDonald v Demmys Lascelles Ltd* (1933) 48 CLR 457.

<sup>23</sup> Note 2 above.

not been synchronised the purchaser may get the benefit of the doubt on tardiness.<sup>24</sup>

Harsh though this might be, this is the law and practice in Hong Kong. Equally important, this effect is that which the parties have agreed to in their contract, the remarks of Godfrey JA in the Court of Appeal in *Union Eagle* notwithstanding:

This is an exceptional case. At least, I hope it is. If it is the common practice of vendors to seek to take advantage of a few minutes' delay by solicitors (or their messengers) to call off the bargains they have made with their purchasers, then it is past high time that [sic] for this court to step in and put a stop to it.<sup>25</sup>

Courts have found this approach unfair because it works harshly against the purchaser, especially where the vendor is poised to sell to another (at a higher price), probably only in a rising market. Where the market is falling, or having fallen, remains static, the vendor may well be likely to overlook delay in completion, thereby waiving his strict legal rights and reducing the essential time stipulation to a term requiring performance within a reasonable time, in the hopes of completion with the instant purchaser because no other buyer is interested in the property. The benefit of what to some may seem to be a harsh interpretation is that it does produce certainty and this is what essentiality of time is all about.<sup>26</sup> Certainty is what drives conveyancing law and practice. It is the uncertainty that has led to the most unjustifiable rules of conveyancing.<sup>27</sup>

Conveyancing practice relating to the essentiality of time does reverse s 13 of the Law Amendment and Reform (Consolidation) Ordinance which provides for the equitable interpretation to be given to time clauses; that equitable rule is that time is *not* of the essence *unless* the parties so provide. The essentiality of time clause in the SPA represents the common law position because Hong Kong practice dictates that *even if there is no* express time stipulation, the court will imply such a term into the contract unless there is an express term to the contrary: *Chong Kai Tai v Lee Gee Kee*.<sup>28</sup> To avoid the common law approach it is necessary to insert an express term that time is *not* of the essence, thereby allowing the spirit of s 13 to operate.

In some contracts essentiality of time relates not to the due date and due time, but merely to the due date. It has been held that this allows the 'midnight

<sup>24</sup> *Ocean Force Enterprises Ltd v Chun Sai Wan* (1999) HCA No 357/97.

<sup>25</sup> [1996] 1 HKC 348, 362 (CA).

<sup>26</sup> *Imperial Bros Pty Ltd v Ronim Pty Ltd* [1998] QCA 444.

<sup>27</sup> See comments below on *Bain v Fothergill* (1874) LR 7 HL 158 and *Want v Stallibrass* (1873) LR 8 Ex 175 (notes 54-62 below and accompanying text).

<sup>28</sup> [1997] 1 HKC 349.

rule' to operate, giving the purchaser up until midnight on the due date to complete the sale: *Camberra Investment Ltd v Chan Wai-tak*.<sup>29</sup> The effect of this is that the purchaser is not considered to have repudiated the contract if he completes by midnight.

#### *The lead-up to Union Eagle*

For the most part judges in Hong Kong accepted, albeit not always enthusiastically, the new equity and did permit the defaulting purchaser recovery of the deposit as relief against its forfeiture, even though that purchaser had repudiated the contract by failing to complete at the due time on the due date.<sup>30</sup> Some judges were able to distinguish the fact situations before them and refused to follow the Australian approach.<sup>31</sup> Any reluctance on the part of the Hong Kong courts to adopt wholeheartedly the Australian approach may have been because of the influence of the English courts. These courts were slow and often unwilling to come around to the idea of relief against forfeiture in respect of the payment of money. The English view was that such relief applied only where a proprietary interest, meaning, for this purpose, an interest in land, was at stake.<sup>32</sup> At most the English courts slowly came around to the view that a proprietary interest in personalty may also be the source of relief against forfeiture.<sup>33</sup> The Australian courts had long decided that there was no discrimination for relief of forfeiture between money and proprietary interests.<sup>34</sup> This is especially so when unconscionability is added to restitution, for then any distinction between money and land disappears.

So then to *Union Eagle*. The facts are not special or dissimilar to many other SPA cases which have ended their days in the Court of Appeal. But this case caused comment not merely because it went onto the Privy Council but because of the implicit warning in the judgment against adoption of the new equity.

<sup>29</sup> [1989] 1 HKLR 568.

<sup>30</sup> These cases really have nothing to do with establishing when an agreed sum in a contract for the sale and purchase of land is a deposit, and when a penalty: *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] 2 All ER 370; *China Pride Investment Ltd v Silverpole Ltd* [1995] 1 HKLR 59. They approach the matter from the point of view of restitution of money retained by an unjust or unconscionable party. See *Keung Shiu Tang v DH Shuttlecocks Ltd* [1994] 1 HKC 286 (unreasonable demands by the vendor were treated as indicating he no longer intended to be bound by the contract); *Cheung Yun-ho v Wong Kwan Cheung* [1995] 2 HKLR 90 (the behaviour of the vendor placed the purchaser in an 'impossible position' so that it was the vendor, not the purchaser, who was considered to have repudiated).

<sup>31</sup> *Health Link Investment Ltd v Pacific Hawk Investment Ltd* [1995] 1 HKC 249 (no unconscionability was found although the vendor was said to have varied express time stipulations to reduce time from essential to reasonable); *China Pride Investment Ltd v Silverpole Ltd* (note 30 above) (time no longer of the essence because 'the circumstances of the unconscionable conduct of the vendor being exceptional "or special" or [based on] fraud or sharp practices' (per Nazareth JA at 64).

<sup>32</sup> *Shiloh Spinners Ltd v Harding* [1973] 1 All ER 90; *The Scaptrade* [1983] 1 All ER 301; *Sport International Bussum BV v Inter-Footwear Ltd* [1984] 2 All ER 321; *BICC plc v Brandy Corp* [1985] 1 All ER 417.

<sup>33</sup> *Stockloser v Johnson* (1954) 90 CLR 235.

<sup>34</sup> *Peter Trunbull & Co Pty Ltd v Mundas Trading Co* (1954) 90 CLR 235.



What were the facts which led to the dispute? Completion was due at 5 pm, but at 5.01 pm on the due day, the vendor's solicitor telephoned the purchaser's solicitor to say that, as there had been no tender by 5 pm, 'the vendor reserves his rights'. At 5.10 pm tender was attempted. At 5.11 pm the vendor's solicitor, having refused to accept the tender, again telephoned the purchaser's solicitor to indicate that the contract was off.

The statement made at 5.01 pm could be considered to be an equivocal statement. The phrase could be interpreted as the vendor's acceptance of the purchaser's offer of repudiation so that the words simply indicated the vendor's acknowledgment that the contract was at an end. It is not up to the court to decide if an offer to repudiate should be accepted.<sup>35</sup> An alternative interpretation could be that the vendor was indicating that he was not accepting the offer to repudiate, but instead he was prepared to vary the contract, by making time not of the essence but merely reasonable. This would mean that the vendor would be estopped from refusing to accept the tender if it was made within a reasonable time. The estoppel would have been based on *High Trees*<sup>36</sup> requiring the phrase 'the vendor reserves his rights' to constitute a representation, the purchaser then accepting that representation by tendering at 5.10 pm, and the detriment being that the purchaser could not resume his former position as held at 5 pm.

A third possibility was to treat the vendor as being estopped from relying on his equivocal statement. In the event the majority in the Court of Appeal were unable to find any equitable ground for relief through estoppel or unconscionability. Godfrey JA, dissenting, thought the vendor had been taking advantage of the few minutes delay. With respect, the dissenting judgment seems to ignore two factors: first, the purchaser had entered into this contract without any vitiating factor in his defence; and second, this was not an unusual situation in Hong Kong.

The Privy Council agreed with the majority<sup>37</sup> and found that the purchaser was at fault. But the Judicial Committee went on to comment on the Hong Kong courts' reliance on the new equity from Australia. Lord Hoffmann said that unconscionability would not be enough to protect the purchaser and allow him to recover the deposit. The plaintiff needs something else to get 'out of the blocks'. Possible relief-aids would be total failure of consideration, unjust enrichment as restitution, or the new estoppel.

<sup>35</sup> *Charter View Development Ltd v Golden Rich Enterprises* [2000] 2 HKC 77.

<sup>36</sup> Note 15 above.

<sup>37</sup> In the Court of Appeal (note 29 above), Litton VP (Ching JA) saw the matter as simply one where the parties had agreed that the purchaser would complete by 5pm, there had been no waiver of essentiality of time, the purchaser was late and he had to suffer the consequences. The statement by the vendor's solicitor at 5.01pm that the vendor 'reserved his rights' did not amount to a waiver. There being no equity to prevent forfeiture of the deposit because the vendor had not acted unconscionably, and in view of the binding effect of *Steedman v Drinkde* [1916] 1 AC 275, that was an end of the matter.

But the real basis for the Privy Council's dislike of unconscionability was linked to the earlier decision of *Steedman v Drinkle*<sup>38</sup> which it is said clearly explained the exclusion of equity from these cases where 'the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be of the essence of their bargain'.<sup>39</sup> It was acknowledged, however, that it would be a different matter if the parties had varied the terms of the contract to make time reasonable rather than of the essence.<sup>40</sup> Acknowledging further that the Australian courts<sup>41</sup> had disregarded the *Steedman* approach and instead had followed *Brickles v Snell*,<sup>42</sup> a move which the Judicial Committee clearly did not appreciate, the Hong Kong courts would be urged to ignore the Australian decisions and continue to apply *Steedman*. Noting that the case had been dragging on for five years thereby 'sterilizing' the land, and finding nothing in equity to prevent the vendor from succeeding, the court decided in favour of the vendor. Indeed it was said that there was a

need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with an essential condition as to time, equity will not intervene.<sup>43</sup>

But one olive branch was thrown out: perhaps in the future *Steedman v Drinkle* could be relaxed 'as the Australian courts have done, or by the development of the law of restitution and estoppel'.<sup>44</sup> But clearly in *Union Eagle* the Judicial Committee was of the view that even had there been unconscionability, that alone would not have been enough to justify granting relief to the purchaser.

The olive branch from the Privy Council is in line with the current, accepted view that unconscionability needs a partner. One such partner is restitution; another is estoppel; still another is total failure of consideration. This partnership is often the only viable and available trigger for relief. In other cases it is chosen as the better of two possible remedies. Consider common law damages: remoteness, mitigation, the presence of a valid enforceable contract, breach of that contract and then the need to prove loss and that that loss is the plaintiff's. And do not forget limitations. Consider general equitable relief: discretionary, if specific relief is unavailable then damages in equity; and subject to laches. Now consider the new relief of restitution, that is the reversal of unjust enrichment by the restoration of value improperly received and

<sup>38</sup> Ibid.

<sup>39</sup> Ibid. per Viscount Haldane at 279.

<sup>40</sup> *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319.

<sup>41</sup> *Legione v Hately*; *Stern v McArthur* (note 14 above).

<sup>42</sup> [1916] 2 AC 599.

<sup>43</sup> *Kilmer v British Columbia Orchard Lands Ltd* [1913] AC 319.

<sup>44</sup> Note 1 above, per Lord Hoffmann at 179.

<sup>44</sup> Ibid.

retained by the defendant. Remoteness and mitigation are irrelevant. Limitations are seemingly handled quite differently for restitution. And this should be so because restitution serves to reverse unjust enrichment — if the recipient never did own the property why should he be able to retain it; if he never was the owner, it must always have belonged to the true owner, hence a variation perhaps of *nemo dat quod non habet*. Restitution can arise in cases where the plaintiff did not own the property, the subject matter of the action, until it came into existence by the default of the defendant. Where that default causes the defendant to be treated as a fiduciary, then recovery is assured. The solicitor in *Phipps v Boardman*<sup>45</sup> used knowledge gained as an adviser to trustees of an estate to show the trustees how to acquire control of a company. This was done and a large fortune was made. The solicitor sought to retain a share that he considered his due on the basis that the profits would never have been made but for his expertise and ideas. However, he was required to disgorge all to the trustees on the basis that he had not obtained informed consent from all beneficiaries. Receiving only a ‘generous allowance’ for his work, time and ideas, he no doubt would have second thoughts in the future about sharing his ideas with anyone. But the profit — which had not been in existence until the solicitor acted — was part of the estate and liable to be ‘restored’ to the estate.

By and large restitution has not totally been treated as neutral on limitations. It would seem that, because restitution crosses the boundaries of contract, tort and equity, it would be unfair to apply common law limitations to a recovery in a contract or a tort, and unfair to consider laches in an equitable setting. This is because the core of restitution is the recovery of one’s property. Of course in the *Phipps v Boardman* situation it is not so much ‘recovery’ as preventing the fiduciary (or the party retaining the benefit) from making a windfall. But most restitution cases do not make great play for laches or limitations on the ground that to do so might well be interpreted as assisting an equitable fraud. The High Court of Australia had been prepared to overturn the rule which had been in force since *Bilbie v Lumley*,<sup>46</sup> which limited recovery of money mistakenly paid to cases of mistake of fact. Instead there was now to be no distinction between mistake of law or of fact, in particular because the defendant would have been able to rely on the defences of estoppel or change of position if appropriate.<sup>47</sup> These defences may be tested by reference to limitations, although the High Court said nothing about that. The House of Lords then grasped upon the defences to convince it to agree with what had been said in *David Securities Pty Ltd v Commonwealth Bank of Australia*<sup>48</sup> and to allow recovery for mistake of

<sup>45</sup> [1964] 3 All ER 187.

<sup>46</sup> (1802) 102 ER 448.

<sup>47</sup> *David Securities Pty Ltd v Commonwealth Bank of Australia* (note 12 above).

<sup>48</sup> *Ibid.*

law; but going one step further it said that relief was retrospective: *Kleinwort Benson v Lincoln CC*.<sup>49</sup> Retrospectivity was necessary to prevent the defendant obtaining a windfall. Despite the origins of the new equity in Australia, a decision of the New South Wales Supreme Court rejected the possibility of retrospectivity for restitution because, although judicial lawmaking can operate retrospectively, this result should not interfere with limitations so that if limitations has already operated to bar the right of action there can be no going back.

It seems that discretion is administered differently with the new estoppel and restitution than is usual with general equitable remedies. Here I am using the term 'equitable remedies' in contradistinction to restitution. This is because there is not a clear consensus on whether we now have three forms of relief for obligations: contract (consensual obligations); tort (relief following the commission of a wrong); and restitution. Perhaps there are only two: contract and tort, with restitution being interwoven between the two. For the purposes of this article the question of the 3:2 debate is largely irrelevant although it should not be forgotten entirely.

### Post *Union Eagle* and related matters

Where then does unconscionability now lie in conveyancing matters? Was *Union Eagle* a storm in a tea-cup? Is there scope for the new equity in conveyancing matters or indeed in any other areas of the law? There may be situations where unconscionability would be apt but unavailable. The unavailability may have nothing to do with equity's usual discretionary bars. Whatever the reason, it is another pointer to the ad hoc uncertainty produced in conveyancing where the contract agreed upon by the parties is redrafted by the court.

#### *Estoppel against an unconscionable vendor*

Some months after *Union Eagle* the Court of Appeal decided *Pacific South (Asia) Ltd v Million Unity International Ltd*.<sup>50</sup> In a 2:1 judgment the vendor was found to have acted unconscionably to the extent that he was estopped from relying on his legal rights, and was held to have failed to have 'undeceived' the purchaser's solicitor so that the purchaser was entitled to specific performance. The point of time at which the purported repudiation occurred was at the exchange of the Sale and Purchase Agreement rather than at completion — hence the order for specific performance.

<sup>49</sup> Note 12 above.

<sup>50</sup> [1997] 3 HKC 440.

In *Pacific South (Asia) Ltd* the purchaser had executed the Provisional Agreement (PA) and had paid an initial deposit. The parties were then to execute a formal Sale and Purchase Agreement (SPA) and the purchaser was to pay the balance of the deposit at this time. Eventually the SPA was ready for exchange and the purchaser's solicitor sent to the vendor's solicitor an executed copy of the SPA for exchange, together with a personal cheque from the purchaser for the balance of the 20% deposit. The purchaser's copy of the SPA and the cheque went back and forth between the solicitors. At one stage the purchaser did obtain a copy of the SPA executed by the vendor but the cheque remained unaccepted. Finally the vendor's solicitor informed the purchaser's solicitor that the vendor accepted the purchaser's offer of repudiation and the contract was off. Unsure of why anything done by the purchaser would be treated in this way, the purchaser sought specific performance of the contract through a vendor-purchaser's summons. The trial court found for the purchaser, a decision that was upheld on appeal by a 2:1 majority decision.

Bearing in mind the admonition of the Privy Council, the majority did link unconscionability to estoppel. What had the vendor done wrong? The core of the complaint by the vendor was that the cheque tendered for the balance of the deposit was a personal cheque of one of the directors of the purchaser company, but should have been a cashier's order or a cheque drawn on the account of the purchaser's solicitor. But this fact was not communicated to the purchaser's solicitor until acceptance of the 'repudiation'. This was considered to be unconscionable because the vendor's solicitors had 'led the purchaser's solicitors into a trap'.<sup>51</sup> The purchaser's solicitors thought the cheque was rejected because it had been paid over too soon. Because the vendor's solicitors knew the purchaser's solicitors were unaware of the reason for rejection of the cheque, the latter should have been informed. As they had not been informed, the vendor's solicitors had an 'obligation to undeceive the purchaser's solicitors'.<sup>52</sup> They failed to do so and so the vendor could not rely on his legal rights. The judgment illustrates a merging of identities of the vendor and its solicitors so that it is not altogether clear on whom lay the blame for the negative representation, ie the failure to communicate the reason. In this case the estoppel arose because:

Where one party to a transaction perceives that the other party is labouring under a mistake as to some essential matter, he comes under an obligation to undeceive the other party and his omission to do so will foster and perpetuate the delusion. In our case, the vendor's solicitors knowing that the purchaser's solicitors believed the objection to the tender was on the

<sup>51</sup> *Ibid*, per Godfrey JA at 447.

<sup>52</sup> *Ibid*, per Godfrey JA at 448.

ground of its prematurity came under an obligation to undeceive the purchaser's solicitors, an obligation which, disgracefully, they failed to discharge.<sup>53</sup>

Could not the purchaser's solicitors have asked why the cheque was being rejected? Should they not have known that a personal cheque would not be acceptable? Be that as it may, the Court of Appeal was prepared to place the burden on the vendor or on its solicitors. This was not a consumer transaction. The purchase price was \$205 million and both parties were companies. But a negative estoppel was able to ground the unconscionability and to give relief to the purchaser.

#### *The defaulting vendor*

It may be thought that where the purchaser is the innocent party then, in the absence of a clause to the contrary in the contract, the vendor will be required to return the deposit, and to pay damages. But damages may not be awarded if *Bain v Fothergill*<sup>54</sup> applies. Further, the situation may be one where the vendor relies on *Want v Stallibrass*<sup>55</sup> to deny recovery even of the deposit. Both of these cases reflect nineteenth century concerns with the difficulties and uncertainties in establishing title to land to the extent that it was implicit in a contract for the sale and purchase of land that the purchaser's right to relief would be restricted where the vendor was not able to show good title. In the year 2000, Hong Kong is one of the last jurisdictions to enforce these decisions.

The rule in *Bain v Fothergill* has been abolished in most jurisdictions except Hong Kong. From 1874 in England, legislation has enabled the court to exercise its discretion to overturn *Flight v Booth*,<sup>56</sup> and in effect to treat the decision in *Want v Stallibrass* as the norm regardless of the state of the vendor's title: see s 9 of the Vendor and Purchaser Act 1874, and s 49(2) of the Law of Property Act 1925. A proposal that Hong Kong adopt s 49(b) is being considered at present, and may be adopted in this session of the Legislative Council.

What do these cases provide? *Bain v Fothergill* allows the vendor to evade damages where the contract has been discharged because the vendor is unable to make good title. The purchaser will recover his deposit, and conveyancing expenses but nothing else, except perhaps interest on late payment. There are exceptions to the rule that have the effect, if applicable, of enabling the purchaser to seek substantial damages. However, complicating this in Hong Kong is the common clause in the SPA that restricts the purchaser's remedies

<sup>53</sup> Ibid.

<sup>54</sup> Note 27 above.

<sup>55</sup> Note 27 above.

<sup>56</sup> (1834) 1 Bing NC 340.

on the vendor's default. This is not a situation of unconscionability on the part of the vendor. Any such behaviour is excused unless it falls within the exceptions to the rule. Hong Kong still applies *Bain v Fothergill*, although there have been judicial comments that it should not do so. But every so often it is applied without criticism: see for example *Roseric Ltd v West River Development*<sup>57</sup> (against) and *Ma Hon Meng v Lee Tsan Sum*<sup>58</sup> (in favour).

*Want v Stallibrass* followed *Flight v Booth*<sup>59</sup> but added a proviso to that decision. The severity of *Flight v Booth* could not operate where the vendor had no title at all. In all other cases, the *Flight v Booth* rule prevents the purchaser from recovering the deposit, even where the vendor does not have good title, if the contract contains a term allowing the purchaser to make requisitions on title within a specified time, and he failed to do so. The purchaser is then treated as having defaulted if later it is discovered that the vendor did not have a good title. The vendor cannot obtain specific performance. The contract is terminated. But despite this, the purchaser cannot get his deposit back. The principle is that it is thought that it would be too harsh to require the vendor to return the deposit where, without fraud, he was the victim of the uncertain and complicated intricacies of the English system of real property. In 1874, s 9 of the Vendor and Purchaser Act, and later s 49(2) of the Law of Property Act 1925, gave the court in England a discretion to return the deposit to the purchaser where the purchaser applied under a vendor-purchaser summons if that was necessary to do justice to the parties.<sup>60</sup> It is only where the vendor has absolutely no title because it is wholly bad, that the purchaser is able to get back the deposit. Section 12 of the Conveyancing and Property Ordinance,<sup>61</sup> providing for the procedure of the vendor-purchaser summons, does not contain a discretionary power along the lines of that in s 49(2). It is timely that amendment to s 12 be considered.

Apart from the fact that *Flight v Booth* and *Want v Stallibrass* are considered to continue to apply in Hong Kong, it may have been possible for the purchaser to take action for restitution on the basis that the vendor obtained a benefit which he cannot retain. But the vendor would use these decisions as a defence. Consequently a court would be hesitant to treat a vendor as acting unconscionably if he relied upon them. Avoidance of them and *Bain v Fothergill* either awaits the enactment of the Land Titles Bill,<sup>62</sup> or requires legislative assistance. The circumstances in which *Bain v Fothergill* is applied would not

<sup>57</sup> [1993] 2 HKC 404.

<sup>58</sup> (2000) HCA No 1620/98.

<sup>59</sup> Note 56 above.

<sup>60</sup> *Universal Corp v Five Ways Properties Ltd* [1979] 1 All ER 552.

<sup>61</sup> Cap 219.

<sup>62</sup> It should be noted that *Bain v Fothergill* has long been abandoned in jurisdictions applying a system of title by registration, known as the Torrens system. Further, these jurisdictions have enacted legislation similar to s 49(2) in the event that it is needed.

ordinarily be apt for unconscionability or restitution because the purchaser does at least get back the deposit and certain expenses.

Perhaps the desire to apply the new equity in respect of the purchaser who is deemed to have repudiated the contract is intended to counteract the harshness of the doctrines and principles applied against him in these two cases.

*How do hard cases make good law?*

Where necessary local courts will ignore the new equity and apply the law as it is. One such case which would seem to 'cry out' for intervention was that of *Chekiang First Bank v Fong Siu Kin*.<sup>63</sup> The defendant sought to avoid losing her land which was subject to a third-party charge, on the basis that her entry into the contract had been effected under undue influence. In fact the trial court found this was not proven. On appeal the Court of Appeal agreed. This is a case that would have fitted well into the framework of an unconscionable bargain in the mould of *Commercial Bank of Australia v Amadio*.<sup>64</sup> It may even be that it was a much stronger case than *Amadio* but no reference was made to unconscionability nor to unconscionable bargains by the defendant. In *Chekiang First Bank* an elderly lady had charged her only asset as security for a loan by the chargee to a third party whom she did not know and who had only a vague relationship to her daughter. The third party's wife had been to school with the mortgagor's daughter. The chargor was unable to have the charge set aside simply because:

The legal position is straightforward. [The plaintiff] entered into a legally binding transaction. She failed to establish facts which might have enabled the judge to relieve her of her legal obligations by applying equitable principles.<sup>65</sup>

The solicitor for the chargee acted for both the chargor and the borrower. No one explained to the chargor, an elderly and illiterate lady, the consequences of entering into such a transaction. It was manifestly disadvantageous to her. But the chargee knew nothing of her situation, even though the same solicitor acted for all three parties. The court considered that this represented 'such a situation of conflicting duties that they could not have properly discharged their responsibility' to the chargor which 'was at best peripheral' to the question before the court.<sup>66</sup>

Undue influence could not be proven against the chargee; neither could undue influence of the type in *Barclays Bank v O'Brien* apply because, as there

<sup>63</sup> [1997] 2 HKC 302.

<sup>64</sup> Note 5 above.

<sup>65</sup> Note 63 above, per Litton VP at 310.

<sup>66</sup> *Ibid*, per Litton VP at 306.



was no relationship at all between the chargee and the chargor, there was no situation of trust and confidence to be abused by the chargee. Hence no avoidance on the *O'Brien* argument.

What should have been raised by the chargor was unconscionability or preferably unconscionable bargain. As Godfrey JA observed:

The law does not save people from the consequences of their own folly or improvidence. It does, however, save them from being imposed upon by the unconscionable conduct of others.

So, if the third party is 'poor and ignorant', and thus it is unconscionable to take advantage of him, the bank's security may be set aside, especially where, as here, the asset given by the third party as the security is the third party's only asset of value. ... But no such case was pleaded or proved below nor advanced here (although perhaps it might have been) and I say no more about it.<sup>67</sup>

One might have gone further and say that this really was an unconscionable bargain but for one fact: the chargee was not taken to have known of any disability of the chargor. But had the chargor pleaded *Amadio*, should not the fact that the same solicitor acted for everyone involved have constituted notice because of the disability?

#### *New approaches by the common law*

It may seem a wrong juxtaposition to consider common law damages in the context of the previous discussion. After all, *Hadley v Baxendale*<sup>68</sup> and subsequent decisions have provided a consistently strict regime for relief. But 'times are a-changing' even for common law damages. There have been several recent decisions, supporting others of not long duration, that seem to overturn *Hadley v Baxendale* and the general principles applicable to common law damages. *Hadley v Baxendale* required that breach of the valid contract caused the plaintiff to suffer loss. Recovery of this loss was restricted to the plaintiff in his action against the defaulting defendant; otherwise the doctrine of privity would have been gravely damaged. Yet *Alfred McAlpine Construction Ltd v Panatown Ltd*,<sup>69</sup> and *AG v Blake*<sup>70</sup> seem to have overturned these principles without shattering the mould of common law relief. The fulcrum for relief by way of common law damages has been that of unconscionability or restitution. It may be that these are examples of restitution for a wrong rather than damages for breach.

<sup>67</sup> *Ibid*, per Godfrey JA at 310.

<sup>68</sup> (1854) 9 Ex 341.

<sup>69</sup> [2000] UKHL 43.

<sup>70</sup> Note 4 above.

But simply put, the cases have decided that a defendant who has breached the contract can no longer escape an obligation to compensate the plaintiff, under the guise of common law damages, where the plaintiff himself suffers no loss (because none flows from the breach), or where loss does flow but that loss is suffered only by a third party (so that even though 'damages' are awarded to compensate fictitious loss by the plaintiff, quantified by reference to the third party's loss, the plaintiff can keep the damages because there is no obligation to pass them onto the third party).

This seems to be an ideal illustration of a fact pattern that gives the plaintiff a benefit, to which he is not entitled, at the expense of the defendant. It seems that the plaintiff is receiving a 'windfall'. The defendant is quite clear that fact and law are on his side: the plaintiff suffered no loss so why should he receive damages which are to be awarded at common law to compensate loss? English courts have in recent years re-examined two fundamental principles and come up with surprising decisions in several cases. The principles are: first, that damages compensate loss so loss must be proven; and second, privity prevents anyone not a party to the contract from suing or being sued on it. Thus damages were recoverable in *Radford v De Froberville*<sup>71</sup> (no loss suffered by the breach but the innocent party was going to perform the defendant's obligations) but not in *Surrey CC v Bredero Homes Ltd*<sup>72</sup> (no loss suffered from the breach because the plaintiff was seeking to share in the profits of the defendant). Damages were recoverable in *Linden Gardens v Lenestra Sludge Disposals Ltd*<sup>73</sup> (no loss, but recovery to prevent defendant profiting from his breach) but not in *Ruxley Electronics and Construction Ltd v Forsyth*<sup>74</sup> (no recovery because it was not damages being sought but the cost of the cure). Earlier oddities include *Jackson v Horizon Holidays*<sup>75</sup> (damages for loss of enjoyment, including that of third parties, and no problem with privity in a holiday situation). But it is the *Surrey* and *Linden* situations that have the strongest links to equity, and these links have been extended by the recent cases of *McAlpine* and *AG v Blake*. The latter case is quite honestly acknowledged to be an equitable result.

Even though the House of Lords had affirmed in *Ruxley* that common law damages compensate loss, and re-affirmed this in *McAlpine* it was prepared to grant relief in reliance on, or because of, equitable principles which present a defendant using his ill-begotten gains, as for example *Phipps v Boardman*.<sup>76</sup>

*Bell v Lever Bros*<sup>77</sup> is a good example of the old rule, and *McAlpine* is a good example of the new. So on the common law damages front, the new equity

<sup>71</sup> [1977] 1 WLR 1262.

<sup>72</sup> [1993] 3 All ER 705.

<sup>73</sup> [1993] 3 All ER 417.

<sup>74</sup> [1995] 3 WLR 118.

<sup>75</sup> [1975] 1 WLR 1468.

<sup>76</sup> Note 45 above.

<sup>77</sup> [1932] AC 161.

seems to be doing well. Another example if needed is that of *Banque Financiere de la Citie v Parc*<sup>78</sup> where a group of prior mortgagees were required by a later mortgagee to forego individual priorities in favour of the later lender. The Letter of Postponement executed by all mortgagees and the borrower was not binding on one mortgagee, and he required payment in accordance with his existing priority. This mortgagee was required to disgorge the payment because the commercial interpretation of the transaction required that he be subordinated to the later. The chargee was a member of a group of companies of which the other prior mortgagees and the mortgagor were part. The later chargee would not have contracted but for the promise of postponement of priority and so although not bound, the prior mortgagee had to give way to the later. Here it was a question of unjust enrichment.

### Conclusion

There has been extensive criticism of *Union Eagle*. Indeed this writer is critical of the views expressed in its obiter on the basis that the Privy Council was not acknowledging that the new equity has adapted to communal needs since the time of the decision of *Steedman v Drinkle* and other such cases. On the facts of *Union Eagle* the writer would find little, or no, cause to disagree with the result because conveyancing law and practice does make time of the essence, and the words used at 5.01 pm could — perhaps by drawing not too long a bow — constitute an acceptance of the offer of repudiation. It is significant that these words were uttered *after* the due time for completion — albeit one minute later. If time was of the essence that contract was then ended for all purposes except those of relief, in the sense of the secondary obligations.<sup>79</sup> Thus the notion that a vendor could legally be offering to vary the terms of the contract by converting essentiality of time into merely reasonableness of time, is contractually impossible because nothing could revive the expired contract. Therefore, on contract terms alone the contract was at an end and the only shadow remaining was the right to relief.

If the words were to be treated as converting essentiality into reasonableness it would be necessary to show that the vendor did not treat the failure to tender on time as a repudiatory breach; or that if he had done so he had elected not to accept the offer of breach — thereby keeping the contract alive — and hence varying its terms (unilaterally? for consideration? or was it a bilateral variation?) to extend the time for payment. That extension was one of 10 minutes! Would a court consider that a logical conversion from essentiality to reasonableness would last a mere 10 minutes?

<sup>78</sup> [1998] 1 All ER 737.

<sup>79</sup> *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827.

If the conclusion is that these words, if not illustrative of the vendor's acceptance of the repudiatory breach, were at least ambiguous, then it would be reasonable to expect that if the vendor decided to extend the time for completion, this is something his solicitor could have communicated when on the phone at 5.01 pm. The vague and imprecise words used could lead to various interpretations but logic and practice would dictate that the vendor was not converting essentiality into reasonableness, but was merely accepting the offer of breach.

But if the failure to tender at 5.00 pm was the offer and if the words used at 5.01 pm constituted the acceptance, there was nothing in the *Union Eagle* facts to indicate that the vendor had acted unconscionably in relying on his legal rights. And if this is so, there would seem to be no right to pursue the vendor for relief against forfeiture of the deposit, bearing in mind that the action for relief whilst founded on unconscionability, probably even then needed something more than that simple claim. So if accepting that the Privy Council was correct in its decision, with the consequence that the 5.01 pm words were the acceptance of the offer, and knowing that Hong Kong practice has long provided that there is 'no elasticity in punctuality' and accepting that the vendor did nothing inequitable in relying on his legal rights, the purchaser in *Union Eagle* had to lose the case. It may leave a sour taste in the mouth and we may not like it. But the law it is, and certainty is thereby achieved.

What *Union Eagle* has shown Hong Kong is that the refusal of relief on one ground is not the end of the matter — relief should be sought on an alternative ground focused on expansive and generous equity.

Unconscionability is the DNA running through estoppel and restitution: it is at their core. Hence estoppel will found a contract where denial of its existence would allow the representor to avoid his legal obligations.<sup>80</sup> Restitution will be available to reverse unjust enrichment.

The richness of Hong Kong equitable jurisprudence does have a place for the new equity. How the two concepts of indulgent generosity and that of the need for certainty are to co-exist is another matter. A legal system without the provisions for something like restitution, unconscionable bargains, or even estoppel in the new forms, would by its very parsimony deny justice which so many centuries ago flowed from the fountain of justice, and which matured by way of Chancery into our abundant equity of today. Conveyancing contracts have long been described as creating 'conscientious obligations'.<sup>81</sup> The application of the new equity will ensure that interpretation continues.

<sup>80</sup> *Walton's Stores (Interstate) Ltd v Maher* (note 16 above).

<sup>81</sup> *Barry v Heider* (1914) 19 CLR 197, per Isaacs J at 213.