IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[1995] SGCA 58

CA 149/1994

Between

Pacific Rim Investments Pte Ltd

… Plaintiff

And

Lam Seng Tiong
Another

… Defendant

GROUNDS OF DECISION

Courts and Jurisdiction — Jurisdiction; Equity — Defences — Equitable set-off; Land — Sale of land; Land — Sale of land

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Pacific Rim Investments Pte Ltd v Lam Seng Tiong and Another

[1995] SGCA 58

CA 149/1994
Karthigesu JA; L P Thean JA; Yong Pung How CJ
08 July 1995

1 Cur Adv Vult

2 This is an appeal against the decision of Warren LH Khoo J, in which he granted specific performance of the sale and purchase agreement dated 2 November 1992 (the agreement) made between the appellants (the vendors) and the respondents (the purchasers), whereby the vendors agreed to sell to the purchasers a semidetached house, No 41 Lorong Marzuki, Singapore (the property) at the price of $1m. [See [1995] 2 SLR 194 .] The proceedings were brought by the purchasers following a purported termination of the agreement by the vendors on 25 January 1994. The sale and purchase has since been completed on 15 September 1994 pursuant to the order of the learned judge.

3 **The facts**

4 When the agreement was signed in 1992, the property was then under construction. Although the vendors were not developers subject to the Housing Developers (Control and Licensing) Act (Cap 130) (the Act), the agreement was modelled on the form as prescribed by the Rules made under the Act. The

agreement provided, inter alia, for payment of the purchase price by instalments. By cl 3 thereof, the purchasers were required to pay each instalment within 14 days after the receipt of a notice from the vendors that a particular stage of development has been completed. The progress payments which are material in this appeal are those under cl 3(1)(h) and (i) and these provisions are as follows:

> *(1)The purchase price shall be paid by the purchaser to the vendor by instalments and at the times following that is to say:*
>
> (h) within fourteen (14) days after receipt by the purchaser of the vendor`s notice to take possession … a sum equal to twenty (20) per cent of the purchase price;
>
> (i) on completion of the sale and purchase of the building unit in accordance with cl 14 hereof, the balance ten (10) per cent of the purchase price to be dealt with as follows:
>
> (aa) two (2) per cent of the purchase price shall be paid forthwith to the vendor;
>
> (bb) the remaining eight (8) per cent of the purchase price shall be paid to the purchaser`s solicitors as stakeholders, and the said sum or the balance thereof (***after any deduction has been made in accordance with cl 18 hereof and for moneys owing to the purchaser***) shall be paid to the vendor within seven (7) days … . [Emphasis is ours.]

5 Under cl 4 time was made of the essence of the contract in respect of the payment of any instalment of the purchase price or any part thereof. The consequences of a failure to comply with cl 3 were provided for in cl 5, under which, essentially, the vendors were entitled to interest for the late payment of any instalment and the interest was to run from the end of the period as stated in the relevant notice of payment. Clause 5 also provided that if the instalment and interest were unpaid for any period in excess of 14 days after the expiry of the period stated in the notice, the vendors were at liberty to give the purchasers a further notice in writing of not less than 14 days of their intention to treat the agreement as having been repudiated by the purchasers and upon the expiry of the said notice, the agreement would be annulled, unless in the meanwhile such

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unpaid instalment and interest had been made within the period stated in the notice. Once again, time was expressed to be of the essence. If the agreement was so annulled, the vendors would be entitled to resell the property and forfeit 20% of the purchase price out of the instalments paid to them and refund the balance of the instalments, if any, to the purchasers.

6 Finally, it is also relevant to refer to cl 11, by which the vendors agreed to deliver vacant possession to the purchasers on or before 30 September 1993. In the event of a delay in giving vacant possession, the vendors were liable to pay to the purchasers liquidated damages at the rate of 10% pa on the total amount of all the instalments of the purchase price which had already been paid, calculated daily from 1 October 1993 to the actual date of giving of vacant possession.

7 Having set out in summary this contractual scheme, we now advert to the dispute which has arisen between the parties. By 30 July 1993, the purchasers had paid 70% of the purchase price as provided for under paras (a) to (g) of cl 3(1). The next stage is that under para 9(h), and it was for the vendors to give notice to the purchasers to take possession of the property. That they had failed to do prior to the date stipulated in cl 11, ie 30 September 1993. Only on 10 December 1993 did the vendors give to the purchasers the notice to take possession of the property under cl 3(1)(h) (cl 3(1)(h) notice). By that date, the vendors had become liable to pay to the purchasers liquidated damages under cl 11. Nevertheless, upon receipt of the cl 3(1)(h) notice, the purchasers were obliged to pay to the vendors 20% of the purchase price amounting to a sum of $200,000 within 14 days, ie by 24 December 1993. The purchasers, however, failed to comply with the cl 3(1)(h) notice and did not pay the vendors the sum of $200,000 by 24 December 1993. By 5 January 1994, the certificate of title to the property had already been issued and the vendors were in a position to

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complete. They, therefore, gave a notice pursuant to cl 3(1)(i) (the notice to complete), requiring the purchasers to complete the purchase and pay the last 10% of the purchase price within 14 days, ie by 19 January 1994. The amount payable was quantified by the vendors in the sum of $21,650 which included survey fees amounting to $1,650.

8 On 8 January 1994, the purchasers paid to the vendors a sum of $100,000 being part payment of the 20% of the purchase price under the cl 3(1)(h) notice. Following that, the vendors exercised their rights under cl 5 of the agreement, and on 10 January 1994 they served a notice under cl 5(1) (cl 5(1) notice) requesting the purchasers to pay the `outstanding progress instalment due under cl 3(1)(h) of the sale agreement together with interest thereon` within 14 days from the receipt of the notice, failing which the vendors would treat the agreement as having been repudiated by the purchasers. Thus, the expiry date of this notice was 25 January 1994. In response to the cl 5(1) notice, the purchasers paid the remaining $100,000 under cl 3(1)(h) on 12 January 1994. However, they did not pay the interest which had accrued from the late payment of the instalment under cl 3(1)(h). On 18 January 1994, the solicitors for the purchasers wrote to the solicitors for the vendors to explain their position in the following terms:

> *The interest for late payment of progress instalments amounts to $931.50.*
>
> Vacant possession was given to our clients today. The liquidated damages payable by your clients is $21,059.89.
>
> Kindly note that at completion, we require a cashier`s order for the balance sum of $20,164.39 issued in favour of [respondents] ... .

9 In response, solicitors for the vendors, on 20 January 1994, wrote thus:

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> We refer to the above matter and to the teleconversation between our respective clerks on 19 January 1994 wherein we have informed you that our clients have executed the transfer and that we are ready to complete this matter.
>
> We are instructed by our clients that they will charge your clients interest for late completion herein with effect from the 19th instant up to the actual date of completion.
>
> We are also instructed by our clients that they are not agreeable to your clients` claim for liquidated damages for the period 30 September 1993 to 18 January 1994 amounting to $21,095.89.

10 It was unclear whether the vendors were `not agreeable` to the liability or the amount of liquidated damages. But, certainly there was liability on the part of the vendors to pay liquidated damages, and it seems to us that the dispute could relate only to the quantum.

11 On 22 January 1994 the purchasers` solicitors wrote the vendors` solicitors stating, inter alia, the following:

> *We wish to inform you that we are also ready to complete but are not prepared to do so unless you settle our clients` claim for liquidated damages at completion. Our computation is according to cl 11 of the said sale and purchase agreement. There will be no compromise over this. If you think our computation is not correct, please clarify ... .*

12 In the circumstances, you are not entitled to charge interest as it is clear you are not in a position to complete this matter. Kindly note that if we do not hear from you by Monday, 24 January 1994, our clients will charge your clients interest for late completion with effect from 25 January 1994.

13 The vendors then replied on 24 January 1994 as follows:

> … Your clients` claim for the liquidated damages should be for the period 1 October 1994 to 10 December 1994 amounting to $13,616.38 and not $21,059.89 as computed by you.
>
> … In any event, any deduction for liquidated damages should be made from the balance of the progress instalment due under s 3(1)(i)(bb) of the sale agreement.
>
> Our clients maintain that they are entitled to charge your clients interest for any late payment of the outstanding progress instalments.
>
> For your information, the interest for late payment of the progress instalment due under cl 3(1)(h) of the sale agreement is $958.90. Our clients require this sum to be paid to us immediately.

14 However, the very next day, the vendors wrote to the purchasers informing them that the vendors regarded the agreement as having been repudiated by the purchasers, as the latter had defaulted in the payment of the late payment interest within 14 days of the cl 5(1) notice, and, therefore, the agreement had been annulled. Following the purported annulment of the agreement, the purchasers commenced proceedings against the vendors.

15 **The decision below**

16 Warren LH Khoo J, who heard the case, decided that the only issue was whether the vendors were entitled to treat the agreement as having been repudiated by the purchasers. The learned judge held that the liquidated damages were payable as soon as ascertainable, and the amount had crystallized by the time the cl 3(1)(h) notice was given to the purchasers on 10 December 1993. The purchasers had the right at any time after receipt of the notice to be paid the liquidated damages due or to set off this amount against any sum due to the vendors. Moreover, as at 18 January 1994 when the set-off was exercised, the liquidated damages payable by the vendors far exceeded the late payment interest payable by the purchasers. In the premises, the learned judge found that

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it was the vendors rather than the purchasers who had wrongfully repudiated the agreement. Accordingly, he ordered specific performance of the agreement.

17 **The appeal**

18 Before us, counsel for the vendors raised three grounds of appeal. First, it was submitted that the purchasers had, in breach of their obligation, failed to complete the purchase on 19 January 1994, and as of that date the amount payable by the purchasers to the vendors exceeded the liquidated damages payable by the vendors to the purchasers. Next, it was submitted that set-off is a procedural right which the purchasers could only raise in legal proceedings brought against them; it is not a substantive defence to which they could have recourse as a form of self-help remedy. On either of these grounds, the vendors were entitled to treat the agreement as having been repudiated by the purchaser`s failure to pay on time and the agreement was properly terminated or annulled after the expiry of the cl 5(1) notice. Finally, if the vendors succeeded on either of the two grounds, counsel further submitted that the court could not grant relief against forfeiture of the purchasers` interest in the land.

19 **Failure to complete**

20 We turn to the first ground. It was not disputed that the completion date was 19 January 1994 pursuant to the notice to complete given on 5 January 1994. As of the date of completion, the purchasers were liable to pay the remaining balance of the purchase price and to complete the purchase. Therefore, counsel for the vendors submitted that according to , the purchasers were under an obligation to complete by tendering the correct amount due on completion, even if there was a dispute as to the amount payable. The fact that a completion account had not been provided by the vendors did not affect their

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obligation to do so: . The purchasers, however, had taken a wrong legal position when they failed to complete the purchase: they claimed liquidated damages which was at that stage not properly accounted for and refused or failed to complete. In any case, as at 19 January 1994, the balance due from the purchasers to the vendors clearly exceeded the amount of liquidated damages payable by the vendors to the purchasers and could not be completely set off.

21 This argument, in our opinion, is misconceived. The issue is whether the vendors had acted within their legal rights when they treated the agreement as having been repudiated by the purchasers and sought to terminate or annul the agreement. The purported termination or annulment was based on the cl 5(1) notice and that notice was in respect of the purchasers` failure to pay the interest on the late payment of the instalment due under the cl 3(1)(h); it was not based on the failure to complete the purchase. Their letter of 25 January 1994 which sought to terminate the agreement, stated, in so far as relevant, the following:

> *The fourteen (14) days for payment of the outstanding interest had expired and todate [sic], your clients have still not paid the same.*
>
> Without prejudice to our clients` rights under the sale agreement, we are instructed by our clients to and do hereby give you notice that our clients have accordingly treated the sale and purchase agreement as having been repudiated by your clients.

22 Whilst the failure to complete on time did give rise to a liability for payment of interest on the balance sum payable on completion and other consequences, it has no bearing whatsoever on the alleged repudiation of the agreement by the purchasers relied upon by the vendors. True it is that the purchasers did not complete the purchase on 19 January 1994; however, the vendors did not raise a further notice under cl 5(1) in respect of the purchasers` failure to complete and accordingly were not entitled to treat the agreement as

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having been repudiated by the purchasers` failure to pay the amount due on completion. We therefore reject the first ground of appeal.

23 **Equitable set-off in general**

24 We now turn to the second ground. As at 18 January 1994 the amount of liquidated damages payable by the vendors to the purchasers under the agreement stood at $13,616.38 and thus was far greater than the amount of interest, $931.50 (according to the purchasers) or $958.90 (according to the vendors), which had accrued as a result of the late payment of the instalment under cl 3(1)(h). The purchasers claimed to set off the interest against the liquidated damages. This is an equitable set-off, and the purchasers claimed that it was available to them as a substantive defence to the vendors` claim for the interest. The contention of the vendors, on the other hand, was that this right of set-off is a procedural rather than a substantive one. At best, the purchasers were entitled to rely on this right to claim liquidated damages in legal proceedings when brought by the vendors for recovery of the interest for late payment; it is not a substantive right exercisable in the form of a self-help.

25 The crucial issue here is whether this set-off, which is an equitable set-off, is a procedural or substantive right because different consequences flow. If the equitable set-off is a substantive defence, the first consequence is that its existence provides justification for the person with that right (the debtor) to withhold payment to the other party (the creditor) in the absence of legal proceedings. In short, it is a form of self-help remedy available to the debtor who is not obliged to await legal proceedings to be brought to deduct his cross-claim. Secondly, since the debtor is entitled to assert the right of equitable set-off outside the legal proceedings, the creditor is prevented from exercising extrajudicial rights and remedies for default which include the termination of a

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contract. Lastly, set-off as a cross-claim may be time-barred if it is brought in a separate action by the debtor to enforce it. However, as a substantive defence, it remains available to the debtor in legal proceedings brought by the creditor.

26 Counsel for the vendors cited extensive passages from ***Legal Problems on Credit and Security*** by Professor RM Goode to show that equitable set-off is merely a procedural remedy and does not operate as a substantive defence. At pp 132-133, Professor Goode opined:

> *Set-off is a procedural right by which a person against whom a claim for money, or for other relief based on the non-payment of money, is made in proceedings may set up a countervailing claim in reduction or discharge of his liability on the plaintiff`s claim. It is to be distinguished from a substantive defence in that the defendant admits liability on the claim but contends that he ought not to be required to pay more than the balance, if any, remaining after deduction of his cross-claim, and that if there is no such balance then any other relief claimed by the plaintiff on the ground of the defendant`s non-payment should be denied. Set-off thus goes not to substantive liability on the claim but to the amount for which the plaintiff is entitled to obtain judgment and the availability of non-monetary judicial relief based on non-payment.*

27 Two grounds were provided by Professor Goode for his view, both of which were adopted by counsel for the vendors. These were at pp 138-139:

> The history of set-off shows that it evolved as a purely procedural shield, not a substantive defence. The requirement of equity that the cross-claim should `impeach` the claim might be thought to suggest that it operated as a substantive defence. Nothing could be further from the truth. If the plaintiff`s performance of his counter-obligation had indeed been a condition precedent to his own right of payment the assistance of equity would never have been required; the defendant would simply have taken his stand on the contract. The intervention of equity was required precisely because the cross-claim did not constitute a substantive defence. In matters of set-off, courts of equity, like courts of law, respected the agreement between the parties and intervened only to require account to be taken of the cross-claim at the stage of judgment or execution.

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> Equitable set-off was never invoked to override an express or implied contractual agreement that the promise and counter-promise should be independent of each other, still less that obligations under separate contracts should be kept separate.
>
> So it has remained to this day. Though in modern practice pleaded as a defence, the defendant`s cross-claim does not constitute a denial of liability; on the contrary, it amounts to an admission that the defendant is liable on the claim and a contention that he is entitled to set off his cross-claim in reduction or extinction of the amount for which the plaintiff is entitled to judgment. ... [S]et-off under English law is purely procedural and takes effect on and from the date of judgment. Neither the plea of set-off nor the judgment resulting from it operates retrospectively to validate the defendant`s withholding of payment. The courts of common law ***could*** have evolved a substantive defence doctrine comparable to that of the civil law, treating the assertion of the cross-claim as a deemed payment by force of law except where excluded by the contract, but they did not do so; and courts of equity left the determination of the substantive rights to the courts of common law, intervening by injunction to require account to be taken of the cross-claim for the purpose of judgment or enforcement where the justice of the case so required. Hence the fusion of common law and equitable jurisdiction resulting from the Supreme Court of Judicature Act 1873 did not produce any new substantive right; set-off in equity remains what it has always been, procedural only.

28 Counsel for the purchasers submitted that Professor Goode`s opinion on the nature of equitable set-off is very much against the weight of authorities which clearly bear out that equitable set-off is a substantive defence, exercisable as a form of self-help remedy.

29 On this issue, we take as the starting point the case of , where the plaintiff sought to recover from the defendant a sum due under a building contract and the defendant counterclaimed or claimed by way of set-off (i) a sum on quantum meruit for extra work carried out, (ii) that the loss was caused by the plaintiff`s refusal to admit the defendant`s workmen, and (iii) damages for trespass to the defendant`s tools. It was held by the Court of Appeal that there was an equitable set-off of the cross-claim by the defendant against the claim of the plaintiff and

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the court gave judgment to the defendant on the claim and judgment to him on the counterclaim for the balance. In the course of his judgment, Morris LJ gave a learned exposition of the origin of the doctrine of equitable set-off. He said, at pp 18-19:

> *Before the passing of the Judicature Acts there were circumstances in which a court of equity would restrain one who was a plaintiff in an action at law from proceeding until the further order of the court with the trial of his action at law, or might restrain him until the further order of the court from levying execution upon a judgment obtained in his favour. The court of equity would not act merely because there were cross-demands. The assistance of the court of equity would only be given to someone who could show some equitable ground for being protected against his adversary`s demand. Lord Cottenham LC made that clear in 1841 in his judgment in* ***Rawson v Samuel*** *[(1841) Cr & Ph 161, 178]. Lord Cottenham examined the reported cases dealing with what he said was `familiarly` spoken of as `equitable set-off`, and came to the conclusion that what had to be established was that there was an equity which went to impeach `the title to the legal demand`.*
>
> After the Judicature Acts were passed it was no longer necessary for a defendant to bring a separate action if he had a cross-claim. He could present his cross-claim in the existing action brought against himself. So counterclaim, the creature of the Judicature Acts, became possible. ...
>
> If a plaintiff had a demand which was a matter of equitable jurisdiction and brought proceedings in a court of equity, then not only could there be a set-off in regard to any liquidated demand but the courts of equity allowed a defendant to defend by showing that he had what was called an equitable set-off, that is, as Lord Cottenham pointed out, some equitable ground for being protected against the claim.

30 Developing parallel to equitable set-off, which evolved in the courts of equity, were the rights of legal set-off and abatement at common law. In an action at law, a defendant could only exercise the right of legal set-off after the passing of the Statutes of Set-off. This statutory creation was a purely procedural right which allowed liquidated claims or mutual debts to be heard in the same action and to be set off, even if the claims were not connected. In

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contrast, an unliquidated claim could not be set off in the same action. To mitigate the unjustness of such a rule, the common law courts developed the doctrine of abatement, which allowed the set-off of unliquidated claims. However, abatement was itself of limited application and was only available in respect of contracts for the sale of goods or for work or labour: see at p 871 [in M & W], [or] p 1293 [in ER]; , at p 215.

31 After the passing of the Judicature Acts, equitable defences could be relied upon in actions at law. Again, we quote what Morris LJ said in at pp 23-24:

> The position is, therefore, that since the Judicature Acts there may be (1) a set-off of mutual debts; (2) in certain cases a setting up of matters of complaint which, if established, reduce or even extinguish the claim, and (3) reliance upon equitable set-off and reliance as a matter of defence upon matters of equity which formerly might have called for injunction or prohibition. …
>
> … The cases within group (3) are those in which a court of equity would have regarded the cross-claims as entitling the defendant to be protected in one way or another against the plaintiff`s claim. Reliance may be placed in a court of law upon any equitable defence or equitable ground for relief: so also any matter of equity on which an injunction against the prosecution of a claim might formerly have been obtained may be relied on as a defence.

32 The decision was followed by Parker J in , where he allowed, inter alia, the charterer`s claim for unliquidated damages for breach of the charterparty by the owner as a set-off against the owner`s claim for hire. He said, at p 297:

> *The whole matter of the development of the equitable right of set-off was exhaustively dealt with by Lord Justice Morris in* ***Hanak v Green*** *[1958] 2 QB 89 in a judgment described by Lord Diplock in his speech in* ***Modern, Engineering v Gilbert Ash****, at p 717, as giving `a masterly account` of the subject. From that judgment I conclude that where the cross claim not only arises out of the same contract as the claim but is so directly connected with it that it would be manifestly unjust to allow the claimant to recover*

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> *without taking into account the cross claim there is a right of set-off in equity of an unliquidated claim. These conditions are clearly satisfied where an owner claims hire in respect of a period in which he has not provided his ship at all. They are in my judgment equally satisfied when, as here, he claims hire in respect of a period when, in breach of contract, he has provided less than the full use of the vessel.*

33 was cited with approval by the Court of Appeal in . There, the Nanfri was let to the appellant charterers on a time charter. The charter agreement provided for certain deductions from hire. There was an alleged loss of speed during one of the voyages undertaken by the Nanfri. The appellant charterers sought to deduct the damages arising from the loss of speed from the hire due to the owners in respect of the Nanfri. In retaliation, the owners withdrew the Nanfri for non-payment of hire. The majority of the Court of Appeal, Lord Denning MR and Goff LJ, agreed that in the circumstances the appellant charterers were entitled to an equitable set-off and to deduct from the hire, sums as loss arising from the loss of speed because the claims were so closely connected, provided that the unliquidated loss was quantifiable by means of a reasonable assessment made in good faith. This was a right quite apart from the contractual entitlement. Therefore, the owners were in breach of the charter agreement when they withdrew the Nanfri from the appellant charterers. Of the nature of equitable set-off, Lord Denning MR said as follows at pp 973-974:

> *It is often necessary to distinguish between a set-off or defence properly so called; and a counterclaim or cross-action ....*
>
> Again take the case where the contract gives a creditor a right to take the law into his own hands - to take a particular course of action if a sum is not paid - such as to forfeit a lease for non-payment of rent or to withdraw a vessel for non-payment of hire. There the distinction between set-off and cross-claim is crucial. When the debtor has a true set-off it goes in reduction of the sums owing to the creditor. If the creditor does not allow it to be deducted, he is in peril. He will be liable in damages if he exercises his contractual right of withdrawal wrongly. But when the debtor has no set-off or defence properly so called, but only

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> a counterclaim or cross-action, then the creditor need not allow any deduction to be made. He can exercise his contractual right without fear; and leave the debtor to bring an action for damages on his counterclaim.
>
> In making the distinction between set-off and cross-claim, the courts of common law had their own special rules. For instance in a series of cases they formulated rules saying when there could be an abatement of rent or an abatement of the sums due for work and labour done, or an abatement of the price of goods sold and delivered. So that the defendant could make deductions accordingly. But the courts of equity, as was their wont, came in to mitigate the technicalities of the common law. They allowed deductions - by way of equitable set-off - whenever there were good equitable grounds for directly impeaching the demand which the creditor was seeking to enforce: see ***Rawson v Samuel*** (1841) Cr & Ph 161, 178-179, per Lord Cottenham LC.
>
> These grounds were never precisely formulated before the Judicature Act 1873. It is now far too late to search through the old books and dig them out. Over 100 years have passed since the Judicature Act 1873. During that time the streams of common law and equity have flown together and combined so as to be indistinguishable the one from the other. We have no longer to ask ourselves: what would the courts of common law or the courts of equity have done before the Judicature Act? We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? ... This question must be asked in each case as it arises for decision: and then, from case to case, we shall build up a series of precedents to guide those who come after us.

34 Goff LJ agreed with the pronouncements expressed by Lord Denning MR and said at p 982:

> *... in my judgment, this defence by its nature is such that it must be open to the charterer to set it up before ascertainment, not merely as a means of preventing the owner obtaining judgment or, at any rate, execution, but also as an immediate answer to his liability to pay hire otherwise due. Of course he acts at his peril and, if he is wrong, he will enable the owner to determine the charter party if he is willing for his part to act at his peril the other way. It cannot be right, in my judgment, that this defence is not operative until the claim has been agreed or awarded or, in other words, that the hire must be deemed due upon the due date for payment notwithstanding the subsistence of a potentially valid equitable set-off.*

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35 A strong proponent of the view that equitable set-off is a substantive defence, Lord Denning MR had said in the earlier decision of , at pp 248-249:

> *... The scope of equitable set-off was considered by Lord Lyndhurst LC in* ***Rawson v Samuel*** *(1841) 1 Cr & Ph 161, 178; recently by this court in* ***Morgan & Son Ltd v Martin Johnson & Co Ltd****[1949] 1 KB 107 and* ***Hanak v Green*** *[1958] 2 QB 9. It is available whenever the cross-claim arises out of the same transaction as the claim; or out of a transaction that is closely related to the claim.*

> Although it is often described as an `equitable set off`, it would, I think, be more accurately stated to be an `equitable defence` ... When the contractor sues for the contract price, the employer can say to him: `You are not entitled to that sum because you have yourself broken the very contract on which you sue, and you cannot fairly claim that sum unless you take into account the loss you have occasioned to me` ... So also with any breach by the plaintiff of the selfsame contract, the defendant can in equity set up his loss in diminution or extinction of the contract price. It is in the nature of a defence. As such it is not subject to a time bar.

36 was followed in where the facts were similar. Robert Goff J held that a charterer may, relying on the principle of equitable set-off, set off certain claims, including loss arising from slow steaming of the vessel, against hire even where the contract did not expressly give him the right to do so. In an instructive passage, Goff J said, at p 26:

> *Furthermore, the exercise of a right of deduction or set-off is essentially an act of self-help; it requires no order of the court or arbitrators for its enforcement. If a party exercises it, however, he must have justification for doing so; and in theory he should be able to prove, at the time of its exercise, that he has that justification ... it is in my judgment implicit in its very nature that it should only be exercised in good faith on reasonable grounds, and furthermore, if the other party considers that it is not being so exercised, he should be able to obtain a rapid adjudication upon that question.*

37 In the Australian case of , a lessor sought summary judgment for the recovery of possession of the premises on the ground of non-payment of rent.

In defence, the lessees maintained that the lessor was in breach of a covenant to repair, and as a result, the lessees had incurred expenses in carrying out the necessary repairs to the premises. The lessees therefore claimed to be entitled to set off the damages suffered by them consequent on such breach of covenant against the rental. WB Campbell J of the Supreme Court of Brisbane said, at p 90:

> *It seems to me that, should I consider that the lessees are entitled to set-off damages suffered by them by reason of the landlord`s breach of covenant, I could not hold that they have breached their obligation under the lease to pay the rental. If they are justified in pleading a set-off, they would be entitled to retain the rental until, at least, the set-off moneys equalled the rental payments due.*

38 His Honour then proceeded to find that the lessees were entitled to an equitable set-off and to withhold the rental. Accordingly, the lessor`s claim failed.

39 A similar case concerning leases of premises was . There, the plaintiffs, the lessees of the premises in question, claimed against the defendants, the underlessees, possession, unpaid rents, mesne profits and interests. The defendants counterclaimed damages for breaches of obligations on the part of the plaintiffs to make good defects in the floor of the premises under a separate agreement made between them. Forbes J held that the defendants could set off their claims for unliquidated damages against the plaintiffs` claim for rent and that although the defendants` claim for damages were under an agreement and not the underlease there was such a close connection between them that it was only fair and just that the defendants` equity should be treated as impeaching the title to the plaintiffs` demand for rent. After reviewing the authorities, Forbes J came to the following conclusion, at pp 155-156:

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> *Applying these principles in the light of what is fair dealing between the parties, I have come to the conclusion that despite the insistence on preserving the agreement as an entity separate from the underlease, there is nevertheless here that close connection between claim and cross-claim which equity requires. The agreement was, inter alia, an agreement to enter into the underlease, the terms of which were set out in the form annexed to the agreement. The special provisions relating to the floor were obviously as much in the minds of the parties when making the agreement as any of the other terms. It would in my view be manifestly unjust to allow the landlords to recover the rent without taking into account the damages which it is alleged the tenants have suffered through failure by the landlords to perform their part of the agreement. Not only is there in my view an adequate connection between the transactions giving rise to claim and cross-claim, there is also the fact that the breach by the landlords is said to render the premises unfit at least in part for the purpose for which they were let. For both these reasons, it seems to me that the defendants` cross-claim can be said to impeach the title to the plaintiffs` legal demand.*

40 Equitable set-off is applicable in other situations. For instance, it has been applied in relation to employment contracts in . Scott J said, at p 415:

> *In my judgment, if an employee, in breach of contract, fails or refuses to perform his contractual services, his right or title to recover his salary for the period during which the failure or refusal occurred is impeached by the employer`s cross-claim for damages. It would, in my judgment, be manifestly unjust in such a case to allow the employee to recover his salary in full without taking into account the loss to the employer of those services. The aphorism `no work, no pay` expresses, in my view, the equity of the situation.*

41 All these decisions clearly establish that equitable set-off is a substantive defence. The argument that equitable set-off is merely a procedural right which apparently was based on the historical origin of the defence is unsustainable. In our view, whatever the means of enforcing the right of equitable set-off by the courts of equity prior to and at the time of the passing of the Judicature Acts, equitable set-off now enjoys the status of a true substantive defence. There are, however, three observations we wish to make. First, the exercise of equitable set-off is only permitted, if equitable considerations support such an exercise. It

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arises where there are good equitable grounds for directly impeaching the title to the legal demand which the creditor is seeking to enforce. As Lord Denning MR succinctly said in , at pp 974-975:

> *... it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff`s demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.*

42 Secondly, the right to equitable set-off may be expressly excluded by contract. Such a possibility was recognized by Goff LJ in , at p 988:

> *... equitable set-off is part of the general law and can only be excluded by clear provisions to that effect ....*

43 Thirdly, there are exceptions, and they include claims for freight in voyage charters, actions on dishonoured bills of exchange and certain actions on bank guarantees: at p 413. In these instances, equity seems to have followed the common law by recognizing the exceptions to common law abatement.

44 We now revert to the facts in the instant case. We find that all the essential ingredients were present for the purchasers to avail themselves of the equitable set-off as a form of self-help. First of all, the agreement did not exclude the right of set-off in equity. Counsel for the vendors relied on cl 3(1)(i)(bb), ie the words in parenthesis in that clause: `(after any deduction has been made in accordance with cl 18 hereof and for moneys owing to the purchaser)`, and argued that the purchasers were only entitled to set off the amount of liquidated damages against the 8% of the purchase price payable on the issue of the `certificate of statutory completion` which would normally take place after completion. In our view, although this clause made provision for a contractual set-off at or after the completion stage, it did not expressly exclude

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equitable set-off against any of the payments prior to completion. Secondly, as at 18 January 1994, the claim for liquidated damages by the purchasers exceeded by far the claim for late payment interest due by the vendors. Thirdly, the vendors` claims and the purchasers` cross-claim arose from the same transaction and were closely linked. In our opinion, there was an equity which directly impeached the vendors` legal right to the demand for payment of interest for the late payment, and the exercise of equitable set-off as a means of self-help was perfectly justified. We are in entire agreement with the learned judge that it was the vendors who wrongfully repudiated the agreement by their letter on 25 January 1994. In the premises, we affirm the decision of the learned judge to grant a decree of specific performance.

45 **Relief against forfeiture**

46 Our decision on the issue above is sufficient to dispose of this appeal. However, full submissions have been canvassed before us on the controversial question whether the courts have power to grant relief against forfeiture in a case such as this, where there is a breach of a contractual provision as to payment, in respect of which time is of the essence. In the circumstances, we consider we should also address this issue.

47 Of the scope of the equitable right to relieve a party against forfeiture of property, Lord Wilberforce in , said at p 722:

> *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*

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> *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*** *(1721) 1 Stra 447 and cases there cited). Yet even this head of relief has not been uncontested: Lord Eldon LC in his well-known judgment in* ***Hill v Barclay*** *(1811) 18 Ves Jun 56 expressed his suspicion of it as a valid principle, pointing out, in an argument which surely has much force, that there may be cases where to oblige acceptance of a stipulated sum of money even with interest, at a date when receipt had lost its usefulness, might represent an unjust variation of what had been contracted for: see also* ***Reynolds v Pitt*** *(1812) 19 Ves Jun 140. 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.*

48 Having set out the scope of such equitable relief, his Lordship went on to say, at pp 723-724:

> *... no decision in the present case involves the establishment or recognition directly or by implication of any general power - that is to say, apart from the special heads of fraud, accident, mistake or surprise - in courts exercising equitable jurisdiction to relieve against men`s bargains ... 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.*

49 Although Lord Wilberforce laid down the courts` power to grant relief against forfeiture in expansive terms, he also spoke of the self-imposed limitations. In , the House of Lords held that the equitable relief from forfeiture

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was inapplicable in that case where the shipowner who had chartered his vessel to the charterer under a time charter withdrew the vessel from hire for non-payment of hire on the stipulated date. Lord Diplock said (at p 702) that what Lord Wilberforce said in `was never meant to apply generally to contracts not involving any transfer of proprietary or possessory rights`. The equitable relief has also not been granted to purely commercial contracts unconnected with any interests in land: see . There is no general principle that whenever a party to a contract is given a contractual right to terminate or rescind the contract for a breach which consists only of non-payment of a sum of money and where the purpose of incorporating such right is to secure payment of that sum, there is an equitable jurisdiction to grant relief against the exercise of such right of termination or rescission. However, in respect of contracts for the sale of land relief against forfeiture has been granted in appropriate cases and in two main forms. First, relief has been granted against the forfeiture by the vendor of the deposit or instalments of the purchase price, or both, paid by the purchaser in the exercise of the courts` power to relieve against a penalty: and . Secondly, relief has also been granted against the forfeiture of interest in the land under the contract, and such relief usually takes the form of the court refusing to recognize the termination or rescission of the contract by the vendor and giving to the purchasers additional time on terms to perform his obligations. It is this latter form of relief with which we are concerned.

50 Until the decision of the Privy Council in (of which more will be said later), there were clear authorities for the view that equity would relieve a defaulting purchaser against the forfeiture of his interest in the land in question, even where he had failed to comply with a provision as to payment, of which time was of the essence. We begin with the old case of 19. There, the plaintiff purchaser contracted to buy a piece of land and paid part of the purchase price.

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However, he failed to pay the balance. By consent, he was given an extension of time by the defendant vendor whereby he agreed to pay the balance by a certain date or lose both the contract and all that he had already paid. The plaintiff was again in default of payment in accordance with the date as agreed. Later, he brought a claim for specific performance. He was granted relief on payment of the principal, interest and costs, after the court took into consideration the special circumstances which led to the delay.

51 Next was the case of , where the purchaser company bought a piece of land for Â£4,000 of which Â£2000 was to be paid at once and the remaining on a certain date. It was further provided that if the remaining Â£2000 was not paid by that day, in respect of which time was of the essence, the vendors were entitled to repossess the land without any obligation to repay any part of the purchase money already paid. James LJ said at p 1025 that this was `an extremely clear case of a mere penalty for non-payment of the purchase-money` and that the purchaser was entitled to be relieved on payment of the residue of the purchase money with interest. Mellish LJ expressed himself thus, at p 1025:

> *... where there is a stipulation that if, on a certain day, an agreement remains either wholly or in any part unperformed - in which case the real damage may be either very large or very trifling - there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty. Here, when you look at the last agreement, it provides that if the whole Â£2000 with interest, or any part of it, however small, remains unpaid after a certain day, then the company shall forfeit the land and the portion of the purchase-money which they have paid. It appears to me that this is clearly in the nature of a penalty, from which the Court will relieve.*

52 Finally, we come to the Privy Council decision of . There, Kilmer contracted to purchase the land in question from the plaintiff company and paid the first instalment of $2,000 upon the execution of the contract. The balance of the purchase price was to be paid by subsequent instalments. Time was of the

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essence as regards these payments. In case of default of punctual payment of any one instalment, the plaintiffs were entitled to forfeit both the contract and all the payments previously made. Kilmer failed to pay the next instalment but obtained an extension of time for payment. He was still unable to pay by the end of the grace period whereupon the plaintiffs terminated the contract. The plaintiffs commenced proceedings for a declaration that the contract was void and Kilmer counterclaimed for specific performance and paid into the court the amount due. The trial judge dismissed the action and decreed specific performance on the counterclaim, relieving Kilmer from any forfeiture or penalties incurred on the authority of and . The Court of Appeal of British Columbia reversed his decision holding that the plaintiffs were entitled to avail themselves of the provisions of the agreement and that there was no ground on which the court could grant relief against the forfeiture. On further appeal, the Privy Council allowed the appeal and granted relief against the forfeiture and ordered specific performance of the contract. They held that the forfeiture clause was of a penal character and fell squarely within the principle of ***Re Dagenhamq*** and relief against the forfeiture of the interest in the land was granted. Although it was canvassed before the Privy Council that the provision making time of the essence had been waived, the Privy Council decided the case without reference to the question of waiver at all. Lord Moulton delivering the judgment of the Board said, at p 325:

> *The circumstances of this case seem to bring it entirely within the ruling of the* ***Dagenham Dock Case****. It seems to be even a stronger case, for the penalty, if enforced according to the letter of the agreement, becomes more and more severe as the agreement approaches completion, and the money liable to confiscation becomes larger.*
>
> Clause 1 is not without a bearing on this view of the case. The purchaser was to be at liberty to subdivide the property, the vendor was bound to assent on receiving three-fourths of the

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> money for which the subdivisions might be sold. And yet the vendor, if his construction of the agreement be right, reserved the power of forfeiting the money paid in respect of these subdivisions, because it will be observed that the conveyance of the subdivisions was not to be made to the respective purchasers, but to Kilmer and the party of the second part.

53 This trilogy of cases show that the courts took an expansive view of the equitable jurisdiction and were disposed to grant relief against forfeiture of interest in land even after the contracts of sale had been terminated for non-compliance with payment provisions, in respect of which time was of the essence. In ***Re Dagenham*** and ***Kilmer*** , the relief was granted on the ground that the provisions purporting to forfeit the purchasers` interest in the land operated as a penalty. But the penal element is not a necessary condition for invoking the equitable jurisdiction to grant relief and there is a distinction between `penalty` and `forfeiture`. In their joint judgment in ***Legione & Anor v Hateley*** , at p 425, Gibbs CJ and Murphy J said:

> *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 by non-payment of rent. No additional penal element was required. It is a short step to hold that relief may be granted against forfeiture of the interest of a purchaser who has defaulted in payment of the purchase money, and that step has been taken in a number of cases to which reference will shortly be made. [Emphasis is ours]*

54 In the same case, Mason and Deane JJ made the following distinction between `penalty` and `forfeiture` in their joint judgment, at p 445:

> *A penalty, as its name suggests, is in the nature of a punishment for non-observance of a contractual stipulation; it consists of the*

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> *imposition of an additional or different liability upon breach of the contractual stipulation (see, generally,* ***O`Dea v Allstates Leasing System (WA) Pty Ltd*** *[(1983) 152 CLR 359]. On the other hand, forfeiture involves the loss or determination of an estate or interest in property or a proprietary right, eg 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.*

55 We respectfully agree with their Honours on these observations; we shall revert to the case of ***Legione*** in greater detail shortly.

56 Two Privy Council decisions (subsequent to ***Kilmer***) adopted a different approach from that taken in ***Kilmer*** . The first was ***Steedman v Drinkle & Anor*** . There, the purchaser agreed to purchase a piece of land in Saskatchewan for $16,000 of which $1,000 was paid and the balance was to be paid by six instalments. The agreement provided that if the purchaser failed to pay any instalment, the vendor was entitled to cancel the agreement and retain the payments made as liquidated damages, and the agreement further provided that time was of the essence of the agreement. The purchaser made default in payment of the first instalment and the vendor cancelled the agreement. The assignee of the purchaser sued for specific performance or alternatively for relief against forfeiture of his right and interest under the agreement and his equitable interest in the land on terms. The trial judge held that time being made of the essence refused relief against forfeiture of the purchaser`s interest in the land but was disposed to relieve the purchaser against forfeiture of the amount paid, presumably on the ground that such forfeiture operated as a penalty. The Supreme Court of Saskatchewan reversed his decision and on the authority of ***Kilmer v British Columbia Orchard Lands Ltd*** held that the court had

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jurisdiction to grant specific performance, which it accordingly decreed upon payment of the amount due; in effect, the court relieved the purchaser from forfeiture of his equitable interest in the land. On further appeal, the Privy Council reversed the judgment below on the remedy of specific performance, holding that the respondents were not entitled to specific performance because the remedy would never be granted to a party who had broken a provision of which time was of the essence, but allowed the purchaser relief against the forfeiture of the deposit paid because the forfeiture was in the nature of a penalty. Viscount Haldane said, at p 279:

> *As to the relief from forfeiture, their Lordships think that the Supreme Court was right in holding, for the reasons assigned in the former decision of this board, that the stipulation in question was one for a penalty, against which relief should be given on proper terms. But as regards specific performance they are of opinion that the Supreme Court was wrong in reversing the judgment of Newlands J. Courts of equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in cases where justice requires it, even though literal terms of stipulations as to time have not been observed. But they never exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be of the essence of their bargain. If, indeed, the parties, having originally so provided, have expressly or by implication waived the provision made, the jurisdiction will again attach.*

57 In so deciding, the Privy Council distinguished the case from ***Kilmer*** on the basis that in ***Kilmer*** the provision as to time being of the essence had ceased to be applicable. Viscount Haldane said, at p 280:

> *So far the decision, which merely applied a well-known principle, is easy to follow, and in their Lordships` opinion, so far it governs the present case. But the board went on to decree specific performance. As time was declared to be of the essence of the agreement, this could only have been decreed if their Lordships were of opinion that the stipulation as to time had ceased to be applicable. On examining the facts which were before the Board,*

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> *it appears that their Lordships proceeded on the view that this was so.*

58 With respect, we find that reasoning difficult to follow. ***Kilmer*** was not decided on the basis that the provision as to time being of the essence was not insisted on or had ceased to apply. It is true that the time originally fixed had been extended but the extension of time was for a fixed period and, in our view, the extended time was substituted for the original time, and was `not an utter destruction of the essential character of the time`: per Jessel MR in ***Barclay v Messenger*** , at p 456.

59 Nonetheless, ***Steedman*** is the authority for the proposition that in a contract for the sale of land the courts have power to grant relief against the forfeiture of instalments of the purchase price already paid but not to grant relief against the forfeiture of an interest in land, where there is a breach of a provision of which time is of the essence. The approach was followed by the Privy Council in ***Brickles v Snell*** on an appeal from the Supreme Court of Canada. There, the purchaser under an agreement for sale of land, of which time was made of the essence, was in default at the date fixed for completion and the vendor cancelled the agreement. The trial judge held that the purchaser was not in default and granted specific performance. On appeal his decision was reversed, and on further appeal to the Supreme Court of Canada, the decision of the trial judge was restored. From that decision the vendor appealed to the Privy Council which allowed the appeal holding that the purchaser being in default was not entitled to specific performance. The purchaser, however, had not asked for relief against the forfeiture of his deposit and obtained no remedy at all.

60 In contrast, the High Court of Australia in ***Legione & Anor v Hateley*** and ***Stern & Anor v McArthur & Anor*** took a different stand. In ***Legione*** , a contract for the sale of land provided for payment of the balance of purchase

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price and time was expressly made of the essence; the contract further provided that a party could not enforce his rights unless he had given the other written notice specifying the default and his intention to enforce his rights if the default was not rectified. The purchaser did not pay the balance on the due date and the vendor issued the required notice. The purchasers failed to make good the default and the vendor exercised its right and rescinded the contract. Four days later, the purchasers tendered the balance of the purchase price which the vendor refused to accept. The purchasers sued for specific performance. The trial judge held that the notice of rescission was valid and dismissed the action. On appeal, the Full Court of the Supreme Court of Victoria, allowed the appeal and granted specific performance. The vendor appealed. Before the High Court several questions were raised and one of them was whether relief from forfeiture of the interest under the contract could and should be granted to the purchasers. By a majority, the High Court held that the case was an appropriate one to grant such relief and remitted the case to the Supreme Court of Victoria for determination of the purchasers` claim for relief from the forfeiture of their interest in the land.

61 The court embarked on a detailed analysis of the two conflicting lines of authorities and expressed a preference for the earlier decisions of ***Kilmer*** and ***Re Dagenham*** . In their joint judgment, Gibbs CJ and Murphy J in addressing the issue referred to the part of Lord Wilberforce`s speech in ***Shiloh Spinners Ltd*** , which we have quoted, and held that in the light of these statements of principle it was difficult to see why, if relief against the forfeiture of money payments could be granted to a purchaser who was in breach of an essential term, as in ***Steedman v Drinkle*** , relief against the forfeiture of his interest in the land could not also be given. To them, it is open to the court to grant relief to prevent injustice. They said, at p 429:

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> *A court of equity will grant specific performance notwithstanding a failure to make a payment within the time specified by the contract if there is nothing to render such an order inequitable. The fact that time for the performance of the stipulated obligation is of the essence of the contract generally makes the grant of specific performance inequitable in such a case. However, 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 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.*

62 Mason and Deane JJ in their joint judgment expressed similar views. They said, at pp 446-447:

> ***Steedman v Drinkle*** *and* ***Brickles v Snell*** *deny the exercise, rather than the existence, of jurisdiction to relieve against forfeiture of the purchaser`s interest under a contract when he is in breach of an essential term and the contract has been brought to an end. 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.*

63 Their Honours then addressed the issue in the following terms, at p 447:

> *Relief against forfeiture of the purchaser`s interest under a contract for sale ordinarily involves an order for specific performance of the contract against the vendor, subject to compensation, that is, to the imposition of such terms as will fairly compensate him for insistence on completion of the contract in the altered circumstances occasioned by the purchaser`s breach. The critical question then is: Should specific performance ever be ordered when the purchaser is in breach of an essential condition? The argument in favour of a negative answer is forceful. If parties expressly or impliedly stipulate that performance of a term is essential to their bargain then it would ordinarily be unjust to the innocent party to require him to complete notwithstanding a breach of the term. Generally speaking equity expects men to carry out their bargains and `will*

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> *not let them buy their way out by uncovenanted payment` (* ***Shiloh Spinners Ltd v Harding*** *per Lord Wilberforce). Nor will it remake the parties` contract simply because it transpires that as things have happened one party has made a bad bargain.*
>
> But if there be fraud, mistake, accident, surprise or some other element which would make it unconscionable or inequitable to insist on forfeiture of the purchaser`s interest under the contract because he has not performed in strict accordance with its terms there is no injustice to the innocent party in granting relief against forfeiture by means of specific performance with or without compensation.

64 Later, their Honours in referring to the Privy Council`s decisions in ***Steedman v Drinkle*** and ***Brickles v Snell*** expressed the view that those decisions were based on the strict enforcement of the terms of the contract and the overriding importance attached to the concept of freedom of contract. They then said, at pp 448-449:

> *... 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. 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 the forfeiture of the purchaser`s interest under a contract of 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.*

65 The majority decision in ***Legione v Hateley*** was followed subsequently by the High Court in the second case of ***Stern v McArthur*** . Mason CJ repeated in substance what he and Deane J had said in ***Legione*** . He said, at p 501:

> *... as* ***Legione*** *was to demonstrate, equity will relieve against an unconscionable exercise of legal rights. If the vendor`s insistence on rescission and forfeiture of the purchaser`s interest under the contract is, in the circumstances of the case, unconscionable,*

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> *there can be no unfairness in depriving the vendor of the benefit of rescission with the forfeiture of the purchaser`s interest entailed by rescission. That was the message conveyed by* ***Legione****. It was a message which confirmed the long-standing principle that, granted the existence of the preliminary condition for the exercise of the jurisdiction to relieve against forfeiture, the actual exercise of the jurisdiction depends upon the existence of circumstances which make it unconscionable for the vendor to insist on rescission and forfeiture of the purchaser`s interest: see the joint judgment of Mason and Deane JJ in* ***Legione*** *[(1983) 152 CLR, at pp 447-448].*

66 On the other hand, the New Zealand High Court in ***Location Properties Ltd v GH Lincoln Properties Ltd*** did not follow the Australian decisions but ***Steedman v Drinkle*** instead. Greig J after reviewing all the authorities said at p 316:

> *It is, to say the least, difficult to reconcile all the decisions but I prefer the principle in* ***Steedman v Drinkle,*** *consistent, as I think it is, with the history of authority. The real distinction is in the facts and so where, under a long-term agreement for the sale and purchase, the purchaser is let into possession then any forfeiture and the right to relief against it is to be considered on the direct analogy of the right of the mortgagor and of the equity of redemption and of the lessee to relief from forfeiture of possession and ownership of the property in question. But other considerations apply to a situation such as this where there is an agreement for sale and purchase unexecuted, unperformed, with specific provisions making time of the essence of the contract for the termination and cancellation of the contractual rights between the parties. These are not simply provisions which are imposed to ensure the performance of money obligations. They are provisions which are intended to bring to an end the arrangements between the parties.*

67 We respectfully agree and adopt the majority views of the High Court of Australia in ***Legione v Hateley*** . We accept that generally where a party to a contract has failed to perform his obligations in due time, in respect of which time is of the essence, the courts would not grant him specific performance. However, there are other equitable considerations which should be taken into account, and in appropriate cases, in a contract for the sale of land relief against

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forfeiture would be granted, notwithstanding a breach by the party seeking such relief of an obligation of which time was made of the essence. The remedy of relief against forfeiture should not be equated with that of specific performance. The two remedies are often perceived to run parallel to each other. In our opinion, the grant of the relief against forfeiture is a prelude to an order of specific performance. The court, in essence, is asked to disregard the rescission or termination of the contract by the vendor as a form of relief prior to the grant of specific performance. The fundamental principle upon which equity acts is that a party having a legal right shall not be permitted to exercise it in such a way that the exercise amounts to unconscionable conduct (per Mason and Deane JJ in ***Legione*** at p 444). The exercise of the jurisdiction to grant relief against forfeiture in the face of a breach of a provision, of which time is of the essence, in appropriate cases is entirely consistent with this equitable principle. Needless to say, such jurisdiction would only be exercised in exceptional circumstances since the courts would not ordinarily countenance a departure from contractual rights and obligations. Hence, in order to invoke successfully the courts` jurisdiction, the circumstances of the case must reveal elements of unconscionability and injustice. In our judgment, in exceptional circumstances, relief against the forfeiture of an interest in land under a contract of sale may be granted where there is a breach of a provision as to payment, in respect of which time is of the essence.

68 Reverting to the circumstances of this case we think that relief would be granted to the purchasers, if the vendors were held entitled to issue the notice to terminate or annul the agreement. As at the date on which the vendors gave the notice of termination, ie 24 January 1994, the purchaser had paid 90% of the purchase price. The amount which was outstanding and due, on the basis of which the vendors invoked cl 5(1) to treat the agreement as having been

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repudiated by the purchasers was $931.50 (according to the purchasers` computation) or $958.90 (according to that of the vendors). Either figure is a small and insignificant amount in relation to the liquidated damages amounting to $13,616.38 and the purchase price of $1m. The breach by the purchasers - we assume that there was a breach for the purpose of this issue - arose because of a genuine dispute between the vendors and purchasers as to whether the purchasers were entitled to set off the interest owed against the liquidated damages. There was no indication that the purchasers were in effect repudiating the agreement or were unable to perform their obligation under the agreement. The purchasers tendered the outstanding balance on 31 January 1994, five days after the termination of the agreement by the vendors. Further, there is no dispute that the value of the property has increased considerably since the agreement was entered into. If the vendors were permitted to exercise their right to terminate or annul the agreement and resell the property, they would receive a huge windfall which was clearly not contemplated at the time the agreement was made. Under the agreement, the vendors were entitled only to the purchase price and it was the purchasers who would be entitled to such a benefit. Conversely, if the value of the property has plummeted, equally, it was the purchasers who would have to suffer and bear this loss. In all the circumstances, it would be unconscionable in this case that the vendors should reap such a huge windfall. This is especially so when the breach by the purchasers was trivial: a failure to pay the interest amounting to $931.50 or $958.90 (depending on which of the two figures is accepted), as compared to the magnitude of the financial loss and the sums already paid to the vendors prior to the termination. The primary objective of the right to forfeiture is to ensure that the progress payments of the purchaser price are duly made. In this case, an order for specific performance, as was made by the trial judge, with appropriate provision for payment of interest, if necessary, would have given to the vendors all that the

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right of forfeiture aimed to achieve. In our judgment, this would be an appropriate case for such relief to be granted.

69 The position here is somewhat similar to that in ***Legione*** , where Gibbs CJ and Murphy J in considering the factual situation made the following observations, at p 429:

> *In the present case, the circumstances revealed by the existing evidence indicate that it would be unjust for the vendors to insist on the forfeiture of the purchasers` 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.*

70 **Conclusion**

71 In the result, we dismiss the appeal with costs. There will be the usual consequential order that the deposit in court as security for costs be paid out to the purchasers or their solicitors to account of costs.

72 ***Appeal dismissed.***

Karthigesu JA
L P Thean JA
Yong Pung How CJ

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