Relief against forfeiture

Tanwar Enterprises Pty Ltd v Cauchi [2003] HCA 57
Romanos v Pentagold Investments Pty Ltd [2003] HCA 58

By Andrew S Bell

On 7 October 2003, the High Court handed down two important decisions (*Tanwar* and *Romanos*) concerning the doctrine of relief against forfeiture. In each case, joint judgments were delivered by Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ with separate but concurring judgments by Kirby J and Callinan J. The unanimous nature of these decisions stands in marked contrast to the High Court's earlier decision in *Stern v McArthur* (1988) 165 CLR 489 in which the court had split 3 - 2 in deciding to afford relief against forfeiture of a purchaser's interest in land in circumstances where the purchaser had built a house on the land, the land had risen in value and there was a relatively modest default in the meeting of an essential instalment obligation.

The decisions' principal importance lies in the guidance they give to practitioners as to the circumstances where the exercise of legal rights to terminate a contract for the sale of land by reason of the purchaser's failure to make timely payment of a settlement sum or an instalment amount will be unconscientious. Such cases will tend to occur in a rising property market and, whilst the facts of no two cases will ever be precisely alike, both decisions emphasise that 'equity does not intervene to reshape contractual relations in a form the court thinks more reasonable or fair where subsequent events have rendered the situation of one side more favourable than that of the other side. Rather, one asks whether the conduct of the vendors caused or contributed to a circumstance rendering it unconscientious for them to insist upon their legal rights to terminate the contract.' The decision in *Tanwar* also resolves an important difference in principle and approach to questions concerning the availability of relief against forfeiture that had emerged in *Stern v McArthur* in the judgments of Mason CJ and Gaudron J. This is considered further below.

In *Tanwar*, three contracts for the sale of land were terminated by the vendors on 26 June 2001 consequent upon a failure to complete by 4.00 pm on 25 June 2001. (Earlier notices of termination in respect of an earlier nominated settlement date had been withdrawn). At the settlement conference fixed for 25 June 2001, the solicitor for the proposed second mortgagee reported that funds which were to be used in financing the purchase had yet to be transferred from Singapore by reason of various regulatory checks by Singaporean authorities. The funds were received the following morning. The court held that this circumstance did not render the issue of the notice of termination unconscientious, it being said that the vendors had withdrawn the earlier Notices in return for the assumption by Tanwar of an obligation to complete in unqualified terms (i.e. not 'subject to finance') and the fact that there could be a failure by a third party to provide finance was reasonably within the contemplation of Tanwar.

As noted above, in reaching this conclusion, the court highlighted the difference in *Stern v McArthur* between the approach of Gaudron J, one of the members of the majority in that case, and that of Mason CJ, in the minority. In his judgment, Mason CJ had emphasised that, for there to be a relevant case of unconscientious conduct, the vendor must have in some way caused or contributed to the breach by the purchaser (as had occurred in *Legione v Hately* (1983) 152 CLR 406) whereas Gaudron J considered that unconscientiousness could exist in the absence of any contributing conduct by a vendor in circumstances where a house had been built on the land, the land had increased in value and the default was relatively insignificant, with monthly instalment payments being resumed after the breach and purported termination. Her Honour had focused on the absence of prejudice to the vendors in circumstances where an order for specific performance would have secured all that the vendors had contracted for.

'The decision in *Tanwar*, in particular, contains important observations in respect of the phrase 'unconscionable conduct'. The joint judgment described it as a phrase which was apt to mislead in several respects.'

In *Tanwar*, the court stated that the approach that had been articulated by Mason CJ in *Stern* should be accepted. 'At least where accident and mistake are not involved', said the court, 'it will be necessary to point to the conduct of the vendor as having in some *significant* respect caused or contributed to the breach of the essential time stipulation' (emphasis added). One consequence of this clear statement is that, where a purchaser has entered into possession and constructed or commenced to construct a building prior to completion, in the absence of any significant act on the vendor's part occasioning or contributing to the breach, the fact that a vendor may receive a windfall gain will not render an act of termination unconscientious. Improvements to property unconnected with any act of inducement or representation by a vendor (or a genuine case of 'accident' or 'surprise' - discussed below) will be 'at risk of operation of the contractual provisions for termination'.

The decision in *Tanwar*, in particular, contains important observations in respect of the phrase 'unconscionable conduct'. The joint judgment described it as a phrase which was apt to mislead in several respects:

First, it encourages the false notions that (i) there is a distinct cause of action, akin to an equitable tort, wherever a plaintiff points to conduct which merits the epithet 'unconscionable'; and (ii) there is an equitable defence to the assertion of any legal right, whether by action to recover a debt or damages in tort or for breach of contract, where in the circumstances it has become unconscionable for the plaintiff to rely on that legal right.

Secondly, and conversely, to speak of 'unconscionable *conduct*' as if it were all that need be shown may suggest that it is all that can be shown and so covers the field of equitable interest and concern. Yet legal rights may be acquired by conduct which pricks no conscience at the time. A misrepresentation may be wholly innocent. However, at the time of attempted enforcement, it then may be unconscientious to rely upon the legal rights so acquired. To insist upon a contract obtained by a misrepresentation now known to be false is, as Sir George Jessel MR put it in *Redgrave v Hurd* (1881) 20 Ch D 1 at 12-13, 'a moral delinquency' in a court of equity.

'It was concluded that equity would not relieve where 'the possibility of the accident might fairly be considered to have been within the contemplation of the contracting parties'.'

Thirdly, as a corollary to the first proposition, to speak of 'unconscionable conduct' may, wrongly, suggest that sufficient foundation for the existence of the necessary 'equity' to interfere in relationships established by, for example, the law of contract, is supplied by an element of hardship or unfairness in the terms of the transaction in question, or in the manner of its performance. The vendors contend that the thrust of the submissions by Tanwar reveals this weakness in its case.

It also emerges from the joint judgment in Tanwar that the mere consideration of the series of 'subsidiary questions' identified in the joint judgment of Mason and Deane JJ in *Legione v Hately* (1983) 152 CLR 406 at 449 as of particular importance for the purposes of analysing a claim for relief against forfeiture will not be determinative. After *Tanwar*, an affirmative answer to the first of these questions - 'Did the conduct of the vendor contribute to the purchaser's breach?' - should now be seen as a necessary but not sufficient condition for the grant of relief against forfeiture.

As a subsidiary aspect of its argument, the appellant in *Tanwar* appealed to the doctrine of 'accident' as another basis for providing relief against forfeiture. The question was posed in the joint judgment as to what remained of the subject matter of the doctrine of 'accident' in modern equity. It was concluded that equity would not relieve where 'the possibility of the accident might fairly be considered to have been within the contemplation of the contracting parties'. On the facts of *Tanwar*, as has been seen, the court held that the fact that there might be a failure by a third party to provide finance was reasonably within the contemplation of Tanwar. It was bluntly stated that 'equity does not intervene to prevent the effect of exercise of a vendor's right to terminate their contract'.

In *Romanos*, it was stated that inadvertence with respect of the time for payment 'without more' would not justify relief by reason of the doctrine of 'accident'. Similarly, the court reiterated that a 'windfall' as a result of the rise in the value of land, improvements to it or the securing, as in *Romanos*, of certain development approvals in respect of it, will not alone warrant relief. For a court of equity to interfere through the grant of relief on this basis would amount to the illegitimate rewriting of the contract based on idiosyncratic notions of fairness.