

CLOGGING THE EQUITY OF REDEMPTION: AN OUTMODED CONCEPT?

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I CONTEXT

To understand the concept of equity of redemption it is necessary to understand the influences of equity upon money lending transactions involving the security of real property over many centuries. Under an old system mortgage, the legal title of the borrower was conveyed to the mortgagee and, upon redemption of the debt, the mortgagor was entitled to a reconveyance of the land which had been the subject of the security. The Court of Chancery developed jurisdiction to set aside the legal title of the mortgagee by compelling the mortgagee to reconvey title to the mortgagor where the mortgagee refused to do so, thus recognising the mortgagor's right to redeem the security. This jurisdiction owes its origin to the influence of the church in endeavouring to curb the effects of usury.

Under this influence, the Court of Chancery began to exercise jurisdiction in personam over mortgagees who failed to restore the security to the mortgagors after an offer was made to redeem. Indeed, if the mortgagor was one day late in repayment under the mortgage deed, the legal title could vest in the mortgagee and the mortgagor would be deprived of their land, regardless of how much remained outstanding. That amount could still be recovered at common law from the mortgagor, notwithstanding the forfeiture of the land. Equity therefore from an early time began to relieve against what was a penalty by compelling the mortgagee to use the mortgagee's legal title as a mere security.¹

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¹ *Kreglinger v New Patagonia Meat and Cold Store Co Ltd* [1914] AC 25 at 35 per Viscount Haldane LC. The equity of redemption has been defined as an interest or equitable right inherent in the land: *Re Wells*; *Swinburne-Hanham v Howard* [1933] Ch 29; protection of the equity of redemption or the right to take proceedings to redeem is recognised in the Torrens system notwithstanding the mortgagor retains title to the land at law and the mortgage is only a charge: *Perry v Rolfe* [1948] VLR 297; *Re CL Forrest Trust* [1953] VLR 246; *Addison v Billion* [1983] 1 NSW LR 586; *Re Australia and New Zealand Banking Group Ltd* [1993] 2 Qd 477 at 481.

The lending of money for usurious rates of interest in commerce was not only looked upon by ecclesiastical authorities with suspicion, but the Courts of Chancery also became alert to discover a want of conscience in terms imposed by lenders. Whilst the courts were loathe to interfere with freedom of contract, they would intervene in circumstances where evidence showed that terms imposed by a mortgagee were unconscientious. To do so, they considered not only the form of the transaction but the substance of the transaction. Where the substance was oppressive, relief would be given.²

If it were determined that the transaction was truly a mortgage, a court would strike down a term of the loan which prevented a mortgagor from getting back the property secured on repaying what was due to the mortgagee.³ Whilst it was tolerably clear that a provision in a mortgage deed which permitted the mortgagee to become the absolute owner of the security in any event, would be struck down, more difficult were those cases where other conditions were attached to the loan by which the mortgagee gained another collateral advantage which would effectively make the remuneration for the loan exceed a proper rate of interest. These principles were established when the usury laws, preventing the charging of excessive interest, were in force. However, Equity went beyond the limits of the usury statutes and was prepared to consider any collateral stipulation which it considered unfair or oppressive, which made the security effectively irredeemable or clogged the equity of redemption in some other way.⁴

In more recent times, common transactions such as those between borrower and lender have been the subject of consumer protection legislation. For example, in relation to the provision of domestic finance, the *Consumer Credit Code*⁵ permits the court to reopen an unjust transaction and, in doing so, directs the court to have regard to many matters, amongst which are those relating to the ability of the borrower to negotiate provisions of the contract,⁶ to consider the imposition of conditions that are unreasonably difficult to comply with but not reasonably necessary for the protection of the legitimate interests of the lender⁷ and, in particular, to consider the terms of other comparable transactions in circumstances where the injustice is alleged to have resulted from excessive interest charges.⁸

Similar provisions exist in the *Trade Practices Act 1974*⁹ which regulate the conduct of parties to business transactions in circumstances where there have been allegations of unconscionable conduct. In the *Consumer Credit Code* the word 'unjust' is defined to

² *Kreglinger v New Patagonia Meat and Cold Store Co Ltd* [1914] AC 25 at 36.

³ *Samuel v Jarrah Timber and Wood Paving Corporation Ltd* [1904] AC 323 at 329 per Lord Lindley.

⁴ *Kreglinger v New Patagonia Meat and Cold Store Co Ltd* [1914] AC 25 at 37 per Viscount Haldane LC; the collateral covenant had to be part of the mortgage transaction generally and not limited to the terms of the mortgage instrument: *Toohey v Gunther* (1928) 41 CLR 181 at 195-196 per Isaacs J. For a detailed consideration of this confusing area see EI Sykes and S Walker, *The Law of Securities* (5th ed, Law Book Company, Sydney, 1993) 73-77.

⁵ Section 70(1); also see s 12CB(1) *Australian Securities and Investments Commission Act 2001* which deals with unconscionable conduct in the supply of financial services. For relevant factors to be considered see s 12CB(2) (limited to supply of services for personal domestic or household use).

⁶ *Ibid* s 70(2)(d).

⁷ *Ibid* s 70(2)(e).

⁸ *Ibid* s 70(2)(n).

⁹ Section 51AC.

include unconscionable, harsh or oppressive.¹⁰ Apart from the statutory inroads into business dealings, an aggrieved party to a loan transaction still has access to a court exercising equitable jurisdiction to relieve against the consequences of unconscionability generally. In *Commercial Bank of Australia Ltd v Amadio*,¹¹ Deane J made the following observation:

Unconscionable dealing looks to the conduct of the stronger party in attempting to enforce, or obtain the benefit of, a dealing with a person under a special disability in circumstances where it is not consistent with equity or good conscience that he should do so. The adverse circumstances which may constitute special disability for the purposes of the principles relating to relief against unconscionable conduct may take a wide variety of forms and are not susceptible to being comprehensively catalogued.¹²

Whilst it is clear that the relationship of borrower and lender does not give rise, of itself, to any presumption of special disability,¹³ there are certainly circumstances where a necessitous borrower may be overborne by a more powerful lender in circumstances giving rise to unconscionability on the part of the lender.¹⁴ However, in ordinary, arm's length, commercial transactions between corporations, this situation is unlikely to arise. In instances such as this, where there has been a claim by a mortgagor of a mortgagee's clogging the equity of redemption, the claim has generally not found favour and the transaction has been argued on a single basis, namely upon the basis of alleged unconscionability by the mortgagee.

In *Westfield Holdings Ltd v Australian Capital Television*¹⁵ Young J concluded, after considering whether there had been a clog on the equity of redemption in an arm's length commercial mortgage transaction where a mortgagee had obtained the right to purchase the whole of the mortgaged property, that:

There does not appear to be any commercial reason why, in 1992, the court should invalidate any transaction merely because a mortgagee obtains a collateral advantage or seeks to purchase a mortgaged property. Quite obviously, equity must intervene if there is unconscionable conduct. Again equity must intervene in a classic case where it can see that a necessitous borrower is not, truly speaking, a free borrower.¹⁶

¹⁰ Section 70(7).

¹¹ (1983) 151 CLR 447.

¹² *Ibid* 474.

¹³ *National Westminster Bank plc v Morgan* [1985] AC 686 at 707; this situation of disability must be distinguished from special disadvantage in one party through illness, ignorance, inexperience impaired faculties, financial need or other similar circumstances: *Blomley v Ryan* (1956) 99 CLR 362 at 415 per Kitto J.

¹⁴ There are a number of considerations which might be taken into account when determining this issue including such matters as the identity of the mortgagor: *Cityland and Property (Holdings) Ltd v Dabrah* [1968] Ch 166 at 180; whether the borrower received independent advice from solicitors: *Multi Service Book Binding Ltd v Marden* [1979] Ch 84 at 111; whether or not the transaction benefits the mortgagor: *Amoco Australia Pty Ltd v Rocca Bros Engineering Co Pty Ltd* [1975] AC 561 at 579 and similar matters. See, also, W D Duncan, 'Caveat Lender: Liability of Lenders Arising from Unconscionable Conduct in the Loan Approval Process' (2000) 21 *Qld Lawyer* 18-31.

¹⁵ (1992) 32 NSWLR 194.

¹⁶ *Ibid* 202.

Similarly, in the case of *Re Modular Design Group Pty Ltd Pty Ltd (receiver and manager appointed) (in liq)*¹⁷ Santow J, after reviewing the operation of an “all moneys” clause, where it had been argued that a wide interpretation may lead to a clog on the equity of redemption of the mortgagor:

In contemporary jurisprudence, the doctrine of clogging has been interpreted in a less formalistic, more substantive manner. This has been consonant with Equity’s wider modern remedial jurisdiction, based on unconscionability. Thus equity will not intervene merely by reason of the mortgagee obtaining a collateral advantage. But it will intervene if there is unconscionable conduct, more readily found in a case of necessitous borrower.¹⁸

It is our contention that the stage has been reached where the principles of equity which recognise unconscionable transactions generally, and the application of statutory provisions such as the *Consumer Credit Code*, the *Trade Practices Act 1974* and the *Australian Securities and Investment Commission Act 2001*,¹⁹ have effectively subsumed the doctrine of clog on the equity of redemption, that the concept is outmoded, and should be abandoned as being irrelevant in the 21st century in favour of the general test for unconscionability.

II CLOGGING THE EQUITY OF REDEMPTION: THE RULE

Historically, a mortgage given as security for a loan took the form of a conveyance to the lender of the borrower’s legal title. Upon repayment of the loan, the mortgagee reconveyed legal title to the mortgagor. If the mortgagor failed to pay on the due date (the contractual date of redemption), the mortgagee’s title became absolute at law. At this time, however, the equitable right to redeem arose. The rule against clogging or fettering the equity of redemption relates to this equitable right. Lord Parker described the rule against clogging the equity of redemption in the following terms:

The rule may be stated thus: the equity which arises on the failure to exercise the contractual right cannot be fettered or clogged by any stipulation contained in the mortgage or entered into as part of the mortgage transaction.²⁰

A mortgage therefore could not contain a clause that conferred on the mortgagee an option to buy the mortgaged property.²¹ Similarly, a clause which allowed the mortgagor only a limited time period within which to redeem the mortgage was void as a fetter on the mortgagor’s right.²² Clauses which conferred a collateral advantage on the mortgagee, such as a mortgagor’s promise to buy specified goods only from the mortgagee, were also regarded suspiciously.²³

¹⁷ (1994) 35 NSWLR 96.

¹⁸ *Ibid* 103.

¹⁹ Courts and Tribunals have wide powers under these three statutes to effectively rewrite or set aside a transaction on the basis that it is unjust (*Consumer Credit Code*, ss 70 and 71) or unconscionable (*Trade Practices Act 1974*, s 87 and *Australian Securities and Investment Commission Act 2001*, s 12GM).

²⁰ *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 48.

²¹ *Samuel v Jarrah Timber and Wood Paving Corporation Ltd* [1904] AC 323.

²² *Salt v Marquess of Northampton* [1892] AC 1.

²³ *Noakes and Co v Rice* [1902] AC 24. Such trade ties are now likely to offend the *Trade Practices Act 1974*.

Although Torrens system mortgages constitute a charge over the borrower's land rather than a conveyance to the lender, the rule against clogging the equity of redemption and the kind of clauses referred to above apply equally to Torrens mortgages.

III CLOGGING THE EQUITY OF REDEMPTION: THE TRADITIONAL APPROACH

The equitable jurisdiction developed a number of rules that prevented a mortgagee from incorporating provisions in mortgage deeds that clogged or fettered the equitable right to redeem. There is general consensus that the equitable maxim of "Once a mortgage, always a mortgage" embodies the rules that have developed to strike down offensive provisions.²⁴ As these rules only applied to a true mortgage, the courts of necessity, enquired into the true substance of the transaction.²⁵ An absolute conveyance with an agreement to repurchase on the payment of a stipulated sum creates exactly that and would give no right of redemption which would bring into effect the rules relating to the protection of the mortgagor's equity of redemption.²⁶ The question of whether the transferor of the land intends to take advantage of the right of repurchase is not relevant.²⁷

In the words of Viscount Haldane, 'If the transaction was once found to be a mortgage, it must be treated as always remaining a mortgage and nothing but a mortgage'.²⁸ The rules which have stemmed from this maxim have not been categorised in any consistent way. This may be due in part to the evolving nature of the equitable jurisdiction 'to mould the rules which they apply in accordance with the exigencies at the time'.²⁹ Nevertheless, in *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*,³⁰ Lord Parker undertook an extensive review of the relevant case law and his conclusions have been cited authoritatively as representing the state of the law as it existed at that time.³¹ Lord Parker concluded that it was not objectionable for the mortgage to confer a collateral advantage upon a mortgagee. However, a provision conferring such advantage would be objectionable if it fell within one of the following three categories.

Firstly, a clause giving the mortgagee a collateral advantage would be void as a clog if it was unfair and unconscionable. This ground was also later considered by both the Court of Appeal and House of Lords in *Knightsbridge Estates Trust Ltd v Byrne*.³² In

²⁴ See, for example, E A Francis and K J Thomas, *Mortgages and Securities* (3rd ed, Butterworths 1986) 171; *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 37; *Westfield Holdings Ltd v Australian Capital Television Pty Ltd* (1992) 32 NSWLR 194.

²⁵ *Salt v Marquess of Northampton* [1892] AC 1 (transaction held to be of a security nature and to confer right to redeem even though it purported to be merely an agreement of a lender to assign a life policy in event of certain contingencies).

²⁶ *Gurfinkel v Bentley Pty Ltd* (1966) 116 CLR 98 at 111.

²⁷ *Beckett v Tower Assets Co* [1891] 1 QB 1 at 25.

²⁸ *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 37.

²⁹ *Ibid* 38.

³⁰ [1914] AC 25.

³¹ See, for example, *Charmelyn Enterprises Pty Ltd v Klovis* (1980) 2 BPR [97142] per Waddell J at first instance at 9529-9530; and by Reynolds JA in the Court of Appeal at 9535; *Knightsbridge Estates Trust Ltd v Byrne* [1939] 1 Ch 441 (Court of Appeal, affirmed in the House of Lords [1940] AC 613); *Cityland and Property (Holdings) Ltd v Dabrah* [1968] 1 Ch 166. Contrast the criticism of Lord Parker's reasoning that underpinned this categorisation: Professor G Williams, 'Doctrine of Repugnancy Part III' (1944) 60 *Law Quarterly Review* 191.

³² [1939] 1 Ch 441 (Court of Appeal) and [1940] AC 613 (House of Lords).

that case, a company mortgaged a number of properties in London to secure an advance from a Friendly Society. Clause 1 of the mortgage provided for repayment by eighty half-yearly instalments. The mortgage further provided that if the mortgagor paid the instalments on the due dates and otherwise complied with the mortgage terms, the mortgagee would not require repayment at a date earlier than the scheduled forty year redemption date. Six years after entering the mortgage, the mortgagor wanted to redeem, and claimed that Clause 1 which postponed their equitable right to redeem for forty years was void as a clog on the equitable right to redeem. The Court of Appeal upheld the validity of Clause 1 (the decision being affirmed on appeal by the House of Lords). The Court accepted that equity would grant relief against contractual terms that were oppressive or unconscionable, but held that the mortgage could not be so regarded in that case. In assessing whether relief should be granted, all circumstances of the case should be considered, including the degree of mutuality. Although the contractual right to redeem had been postponed for forty years, the mortgagee also covenanted not to require payment of the sum for that time. It was also relevant that it was an arm's length commercial transaction upon which each party had received legal advice.

Goff J in the Court of Chancery also relied on this more general ground to strike down a clause in a mortgage in *Cityland and Property (Holdings) Ltd v Dabrah*.³³ The mortgage in that case secured a debt of £2,900 owing by the mortgagor to the mortgagee. The mortgagor covenanted to pay the mortgagee £4,553 by monthly instalments over a six year period. The return to the mortgagee, therefore, was in the form of a premium rather than a specified interest rate. The mortgage also provided that the full premium should become payable upon the mortgagor's default. The premium was effectively 57% of the amount of the loan, and had the effect of making the interest rate upon default an amount of 38%. Relying on *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*,³⁴ the court found that whilst there was no rule in equity precluding a lender from stipulating for a collateral advantage that was fair and reasonable, the charging of a premium of this order had the effect of destroying the borrower's equity in the security, and that such a collateral advantage was in the circumstances unconscionable.

The second ground mentioned by Lord Parker for challenging a provision was whether it could be construed in the nature of a penalty clogging the equity of redemption. He cited as an example a clause conferring upon the mortgagee, on the mortgagor's default, a right to take over the mortgaged property in satisfaction of the debt.³⁵ As the right arose on the mortgagor's default, it was a penalty. As it operated to totally clog the equity of redemption, it was held to be void. It is likely that the provision referred to earlier in *Cityland and Property (Holdings) Ltd v Dabrah*³⁶ that provided for payment of the full premium on the mortgagor's default also offended this second ground.³⁷

³³ [1968] 1 Ch 166.

³⁴ [1914] AC 25.

³⁵ *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 59 citing *Bradley v Carritt* [1903] AC 253 as an example.

³⁶ [1968] 1 Ch 166.

³⁷ Compare *Wanner v Caruana* [1974] 2 NSWLR 301 where a clause which provided for the payment of principal together with interest for the full period of the loan upon the mortgagor's default was regarded as void as a penalty. Street CJ, however, declined to decide whether that clause also constituted a clog on the equity of redemption. It was sufficient to resolve that case to find it void as a penalty.

The third category identified by Lord Parker was a provision that was inconsistent with or repugnant to the equitable right to redeem. His Lordship cited *Samuel v Jarrah Timber and Wood Paving Corporation Ltd*³⁸ as an example of such a provision. In that case, the loan was repayable upon thirty days notice by either party, but the mortgagee was given an option to purchase the mortgaged property for twelve months. If the mortgagee exercised the option, the mortgagor would be unable to exercise either the contractual or equitable right to redeem the property. Lord Parker, therefore, regarded the provision as being void as a clog on the equity of redemption.

Whilst in the modern commercial setting these categories are identifiable from the facts of each case, the courts have generally tested the conduct of the mortgagee against Lord Parker's first category, that is unfairness and unconscionability, elements of which indeed underlie the exercise of the jurisdiction to relieve the mortgagor.

IV CLOGGING THE EQUITY OF REDEMPTION IN MODERN COMMERCIAL DEALINGS

There have only been a handful of cases in Australia in the late 20th century where a mortgagor has alleged successfully or otherwise that the mortgagee by agreement or conduct had clogged the equity of redemption.

These decisions may be conveniently divided into three broad categories. The first category concerns the effect of an assignment of the mortgage to another creditor of the mortgagor in the circumstances of an "all moneys" clause where the assignee of the mortgage claims that the mortgage secures other debts of the mortgagor owing to that assignee. The second category concerns the effect of arrangements between mortgagor and mortgagee pursuant to which the mortgagee acquires the title to the property, and the third category of case concerns the effect of charging an excessive interest rate where the right of redemption has been severely constrained, or made almost impossible, by the substantial increase in the amount required to redeem when compared to the actual principal sum borrowed and the period of the loan.

It is instructive to consider all these categories in more detail.

A *Assignment of Mortgage to Creditor of Mortgagor*

In two relevant cases, *Katsikalis v Deutsch Bank (Asia) AG*³⁹ and *Re Modular Design Group Pty Ltd (receiver and manager appointed) (in liq)*,⁴⁰ the mortgages contained clauses securing the repayment of 'all moneys now or hereafter to become owing or payable to the mortgagee' and extended the terms of the definition of mortgagee to include any of its assigns. In each case, the mortgage was assigned to another party who was already a creditor of the mortgagor. When the mortgagor came to redeem the mortgage, the assignee of the mortgage refused to accept an amount which represented the principal and interest then owing without taking into account the additional debt of the mortgagor owing to that assignee.

³⁸ [1904] AC 323.

³⁹ [1988] 2 Qd R 641.

⁴⁰ (1994) 35 NSWLR 96.

In *Katsikalis v Deutsch Bank (Asia) AG*,⁴¹ the decision that the mortgage did not secure any pre-existing debt of the assignee of the mortgagee was based solely upon the interpretation of the “all moneys” clause. There was a hint in the judgment of Thomas J that if there were additional moneys owed through a combination of other transactions there would be a persuasive onus upon the mortgagee to show that they were so owed in order to defeat the mortgagor’s right of redemption.⁴² There was, however, sufficient intimation in what Thomas J said, to the effect that if pre-existing indebtedness could be transferred to a creditor of the mortgagor by the assignment of a mortgage initially given to another party, thus making the mortgage more difficult to redeem, this fact may amount to a clog on the equity of redemption and result in the intervention of equity accordingly. However, this case very much rested on the interpretation of the particular “all moneys” clause. It has been held elsewhere that there is nothing inherently unconscionable in a mortgagee taking advantage of a widely drafted “all monies” clause and such clauses have become standard in institutional mortgages.⁴³

The second decision, *Re Modular Design Group Pty Ltd (receiver and manager appointed) (in liq)*,⁴⁴ contained very similar facts where guarantees and equitable mortgages given to a bank to secure various debts of the mortgagor were assigned by the bank. In each case, the guarantees and mortgage documents contained clauses securing ‘all moneys now or hereafter to become owing or payable to the bank by the mortgagors’ including ‘moneys which may be due and owing by the mortgagor to the bank under the guarantee’. The mortgages included terms extending the definition of bank to include any of its assigns. The question for the court was whether or not moneys already owing to the assignee by the mortgagor were included as part of the secured debt consequent upon the assignment.

Santow J conceded that ‘it would be a startling result for the debtor, if by the mere device of assigning charges and guarantees to an existing unsecured creditor, that creditor were thereby to become secured for its previously unsecured debt, by reason of the wording in the charge document’.⁴⁵ Again, it was necessary to construe the words of the mortgage and particularly the “all moneys” clause. The mortgagor argued that a wide interpretation of the clause would lead to consequences where the equity of redemption would be impeded or constrained. However, the mortgagor recognised that such a view would be rebuttable where the language of the instrument was sufficiently clear and the equity of redemption not directly clogged.⁴⁶ Santow J looked at the wider point being the question of whether a stipulation literally capable of permitting an accretion of a past unsecured debt of the assignee would constitute a clog on the equity of redemption either directly, or in the sense of impedance of the exercise of that equity by way of collateral stipulation.⁴⁷

He held that where the original mortgage did not clearly contemplate the charging of the mortgagor’s pre-assignment indebtedness, permitting the charge would impede the

⁴¹ [1988] 2 Qd R 641.

⁴² Ibid 650.

⁴³ *Re Bankrupt Estate of Murphy; Donnelly v Commonwealth Bank of Australia* (1996) 140 ALR 46 at 49. For a comprehensive consideration of all monies clauses, see Collier, ‘All Debts Clauses in Commercial Contracts & Guarantee’ (1998) 24 *Monash Law Review* 7.

⁴⁴ (1994) 35 NSWLR 96.

⁴⁵ Ibid 99.

⁴⁶ Ibid 102.

⁴⁷ Ibid.

mortgagor in the exercise of its equity of redemption and constitute a clog. Further, Santow J said that it would be also unfair or unconscionable for the assignee as mortgagee to obtain that collateral advantage.⁴⁸

In summary, Santow J envisaged circumstances which could attract the intervention of equity to prevent a mortgage document by its terms causing prior unsecured liabilities of an assignee to be rendered secured following the assignment of a mortgage.

Whilst the mortgagors in each case raised the spectre of the mortgagee clogging the equity of redemption, the decisions were effectively grounded on different bases, namely, the interpretation of the mortgage instruments.⁴⁹

B *Mortgagee Obtaining Collateral Advantage of Option to Purchase Mortgaged Property*

It is this form of advantage to a mortgagee which has attracted the greatest curial attention in more recent times. It has been clear since the unequivocal statement of Lord Parker in *Samuel v Jarrah Timber and Wood Paving Corporation*⁵⁰ that where a mortgagee stipulates for an option to purchase the security, that prima facie this option will be considered to be inconsistent with both the contractual and equitable right of redemption. In this respect, the court must inquire as to whether the transaction is truly one of mortgage or one of sale.⁵¹ There is judicial recognition that if the agreement giving the option to purchase was an integral part of the mortgage transaction, as opposed to the obligations being contained in two distinct contracts, then the likelihood was that there was a clog on the equity of redemption as the transaction was inconsistent with or repugnant to the right of the mortgagors to redeem the mortgaged property.⁵² It has, however, been held that even if an option to purchase is contained in a separate document from the mortgage, the mere separation of the documents may not be sufficient to deny the existence by the mortgagee of a clog on the equity of redemption. It is the transactions themselves which must be independent⁵³ and a court will look to the chronology of the alleged independent transactions and the substance of the whole transaction to determine whether or not the option to purchase is independent of the mortgage.⁵⁴

However, the complexity of the transaction may occasion some difficulty in the discernment on whether or not a transaction is truly a mortgage or a sale and this can pose some difficulty in the application of the principles.⁵⁵ However, notwithstanding an

⁴⁸ (1994) 35 NSWLR 96 at 104.

⁴⁹ In *Kerr v Ducey* [1994] 1 NZLR 577, a transferee of a mortgage purported to add a judgment debt to the secured sum. In finding against the transferee, the court held that the language of the mortgage would not permit this and the “clog” argument was not raised.

⁵⁰ [1904] AC 323.

⁵¹ Ibid at 360.

⁵² *Bannerman Brydone Folster & Company v Murray* [1972] NZLR 411 at 421 citing *Harper v Joblin* [1916] NZLR 895 at 915-916 and *Lewis v Frank Love Ltd* [1961] 1 WLR 261.

⁵³ *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 39.

⁵⁴ See, for example, *In re Supreme Court Registrar to Alexander Dawson Inc* [1976] 1 NZLR 615 at 627 where a separate option to purchase was given to the mortgagee independently of the mortgage, and the option was held to be valid, and *Reeve v Lisle* [1902] AC 461.

⁵⁵ The determination of the limits of the mortgage transaction and the decision as to whether there is one transaction or two has been described by learned authors as ‘a metaphysical problem and one that bristles with difficulties’: see E I Sykes and S Walker, above n 4, 76; much depends on

option to purchase and the mortgage may be expressed in a separate documents, certain factors may point to the whole transaction having legal effect as a mortgage. For example, in *Epic Feast Ltd v Mawson KLM Holdings Pty Ltd (in liq)*⁵⁶ an option to purchase was executed on the same day as the mortgage with the option price equalling the amount of the loan plus interest. Further, the date for repayment of the principal and interest evidenced the last date before which the option could be exercised, thus effectively denying the capacity of the mortgagor to redeem. Regrettably, the question of whether the option to purchase in this case was a clog on the equity of redemption was not pursued at the trial and the appellate court did not express a final view on the matter but DeBelle J did comment, in dictum, that, ‘on the face of the document, there is much which points to the conclusion that this was an unconscionable transaction’ particularly given the usurious rate of interest.⁵⁷

However, in complex transactions involving large well-resourced commercial entities each with independent legal advice, it may be more difficult to discern the true nature of the transaction.

This was the situation in *Westfield Holdings Ltd v Australian Capital Television*.⁵⁸ Briefly, the first defendant agreed to buy television stations in Canberra, Adelaide and Perth for \$185 million to be funded as to \$130 million by the defendants taking over a debt owed to a consortium of banks, as to \$40 million by way of loan from the plaintiff and as to \$15 million by the issue of preference shares. In addition, inter-company debts owed by the defendants to their former, holding company were preserved on the understanding that they were expected to be repaid. Initially, it was thought that this \$11 million would be raised by selling the land upon which the Canberra, Adelaide and Perth television stations were operated to an independent financier for \$11 million and then leased back to the operating companies which \$11 million would then go to discharge the inter-company debts. However, this arrangement did not eventuate and, by another agreement, the plaintiff agreed to provide \$11 million for that purpose to be used solely to discharge those debts, the principal to be paid in full within 10 years from the date of the loan or upon receipt by the defendants from the plaintiff with the relevant purchase price, consequent upon the exercise of an option to purchase real estate owed by the defendant.

One objection to the option was that it was given in the same transaction as the mortgages over the parcel of land owed by the defendants securing the debt. Therefore, said the defendants, the collateral advantage gained by the mortgagee, who effectively had an option of purchasing the mortgaged property, had the effect of destroying the defendant’s right of redemption of the property once the loan was repaid. The defendant, therefore, sought to strike down the option to purchase as being void.

whether the court, upon analysing the transaction, determines whether product is embodiment of two separate transactions that is a contract for loan and mortgage (the mortgage transaction) or a contract embodying the collateral stipulation (the contract of loan) even though they may be in the same document: *De Beers Consolidated Mines v British South Africa Co* [1912] AC 52 (held to be two transactions).

⁵⁶ (1998) 71 SASR 161.

⁵⁷ Ibid 173.

⁵⁸ (1992) 32 NSWLR 194.

The first thing that should be noted is that this case concerned two large corporations, one being a public corporation of some magnitude. Secondly, it should be noted that both corporations were independently legally advised and that this transaction was one of some complexity in order to satisfy the payment of inter-company debts. Young J queried, in the first instance, whether or not the transaction was, in substance, a mortgage or a sale. He ultimately held that the transaction should be classified as a sale rather than a mortgage and, thus, the doctrine relating to clogs on the equity of redemption had no relevance.⁵⁹

Secondly, it was clear that all parties were aware of the reason for this complicated arrangement involving a large sum of money and that it was always contemplated that the defendants would give up ownership of the land upon which the television stations were conducted and take it back on leasehold with the proceeds of the arrangement going to satisfy money due to the related corporations.⁶⁰

Thirdly, even if the transaction were a mortgage, in dicta, Young J commented that the court should not invalidate any transaction merely because the mortgagee obtained a collateral advantage or, indeed, sought to purchase the mortgage property, unless this occurred in circumstances of unconscionable conduct.

In concluding, his Honour said:

In my view, in 1992, the rule (allowing a court to invalidate any transaction where a mortgagee obtains a collateral advantage or seeks to purchase a mortgage property) only applies where the mortgagee obtains a collateral advantage which in all the circumstances is either unfair or unconscionable. It may be that the court presumes from the mere fact of a collateral advantage that the transaction is unconscionable unless there is evidence to the contrary, that the principle does not extend to invalidate automatically cases in which the mortgagee has obtained the right to purchase the whole or part of the mortgaged property in certain circumstances or has obtained a collateral advantage where the circumstances show there has been no unfairness or unconscionable conduct.⁶¹

Again, the court characterised the transaction in terms of a sale notwithstanding the sale was sourced in an option to purchase contained in a mortgage. In any case, notwithstanding this, in the absence of unconscionable conduct, regardless of the description of the arrangement, the court would not intervene. Again, the yardstick of conduct necessary to attract the sanction of the court was that of unconscionable conduct and not the nature of the transaction.

Whilst the obiter of Young J in this case has received some recognition,⁶² being only a judge at first instance, there has been some reluctance by other first instance courts to overturn the accepted line of cases which were the progeny of *Samuel v Jarrah Timber & Wood Paving Corporation Ltd*⁶³ and *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*.⁶⁴ This caution was noted by Cohen J in *Chase Corporation (Australia)*

⁵⁹ Ibid 198.

⁶⁰ Ibid.

⁶¹ (1992) 32 NSWLR 194 at 202-203.

⁶² *Epic Feast Ltd v Mawson FLM Holdings Ltd* (1998) 71 SASR 161 at 173.

⁶³ [1904] AC 323.

⁶⁴ [1914] AC 25.

*Pty Ltd v North Sydney Brick and Tile Co Ltd*⁶⁵ where his Honour said that in the case before him, he would require more detailed submissions before declining to follow the accepted House of Lords decisions and, that, in any case the question was not necessary for him to decide.

Accordingly, it may be too early to assume that a collateral advantage of an option to purchase mortgaged property conferred on a mortgagee must be accompanied by an element of unconscionability or amount to a penalty before that collateral advantage will be set aside. Nevertheless, it should not go unremarked that in more recent times the courts have not needed to fall back on the old doctrine preferring to decide cases like these on other grounds, notably whether the mortgagee's conduct was unconscionable or not.

C *The Charging of Excessive Interest*

As indicated above, the Usury Laws were abolished in 1854.⁶⁶ To ensure borrowers continued to be protected against the charging of excessive interest, the Court of Equity treated this practice as a clog on the equity of redemption on the basis that such conduct was oppressive or unconscionable.⁶⁷ In the early 20th century, legislation was passed in each of the state parliaments of Australia with a view to regulating money lending.⁶⁸ The thrust of this legislation was not particularly to stop usury, but largely to protect those persons less able to transact business from being disadvantaged by moneylenders driving hard and unconscionable bargains.⁶⁹ This legislation was progressively repealed in all states and, subject to whether or not the loan is regulated by the *Consumer Credit Code*, a lender is not limited by statute as to the amount of interest which might be charged.

However, interest to attract a penalty finding must indeed be excessive and not really just high. In *Charmelyn Enterprises Pty Ltd v Klonis*,⁷⁰ a provision of a mortgage provided that, in addition to the principal sum, the mortgagor should pay a sum calculated on a formula based on the Consumer Price Index which gave the mortgagees advantage of protection against inflation during the period of the mortgage. This was in line with the rise in the increase in the value of the security. After consideration of the then existing authorities,⁷¹ the New South Wales Court of Appeal found that the mortgagee had not acted unconscionably or oppressively or in any manner which may have suggested that the agreement was a clog on the equity of redemption. In summarising views of the court, Mahoney JA concluded:

I do not think that the present requirement was unreasonable. I do not see anything unreasonable in the indexing of an obligation of the present kind ...in the context of the

⁶⁵ (1994) 35 NSWLR 1 at 25.

⁶⁶ 17 & 18 Vic c 90.

⁶⁷ *Kreglinger v New Patagonia Meat and Cold Store Co Ltd* [1914] AC 25 at 61.

⁶⁸ *Moneylenders and Infants Loan Act 1905* (NSW); *Moneylenders Act 1906* (Vic); *Moneylenders Act 1916* (Qld); *Moneylenders Act 1912* (WA).

⁶⁹ *Re Taylor; ex parte Swan* (1907) 24 WN (NSW) 159.

⁷⁰ (1980) 2 BPR [97142] 9527.

⁷¹ *Cityland and Property Holdings Ltd v Dabrah* [1968] 1 Ch 166; *Multiservice Bookbinding Ltd v Marden* [1979] 1 Ch 84.

three year term in the instant mortgage, there was I think nothing unreasonable in the adoption of such a mechanism.⁷²

However, this decision did not properly test the principles to the extent of other decisions as the anti-inflationary interest clause could not be said to be usurious. However, other more recent decisions clearly draw a linkage between usury and unconscionable conduct in the modern context.

In *Epic Feast Ltd v Mawson KLM Holdings Pty Ltd*⁷³ a mortgage for \$250,000 made on 9 July 1996 required the loan to be repaid with interest on or before 4 November 1996. Upon calculation, in those four or so months, the principal and interest to be repaid on that date amounted to \$1.47 million reflecting an effective rate of interest of 61.5 percent per annum. The court drew the inference that this was an unconscionable transaction ‘particularly given the usurious rate of interest’.⁷⁴ There is nothing startling about this proposition particularly when one considers the approach taken by Goff J in *Cityland and Property (Holdings) Ltd v Dabrah*⁷⁵ who struck down the right of the mortgagee to claim an effective interest rate of 57 percent per annum over a period of five years in circumstances where the amount outstanding would have been in excess of the value of the security at that time. The conduct of the mortgagee was held to be unconscionable and oppressive.

Apart from this South Australian case, the charging of excessive interest seems to be the province of short term bridging finance lenders and the relief for the borrower seems to be founded more upon general unconscionability than upon the basis that charging of the excessive interest renders the right of redemption illusory or constitutes a clog on that right.

In the more recent case of *Asia Pacific International Pty Ltd v Dalrymple*,⁷⁶ borrowers entered into a Deed of Loan with an interest rate of 20 percent per month. The amount of the loan was some \$70,000 lent on 10 November 1997 and due for repayment one month later on 9 December 1997. If the borrowers paid interest on the dates fixed, the lenders agreed to accept the rate of 15 percent per calendar month. The security for the loan was the third ranking bill of mortgage over property owed by the borrowers and there was provision for capitalisation of unpaid interest.⁷⁷ By July 1999, the debt including principal and interest, including capitalised interest, amounted to \$2.7 million. The borrowers sought to have the provision relating to the payment of interest set aside on the basis that it was unconscionable.

On reviewing the Deed of Loan and the facts surrounding the loan, Shepherdson J made the following findings of fact of relevance.

1. The transaction between the parties was at arm’s length negotiated through a mortgage broker.

⁷² *Charmelyn Enterprises Pty Ltd v Klonis* (1980) 2 BPR [97142] at 9541-9542.

⁷³ (1998) 71 SASR 161.

⁷⁴ *Ibid* 173.

⁷⁵ [1968] 1 Ch 166.

⁷⁶ [2000] 2 Qd R 229.

⁷⁷ This in itself would not be unconscionable: *General Credit (Finance) Pty Ltd v Grimm* [1978] Qd R 449 at 468.

2. The lenders went to pains to ensure that the borrowers were properly advised as to the terms of the loan and understood the consequences should there be any default and the advice was independent.
3. One of the borrowers was experienced commercially.

However, Shepherdson J found one provision of the Deed of Loan oppressive and unreasonable. This was the provision for capitalisation of interest read in conjunction with the interest rate of 20 percent per month. His Honour said:

In my view, I should look at the end result objectively. When I do that, I come to the conclusion that the insertion into the Deed of Loan and bill of mortgage (which provided for interest at 20 percent per month albeit reducible to 15 percent per month if paid on time) of an agreement to pay interest on unpaid interest has taken advantage of the defendants' special vulnerability. Exhibit 4 shows that they are in urgent need of this loan of \$60 000—and the above insertion in the agreement is in my view 'unreasonable and oppressive to an extent that affronts ordinary minimum standards of fair dealing'.⁷⁸

His Honour found unconscionable conduct on behalf of the lender by the insertion of provisions that made the unpaid interest to be capitalised and bear further interest at the rate of 20 percent per month. Shepherdson J commented whilst that a lender should be extremely careful to ensure, as far as the lender can, that a borrower has competent and independent advice and understood the nature of the obligation entered into, the giving of the contract of loan may still amount to unconscionable dealing.⁷⁹

His Honour concluded that the rate of interest should be reduced to 15 percent per month rejecting the 20 percent per month rate as oppressive.⁸⁰ The Deed of Loan was therefore varied by the court to provide for payment of principal of \$75,500 unpaid plus a number of instalments of \$10,500 each unpaid for interest, making the total debt approximately \$293,000.

The borrowers were prepared to argue that the charging of this excessive interest amounted to a clog on the equity of redemption, but did not need to do so, relying successfully on the grounds of unconscionability.⁸¹

The case is of interest as it does clearly illustrate that payment of interest on unpaid interest at an excessive rate may evidence the taking of advantage of the borrowers' special vulnerability that is the urgent need for the loan in the circumstances. Whilst the provision in the Deed of Loan for the capitalisation of interest in this manner was explained to the borrowers, one of whom had commercial experience, this was insufficient to immunise the lenders against a successful charge of unconscionable conduct at the instance of the borrowers.⁸²

⁷⁸ *Asia Pacific International Pty Ltd v Dalrymple* [2000] 2 Qd R 229 at 240.

⁷⁹ *Ibid* 241.

⁸⁰ *Ibid* 243.

⁸¹ *Ibid* 244.

⁸² In *Multispan Constructions No.1 Pty Ltd v 14 Portland Street Pty Ltd* (No 2) [2001] NSW SC 1047, a court entered judgment for a party for a principal sum and interest at the rate of 25% per annum compounded monthly which was the rate applicable under relevant financing and security documents between the parties. Barrett J at [6] said that the creditor's legitimate expectation would be to have interest at the contracted rate until payment and that the interests of justice were not served by an outcome which sees a creditor suffer the substitution of some lower prescribed interest rate for the contracted rate just because the creditor had been forced to pursue the debtor to

However, it is of note that it was not necessary for the mortgagors to raise the issue of clogging the equity of redemption and the decision was made on other grounds.

V CLOGGING THE EQUITY OF REDEMPTION: MEETING POLICY OBJECTIVES?

Having considered these recent Australian decisions, the question must be asked whether the policy objectives underlying the doctrine against clogging the equity of redemption are still best served by applying the rules stated by Lord Parker in *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd*.⁸³ The doctrine developed to protect borrowers from unscrupulous lenders who took unfair advantage of them by imposing oppressive terms in the mortgage. The need to protect necessitous borrowers against unscrupulous lenders is as relevant today as ever before. However, it is submitted that the application of the doctrine against clogging the equity of redemption is not the appropriate vehicle through which to safeguard the interests of those in need of protection.

The doctrine is, at the same time, both too narrow and too wide. The doctrine is too narrow because there are circumstances in which people other than borrowers deserve to be protected against unscrupulous lenders. Guarantors who mortgage property to secure advances to others also require protection. The plethora of cases over the past two decades illustrate the role that equity plays in this context.⁸⁴ However, such cases fall outside the ambit of the doctrine because guarantors do not enjoy a right of redemption. At the same time, the doctrine is too wide. In some lending transactions, both parties have equal bargaining power and are independently advised. This is particularly so where the borrower is a large commercial organisation. In such circumstances, the borrower cannot be regarded as being in need of protection. It seems incongruous that there are, in such circumstances, restrictions on the kind of collateral advantage that the borrower may confer upon the lender. The folly of applying the doctrine in such an inflexible way has been judicially recognised.⁸⁵

The blanket application of the doctrine has had unfortunate results. There has been much uncertainty in identifying mortgage provisions which attract the application of the doctrine. It was originally thought that no collateral advantage could be conferred on a mortgagee other than the payment of principal and interest. When the courts ultimately accepted that conferral of an additional benefit was permissible, doubt arose about whether that benefit could persist after redemption.⁸⁶ Even today, the case law is not entirely consistent on this point. Secondly, as the doctrine applies only to a mortgage transaction, in a number of decisions, technical arguments have centred on the true nature of the transaction.⁸⁷ If the transaction were a mortgage, the particular provision

judgment; see also *State Bank of New South Wales Ltd v Chia* (2000) 50 NSW LR 587.

⁸³ [1914] AC 25.

⁸⁴ See, for example, *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395; *Ribchenkow v Suncorp-Metway Ltd* (2000) 175 ALR 650.

⁸⁵ *Westfield Holdings Ltd v Australian Capital Television* (1992) 32 NSWLR 194 at 202; *Samuel v Jarrah Timber and Wood Paving Corporation Ltd* [1904] AC 323 at 325.

⁸⁶ For a historical account of the development of the doctrine in this regard, see P Devonshire 'The Modern Application of the Rule Against Clogs on the Equity of Redemption' (1997) 5 *Australian Property Law Journal* 1, 3-5.

⁸⁷ For example, see *Westfield Holdings Ltd v Australian Capital Television Pty Ltd* (1992) 32 NSWLR 194; *Gurfinkel v Bentley Pty Ltd* (1966) 116 CLR 98; *Lewis v Frank Love Ltd* [1961] 1

would be void as a clog. However, if the provision could be regarded as forming part of another transaction or was contained in a separate document, it might be enforced. In some cases, a clause has been held not to form part of a mortgage transaction despite compelling factors to suggest that this was in fact intended by the parties.⁸⁸ Such decisions were reached more from the courts desire to uphold agreements voluntarily entered into by the parties in furtherance of their legitimate interests, rather than from strict application of legal principle. While the outcomes in such cases may reflect commercial expectations, the decisions can be difficult to reconcile on the facts.

Finally, and most significantly, the blanket operation of the doctrine may result in provisions being struck down although they have been negotiated between parties of equal bargaining power, and truly represented their best interests (at least at the time the provisions were negotiated). This is highlighted where a mortgagor confers on the mortgagee an option to purchase the mortgaged property. If the option forms part of the mortgage, the doctrine, as it is traditionally applied, would operate to strike down that provision. The inflexible operation of the doctrine in this context has attracted criticism both in the cases and in the academic literature.⁸⁹

No doubt as a result of these difficulties, the doctrine is becoming less relevant in recent times, as evidenced by less reliance upon it being made by aggrieved borrowers. In the modern Australian cases referred to earlier in this article, there was remarkably little consideration of the doctrine. Had these cases been decided earlier last century, it is likely that the application of the doctrine would have played a greater role in the outcome of the cases. Instead, the courts are increasingly basing their decisions on other grounds. In truth, this is appropriate. In the first class of cases, the focus was less on the principle about a clog or bar on the equitable right to redeem, and more on the proper interpretation of the “all moneys” clauses. The indications were that had the mortgage documents contained appropriately drafted provisions, the mortgagor may have been required to repay money owing to the assignee of the mortgage before being able to redeem the property. The indication was that the doctrine of clogging the equity of redemption would not have been a barrier. In the second category of case regarding the conferral of an option to purchase property, principles of unconscionability were really determinative of the validity of the provision, not outmoded concepts of clogging the equity of redemption. Similarly, in the third category where the issue was the excessive interest rate being charged, the cases have been most recently decided on general principles of unconscionability.

VI CONCLUSIONS

In his article considering the modern application of the rule against clogging the equity of redemption, Devonshire comments on the changing role of equity. He is critical of the outcome of applying the doctrine in the context of an option to purchase clause in a

WLR 261; *Baker v Biddle* (1923) 33 CLR 188; *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25.

⁸⁸ See, for example, *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25.

⁸⁹ *Westfield Holdings Ltd v Australian Capital Television Pty Ltd* (1992) 32 NSWLR 194 at 202, those comments being cited with approval in *Re Modular Design Group Pty Ltd (receiver and manager appointed) (in liq)* (1994) 35 NSWLR 96 at 103; *Samuel v Jarrah Timber and Wood Paving Corporation Ltd* [1904] AC 323 at 325; P Devonshire, above n 86, 9-10.

mortgage, and argues for a more flexible approach in that context. In his conclusion, however, Devonshire does not suggest that ‘the clogs principle is entirely redundant’. It is at this point that we take a different view. In commenting on the evolution of the equitable jurisdiction in the context of this doctrine, it has been said that the case law:

illustrates the elastic character of equity’s jurisdiction and the power of equity judges to mould the rules which they apply in accordance with the exigencies of the time.⁹⁰

Nevertheless, elastic can only be stretched so far. The case law demonstrates that the point has been reached where the doctrine of clogging the equity of redemption can no longer stretch to serve the exigencies of our time. We need to move to principles that are, at the same time, both wide enough to extend to those in need of protection, yet not so broad as to apply to those who are not in need. Unconscionable or oppressive mortgage transactions should no longer be treated differently from any other transaction.

Over recent decades, principles of unconscionability have been expanding.⁹¹ Principles of unconscionability may now be relevant even in the absence of special disability. *Westfield Holdings Ltd v Australian Capital Television*⁹² provides such an example. Relief on the grounds of unconscionability was considered by the Supreme Court of New South Wales in the context of a multi-million dollar business dealing between two large corporations. Given the increased flexibility of this equitable doctrine, it is submitted that the interests of justice and the protection of borrowers can be accommodated in a much more principled way than can occur under concepts difficult to apply and rules that come within the ambit of the doctrine against clogging the equity of redemption.

It is also interesting to note that, in the *Consumer Credit Code*, Parliament uses the language ‘unjust’ to include ‘harsh oppressive or unconscionable’⁹³ to proscribe conduct in a mortgagee or lender which might attract the sanction of the courts, but nowhere in the legislation is the concept of clogging the equity of redemption mentioned. The same comment can be made of other similar consumer protection legislation.⁹⁴

It is submitted that Parliament, having given a lead to the courts in this somewhat historically arcane area of modern commercial practice, doubts concerning the application of the doctrine should be finally laid to rest by the courts.

Devonshire concluded in 1997 that the ‘clogs principle’ was not entirely redundant.⁹⁵ However, it is apparent from the most recent case law that any argument of a mortgagor based upon the existence of a clog on the equity of redemption is merely of secondary

⁹⁰ *Kreglinger v New Patagonia Meat and Cold Storage Co Ltd* [1914] AC 25 at 38 per Viscount Haldane LC.

⁹¹ For a recent consideration of these issues, see T Cockburn, ‘The Boundaries of Unconscionability and Equitable Intervention: *Bridgewater v Leahy* in the High Court’ (2000) 8 *Australian Property Law Journal* 143.

⁹² (1992) 32 NSWLR 194.

⁹³ Section 70(7) *Consumer Credit Code*.

⁹⁴ *Contracts Review Act 1980* (NSW), s 9; *Trade Practices Act 1974*, s 51AC; *Australian Securities and Investments Commission Act 2001*, s 12CB.

⁹⁵ P Devonshire, above n 86, 10.

or tertiary importance after statutory or equitable remedies based upon unconscionable conduct have been pursued.