RELIEF AGAINST FORFEITURE OF A LEASE IN WESTERN AUSTRALIA

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I INTRODUCTION

At common law, a landlord has the right to enforce forfeiture of a lease where the tenant breaches a term that is expressed as a condition of the lease agreement.[1] Breach of covenant, on the other hand, does not give a landlord a right to forfeit the lease unless such a right is expressly embodied in the lease agreement.[2] In practice, this is rarely an issue as tenancies created by a formal document invariably reserve a right of forfeiture for breach of any covenant, including the covenant to pay rent.

For leases created under the *Transfer of Land Act 1893* (WA) s 93(2) of the Act implies, in favour of the landlord, the right to forfeit the lease for breach of any covenant, which continues for more than one month. The occurrence of an event that entitles the landlord to forfeit a lease does not of itself amount to a forfeiture of the lease, unless and until the landlord takes action to determine the lease, either by physical peaceable re-entry or by issue and service of a writ proclaiming possession.[3]

Moreover, the landlord's right of re-entry is subject to two important general limitations. Firstly, s 81(1) of the *Property Law Act 1969* (WA), where applicable, stipulates a certain procedure that the landlord must follow prior to re-entry. The landlord must serve the tenant notice of the alleged breach and give the tenant reasonable time to remedy the breach. Secondly, even though the landlord is entitled to terminate the lease, in appropriate circumstances, the tenant may obtain judicial relief against forfeiture of the lease.

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1 *Doe d Henniker v Watt* (1828) 8 B & C 308.

2 *Doe d Willson v Phillips* (1824) 2 Bing 13

3 *Moore v Ullcoats Mining* [1908] 1 Ch 575; *In Fremantle Trades Hall Industrial Association v Victor Motor Co Ltd* [1963] WAR 201, it was held that an unequivocal demand for possession communicated to the lessee was also sufficient to effect re-entry. See also *Ex Parte Whalan* [1986] 1 Qd R 500; *Rosa Investments Pty Ltd v Spencer Shier Pty Ltd* [1965] VR 97. For a contrary view see *Consolidated Development Pty Ltd v Holt* [1986] 6 NSWLR 607 (Unreported, Young J, 17 February 1986).

This paper is concerned with the law regarding relief against forfeiture in Western Australia. The paper explores the current state of the law in this jurisdiction, in particular, the basis of the courts' jurisdiction, the principles governing the exercise of this jurisdiction and the circumstances the courts consider in deciding whether to grant relief against forfeiture. The paper also considers the possibility of invoking a broad principle of 'unconscionable conduct' under ss 51AA, 51AB and 51AC of the *Trade Practices Act 1974* (Cth), as an additional remedy for tenants seeking relief against forfeiture.

II RELIEF AGAINST FORFEITURE

The grant of relief against forfeiture involves the coercive re-establishment of the relationship of lessor and lessee, which has been effectively sundered at law.[4] The basis and extent of the courts' jurisdiction to grant relief against forfeiture differs depending on whether the ground for forfeiture is non-payment of rent or breach of other covenants. For convenience, we shall discuss the two grounds separately.

A *Non-payment of rent*

For centuries, the Courts of Chancery asserted a right to grant relief against forfeiture for breach of the covenant to pay rent. The main reason for this was that the courts considered the landlord's right of re-entry as mere security for the payment of rent. Therefore, if the landlord could be restored to his or her previous position by payment of all outstanding rent, costs and expenses to which he or she had been put, the tenant would be entitled to be relieved from the forfeiture of his or her lease.[5]

Sections 16(1)(d)(i) and 24(3) of the *Supreme Court Act 1935* (WA), confirms the Supreme Court's inherent equitable jurisdiction, which includes the power to grant relief against forfeiture.[6] That jurisdiction may be exercised whether the landlord regained possession by judicial process or peaceably without the assistance of any court.[7]

The authors of a leading textbook *Australian Real Property Law*,[8] Bradbrook, MacCallum and Moore, assert that the equitable rules for the

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4 *Stieper v Devoit Pty Ltd* (1977) 2 BPR 9602, 9610.

5 *Greenwood Village v Tom The Cheap* [1976] WAR 49, 51.

6 *In Fremantle Trades Hall Industrial Association v Victor Motor Co Ltd* [1963] WAR 201.

7 *Howard v Fanshawe* (1895) 2 Ch 581.

8 Adrian J, Bradbrook, Susan V. MacCallum and Anthony P. Moore, *Australia Real Property* Law (3rd ed, Sydney: Thomson LawBook Co, 2002).

granting of relief against forfeiture 'have now been consolidated into legislation in *each* Australian jurisdiction'[9]. They state that the effect of the legislation is broadly twofold.

Firstly, where a landlord institutes proceedings to enforce forfeiture and the tenant pays to the landlord or into court all arrears and costs before trial begins, the court proceedings will stop. This is a mandatory provision and is not subject to judicial discretion.

Secondly, where the tenant fails to pay as previously mentioned, and the property owner obtains judgment for possession, the legislation gives the courts discretionary power to grant relief against forfeiture. However, the tenant must seek relief no later than six months after execution of the judgment for possession. Once that period expires, 'relief may not be granted in any circumstances'[10].

The learned authors cite the relevant legislation in the other jurisdictions for the proposition.[11] Curiously, they do not refer to any Western Australian legislation.[12] This raises the question whether in WA the courts' equitable jurisdiction to grant relief against forfeiture because of non-payment of rent is consolidated into legislation as in the other jurisdictions. If there were any such provisions, one would have expected to find them either in the *Supreme Court Act 1935* (WA) or the *Property Law Act 1969* (WA), respectively.

The *Supreme Court Act 1935* (WA) affirms, without more, the Supreme Court's inherent equitable jurisdiction. There is no provision in the Act that limits the exercise of the Supreme Court's jurisdiction with regard to relief against forfeiture. The Supreme Court's statutory jurisdiction to grant relief against forfeiture, under s 81 of the *Property Law Act 1969* (WA), is excluded where the ground for forfeiture is for the non-payment of rent.[13]

The legislation in the other states that consolidates the exercise of the courts' equitable jurisdiction to relieve against forfeiture for non-

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9 Adrian J, Bradbrook, Susan V. MacCallum and Anthony P. Moore*, Australia Real Property* Law (3rd ed, Sydney: Thomson LawBook Co, 2002), 464 (Emphasis added).

10 Adrian J, Bradbrook, Susan V. MacCallum and Anthony P. Moore*, Australian Real Property Law*, (3rd ed Sydney: Thomson LawBook Co, 2002), , 464 (they cite *Dennis and Capley v Eddie* [1952] VLR 92, as authority for the proposition).

11 *Landlord and Tenant Act 1899* (NSW), ss 8-10 *Conveyancing Act 1919* (NSW), ss 128-131; *Supreme Court Act 1986* (Vic), ss 79, 80, 85; *Property Law Act 1958* (Vic), ss 146-147; *Property Law Act 1974* (Qld), ss 123-128; *Landlord and Tenant Act 1936* (SA), ss 4, 5, 7, 9; *Law of Property Act 2000* (NT), ss 136-143.

12 They also omit reference to Tasmania and the ACT legislation. See also B Edgeworth, CJ Rossiter and MA Stone *Sackville and Neave Property Law Cases and Materials,* (7th ed, Sydney: Butterworths, 2004), 846 - 847.

13 *Property Law Act 1969* (WA), s81(9).

payment of rent, is based on s210 and s212 of the English *Common Law Procedure Act 1852* (UK).[14] The two sections are a modern version of ss 2 and 4 respectively, of the *Landlord and Tenant Act 1730* (UK).[15]

Prior to that Act there was no limit upon the time within which a tenant might seek relief in equity against forfeiture for non-payment of rent. The main reason for the enactment was to relieve landlords, who had re-entered for non-payment of rent, from the inconvenience of continuing uncertainty of not knowing when or whether the tenant would seek relief against forfeiture, and if so, whether relief would be granted.[16] The question is whether the *Landlord and Tenant Act 1730* (UK), applies in Western Australia.

Statutes of the Parliament of the United Kingdom, of general application in force on 1 June 1829,[17] were inherited if they were suitable for local conditions unless overridden by legislation.[18] The test whether an imperial statute was suitable for local conditions is variously put. For example, in *Delohery v Permanent Trustee Co of NSW*,[19] Griffith CJ, citing *Attorney- General v Stewart*[20] said that the test was whether the Act in question was 'a law of local policy adapted solely to the country in which it was made'.

In *Quan Yick v Hinds,*[21] Barton J said that the question was whether the Act 'was founded on reasons which were peculiar to England in their application, and which had no reference to the conditions of an infant settlement'. The *Landlord and Tenant Act 1730* (UK), seems to be of general application in a sense that it deals with the exercise of the courts equitable jurisdiction.

Detailed discussion of whether the *Landlord and Tenant Act 1730* (UK) was suitable for WA circumstances is beyond the scope of this paper. Suffice to observe that the Act's provisions do not seem to be unique to circumstances in England. The fact that most other jurisdictions re-enacted similar provisions suggests that the Act was not only of a general application but also suitable for local

14 15 & 16 Vict. c76.
15 4 Geo 2, c28.
16 *Doe d Hitchens v Lewis* (1751) 1 Burr 614, 619.
17 *Interpretation Act 1984* (WA), s 73.
18 *Quan Yick v Hinds* (1905) 2 CLR 345, 356.
19 (1904) 1 CLR 283, 310.
20 (1817) 2 Mer 143, 160.
21 (1905) 2 CLR 345, 367.

circumstances.

In the absence of overriding legislation,[22] it is arguable that the *Landlord and Tenant Act1730* (UK), might be current law in WA.[23] Surprisingly, we have not sighted any reported or unreported judgment of the WA Supreme Court dealing with the issue of whether the *Landlord and Tenant Act 1730* (UK), applies in this jurisdiction. For reasons unknown to this writer, the legal fraternity in WA seems to have ignored the *Landlord and Tenant Act 1730* (UK). This is particularly surprising with respect to certain cases, which, if the *Landlord and Tenant Act 1730* (UK), were applied, should not have proceeded.

For example, in *Fremantle and District Trades Hall Industrial Association of Workers v Victor Motor Company Pty Ltd,*[24] the defendant (tenant) paid and the plaintiff received and acknowledged a sum of money equivalent to rent up to the time of the hearing. Under s 4 of the *Landlord and Tenant Act1730* (UK), the legal proceedings for forfeiture should have stopped automatically.

Similarly, the case of *Greenwood Pty Ltd v Tom The Cheap*,[25] should not have proceeded because, on the facts, it appears that by the time of the hearing to recover possession the total amount of payment tendered by the defendant (tenant) exceeded what was due by 'hundreds of dollars'.

Interestingly, in this case Jackson CJ observed that equity's right to relieve against forfeiture for non-payment of rent was recognised and restricted as to time, by ss 2 - 4 of the *Landlord and Tenant Act 1730* (UK).[26] Yet, his Honour said nothing with respect to the application of the Act to the case before him. In both cases, the courts granted the respective tenants relief from forfeiture of their lease for non-payment of rent.

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22 Section 81 of the *Property Law Act 1969* (WA), which deals with statutory relief against forfeiture, does not override this Act. Section 81(9) expressly states that the section does not affect the law relating to re-entry or relief in case of non-payment of rent. See also *Fremantle and District Trades Hall Industrial Association of Workers v Victor Motor Company Pty Ltd* [1963] WAR 201. , and *Symmons Plains Pastoral Holdings v Tasmania Motor Racing* [1996] 6 Tas R 284 (Unreported, Zeeman J, 27 November 1996).

23 The Law Reform Commission of Western Australia *Report on United Kingdom Statutes in Force in Western Australia* Project no. 75 (1994) 64, recommended that sections 2 and 4 of the Act should be repealed. It is implicit in the recommendation that the Commission was of the view that the provisions were still in force.

24 [1963] WAR 201.

25 [1976] WAR 49.

26 *Greenwood Pty Ltd v Tom The Cheap* [1976] WAR 49, 50.

27 The Law Reform Commission of WA *Report on United Kingdom Statutes in Force in WA Project No75* (1994) 64, recommended that ss 2 and 4 of the Act should be repealed 'although there is no equivalent provision in Western Australia'.

Probably it is too late now to resuscitate *The Landlord and Tenant Act 1730* (UK).[27] In the circumstances, for present purposes, we shall assume that in this jurisdiction, unlike the other jurisdictions, the equitable rules for granting relief against forfeiture for non-payment of rent are not subject to statutory control. There is no time limit, within which a tenant may seek relief against forfeiture for non-payment of rent. Of course, if the delay to seek relief is unjustifiable it may operate against the grant of relief. Generally, as a guideline the application for relief must be made within a period of six months from the date the landlord regained possession.[28]

1 *Exercise of the court's jurisdiction*

It is, of course, up to the court to determine whether to grant a tenant relief from forfeiture. In *Shiloh Spinners Ltd v Harding,*[29] Lord Wilberforce reiterated the proposition that the purpose of the jurisdiction to grant relief against forfeiture is not to release parties from their bargains. On the contrary, it was a general principle of law to enforce contractual obligations, except in appropriate circumstances. The onus is upon the person seeking relief to satisfy the court that relief ought to be granted.[30] Where the tenant tenders the outstanding rent and costs, the courts usually, as a matter of course, exercise the discretion in favour of the tenant. In *Greenwood Village v Tom The Cheap*,[31] Jackson CJ aptly summarized the judicial attitude as follows:

> Equity regards a proviso for re-entry on non-payment of rent as merely a security for the rent, so that if the landlord can be restored to his position by payment of arrears of rent or other moneys due and any costs and expenses to which he has been put the tenant is entitled to be relieved against the forfeiture of his tenancy. The object of the proviso is to secure to the landlord the payment of his rent; and when the rent has been paid, the tenant should ordinarily be relieved from forfeiting his term.[32]

The case of *Greenwood Village v Tom The Cheap*[33] is a good illustration of the courts' indulgence towards tenants. Under an agreement for a lease, the landlord/plaintiff sought to re-enter on the ground of non-payment of rent. The tenant/defendant refused to quit and tendered cheques for all arrears of rent and more. The plaintiff did not bank the

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28 *Howard v Fanshawe*, (1895) 2 Ch 581.
29 [1973] AC 691, 723.
30 *Esther Investments Pty Ltd v Cherrywood Park Ltd* [1986] WAR 279, 299 (Brinsden J).
31 [1976] WAR 49, 51.
32 *Greenwood Village v Tom The Cheap* [1976] WAR 49,51.
33 [1976] WAR 49, 51.

cheques and instituted these proceedings to recover possession. The defendant counterclaimed relief against forfeiture.

On the facts of the case, the defendant appeared to be facing serious financial difficulties. In fact, it had entered into a scheme of arrangements with its creditors under s 181 of the *Companies Act, 1961 (WA)* to trade out of its difficulties. The plaintiff alleged that because of the defendant's financial situation, it was unlikely to pay future rent, or if it did, payment might be held to be a preference, with a risk that if the defendant went into liquidation the money might have to be repaid.

The issue was whether the court ought to grant the defendant relief against forfeiture. Chief Justice Jackson quoted with approval Jenkins LJ's famous passage in *Gill v Lewis,*[34] that 'save in exceptional circumstances, the function of the court in exercising this equitable jurisdiction is to grant relief when all that is due for rent and costs has been paid up'. His Honour rejected the plaintiff's argument that there were 'exceptional circumstances' that justified a refusal of relief. He held that notwithstanding the defendant's financial difficulties its position was not hopeless.[35]

Similarly, in *Fremantle and District Trade Hall Industrial Association of Workers v Victor Motor Company Pty Ltd*,[36] relief was granted to a tenant upon proof that it had tendered to pay 'the equivalent of the rent throughout although at irregular intervals, so that at the time of the hearing the [landlord] had received the equivalent of all rental which would have accrued under the lease were it current.'[37] The fact that the landlord had previously instituted action for the recovery of rent was not by itself a ground for refusal of relief against forfeiture.[38]

It has also been held that the courts will not refuse to grant relief against forfeiture to a tenant because he or she has a bad rent history 'at least on the first application'.[39] Indeed, according to Professor Gray:

> No matter how appalling the record of the tenant, the courts habitually take the view that re-entry is a mere security for payment of the rent and

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34 (1956) 2 QB 1, 13.

35 In *Hayes v Gunbola Pty Ltd* (1986) 4 BPR 9247, 9250-9251, it was held that it was not necessarily contrary to public policy to grant relief to an insolvent tenant, as the benefit of the lease inure for the creditors.

36 (1963) WAR 201.

37 *Fremantle and District Trade Hall Industrial Association of Workers v Victor Motor Company Pty Ltd* [1963] WAR 201, 208.

38 *Fremantle and District Trade Hall Industrial Association of Workers v Victor Motor Company Pty Ltd* [1963] WAR 201, 208 (D'Arcy J).

39 *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 235 (Unreported, Young CJ in Eq, 31 March 2004)..

40 Gray and Gray, *Elements of Land Law,* (3rd ed London: Butterworths, 2001) 1279.

> that if the rent is eventually paid, there is nothing that the landlord can currently complain of; he can only complain of the past.[40]

Usually, a tenant in breach of a covenant to pay rent is, at the same time, in breach of several other covenants. In relief against forfeiture for non-payment of rent cases, landlords opposing the application for relief tend to include breaches of other covenants to boost their arguments. Some authorities suggest that breach of other covenants in a lease is irrelevant to the application for relief against forfeiture of a lease for non-payment of rent.[41] Others, however, are more circumspect. They state that breach of other covenants in the lease does not justify a refusal to grant relief against forfeiture for non-payment of rent, save in very exceptional circumstances.[42]

The test for exceptional circumstances is whether the conduct of the applicant against forfeiture is such as to make it 'inequitable' that relief should be given to him or her.[43] For example, in *Stieper v Devoit Pty Ltd*,[44] the court withheld relief because the tenant's use of the leased premises exposed the premises to uninsurable fire hazards, which was inequitable to the landlord. Likewise, in *Pioneer Quarries (Sydney) Pty Ltd v Permanent Trustees Co of NSW*,[45] the tenant's use of the premises for immoral purposes influenced the courts in its decision to refuse to grant relief from forfeiture for non-payment of rent. In any case, the courts will not take into account breach of any covenant for which the landlord is required to serve notice under s 81 of the *Property Law Act 1969* (WA), where no such notice was served.[46]

Another issue that commonly arises is whether tenants who make good their default by payment of outstanding rent nonetheless are not entitled to relief against forfeiture where the breach was wilful. In *Shiloh Spinners Ltd v Harding,* Lord Wilberforce expressed the view that persons seeking relief against forfeiture must show that relief is 'appropriate' and that entailed consideration of their conduct, in particular whether the default was 'wilful'.[47] Recent authorities affirm the view that the courts may grant relief even if the refusal to pay rent

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The authors cite English and Australian cases for the propositions.

41 *Jam Factory Pty Ltd v Sunny Paradise Pty Ltd* [1989] VR 584, 591 (Ormiston J).

42 *Lo Guidice v Biviano (No. 2)* 1962 VR 420, cited with approval in *Symmons Plains v Tasmania Motor Racing Co Pty Ltd and another* (1996) 6 Tas R 284.

43 *Gill v Lewis* (1956) 2 QB 1, 17 (Hodson LJ).

44 (1977) 2 BPR 9602 cant find this case

45 (1970) 2 BPR 9562.cant find this case

46 *Cicinave Pty Ltd v Jasco Pty Ltd* (1989) 5 BPR 11, 139. *World by Nite Ltd v Michael* (2004) 1 Qd R 338; *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 235 (Unreported, Young CJ in Eq ,31 March 2004)... .

47 *Shiloh Spinners Ltd v Harding* [1973] AC 691, 723.

48 *Hayes v Gunbola Pty Ltd* [1988] NSW ConR 55-375 (Unreported, Young J, 17 June

was wilful. The fact that the default was wilful is just one of the factors the courts will take into account to determine whether it is equitable to grant relief.[48]

B *Breach of covenant other than non-payment of rent*

The courts have statutory and equitable jurisdiction to relieve against forfeiture for breaches other than non-payment of rent.

1. *Statutory jurisdiction*

Section 81(2) of the *Property Law Act 1969* (WA) confers upon the Supreme Court jurisdiction to grant relief against forfeiture.[49] The subsection relevantly provides that where, 'a lessor is proceeding by action or otherwise' to recover the premises, the lessee may apply to the Court for relief against forfeiture, and the Court, after reviewing the circumstances of the case and the conduct of the parties, may grant or refuse relief. Where the Court grants relief, it does so on such terms as to costs (if any), expenses, damages, including the granting of an injunction to restrain any like breach in the future and to all the other circumstances' as the court thinks appropriate.[50]

The statutory jurisdiction to grant relief against forfeiture of a lease extends to forfeiture of an agreement for a lease where the lessee has become entitled to have the lease executed.[51] Section 81(8) of the *Property Law Act 1969* (WA) expressly excludes the statutory relief where a landlord forfeits the lease because the lessee is bankrupt, has assigned the lease or parted with possession of the premises without consent. In addition, the provision excludes statutory jurisdiction in the case of a lease of any licensed premises as defined under the *Liquor Act 1970* (WA) where the lessee has breached any term by which the licence granted in respect thereof may be forfeited.

There is uncertainty whether the Supreme Court has equitable jurisdiction to relieve against forfeiture for breach of covenant (other than non-payment of rent) in situations where the statutory jurisdiction is not applicable. According to some authorities, equity would not relieve against forfeiture for breach of covenant other than non-

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49 Other jurisdictions have similar provisions based on s 14(2) of the English *Conveyancing Act 1881* (44 & 45 Vic. C. 41).

50 *Property Law Act1969* (WA) ss 81(2)(a), 81(2)(b).

51 Section 81(5) *Property Law Act 1969* (WA) See also *Greenwood Village v Tom The Cheap* [1976] WAR 49. .

52 *Barrow v Isaacs* [1891] 1 QB 417, 425; *Upjohn v Macfarlane* [1922] 2 Ch 256. See also *Billson and others v Residential Apartments Ltd* [1992] 1 AC 494, 534 (Lord

payment of rent unless there was fraud, accident or mistake.[52] Hence, Parliament enacted s81 of the *Property Law Act 1969* (WA) (and the equivalent provisions in the United Kingdom and most Australian jurisdictions) to supplement equity and to extend the availability of relief against forfeiture for breach of other covenants in circumstances stipulated in the section.[53]

However, in *Shiloh Spinners Ltd v Harding*, the House of Lords affirmed that the courts' inherent equitable jurisdiction to grant relief against forfeiture was not so narrowly confined; it extended to relieve against forfeiture for breach of other covenants.[54] The Court also rejected the proposition that the equivalent of s81 excluded the courts' inherent jurisdiction to grant relief in cases falling outside the area governed by the provision. Following this decision, the Supreme Court in *Love v Gemma Nominees*[55] and *Esther Investments Pty Ltd v Cherrywood Park Pty Ltd,*[56] held that the Supreme Court might invoke its inherent jurisdiction to grant relief against forfeiture in any circumstances where its statutory jurisdiction is not available.[57]

Recent English authorities, however, have cast doubt on the correctness of the foregoing proposition. In the Court of Appeal case of *Official Custodian for Charities v Parway Estates Developments (In Liquidation)*,[58] Lord Dillon expressly rejected Counsel's submission that the courts retained inherent jurisdiction to grant relief against

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53 *Billson and others v Residential Apartments Ltd* [1992] 1 AC 494, 535 (Lord Templeman).

54 *Shiloh Spinners Ltd v Harding* [1973] AC 691, 722 -725. However, subsequent English authorities assert that this is not the correct interpretation of the relevant passage in Lord Wilberforce's speech, see *Official Custodian for Charities v Parway Estates Developments (In Liquidation*) [1985] 1 Ch 151..

55 (Unreported, Sumpreme Court of Western Australia, Burt CJ, 14 September 1982).

56 [1986] WAR 279 , 288 (Burt CJ), 297 (Brinsden J).

57 See also *Evanel Pty Ltd v Stellar Mining NL* [1982] 1 NSWLR 380, 386; *Pioneer Gravels (Qld) Pty Ltd v T & T Mining Corp Pty Ltd* [1975] Qd R 151; *Shiloh Spinners v Harding* [1973] AC 691 is cited with approval in the High Court judgment in *Legione v Hateley* (1983) 152 CLR 406, 424, 447, for the proposition that the courts have equitable jurisdiction to grant relief against forfeiture for breach of covenant other than non payment of rent. However, as Bailey J observed in *Chief Executive Officer (Housing) v Binsaris*; [2002] NTSC 9 (Unreported, Bailey J, 5 February 2002), *Legione v Hateley* (1983) 152 CLR 406 did not concern relief against forfeiture of a lease. The High Court also cites *Shiloh Spinners v Hardy* (1983) 152 CLR 406 in *Tarwar Enterprise Pty Ltd v Cauchi and others* (2003) 201 ALR 359 (a sale of land case).

58 [1985] 1 Ch 151.

59 [1973] AC 691, 724-725.

60 *Official Custodian for Charities v Parway Estates Developments (In Liquidation* [1985] 1 Ch 151 165. This case is cited with approval by Walton J in *Smith v Metropolitan City Properties Ltd* (1986) 227 EG 753. See generally Adrian J, Bradbrook, Susan V. MacCallum and Anthony P. Moore, *Australian Real Property*

forfeiture where statutory jurisdiction was not available. Lord Dillon held that the passage in Lord Wilberforce's judgment in *Shiloh Spinners v Holding,*[59] often cited to support this proposition, on its true construction, in fact had the contrary meaning.[60]

His Lordship was emphatic that the effect of the provision corresponding with s 81 was to oust the courts' wider equitable jurisdiction to relieve against forfeiture in circumstances listed in s 81(8). Based on this authority, the Supreme Court has no jurisdiction to relieve against forfeiture for breach of a provision against assigning the lease or parting with possession without the consent of the landlord.

To date there is no Supreme Court judgment sighted by this author where the Court's inherent jurisdiction to relief against forfeiture in such circumstances is challenged or discussed.[61] Obviously, the Supreme Court is not bound by English decisions. It may well be that the legal position is regarded as settled by *Love v Gemma Nominees* and *Esther Investments Pty Ltd v Cherrywood Park Pty Ltd.*[62] However, it is submitted that in view of the post *Shiloh Spinners v Holding*[63] English authorities, and in the absence of direct High Court authority, the issue is not beyond dispute.[64]

With respect to the Supreme Court's inherent jurisdiction to relieve tenants against forfeiture for non-payment of rent, the legal position is clear. Section 81(9) of the *Property Law Act 1989* (WA) states, 'except as otherwise mentioned' s 81 does not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent. The effect of the provision is to save the Supreme Court's inherent jurisdiction (to the exclusion of the statutory jurisdiction) to grant relief where the ground for forfeiture is the non-payment of rent.[65]

Law (3rd ed, Sydney: Thomson LawBook Co, 2002), 464, 470.

61 See eg, in *Old Papa's Franchise System Pty Ltd v Camisa Nominees Pty Ltd* [2003] WASCA 11 (Unreported Murray, Packer and McLure JJ, 12 February 2003) relief against forfeiture for breach of covenant not to assign without consent was declined on the facts of the case but not for want of jurisdiction.

62 This also seems to be the view in some other jurisdictions, see eg, The Federal Court judgment in *Canberra International Airport Pty Ltd v Ansett Australia Ltd (admins apptd) and others* (2002) 41 ACSR 309, 319 (Kenny J).

63 (1973) AC 691.

64 In the Supreme Court of the Northern Territory judgment *Chief Executive Officer (Housing) v Binsaris*; [2002] NTSC 9 (Unreported, Bailey J, 5 February 2002), Bailey J observed that 'it cannot be said with any real confidence that Australian courts have recognized power to grant relief against forfeiture for breach of covenant other than non payment of rent'. In the Northern Territory, s 138 of the *Law of Property Act,2000* (NT), expressly gives the Supreme Court jurisdiction to grant relief against forfeiture for breach of any covenant.

65 The statutory jurisdiction was enacted to extend the availability of relief against forfeiture for breach of other covenants: *Symmons Plains Pastoral Holdings v Tasmania Motor Racing* [1996] 6 Tas R 284 (Unreported, Zeeman J, 27 November 1996) (this was reference to s 15(7) of the *Conveyancing and Law of Property Act*

2. *When to seek relief*

Section 81(2) of the *Property Law Act 1989* (WA) states that a tenant may seek relief where the landlord is 'proceeding by action or otherwise', to enforce or has enforced without the aid of the Court a right of forfeiture or re-entry. The landlord is 'proceeding' to enforce forfeiture when he or she serves the tenant the statutory notice of the breach. Therefore, at that point, the tenant may apply for relief against forfeiture without waiting for the landlord to re-enter or institute forfeiture proceedings.[66] For example, where the breach is incapable of remedy or the tenant is unable to remedy the breach within a reasonable time, he or she may pre-empt the landlord's action by seeking relief against forfeiture.

The tenant may also seek relief against forfeiture during the landlord's judicial proceedings to enforce forfeiture. Previously, the view was that in such action a tenant could not seek relief against forfeiture unless the tenant admitted the breach and the consequent forfeiture.[67] However, the modern view is that the tenant may deny liability for breach of covenant and in the alternative seek relief from forfeiture.[68]

Less commonly perhaps, a tenant may in addition seek relief by instituting a separate action after the landlord has obtained the judgment for possession. In the latter event, it is settled law that the tenant must apply for relief before the landlord regains possession pursuant to the judgment. The reason is once the landlord enters possession in reliance upon the judgment he or she is no longer 'proceeding' to enforce the forfeiture; the process is completed.[69] It should be stressed that jurisdiction to grant relief in this regard does not cease when the landlord obtains the judgment for possession; it ceases only when the landlord actually regains possession pursuant to 'a final, unappealed and fully executed judgment.'[70]

In England and some other jurisdictions there was controversy as to whether a tenant could seek relief after the landlord has obtained re-

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1884 (TAS), which is similar to s 81(9) of the *Property Law Act 1969* (WA).

66 *Billson v Residential Apartments Ltd* [1992] 1 AC 494, 539 (Lord Templeman.

67 P Butt, *Land Law* (4th ed, Sydney: Lawbook co, 2001) 348.

68 P Butt, *Land Law* (4th ed, Sydney: Lawbook co, 2001) 348. See eg, *Old Papa's Franchise System Pty Ltd v Camisa Nominees Pty Ltd* [2003] WASCA 11 (Unreported Murray, Packer and McLure JJ, 12 February 2003).

69 *Billson v Residential Apartments*, [1992] 1 AC 494, , 538, 539 (Lord Templeman), 542 (Lord Oliver of Aylmerton).

70 *Billson v Residential Apartments*, [1992] 1 AC 494 , 542 (Lord Oliver of Aylmerton).

entry peaceably without the assistance of any court. This was one of the main issues in the famous House of Lords judgment in *Billson v Residential Apartments Ltd*.[71] In that case, the House of Lords affirmed that it was open for the tenant to seek relief against forfeiture even where re-entry was peaceable.

It is submitted that in Western Australia this is a non issue. This is because s 81(2) of the *Property Law Act 1969* (WA), unlike the English equivalent provision, expressly states that a tenant may apply for relief where the lessor is proceeding by action or otherwise 'to enforce or has enforced [a right of re-entry or forfeiture] without the aid of the Court.'

There is no limit on the time within which a tenant may apply for relief against peaceable re-entry. This may put the landlord in the difficult position of not knowing when or whether the tenant would seek relief. A possible solution is for the landlord to institute proceedings for a declaration that the lease was lawfully terminated and to seek an order for possession.[72] As we have seen above, once the landlord regains actual possession pursuant to a court order the tenant cannot apply for relief. In any case, because the jurisdiction is equity based, the doctrine of laches (delay defeats equity) may apply to defeat the application for relief against peaceable re-entry.[73]

3. *Exercise of the statutory jurisdiction*

In *Hyman v Rose*,[74] the House of Lords rejected attempts by the courts to lay down principles upon which relief should be granted under the equivalent of s 81(2) of the *Property Law Act 1969* (WA). It was held that though such statements were useful and might reflect the judicial position for normal cases, the statutory jurisdiction was so wide that it was best not to lay down rigid rules for its exercise.

Generally, the courts will almost certainly grant relief against forfeiture if the tenant makes good the breach and/or any financial loss, and if the tenant is able and willing to fulfil his or her obligations in the future.[75] Some suggest that the courts appear to be more willing to grant relief under the statutory jurisdiction than in respect of breach of covenant to

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71 (1992) 1 AC 494 at 539.

72 *Howard v Fanshawe* (1895) 2 Ch 581, 588.

73 The Law Reform Commission (UK): General Law of Landlord and Tenant CP 28-2008, 176.

74 [1912] AC 623, 631 (Loreburn LC). Cited with approval in *Sparta Nominees Pty Ltd v Orchard Holdings Pty Ltd* [2002] WASC 54 (Unreported, Murray J, 28 March 2002).

75 *Sparta Nominees Pty Ltd v Orchard Holdings Pty Ltd* [2002] WASC 54 (Unreported, Murray J, 28 March 2002).

76 Adrian J, Bradbrook, Susan V. MacCallum and Anthony P. Moore, *Australia Real Property* Law (3rd ed, Sydney: Thomson LawBook Co, 2002), 470.

pay rent.[76]

Earlier authorities held that certain breaches, such as using the premises for immoral or illegal purposes, were irremediable so that even if the tenant desisted from his or her breach the courts would refuse to grant him or her relief against forfeiture.[77] However, recent authorities indicate that the fact that a breach is irremediable is not necessarily a bar against the grant of relief, though the courts take a particularly strict view about such breaches.[78]

In *Shiloh Spinners Ltd v Harding*,[79] Lord Wilberforce observed that, in deciding whether it was an 'appropriate' case to grant relief against forfeiture, the courts take into account:

> 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. [80]

In *Sparta Nominees Pty Ltd v Orchard Holdings Pty Ltd,* Murray J after citing with approval Lord Wilberforce's foregoing observations added that:

> [T]he Court on occasion displays a rather punitive attitude and may refuse relief in the exercise of discretion where the applicant for relief is a recidivist, in breach of the lessee's covenants on numerous occasions, or where the breach is wilful or deliberate, unless the lessee can be seen to recognise the error of his ways.[81]

In that case, his Honour granted relief to the tenants on the basis that if the lease were forfeited they stood to lose their livelihood; in contrast, there was no evidence that relieving the tenants from forfeiture would cause financial loss to the landlord. Moreover, his Honour said that the tenants' breach was not wilful in the sense that 'they knew their obligations at all times and simply chose to disregard them.' Rather it was a matter of human error.

Even if the breach is wilful and/or serious it does not necessarily preclude judicial relief against forfeiture. For example, in *Love v Gemma Nominees Pty Ltd,*[82] the tenant, with the consent of the landlord, carried out improvements on the leased premises, which significantly increased the value of the property. Later, the landlord, after serving due notice, sought to terminate the lease because of the breach of certain covenants in the

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77 *Rugby School (Governors) v Tannahill* (1935) 1 KB 87.
78 *G.M.S. Syndicate Ltd v Gary Elliot Ltd* (1981) 1 All E R 619.
79 (1973) AC 691.
80 *Shiloh Spinners Ltd v Harding* (1973) AC 691, 723.
81 *Sparta Nominees Pty Ltd v Orchard Holdings Pty Ltd* [2002] WASC 54 (Unreported, Murray J, 28 March 2002).
82 (Unreported, Sumpreme Court of Western Australia, Burt CJ, 14 September 1982).

lease, including failure to carry out sanitary works ordered by the Licensing Court,[83] failure to reside personally on the premises and allowing a third party to re-side on part of the premises without the landlord's consent.

Chief Justice Burt cited with approval Lord Wilberforce's observation above. The Chief Justice noted that though Lord Wilberforce's observation was in the context of the general equitable jurisdiction it was equally applicable to the exercise of the statutory jurisdiction.[84] However, in this case Burt CJ held that notwithstanding the conduct of the defendant and the gravity of the breaches, 'because and only because of the disparity between the value of the property of which forfeiture is claimed compared with the damage caused by the breach, which is nil,' it was an appropriate case to award relief against forfeiture.[85]

Likewise, in *Billson v Residential Apartments Ltd*,[86] the trial judge expressed a view that the wilfulness of the breach does not necessarily preclude the Court from granting the tenant relief against forfeiture. In that case, the tenant, without the consent of the landlord, converted 24 bed-sitters into 18 self-contained flats at a considerable cost. As a result, there was a significant increase in the value of the property. Justice Mummery, the trial judge, held, *obiter dicta*, that:

> [A]lthough the defendants had acted in deliberate breach of their obligations, it would, in my judgment, be inequitable to refuse relief from forfeiture since the effect of that would be to deprive them of all benefit of the very substantial expenditure on the acquisition and improvement of the property. In my judgment, that would be unfairly disproportionate to the breach of covenant, which they have committed and to their conduct in this affair. I would have exercised a discretion to grant relief on stringent conditions.[87]

Similarly, in *Wynsix Hotels (Oxford St) Pty Ltd v Toomey*,[88] supra, Young CJ in Eq, observed that the fact that the landlord would get a windfall if the court refused to relieve the tenant against forfeiture made it 'more likely that relief against forfeiture should be given than less likely.

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83 By the time of the action, the tenant had done the required work.

84 *Love v Gemma Nominees Pty Ltd* (Unreported, Sumpreme Court of Western Australia, Burt CJ, 14 September 1982).. See also *Sparta Nominees Pty Ltd v Orchard Holdings Pty Ltd* [2002] WASC 54 (Unreported, Murray J, 28 March 2002).

85 *Sparta Nominees Pty Ltd v Orchard Holdings Pty Ltd* [2002] WASC 54 (Unreported, Murray J, 28 March 2002).

86 (1990) 60 P & CR 392 (quoted from *Wynsix Hotels (Oxford St) Pty Ltd v Toomey* [2004] NSWSC 235 (Unreported, Young CJ in Eq ,31 March 2004)).

87 *Billson v Residential Apartments Ltd* (1990) 60 P & CR 392. The judgment was reversed by the House of Lords on different grounds see*Billson v Residential Apartments Ltd* [1992] 1 AC 494.

88 [2004] NSWSC 235 (Unreported, Young CJ in Eq ,31 March 2004).

The Supreme Court of WA Full Court case of *Old Papa's Franchise Systems Pty Ltd v Camisa Nominees Pty Ltd,*[89] illustrates a relatively rare recent judgment where the Court refused to grant relief against forfeiture. The case involved the lease of commercial properties for a term of ten years plus two five-year options. The tenant sought permission to assign the lease but the landlord declined. Notwithstanding, the tenant assigned the lease. The tenant also made some unauthorised improvements to the land and was in default of payment of rent. The Court found that the tenant was in breach of the lease agreement and that the landlord had a right to terminate the lease. The trial Judge declined to relieve the tenant from forfeiture.

On appeal to the Full Court, in a leading judgment McLure J agreed with the appellant that the breach of the lease resulting from the improvements was relatively minor and added some value to the property. Justice McLure also agreed that refusal to grant relief would cause 'very significant' prejudice to the appellant's business. Her Honour observed that where a tenant undertook to remedy the breaches giving rise to forfeiture, the Court should grant relief against forfeiture as a matter of course and only refuse to do so in exceptional circumstances. In this case, McLure J found that the wilful nature of the breach of covenant not to assign without consent, in circumstances where both the assignor and assignee were in serious financial difficulties, justified the trial Judge's refusal to relieve the tenant from forfeiture.[90]

4 *Conclusion*

The case law is consistent in that where a tenant is ready and willing to remedy the breach (whether the breach is non-payment of rent or any other covenant) that gave rise to forfeiture, it is almost certain that the Court will grant relief from forfeiture except in exceptional circumstances. The main reason for this is that forfeiture of a lease more often than not results in substantial loss to the tenant, which usually is disproportionate to the loss the landlord is likely to suffer due to the breach. Whether there are "special circumstances' to justify the Court to refuse to grant relief from forfeiture depends on the circumstances of each individual case. There are two grounds landlords tend to plead to show special circumstances:

1 wilfulness of the breach, and

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89 [2003] WASCA 11 (Unreported Murray, Packer and McLure JJ, 12 February 2003)

90 *Old Papa's Franchise System Pty Ltd v Camisa Nominees Pty Ltd* [2003] WASCA 11 (Unreported Murray, Packer and McLure JJ, 12 February 2003) Murray and Parker JJ,

2 the tenant's financial inability to meet his or her obligations under the lease.

The case law demonstrates that neither ground by itself is enough to determine the matter, especially, it would seem, where the landlord stands to gain a windfall. The Court takes into account all the circumstances of each case. The circumstances vary so much that previous cases are at best examples and not authority for a particular decision.

III Alternative Relief: Unconscionable Conduct under the TPA

In addition or as an alternative to an application for relief against forfeiture, a tenant may seek relief under the *Trade Practices Act 1974* (Cth), upon proof that the landlord engaged in 'unconscionable' conduct before or in course of the lease. Engaging in 'unconscionable' conduct is prohibited under sections 51AA, 51AB and 51AC of the *Trade Practices Act 1974* (Cth). For present purposes, the relevant provision is s 51AC of the *Trade Practices Act 1974* (Cth). However, to understand the meaning and effect of this provision we shall start with a brief review of s 51AA of the *Trade Practices Act 1974* (Cth).

Section 51AA of the *Trade Practices Act 1974* (Cth) prohibits corporations in trade or commerce to engage in a conduct that is 'unconscionable' within the meaning of the unwritten law from time to time of the State and Territories. The section was inserted in the *Trade Practices Act 1974* (Cth) in 1992. Its effect was to import the general equitable notion of unconscionability into the statutory regime of the Act. The object was not to create new legal rights but rather to make available to victims of unconscionable conduct, in commercial transactions, the flexible remedies under the *Trade Practices Act 1974* (Cth) and to enable the Australian Competition and Consumer Commission ('ACCC') to scrutinise commercial transactions for alleged unconscionable conduct and, if necessary, bring representative actions on behalf of the victims.[91]

The provision has generated a lot of controversy since its enactment, mainly with respect to the meaning and scope of the expression 'conduct that is unconscionable within the meaning of the unwritten law'.[92] Some authorities suggest that the operation of the provision was

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concurred.

91 Nicole Dean, 'Case and Comment: *ACCC v Berbatis Holding* (2003) 197 *Australian Law Report* 153'(2004) 26(2) *Sydney Law. Review* 255, 257.

92 *Trade Practices Act 1974* (Cth) s 51AA.

93 (1956) 99 CLR 362.

94 (1983) 151 CLR 447. See *ACCC v Berbatis Holding* (2003) 197 ALR 153,,163 (Gummow and Hayne JJ).

confined to one species of unconscionable conduct: the unconscionable taking advantage of a 'special disadvantage' of another as expounded by the High Court in *Blomley v Ryan*[93] and *Commercial Bank of Australia v Amadio.*[94] In the former case, Kitto J said:

> [T]he court has power to set aside a transaction, whenever one party to a transaction is at a special disadvantage in dealing with the other party because of illness, ignorance, inexperience, impaired faculties, financial need or other circumstances affecting his ability to conserve his own interests, and the other party unconscientiously takes advantage of the opportunity thus placed in his hands.[95]

Similarly, in *Commercial Bank of Australia Ltd v Amadio*,[96] after referring to passages in the judgments of Fullagar J and Kitto J in *Blomley v Ryan,* Mason J said:

> … It is made plain enough … that the situations mentioned are no more than particular exemplifications of an underlying general principle which may be invoked whenever one party by reason of some condition [or] circumstance is placed at a special disadvantage vis-à-vis another and unfair or unconscientious advantage is then taken of the opportunity thereby created. I qualify the word 'disadvantage' by the adjective 'special' in order to disavow any suggestion that the principle applies whenever there is some difference in the bargaining power of the parties and in order to emphasize that the disabling condition or circumstance is one which seriously affects the ability of the innocent party to make a judgment as to his own best interests, when the other party knows or ought to know of the existence of that condition or circumstance and of its effect on the innocent party.[97]

Other authorities suggest that the operation of the provision is not limited to situation of "special disadvantage".[98] Readers are referred to the numerous learned writing on the subject.[99] Suffice to say that to date, as demonstrated by the High Court judgement in *ACCC v Berbatis,*[100] the circumstance must be extreme indeed for a conduct in

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95 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, page?

96 (1983) 151 CLR 447.

97 *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, 462.

98 *ACCC v Samton Holding* (2002) 117 FCR 301; *Boral Formwork & Scffolding Pty Ltd v Action Makers Ltd (in administrative receivership)* [2003] NSWSC 713 (Unreported, Austin J, 6 August 2003). See also Kirby J's minority judgment in *ACCC v Berbatis Holding* (2003) 197 ALR 153, 174, 180.

99 See eg, Nicole Dean, 'Case and Comment: *ACCC v Berbatis Holding* (2003) 197 *Australian Law Report* 153' (2004) 26(2) *Sydney Law. Review* 255, 257; Eileen Webb, 'Fayre Play for Commercial Landlords and Tenants – Lessons for Lawyers' (2001) 9 *Australian Property Law Journal* 99; Phillip Tucker, Unconscionability: The Hegemony of the Narrow Doctrine Under the Trade Practices Act (2003) 11 *Trade Practices Law Journal* 78; and C. E Dal Pont, 'The Varying Shades of Unconscionable Conduct – Same Term Different Meaning' (2000) 19 *Australian Bar Review* 135.

100 (2003)197 ALR 153.

101 See the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth), s 51AB (formerly s 52A), applies similar terms with respect to the supply by a corporation of

a commercial transaction to be caught by the provision.

In 1998, Parliament further amended the *Trade Practices Act 1974* (Cth) and inserted s 51AC.[101] The provision specifically extends the principle of unconscionable conduct to small business transactions involving the supply of goods and services under 3 million dollars. Section 51AC(1) relevantly provides:

> A corporation must not, in trade or commerce, in connection with:
> 1 the supply or possible supply of,services to a person (other than a listed public company); or
> 2 the acquisition or possible acquisition of,services to a person other than a listed public company)
> engage in conduct that is, in all circumstances, unconscionable.[102]

Section 51AA does not apply to situations covered by s 51AC.[103] The main difference between the two provisions is that the latter contains a non-exhaustive list of factors to which the court may have regard in determining whether the conduct is unconscionable. These factors include the relative bargaining strength of the parties, whether the supplier of the services exerted undue influence or pressure or used unfair tactics, or did not act in good faith. Since the provision is relatively recent the meaning and scope of 'unconscionable' conduct in its context is still a matter of debate. In *Hurley v McDonald's Australia Ltd,* [104] the Full Federal Court said:

> For conduct to be regarded as unconscionable, serious misconduct or something clearly unfair or unreasonable, must be demonstrated. Whatever 'unconscionable' means in s51AC, the term carries the meaning given by the Shorter Oxford English Dictionary, namely, actions showing no regard for conscience, or that are irreconcilable with what is right or reasonable. The various synonyms used in relation to the term 'unconscionable' import a pejorative moral judgment.[105]

Several cases, including the Full Court judgement in *Old Papa's Franchise System Pty Ltd v Camisa Nominees Pty Ltd,*[106] cite the above analysis of the provision with approval. We shall deal with this case presently. In *Simply No-Knead (Franchising) Pty Ltd,*[107] Sundberg J, was in no doubt that Parliament intended s 51AC to extend the general doctrine of unconscionability expressed in s 51AA. After citing the above passage, his Honour said:

> [I]n my view 'unconscionable' in s 51AC is not limited to the cases of equitable or unwritten law unconscionability the subject of s 51AA. The principal pointer to an enlarged notion of unconscionability in s 51AC lies

consumer goods or services to a person.

102 *Trade Practices Amendment (Fair Trading) Act* (Cth).

103 Section 51AA(2) *Trade Practices Amendment (Fair Trading) Act 1998* (Cth).

104 [2000] ATPR 41741, 4585.

105 *Hurley v McDonald's Australia Ltd* [2000] ATPR 41741, 4585.

106 [2003] WASCA 11 (Unreported, Murray, Packer and McLure JJ, 12 February 2003).

107 (2000) 178 ALR 304.

> in the factors to which subs (3) permits the court to have regard. Some of them describe conduct that goes beyond what would constitute unconscionability in equity. For example, factor (j) directs attention to the extent to which the supplier was willing to negotiate the terms and conditions of any contract for supply of the services with the business consumer. Further, it is to be remembered that the list of factors in subs (3) is not exhaustive.[107A]

Justice Sundberg concluded that the supplier's 'unreasonable, unfair, bullying and thuggish behaviour' in relation to the transaction amounted to unconscionable conduct within the meaning of s 51AC.

In *ACCC v 4WD System Pty Ltd and others,*[108] Selway J explored the evidence required to prove 'unconscionable' conduct under s 51AC of the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth). His Honour said that the evidence must establish that the supplier's conduct was so 'unacceptable' that it could properly be described as 'unconscionable'. It is not enough to show that the supplier's behaviour was misleading or otherwise in breach of other provisions of the *Trade Practices Act 1974* (Cth). Nor is evidence of unreasonable or unfair behaviour sufficient by itself to prove unconscionable conduct. In his Honour's view, normally 'behaviour would only be 'unconscionable' if some moral fault or responsibility is involved. Normally it might be expected that this would involve either a deliberate act, or at least a reckless act.[109]

The case of *Old Papa's Franchise System Pty Ltd v Camisa Nominees Pty Ltd*[110], illustrates the first attempt, as far as we can ascertain, by a tenant to seek relief under s 51AC of the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth) as an alternative to relief against forfeiture. As may be recalled, the tenant/appellant assigned the lease without consent and carried out unauthorised improvements. Facing imminent forfeiture of the lease, the appellant brought proceedings against the landlord/respondent under s 51AC of the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth) for unconscionable conduct. It claimed that the respondent's refusal to give consent to the assignment of the lease and to the liquor application and associated improvements of the premises was unreasonable and actuated by a desire to harm it and terminate the lease. The appellant also made other accusations against the respondent including the lengthy, 'unjustified', erection of scaffolding with a view to interrupt the appellant's business. The appellant sought an injunction under s80 of the *Trade Practices Act 1974* (Cth), to restrain the respondent from terminating the lease.

In the event, the appellant failed to prove that the respondent's conduct

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107A (2000) 178 ALR 304, 315.
108 *ACCC v 4 WD System Pty Ltd* (2003) 200 ALR 491.
109 *ACCC v 4 WD System Pty Ltd* (2003) 200 ALR 491, 543, 544.

was unconscionable within the meaning of s 51AC of the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth). As we saw earlier, the Full Court also upheld the trial judge's refusal to grant the appellant relief against forfeiture. Nevertheless, the case demonstrates that in an appropriate case a tenant may seek relief against forfeiture of a lease and/or relief under the *Trade ractices Act 1974* (Cth) on the ground of unconscionable conduct, as broadly defined, in s 51AC of the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth). As we have seen, in determining whether to grant relief against forfeiture of a lease, the Court mainly focuses on the tenant's conduct and circumstances. In contrast, under s 51AC of the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth), while the tenant's conduct and circumstances are relevant, the most important consideration is the conduct of the landlord.[111] For this reason, it is possible in the circumstances of a particular case for the Court to refuse to grant the tenant relief against forfeiture yet find it appropriate to grant relief under s 51AC. For example, in *Old Papa's Franchise System Pty Ltd v Camisa Nominees Pty Ltd*[112] case, if the appellant had established that the respondent's conduct was unconscionable in contravention of s 51AC of the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth) the Court might have awarded the appellant relief under the *Trade Practices Act 1974* (Cth) even though the appellant's financial circumstances were such that it was not appropriate to grant it relief against forfeiture. The main advantage of relief under the *Trade Practices Act 1974* (Cth) is the multitude of remedies that the Court may award.[113]

Dr Pingilley, in an article published in 1987, described s52 of the *Trade Practices Act 1974* (Cth), as a 'plaintiff's new Exocet'.[114] In a subsequent joint article, Professor Duncan and Christensen, referred to s 51AC of the *Trade Practices Amendment (Fair Trading) Act 1998* (Cth) as 'an upgraded version of that missile'.[115] To date there is little evidence of extensive use of s 51AC of the *Trade Practices Amendment*

110 [2003] WASCA 11 (Unreported, Murry, Packer and McLure JJ, 12 February 2003).

111 *ACCC v 4 WD System Pty Ltd* (2003) 200 ALR 491. .

112 [2003] WASCA 11 (Unreported, Murry, Packer and McLure JJ, 12 February 2003).

113 Example of these remedies include: injunction (s 80); damages (s 82); and any such order(s) that the Court considers will compensate the tenant for the loss resulting from contravention of the provision (s 87), see the *Trade Practice Act 1974* (Cth).

114 Warren Pingilley, 'Section 52 of the Trade Practices Act 1974: A Plaintiff's New Exocet' (1987) 15 *Australian Business Law Review,* 247.

115 W D Duncan and Sharon Christensen, 'Section 51AC of the Trade Practices Act 1974:

(Fair Trading) Act 1998 (Cth) in the landlord/tenant relationship as anticipated by the learned writers. Nonetheless, in an appropriate case it could be as effective a remedy as relief against forfeiture. In some cases, it might even be more effective than relief against forfeiture.

An 'Exocet' in Retail Leasing' (1999) 27 *Australian Business Law Review*, 280.