Singapore Journal of Legal Studies
[1997] 50 – 85

DEPOSITS AND REASONABLE PENALTIES

This article examines the law relating to the forfeiture of deposits, and the relevance of the law on contractual penalties. Deposits are very much like agreed sums payable upon a breach of contract, except for the fact of advance payment. However, there are very strong judicial statements to the effect that deposits are not subject to the same rules that apply to agreed sums payable upon a breach of contract. Consequently, while agreements to pay penalties are not enforceable, a reasonable penalty may be retained if paid in advance as a deposit. This article examines the legal position from both technical and policy perspectives.

I. INTRODUCTION

ONE of the rules that every student of contract law will learn is that an agreement to pay a penalty for breaching a contract is unenforceable. This is in contrast to an agreement to pay liquidated damages, which is a genuine pre-estimate of the probable loss made at the time that the contract is made. Penalties are stipulated "in terrorem of the offending party"[1] and cannot be recovered; but liquidated damages (and no more) are recoverable, whatever the actual loss suffered (hereafter "the penalty rule"). The penalty rule originated in equity, but was subsequently adopted by common law courts.[2]

It would be rational to expect the same basic rule to apply when the same sum of money is, by agreement, paid as a deposit before any breach of contract, to be forfeited upon a breach of contract. There would seem to be no significant difference between the two, except for the fact of advance payment. If protection is the basis of the law, then a promisor who is unable to resist paying over a penalty in advance could be in greater need of protection than one who has only agreed to pay a penalty in the future. For an agreed sum has to be sued for, while a deposit will already be in hand.[3]

Deposits of money are often required before contracts are made or performed. To a lay person, the deposit performs an obvious function. It ensures that the other party is serious, and will subsequently complete the

1 *Dunlop Pneumatic Tyre* v *New Garage and Motor Co* [1915] AC 79 at 86.
2 See *Law* v *Local Board of Redditch* [1892] 1 QB 127 at 133.
3 In some cases, *eg*, contracts for the sale of land, there may be a third party stakeholder.

contract. At any time prior to a breach, the potential loss of the deposit will encourage performance. Various terms have been used to describe this, including "guarantee",[4] "pledge",[5] and "earnest".[6] If the contract is performed, the deposit will be part-payment of the contract price. If the other party fails to perform, the deposit can simply be forfeited.[7] The self-help remedy is swift and involve no additional cost. Anyone who requires the payment of a deposit is likely to have several things in mind, including the probable loss that may be suffered, a test of the seriousness of the other party, an incentive to the other party to perform the contract, and probably a penal element (in a literal sense) for breaching the contract.

The forfeiture of a deposit is analogous to an action for a penalty. Viewed from a functional point of view, an effective way to guarantee performance is to collect a harsh penalty in advance. Also, an effective assurance of one's own intention to perform the contract is to pay a large part of the contract price in advance. Some judicial definitions of a deposit can be read as definitions of a penalty for breach of contract. For example, in *Howe* v *Smith*, Fry LJ distinguished a deposit as "an earnest to bind the bargain so entered, and creates by fear of its forfeiture a motive in the payer to perform the rest of the contract".[8] It has been said many times that there are no good reasons for distinguishing between deposits and penalties.[9] The similarity between deposits and agreed sums payable upon a breach of contract is even more striking when an innocent party to a breach of contract sues for an unpaid deposit. There is ample authority to support such a claim, so that the deposit can be forfeited upon recovery.[10] This result is correct in principle. The party that is supposed to have paid the deposit should not be in a better position by not having paid the deposit as promised. Also, if the issue is one of damages for breaching the obligation to pay the deposit, then the award must put the innocent party in the same position as if the

4 *Collins* v *Stimson* (1883) 11 QBD 142; *Re Parnell* (1875) 10 Ch App 512; *Howe* v *Smith* (1884) 27 Ch D 89.

5 *Saville* v *Saville* (1721) 1 P Wms 745, 24 ER 596.

6 *Hinton* v *Sparkes* (1868) LR 3 CP 161; *Howe* v *Smith*, *supra*, note 4.

7 In *Casson* v *Roberts* (1863) 32 LJ (Ch) 105, the court refused to imply a term to allow the forfeiture of a 4.6% deposit for a contract to buy land. However, in later cases like *In Re Parnell, supra*, *note 4, Howe* v *Smith, supra*, note 4 and *Hall* v *Burnell* [1911] 2 Ch 551, the right to forfeit on breach was readily implied.

8 *Supra*, note 4, at 101.

9 *Eg,* see Hodkinson, "Specific Performance and Deposits" (1984) 4 OJLS 137.

10 *Damon Compania Naviera SA* v *Hapag-Lloyd International SA* [1985] 1 WLR 435, preferring the approach in *Dewar* v *Mintoft* [1912] 2 KB 373 to that in *Lowe* v *Hope* [1970] Ch 94. The approach in *Dewar* and *Damon* have been accepted by the Singapore Court of Appeal: see *Indian Overseas Bank* v *Cheng Lai Geok* [1993] 1 SLR 470 at 477-79.

deposit had been paid. If the deposit would have been forfeited if paid, then the damages for failing to pay the deposit must equal the sum that would have been forfeited. The recovery of an unpaid deposit for the purposes of forfeiture is in effect indistinguishable from an action to recover agreed damages.

However, with the Privy Council decisions in *Workers Trust & Merchant Bank* v *Dojap Investments*[11] (hereafter "*Dojap*") and *Linggi Plantations* v *Jagatheesan*[12] (hereafter "*Linggi*"), there are now two high level decisions which establish that a "reasonable" deposit of money may be forfeited even if the same sum of money might not, because of the penalty rule, be recoverable as a sum agreed to be payable upon a breach of contract. Although the two cases involve contracts for the sale of land, there is no convincing reason for the relevant principles to apply only to deposits in land sales.[13]

II. The Reasonable Deposit and the Reasonable Penalty

A. *The Privy Council Cases*

Linggi is a case from Malaysia on which the Judicial Committee of the Privy Council was asked to advise.[14] Even though the decision was based on the Malaysian Contracts Ordinance, general principles of the common law and equity were discussed. The case involved a typical contract for the sale of land, where a sum equal to 10% of the purchase price was paid "by way of deposit and part payment". The contract stipulated that on default by the buyer the deposit "shall be forfeited to the vendor to account of damages for breach of contract." The seller suffered no obvious damage as a result of the subsequent failure to complete. The main issue was the status of the deposit.

Lord Hailsham, on behalf of the Committee, expressed the view that the law relating to the forfeiture of deposits had always been entirely separate and distinct from the learning introduced into English law by the distinction between liquidated damages and penalties. In his view, the law on deposits

[11] [1993] AC 573. On appeal from Jamaica. Cited with approval by the Privy Council in an appeal from Trinidad and Tobago: *Bidaisee* v *Sampeth* , 3 April 1995 (found on LEXIS); and again in *Union Eagle Ltd* v *Golden Achievement Ltd* [1997] 2 WLR 341 at 344 (from Hong Kong).

[12] [1972] 1 MLJ 89. On appeal from Malaysia.

[13] But see Beale, "Unreasonable Deposits" (1993) 109 LQR 524 at 529. Most deposit related litigation involve contracts for the sale of land, probably because of the large sums involved.

[14] The relevant legislation in Malaysia did not cater for an outright appeal. The Committee was only given the power to advise the Head of Malaysia.

developed much earlier than the equitable jurisdiction to relieve an obligee from the harshness of the common law. The law relating to deposits had been imported from the civil law and "a true deposit" can be forfeited, and one of a reasonable amount "was not normally the subject of equitable relief".[15] In his Lordship's view, there was nothing "unusual or extortionate" in a 10% deposit on a contract for the sale of land, and relief was not granted.

The nature of the jurisdiction to grant relief when the size of the deposit is not reasonable was not clearly identified, although it was assumed to exist. His Lordship said it is possible

> that in a particular contract the parties may use language normally appropriate to deposits properly so-called and even to forfeiture which turn out on investigation to be purely colourable and that in such a case the real nature of the transaction might turn out to be the imposition of a penalty, by purporting to forfeit something which is in truth part-payment.[16]

This statement could be seen as identifying either the penalty rule, or a broader and more general equitable jurisdiction as the basis of relief against the forfeiture of money. There was a bare reference to the case of *Stockloser* v *Johnson* (hereafter "*Stockloser*"),[17] with a suggestion that the position was not yet settled. This is probably because different views on the scope of a general equitable jurisdiction to relieve against forfeiture were expressed in that case.[18]

In *Stockloser* (which did not involve a deposit), there was a contract for the sale of plant and machinery, with payment to be made in instalments. The contract provided that should there be default in payment for a prescribed period, the seller would be entitled to terminate the contract, recover the property, and forfeit any payments made. The plaintiff did not pay an instalment on time. He did not indicate his readiness or ability to perform the contract when he sued for the return of payments he had already made, arguing that their retention amounted to a penalty. On the facts of the case, the plaintiff did not succeed in recovering the forfeited payment. However, the majority judgments support a fairly broad jurisdiction to prevent unconscionable forfeitures. Such a jurisdiction would cover the forfeiture of instalment payments as well as deposits, and could in theory subsume the penalty rule.

15 *Supra*, note 12, at 91-94.
16 *Ibid,* at 94.
17 [1954] 1 QB 476.
18 Discussed in Part IV (C), *infra*.

While the scope for judicial relief is not clear, the practical proposition from the *Linggi* judgment is, however, quite clear. The forfeiture of a reasonably sized deposit is not the imposition of a penalty in English law, and is not subject to judicial relief. Despite the potentially difficult task of searching for a "true deposit", it would seem that all that is required is the identification of a reasonable sum which is not extortionate. Viewed from a simplistic and practical perspective, it may be said that a reasonable penalty in the form of a deposit will be judicially upheld.

The technical reasoning based on a different source of development is not convincing, and does not justify the difficult distinction between true deposits and other deposits. There is conceptual difficulty in maintaining that a reasonable deposit is not a penalty even though it might be a penalty if it were not paid as a deposit; but that if the deposit is of an unreasonable amount, then it would not be a true deposit but a penalty, with the result that the penalty rule or a more general equitable jurisdiction to grant relief would apply.

It can be argued that a deposit should not cease to be a true deposit simply because it is unreasonable in amount. The definition of a deposit as a sum to guarantee performance by the fear of its forfeiture can be used to define a penalty. The fear of forfeiture must be greater if the size of the deposit is set at an unreasonable level: the larger the deposit, the more effective it is. There is no logical inconsistency in an earnest (whether reasonable or not) also being a penalty. Even if the deposit were to be derived from a different source and subject to a different rule, whether or not it should continue to be so treated would surely have been an issue that could have been dealt with.

Finally, it is unrealistic to ignore the fact that many parties will set the size of a deposit at a level which is higher than the likely loss, so that further legal action would be normally unnecessary. Whatever the overall function of a deposit, it is difficult to deny that it usually contains elements not only of compensation but also of penalty.

Linggi is not the first case to use a difficult distinction in order to avoid the application of the penalty rule to deposits. In *Wallis* v *Smith,*[19] Fry J at first instance used a different technique: he said that several cases show that when a sum is already in the hands of a stakeholder or a third party, "the court must construe it as liquidated damages, and not as a penalty".[20] Jessel MR in the Court of Appeal thought that the rule for identifying a

[19] (1882) 21 Ch D 243 at 250.
[20] *Ibid,* at 250.

penalty, on the basis of a single forfeiture for different possible breaches of various consequences, did not apply to deposits at all.[21]

Linggi was not universally accepted in the common law world as the conclusive authority on the relationship between the penalty rule and deposits. Some commentators preferred the more logically consistent position that the penalty rule applied equally to all deposits. There is authority for such a position in the earlier decision of the Privy Council in *Public Works Commissioners* v *Hills*,[22] where the penalty rule was applied to a 10% prepayment into a "guarantee fund" which was to be "forfeited as and for liquidated damages".

However, the special position on deposits accepted in *Linggi* would seem to be firmly established now by *Dojap*, where the Privy Council reaffirmed the anomalous position of deposits. The latter case involved a contract for the sale of land at an auction. A 25% deposit was payable immediately, while the balance of the purchase price was to be paid within 14 days, upon which formal completion would take place. The sale price was $11.5 million, and a deposit of $2.875 million was paid. The purchaser did not pay the balance on time, and the vendor lawfully terminated the contract. The deposit was forfeited under a typical forfeiture provision:

> If the purchaser shall fail to observe or comply with any of the foregoing stipulation on his part his deposit shall be forfeited to the vendor who shall be at liberty ... to resell ... and any deficiency in price which may result on and all charges costs and expenses attending a resale or attempted resale, together or rendered useless by such default, shall be made good and paid by the defaulting purchaser at the present sale and be recoverable from him by the vendor as liquidated damages.

The purchaser sought specific performance or alternatively relief against forfeiture of the deposit. At first instance, relief against forfeiture was denied. On appeal, the Court of Appeal of Jamaica took the view that a deposit of no more than 10% would have been reasonable, and granted relief to the extent that the sum paid exceeded 10%. This was presumably on the basis of granting equitable relief only to the extent that forfeiture would have been inequitable, as opposed to finding the agreement for forfeiture void or unenforceable. Specific performance ceased to be an issue when the case was before the Privy Council.

[21] *Ibid*, at 258.
[22] [1906] AC 368, on appeal from the Cape of Good Hope.

Lord Browne-Wilkinson, delivering the judgment of the Judicial Committee, accepted the special anomalous position of deposits on a contract for the sale of land, and expressed the view that the nature of such a deposit had been "settled in English law" since the decision in *Howe* v *Smith*, with "equity having no power to relieve against such forfeiture."[23]

It was pointed out that such a device could be abused if parties were to attach the label of a deposit to a penalty in order to escape the penalty rule. In their Lordships' view, two authorities prevented this. The first was *Stockloser*, where Denning LJ used the example of an extravagant 50% deposit to make the existence of an equitable jurisdiction to grant relief against forfeiture difficult to deny. The second was *Linggi*, which distinguished between reasonable and unreasonable deposits.[24] The sum of the reasoning is therefore similar to that of *Linggi*, in that reasonable deposits are not penalties and can be forfeited, but if the sum involved is extravagant, the court has the power to grant relief from forfeiture. *Dojap* would not add much to *Linggi* if not for a clear reference to a jurisdiction to relieve against forfeiture, and the formulation of an approach towards reasonableness. The exact nature of the jurisdiction to grant relief will be discussed later.

Their Lordships accepted the obvious difficulty of distinguishing between a permissible, reasonable penalty and an unreasonable, impermissible penalty.[25] Instead of looking at the size of the deposit and taking a position as to its reasonableness, a test which is not based on logic was offered. In their view,

> the correct approach is to start from the position that, without logic but by long continued usage both in the United Kingdom and formerly in Jamaica, the customary deposit has been 10%. A vendor who seeks to obtain a larger amount by way of forfeitable deposit must show special circumstances which justify such a deposit.[26]

This approach avoids a direct judicial examination of the deposit for reasonableness, and places the difficult task not on the party who paid the deposit and who then breached the contract, but on the innocent party who

[23] *Supra*, note 11, at 578-9. The specific reference was to the position of "a deposit by the purchaser on a contract for the sale of land". However, it is difficult to justify an exception only for contracts for the sale of land. Also, subsequent references to the jurisdiction to grant relief were to *Stockloser*, *supra*, note 17, and *Commissioner of Public Works* v *Hills, supra*, note 22, both cases that do not involve outright contracts for the sale of land.

[24] *Supra*, note 11, at 579.

[25] *Ibid,* at 580.

[26] *Ibid*.

suffers the breach. It is all the more surprising when it is known that just before expounding it, their Lordships stressed that in order to be reasonable a true deposit must be objectively operating as earnest money and not as a penalty, and that common practice alone was not sufficient to establish reasonableness. In their view, to adopt common practice would make it possible for a class of vendors with considerable influence to evade the rule against penalties. However, although their Lordships rejected long continued usage as a test of reasonableness, their prima facie reasonable deposit test is based on "long continued usage". On this logic, an unreasonable deposit could become reasonable and acceptable if deposits of that order were used for a long enough time.[27]

The starting point is an agreement for forfeiture in a valid and enforceable contract. Once the existence of the contract and its terms are proved, one would expect the onus to be on the party asking for relief from his own promise to convince the court that he should be assisted.[28] The approach of the Privy Council only requires the contract breaker to show that the deposit is greater than the customary deposit of long usage if there is one. If that can be done, the onus of proving reasonableness is moved to the innocent party. But it is surely unfair to tell the vendor, in a judgment on a second appeal, that under a new approach not based on logic, the onus was actually on him to justify the deposit.

The suggested approach would work fairly only if the deposit of "long continued usage" was to be either reasonable or at least not obviously unreasonable in the first place. In either case, it would not follow that a larger sum would be unreasonable, but the onus would be on the party who has purported to retain it to show that it is reasonable. It is unlikely that the court's reasoning would have been the same if the relevant deposit of "long continued usage" in Jamaica had consistently been something like 50% of the price.

The approach in *Dojap* can perhaps be explained on the ground that a 10% deposit in a contract for the sale of land is not obviously unreasonable, and this figure can be adopted as a lower starting point for reasonableness. If so, the approach will not be useful in a different context. It is more important to have an approach for determining a reasonable lower starting point. Evidence of long continued usage alone will not do as this could be no more than evidence of a long history of oppression and unjust enrichment.

[27] In 1975, the UK Law Commission expressed the view that a lower figure than 10%, perhaps 5%, would be preferable at that time (*Penalty Clauses and Forfeiture of Monies Paid*, Working Paper No 61, at para 66).

[28] *Mussen* v *Van Diemen's Land Co* [1938] Ch 253 at 262.

There is also potential circularity because in real life, the size of the deposit is largely influenced by what the law permits.

There was evidence that 10% deposits were once commonly used for land sales in Jamaica. However, there was no evidence that it was the deposit of "long continued usage" in auction sales of land. In fact, the evidence offered pointed to the use of deposits between 15% and 50%. The difference between auction sales and conventional sales should be emphasised. While auction sales of land on such terms is not recommended for ordinary consumers, they are also not intended for them. Ordinary consumers would not promise to pay a total of $11.5 million in cash within 14 days. The importance of urgency to the seller should not be under-appreciated, and those who bid at such auctions should not be seen as naive consumers at the mercy of legally advised vendors. It is important for the vendor to be able to keep those who cannot pay such sums in cash away from the auction. However, on the facts, the vendor was held to have failed to justify the 25% deposit.

The vendors had argued, *inter alia,* that they needed the deposit at that level in order to prevent frivolous bidding. The Privy Council however concentrated on the fact that with the introduction of a transfer tax of 7.5%, deposits had been increased in Jamaica by at least that amount in order to collect the amount of the tax from the purchaser in advance. While this was legitimate, the amount of tax would not be needed in the event of non-completion. The view of the Privy Council was that it would be unconscionable for the vendor to be able to forfeit the deposit to the extent of the 7.5%, as he could then recover it from the revenue and keep it. The increase in the deposit by at least 7.5% was seen as having nothing to do with encouragement to perform the contract.

It is possible however to take a different view of the position of the 7.5%. Whatever the reason for collecting it, it is difficult to deny that its forfeiture could also help to reinforce the incentive to perform the contract. A vendor would look at the whole size of the deposit to consider if it would be adequate for his purposes. The 7.5% uplift should therefore not be seen in isolation. It would have been more realistic to maintain that a total of more than 17.5% would be too much. That however was not the position taken. The Privy Council decided the case on the unconscionable 7.5% uplift, and did not rule on the strong argument about ensuring non-frivolous bids at such auctions. This is somewhat surprising for in the result 7.5% was considered unconscionable by itself even though it is less than the 10% used as a norm for reasonableness.

The Committee rejected the approach of the Jamaican Court of Appeal in granting relief to the extent that forfeiture would be unreasonable. In its view, the vendor did not contract for a lower deposit, and once the deposit in question was not reasonable, none of it could be forfeited. In theory,

it is arguable that if equity were to act in aid of a party under such circumstances, it should do so only to the extent that its interference is justified.[29]

There are practical reasons for the approach of the Privy Council here. A judge would, under the approach of the Jamaican Court of Appeal, have to decide on the *maximum* reasonable level for each case. This would be much more difficult than simply deciding whether a given figure was unreasonable. The possibility of relief to the extent of reasonableness could also encourage the use of large deposits, because in a worst-case scenario, the vendor would still get the equivalent of a reasonable deposit, which would probably be at least 10% of the price. The all or nothing approach will therefore act as a useful restraining force.

Finally, the forfeiture of the deposit was identified as penal because the sum was not a true deposit; and its repayment was ordered on the basis of the penalty rule rather than the jurisdiction in *Stockloser*, which contains different views on the power of the court to order the repayment of part-payments. Ironically, *Commissioner of Public Works* v *Hills*[30] was used as authority for the power to order repayment. The *Hills* case applied the penalty rule to a deposit in a "guarantee fund" which was to be forfeited as "liquidated damages". In that case, no distinction was made between penalties and true deposits, and it is actually Privy Council authority for the much wider view that the penalty rule applies to deposits in general.

Dojap provides no clue as to what would be acceptable special circumstances to justify an increase over "long continued usage". It may be difficult to establish such circumstances. For a start, it may not be wise to show that the deposit used was higher than usual because the potential loss was greater. While it may be logical, it could amount to an admission that the sum was intended to be liquidated damages rather than a true deposit. It may also be dangerous to overstate a disincentive to breach the contract because the most convincing disincentive would cross into the world of penalties.

[29] Estoppel can operate in the same manner. See *Avon County Council* v *Howlett* [1983] 1 WLR 605, where estoppel operated as a rule of evidence to prevent a denial of the underlying representation altogether and not to the extent of detrimental reliance only. So if $10 is paid by mistake but with a representation that the sum is due to the payee, and the payee spends $5 of the sum in reliance of the representation (which he otherwise would not have spent), then the payee can raise an estoppel which will prevent the payor from denying that the sum was due to him, and keep the remaining $5. The new defence of change of position (see *Lipkin Gorman* v *Karpnale Ltd* [1991] 2 AC 548), if applicable to the same facts, will operate *pro tanto*, but there is nothing to prevent estoppel from being pleaded instead.

[30] *Supra*, note 22.

The relevance of *Dojap* to the UK can be implied from the otherwise unnecessary reference to the usual practice there.[31] It is possible that the case may, with time, establish 10% as the de facto acceptable standard, not just in land sales but also in areas where there is no established practice. From a practical point of view, lawyers with a knowledge of these cases are now more likely to use 10% as a benchmark when drafting contracts, even in areas where there is no established practice. Deposits of 10% have now been sanctioned by two Privy Council cases, and whatever the technical position, it might be thought relatively safe to adopt that figure.

A more interesting approach would involve a larger deposit, say of 25%, with a forfeiture clause which provides for its full forfeiture or as large a part thereof as is permitted by law and equity. In such a case, the court may not be able to avoid the problem in the same way as in *Dojap*.

While the "true deposit" distinction used by the two Privy Council cases is easy to criticise, the intended result is not in doubt: deposits will be upheld if they are of a reasonable amount. *Linggi* can be said to leave the determination of reasonableness rather open, while *Dojap* attempts to reduce it by prescribing a prima facie test based on "long continued usage". Both allow a penalty of a reasonable amount in the form of a deposit. The immediate practical impact of *Dojap* is to legitimise deposits of long continued usage.

B. *Singapore*

There is no reported Singapore case that deals in detail with the technical issues raised here, and the special position of deposits as in *Dojap* and *Linggi* has not been expressly accepted.

In *Indian Overseas Bank* v *Cheng Lai Geok,*[32] the court was concerned with a search for a reasonable pre-estimate of the probable loss upon a breach of contract. This suggests the application of the penalty rule. In the case, a contract for the sale of land was made at an auction held by the mortgagees of a property. A 25% deposit was payable, and the successful bidder wrongfully refused to complete the contract. In the High Court, it was held that it would be "inequitable and unconscionable" for the vendors

[31] As far as land sales are concerned, it is possible in some jurisdictions to rely on a specific statutory jurisdiction for relief. *Eg,* s 49(2) of the UK Law of Property Act 1925, which has been widely interpreted: *Universal Corporation* v *Five Ways Property Ltd* [1979] 1 All ER 552. See Oakley, "The Recovery of Lost Deposits" [1980] CLJ 24; "Deposits: Still a Guarantee of Performance?"[1994] Conv 41 & 100. The statutory jurisdiction does not exclude the court's equitable jurisdiction: *Abbey National Building Society* v *Maybeech Ltd* [1985] Ch 190.

[32] *Supra*, note 10 (Court of Appeal).

to forfeit the sum of $650,000. This was primarily because the contract provided for completion in one month, and "the diminution in value of the properties during that brief period cannot be anywhere in the region of $650,000."[33] In his judgment, the learned Judicial Commissioner cited *Stockloser,* and the language used is that of unconscionability, but there was also a reference to the deposit being far in excess of the expected loss. It is not clear from the judgment if the test applied was the penalty rule, or a broader equitable jurisdiction. The Privy Council decision in *Linggi* was not cited.

However, an appeal against the decision on the deposit was successful. The Court of Appeal allowed the forfeiture. It held that the vendor was entitled to sue for and forfeit the deposit because it was *not* a penalty. There was no reference to *Stockloser*. On the facts, the Court found that bids at auctions can vary significantly, and there was no evidence to show the range within which bids at auctions actually fluctuated. Consequently, there was no basis for the High Court to find that it was a penalty.[34] *Linggi* was not cited in the judgment, and *Dojap* had of course not been decided yet. Since the forfeiture did not amount to a penalty, a discussion of the *Linggi* concept of a deposit was also not necessary.

In *Hua Khian Co (Pte) Ltd* v *Lee Eng Kiat,*[35] the High Court applied the penalty rule[36] to a 10% deposit under a contract for the sale of land, which it found was not a penalty. On appeal, the Court of Appeal found that the deposit had to be refunded on a contractual analysis, and did not deal with the possibility of relief against forfeiture.[37]

The cases can support the view that in Singapore, the penalty rule does apply to deposits, but they do not preclude a more detailed technical analysis of the jurisdiction to relieve against forfeiture because (1) the technical arguments raised in *Linggi, Dojap* and *Stockloser* were not considered; and (2) the sums involved were not found to be penalties, so a discussion of the broader issue and jurisdiction was not necessary.

[33] [1992] 2 SLR 38 at 53.
[34] *Supra,* note 32, at 480.
[35] [1996] 3 SLR 1.
[36] *Ibid*, at 5.
[37] *Ibid*, at 14.

C. *The Utility of Deposits*

Deposits serve a useful function. There is a legitimate demand for such a device in commercial transactions in general. It would be a particularly important device when a party has to deal with previously unknown parties from a potentially large group. Agreements to pay liquidated damages would not be very useful in such a context for legal action for the recovery of damages or an agreed sum would be required. In addition, the strict application of the penalty rule may make the agreement to pay liquidated damages unenforceable, unless a customized sum is tailored for each customer within the rules for identifying liquidated damages.

Without the deposit as is commonly used and intended, it might not be possible to make many contracts unless full pre-payment is made. The use of a deposit can therefore benefit both parties and not only the party who is given an efficient self-help remedy. To tie deposits to a reasonable pre-estimate of damages would reduce their utility, and a case-by-case evaluation of the deposit would be required. This would not only be expensive, it may also be impractical. For example, a travel company would not be able to use a standard form that adopts a convenient 10% for all its holiday contracts. It would have to consider, in respect of each holiday, factors such as its expected popularity and the possibility of reselling cancellations in the future, all as determined at the point of time of the booking. This would in theory require a decision by front-line counter staff, which may be unrealistic and commercially impractical. If this were to be required, lawyers will probably produce predetermined scales that appear graduated, in the hope that the agreements may be upheld under the distinction between liquidated damages and penalty, as reasonable estimates of potential losses which are difficult to quantify.

In general, the penalty rule can run counter to the legitimate aim of identifying those who are serious and able to perform. Penalties are not inherently undesirable. There are real life problems in recovering full compensation, and the fact that compensation can be sought from defaulters is not always a satisfactory answer.

In some situations, compensation may be irrelevant to organizations that may not themselves lose more than administrative costs. Such organizations may, however, manage the distribution of limited opportunities and resources, and third parties who might otherwise receive such opportunities and resources may be prejudiced by frivolous applicants and contract breakers.

The non-application of the penalty rule to deposits does not mean that there will be no control over unconscionable use of deposits because the control could take a different form. If the question was whether the penalty rule should apply to deposits because deposits are like contractual penalties,

an affirmative answer would be likely. This has been the question on which many have concentrated. However, an equally apt, and arguably more suitable, approach would be to ask whether the penalty rule should be used to control the potential abuse of deposits. A positive answer to this question is not obvious. The penalty rule has itself been subject to criticism, and as already suggested, it could reduce the utility of the deposit mechanism. It may even be said that the penalty rule is not in line with commercial need and reality.

Few would doubt that when a "liquidated damages" clause is included in a contract, the lay party for whose benefit it is drafted would see it as a penalty. It is the lawyer who drafted the clause who will tell him that it was a reasonable estimate of the probable loss as evaluated at the time that the contract was made. As far as standard form contracts like standard conditions for the sale of land are concerned, most users do not for a moment consider the appropriateness of the size of the deposit provided for in the terms. In fact, 10% deposits have been used in land sales in Singapore during both property booms as well as slumps.

III. "True Deposits" and Other Agreed Sums

In the absence of a change in the law of penalties, the clear separation of true deposits from other arrangements, may be a practical way to allow deposits to be used freely, subject to the requirement of reasonableness. However, it will be seen that a neat separation is not possible, and that a totally rational and comprehensive approach must involve looking at the whole financial arrangement which is triggered by a breach, whether that arrangement is framed in terms of forfeiture or otherwise. It is also not realistic to ignore the relationship of a deposit with damages in general.

A deposit is defined by the underlying contract. Different types of deposits can be defined.

A. *Payment Deposit*

Deposits are usually part-payment of the contract price. Such a deposit can be called a payment deposit as its payment is, in addition to any other purpose, payment in part of the contract price. Only the balance of the contract price is payable after the payment of such a deposit. Words like "in part of the purchase money"[38] will indicate such a deposit, but this function is so well known that it is very readily implied.[39]

[38] *Howe* v *Smith, supra*, note 4.
[39] *Hall* v *Burnell, supra*, note 7.

B. *Account Deposit*

The deposit that serves to create a fund which can be resorted to by the promisee is basically an account deposit. The main purpose of such a deposit is to create a fund in the hands of the promisee. The promisee may look to the fund for reimbursement of expenses, or for any debt or damages that he is entitled to. The actual size of the deposit has no bearing on the quantification of any subsequent liability in debt or to damages. Any liability in excess of the deposited sum can be recovered from the depositor, and if the actual loss is less than the deposit, the surplus in the fund will be to the account of the depositor. The penalty rule is irrelevant to such a deposit, as is the reasonable deposit concept of *Linggi* and *Dojap*. Such deposits need not be identified by a special formula of words. They may be indicated by the nature of the transaction itself. Examples would include deposits paid to landlords (before being let into possession), solicitors (on account of disbursements and costs), and a telephone company (before a telephone line is connected).

C. *Fixed Damages Deposit*

The deposit which serves as liquidated damages can be called a liquidated damages or fixed damages deposit. Such a deposit is liquidated damages paid in advance to a potential plaintiff, and should be subject to (but not necessarily caught by) the penalty rule, as can be illustrated by the decision in *Public Works Commissioner* v *Hills*.[40] Since the deposit sum is the agreed damages for a breach, any actual loss in excess of it cannot be recovered unless the agreed damages clause is not enforceable.[41] Conversely, any actual loss that is lesser than the deposit sum will not result in liability to account for the surplus if the fixed damages clause is valid. Wording like "damages ascertained and fixed"[42] and "by way of liquidated and ascertained damages" will indicate such a deposit.[43] There will be no fixed damages deposit if

[40] *Supra*, note 22.

[41] The excess will not be recoverable if the clause actually limits the damages as in *Cellulose Acetate Silk Co Ltd* v *Widnes Foundry (1925) Ltd* [1923] AC 20. *Cf Watts & Co Ltd* v *Mitsui & Co Ltd* [1917] AC 227 which represents the more common situation where the penalty is ignored altogether and damages greater than the amount of an unenforceable penalty are recoverable.

[42] *Supra*, note 6.

[43] *Eg*, in *Lea* v *Whittaker* (1872) LR 8 CP 70, a deposit was found to be intended as liquidated damages. The injured party was therefore not able to sue for damages in excess of the deposit.

there is a payment deposit together with a clause that provides for liquidated damages of a different amount from the deposit.[44] A court can infer that a deposit is a fixed damages deposit despite the absence of clear words to that effect,[45] although this is probably less likely now after *Dojap*. Fixed damages deposits may also perform an earnest function, and they show the weakness of the distinction made in *Linggi* and *Dojap*. It is difficult to see how the reasonable deposit rule can be applied when the deposit is contractually expressed by the parties to be a form of liquidated damages. The justification for the reasonable penalty rule in *Dojap* is based on the existence of a non-compensatory device. The result of the technical distinction is clearly unsatisfactory because deposits that are defined by words similar to "liquidated damages" or "fixed damages" would be subject to the penalty rule, while those that are not would be governed by the reasonable deposit rule. However, if this distinction were not made, then there would be no clear distinction between deposits and agreed damages, and there may be no justification for a reasonable deposit approach for deposits and a reasonable pre-estimate rule (*ie,* the penalty rule) for agreed damages. This would undermine the justification for the non-applicability of the penalty rule to deposits in *Linggi* and *Dojap*. However, if the distinction were to be maintained, then it would be disadvantageous for a vendor to define the deposit with words that can be associated with agreed or liquidated damages.

In *Union Eagle Ltd* v *Golden Achievement Ltd*[46] (hereafter "*Union Eagle*") there was a contract for the sale of land in Hong Kong. A 10% deposit was paid, which was subsequently forfeited on the failure of the purchaser to tender the balance of the purchase price by a stipulated time, on the facts, by a mere ten minutes. According to the contract, the deposit was to be forfeited "as and for liquidated damages (and not a penalty)." Despite the obvious definition of a fixed damages deposit, the Privy Council held, without offering any reasoning, that these words did not deprive "the deposit of its character as a deposit, an earnest of performance, which was liable to forfeiture on rescission." The result being that if there is a reasonable fixed damages deposit, "no inquiry is [also] made as to whether it is a pre-estimate of damage."[47] This is contrary to the position argued here. It is also contrary to the judgment in *Commisioner of Public Works* v *Hills*,[48] which was however not cited in the judgment.

[44] *Palmer* v *Temple* (1839) 9 A & E 508, 112 ER 1304. In such a case, the deposit is only intended to be a payment deposit.
[45] *Eg*, in *Collins* v *Stimson*, *supra*, note 4.
[46] [1997] 2 WLR 341.
[47] *Ibid*, at 344.
[48] *Supra*, note 22.

If the *Union Eagle* position is indeed correct, then a deposit can be both liquidated damages as well as an earnest or true deposit, which has been argued earlier to be possible, but it will be out of line with the reasoning used in *Linggi* and *Dojap* to distinguish deposits from liquidated damages. It would also mean that a "liquidated damages" deposit will not be treated as "liquidated damages" for the purposes of determining validity or enforceability. But as far as the right to sue for damages in excess of the deposit is concerned, it is likely that the deposit will still be treated as agreed damages that will bar further recovery, *ie,* it will be treated as "liquidated damages". This result will appear odd, but the converse position, *ie,* that damages in excess of the deposit can be recovered, will be no less odd because it will mean disregarding the party-defined term "liquidated damages" altogether.

A likely explanation for use of "liquidated damages" in the drafting of the *Union Eagle* contract must lie in the general assumption that the penalty rule does (or at least could) apply to deposits. The formula of words used was intended to lend support to an argument that it is not a penalty. On conventional reasoning, this is best done by defining it as "liquidated damages". If the wording of the contract were to be examined, it will be seen that the deposit was indeed an earnest deposit rather than a fixed damages deposit.

Although the deposit was expressed to be forfeited as "liquidated damages", it was actually only a component of a larger fixed damages agreement. In addition to the forfeiture of the deposit as "liquidated damages", there was also a right to any deficiency on a resale (with expenses) as "liquidated damages". This right to additional liquidated damages logically undermines the claim of the deposit to be "liquidated damages" for the breach of contract, and suggests that the deposit was really intended to be an earnest deposit in the full sense of *Linggi* and *Dojap*. Furthermore, the liquidated damages clause was expressed not to prevent even more damages from being recovered. It was expressly stated that it did not prevent the "vendor recovering, in addition to liquidated damages, damages representing interest paid or lost by him by reason of the purchaser's failure".[49] If there was a valid agreement for liquidated damages at all, it would be for the sum of the deposit and any expenses and deficiency on a resale, as well as any interest suffered.

On the whole, the *Union Eagle* case is not convincing authority for the view that fixed damages deposits are not subject to the penalty rule.

[49] See the Hong Kong High Court decision in *Union Eagle* that cited clause 12 of the agreement in [1995] 2 HKC 225.

D. *Earnest Deposit or True Deposit*

It should be obvious by now that it is difficult to distinguish a deposit which merely serves an earnest function from one which serves a penal function or even a compensatory function. An earnest function is by itself not inconsistent with the deposit being liquidated damages or a penalty. After *Dojap*, deposits that are not expressly defined as fixed damages or account deposits will probably be identified as "true" deposits if of a reasonable amount.

The modern starting point is Fry LJ's analysis in *Howe* v *Smith*,[50] in which the deposit was observed to have evolved from the civil law concept of earnest.[51] Under his analysis, which was accepted in *Linggi* and *Dojap*, an earnest sum is not a form of liquidated or agreed damages at all. The full deposit can be forfeited so long as the event that its payment was designed to prevent materialises.

If the non-damages nature of a true deposit is taken to its logical conclusion, its forfeiture should have no effect on the ability to recover damages for any actual damage arising from a breach.[52] However, since damages compensate for the overall loss, the "gain" from the forfeiture of the deposit should be taken into account just as any sum received as a result of the breach (in this case, the deposit) would have to be taken into account in defining the net loss. This is the generally accepted and assumed position.[53] If the actual loss is less than the deposit, no further action will be taken. If the actual loss is greater, an action for damages can be brought, with the forfeited deposit being taken into account in the assessment of such damages.

It is not uncommon for there to be an express provision dealing with the right to damages over and above the deposit. For example, a typical clause would allow the forfeiture of the deposit, with a right to any shortfall on a resale. In order to avoid a windfall to the vendor, the court may interpret such a clause as covering the difference between the resale price (to a third party) and the balance of the contract price; and not the full difference between the resale price and the original contract price. The balance of the contract price is the unpaid balance after taking any part-payment into

[50] *Supra*, note 4.

[51] *Ibid*, at 101-2. This was accepted by the Privy Council as early as 1924 in *Mayson* v *Clouet* [1924] AC 980 (on appeal from the Straits Settlements).

[52] *Lock* v *Bell* [1931] 1 Ch 35.

[53] As in *Indian Oveseas Bank* v *Cheng Lai Geok*, *supra*, note 10, at 480, where the damages payable for the breach was $375,000 and the deposit that should have been paid was $650,000. As the deposit was larger than the liability to damages, the deposit was awarded, with no further liability to damages.

account as a deposit would usually be part-payment of the price.[54] In some cases, the vendor may also be given the full right to all wasted expenses in addition to the deposit.

The advantageous position of the vendor has been the subject of much comment. The special position is by itself not a problem, but it should be accepted that in examining a deposit for reasonableness, any additional right to damages should be considered as well. It is unrealistic to consider the reasonableness of a forfeiture clause without taking the whole financial arrangement into account. This would be all the more so when there is, in addition to forfeiture of the deposit, an express clause for fixed damages to be paid upon breach which does not take the deposit into account. Conversely, it would also be unrealistic to apply the penalty rule only to an additional fixed damages clause without taking the forfeiture of a parallel deposit into account.[55]

Some cases involving contracts to buy property can be used to illustrate this. *Essex* v *Daniell*[56] is a case where the contract gave the vendor the right to forfeit the deposit as well as to recover the expenses wasted as a result of the breach. The full sum of wasted expenses was recovered as damages, and in addition, the forfeiture of a 20% deposit was upheld.[57] In *Griffiths* v *Vezey*,[58] the court ordered the forfeiture of a deposit in addition to the payment as damages of the full difference between the original sale price and the resale price if it turned out to be lower. The *Griffiths* case has been criticised on the ground that the payment deposit

[54] *Eg*, in *Ockenden* v *Henley* (1858) E B & E 485, 120 ER 590, where the "deficiency" arising from a resale was found to be the difference between the original contract price and the *balance* of the resale price. See also *Dewar* v *Mintoft* [1912] 2 KB 373, where a deposit was forfeited, and the shortfall on a resale was also recoverable with the deposit taken into account. However, it would seem that if there had not been an actual resale, the deposit could have been forfeited in full.

[55] As an example, see *Talley* v *Wolsey* 38 (1979) P & C R 45, where there was a liquidated damages clause on top of a deposit. The liquidated damages clause allowed for any shortfall on a resale to be recovered as liquidated damages, with account being taken of the deposit.

[56] (1875) LR 10 CP 538. However, the view was expressed that had there actually been a resale, and had the claim been one for the difference in prices, then the reasoning in *Ockenden* v *Henley (supra,* note 54) would have applied, *ie*, that the *balance* of the purchase price would have been recoverable.

[57] H McGregor, *McGregor on Damages* (15th ed, 1988), at para 942, sees *Essex* v *Daniell*, *supra*, note 56, as a difficult case. It however, does not analyse the wording of the contract, and sees the deposit as a type of liquidated damages, which would seem to assume the conclusion in the first place. One unsatisfactory aspect of the case is the observation that the deposit would have been taken into account had there actually been a resale. It was assumed that the clause in question applied even without an actual resale.

[58] [1906] 1 Ch 796.

should have been taken into account in ascertaining the "deficiency in price".[59] However, if the matter is one of intention, there should be nothing in principle to prevent the parties from agreeing that the deficiency should be the difference between the full contract price (rather than the balance of the contract price) and the resale price.

In *Lock* v *Bell*,[60] the contract provided for a 10% deposit of £120 and a further agreed sum of £200 to be paid upon breach. The court allowed the forfeiture of the deposit but did not allow the action to recover the £200 because it was a penalty. However, in applying the penalty test, it only considered an agreed sum of £200 and not the full potential sum of £320. On the facts, there was no practical problem because the £200 itself was found to be a penalty. However, had it been found to be liquidated damages, it would not follow that an agreement to pay a total of £320 would have also been considered to be an agreement to pay liquidated damages; or that it would have been fair to allow both a reasonable deposit of £120 and liquidated damages of £200. It would also not be correct to consider the forfeiture of a 10% deposit alone when in effect, a total of 27% of the price could have been obtained under different headings.

These examples show that it is unrealistic to separate the two components of deposit and other agreed sum, and to apply a test for validity to one without reference to the other. The sum of two reasonable sums may not be reasonable. Even similar tests for both deposits and liquidated damages would not be adequate unless they also apply to the whole financial arrangement. The only way to be consistent is for a single test to be applied to the whole financial agreement, *ie*, to take into account all sums to be forfeited or paid upon a breach of contract, whatever label is applied to them.[61]

IV. Judicial Control of Unfair Use

The possibility of unfair use of forfeiture clauses cannot be ignored. Even those who advocate freedom of contract may not be comfortable to see the forfeiture of a 90% deposit. The main issue here is therefore not a question

[59] *Shuttleworth* v *Clews* [1901] Ch 176. In *Janred Properties Ltd* v *Ente Nazionale Italiano per il Turismo* [1989] 2 All ER 444, the Court of Appeal held that a deposit had to be taken into account in computing the damages for the loss on resale.

[60] [1931] 1 Ch 35.

[61] This argument can be further extended to the additional forfeiture of later instalment payments of the contract price. It is beyond the scope of this article to deal with this. There will be more factors to consider, particularly in the form of any performance received and the residual value of any performance.

of "whether" but "how". In this regard, the penalty rule is not the only avenue for relief.

A. *Relief against Forfeiture of an Interest, Specific Performance and Unconscionability*

1. *General Common Law*

A defaulting party who stands to lose his deposit may ask a court to order the specific performance of the contract. Technically, this is based on an application for relief against the forfeiture of an interest in property according to the terms of the contract. A court that is inclined to assist will grant relief by ignoring the contractual termination of the contract, and order the contract to be specifically performed. In effect, the defaulting party is given more time to perform. In any case, specific performance is not an option unless the defaulting party is able to perform the contract. Specific performance must also be possible on the facts, and it would not be possible if there has been a resale of the subject matter to a third party. However, purchasers who have defaulted in this way may seek an interim injunction to prevent the sale pending the outcome of the litigation.

At common law, there is some uncertainty as to the circumstances where specific performance will be granted. The uncertainty arises in cases where the parties have made time stipulations to be of the essence, for example, by providing that completion or the payment of money is to be strictly by a stipulated time. When the time stipulation is not met, for example, by late payment, the vendor may terminate the contract and forfeit any sums of money that had been paid.

In *Kilmer* v *British Columbia Orchards Lands Ltd,*[62] specific performance was ordered even though time was stipulated to be of the essence, and the applicant had not performed on time. However, in *Steedman* v *Drinkle,*[63] the Privy Council ruled that specific performance should not be ordered if the parties themselves have stipulated that time is to be of the essence and there is no performance within the stipulated time. *Kilmer* was distinguished on the ground that the stipulation as to time had ceased to be applicable.[64] *Steedman* would seem to allow an equitable remedy to be excluded by contract. A total bar derived from the intention of the parties is seen by some as being too strict. Many equitable remedies exist in order to alleviate the harshness of upholding agreements at common law.

[62] [1913] AC 319 (Privy Council).
[63] [1916] 1 AC 275.
[64] See also *Brickles* v *Snell* [1916] 2 AC 599 (Privy Council), which follows *Steedman*.

However, an order for specific performance of a contract that has not been performed on time – when time had been made of the essence – creates potential difficulties for the party with the contractual right to terminate the contract and forfeit any deposit (or prepayment). In cases where specific performance is sought (usually with an interim injunction), the vendor may not be able to resell to a third party until litigation is complete. The possibility of obtaining an order can also be used by a defaulting party as a negotiating tactic.

Recently, in *Union Eagle,*[65] the Privy Council chose to promote commercial predictability. In the case itself, the delay caused by the dispute and litigation was for a period of five years. The only way to promote certainty is to allow the contract to dictate the outcome, and not to interfere. The Privy Council therefore refused to intervene in equity, following *Steedman* v *Drinkle*. In the *Union Eagle* case, there was a contract to sell and buy land which stated that time was to be of the essence. The vendor paid a 10% deposit, and was subsequently only ten minutes late in tendering the completion amount. However, there was evidence that the purchaser knew of the consequences, and attempted to meet the 5 pm completion time. Its agent simply failed to meet it. The obvious argument that the vendor suffered no prejudice was not accepted. The contract was clear on the right to refuse the late tender and to terminate the contract. If the law were otherwise, then one would have to consider how late would be too late. This will effectively make it impossible for anyone to terminate a contract under such terms with certainty, as they would then have to wait a "reasonable" time before becoming immune to equitable interference.

In contrast, a liberal approach towards equitable intervention can be found in the earlier case of *Legione* v *Hately,*[66] where the High Court of Australia took a broad view of the jurisdiction to decree specific performance as a jurisdiction which can be exercised even when time is made of the essence by the parties.

Ultimately, the difference here is not in the correct interpretation of prior authorities, but in the court's perception of the justifiability of judicial interference when the parties themselves have agreed that the contract should only be performed within the stipulated time period.[67] To order the performance of the contract outside of such time would be equivalent to imposing a different contract, with the court ignoring a term of the original contract of which it disapproves. This should not, however, be

[65] *Supra*, note 46, on appeal from Hong Kong.
[66] (1983) 152 CLR 406. See Hodkinson, *supra*, note 9.
[67] New Zealand has chosen not to follow the Australian approach: *Location Properties Ltd* v *Lincoln Properties Ltd* [1988] 1 NZLR 307.

overstated. Equitable intervention is, by nature, invasive on the agreed terms of the parties. The need to prevent injustice must be balanced against the commercial reasons for non-interference stated in the *Union Eagle* case.

The judicial control of the unfair use of forfeiture clauses and other agreed sums raises the problem of judicial interference with freedom of contract. Historically, despite statements like the "Chancery mends no man's bargain", it has been said that at some point of time in the history of equity, a grossly unfair contract would not have been enforced.[68] This was achieved through various rules that developed in different contexts. In particular, there are now established jurisdictions to grant relief from the forfeiture of money and property. English judicial attitudes of the last decade lean towards non-interference, and strong analogies have been rejected in order to prevent the extension of existing rules.[69]

There are even relatively modern judicial statements that support a wide equitable jurisdiction. For example, Lord Simon in *Shiloh Spinners Ltd* v *Harding*[70] said that "equity has an unlimited and unfettered discretion to relieve against contractual forfeitures and penalties. What have sometimes been regarded as fetters to the jurisdiction are, in my view, more properly to be seen as considerations which the court will weigh in deciding how to exercise an unfettered discretion." This may well be a rational explanation for various equitable jurisdictions, but it has been severely criticised judicially in England, and is a wider proposition than English judges are prepared to accept today.[71] Although the logical problem with penalties and deposits could be solved by acknowledging a broad jurisdiction to prevent unconscionability,[72] neither the House of Lords nor the Privy Council are likely to do so. In contrast, one Australian writer has commented that "in Australia the flower of relief against forfeiture has bloomed."[73]

The unavailability of specific performance does not mean that there can be no equitable intervention with respect to the forfeiture of any money that had been paid. In fact, the Privy Council in *Union Eagle* stressed that on the facts before them, there was no issue of penalty or unjust enrichment.

68 Atiyah, *Rise and Fall of Freedom of Contract* (1979), at 147-8.

69 See, *eg*, *The Scaptrade* [1983] 2 AC 694, *Sport International Bussum BV* v *Inter-Footwear Ltd* [1984] 1 WLR 776. *Contra* wider views on the equitable jurisdiction expressed in *BICC* v *Bundy Corporation* [1985] Ch 232, and particularly by Lord Wilberforce in *Shiloh Spinners Ltd* v *Harding* [1973] AC 691.

70 *Supra*, note 69, at 726-7.

71 See Lord Diplock's speech in *The Scaptrade*, *supra*, note 69 at 700. For a more recent statement, see the *Union Eagle* case, *supra,* note 46, at 344-5.

72 Waddams, *The Law of Contract* (3rd ed, 1993), at para 451.

73 J Carter, "Problems in Enforcement" (1993) 6 JCL 1 at 2.

It only involved a 10% deposit (and no more), to which relief against forfeiture would be unlikely under the reasonable deposit rule.

2. *Singapore Position*

In Singapore, the Court of Appeal has recently decided to follow the Australian approach. In *Pacific Rim Investments* v *Lam Seng Tiong* (hereafter *"Pacific Rim"*),[74] Thean JA, delivering the judgment of the Court, examined the authorities, and decided to follow the Australian position.[75]

There was a sale and purchase agreement in *Pacific Rim* which provided for the purchase price to be paid in progressive instalments. Under the contract, time was of the essence with respect to payment obligations. The vendor was late in delivering vacant possession, and it was not disputed that it was liable to pay damages under a liquidated damages clause. The purchaser on the other hand, was late in making a payment, for which interest was sought by the vendor. The purchaser claimed a right to set-off the claim for interest against them from the liquidated damages for which the vendors were liable. A dispute arose, and the vendor treated the purchaser's conduct as a repudiation of the contract. The purchaser sought, *inter alia,* to obtain an order for the specific performance of the contract.

It was held that the vendor had wrongfully terminated the contract. This was sufficient to justify an order for specific performance. However, as full arguments on relief from forfeiture had been made, the court chose to deal with it in its judgment, on the basis of what it would had done if the vendor had the legal right to terminate the contract.

At the relevant time, the purchaser had paid 90% of the full purchase price of $1 million. The interest that he was liable to pay did not exceed $1,000. If the vendor had a right to terminate the contract, the full value of the payments made would have been effectively forfeited.

The court accepted that as a general rule, a party that has not performed his obligations on time would not have the assistance of the courts. However, even if time has been made of the essence in the payment of money, a court could in exceptional cases interfere to prevent the innocent party from exercising his right to terminate the contract, with all its legal consequences. This is in effect relief from forfeiture, and "is a prelude to an order of specific performance." Such judicial interference is based on notions of unconscionable conduct, and would occur only in "exceptional circum-

[74] [1995] 3 SLR 1.
[75] *Ibid*, at 15-24.

stances", where there are elements of "unconscionability and injustice".[76] On the facts, it would have been unconscionable for the vendor to reap such a windfall. The breach involved a trivial sum in relation to the sums already paid.

Although the case seems to adopt an expansive view of equity, the emphasis on unconscionability and injustice makes clear that there will be no judicial interference in most cases. Few will dispute the fairness of this view on the facts in question, where 90% of the purchase price was at stake. However, it does not have any immediate relevance to deposits of smaller amounts. For example, it is not obvious that the forfeiture of a relatively high deposit of between 20% or 30% would satisfy the unconscionable requirement that will invoke the jurisdiction. This is of course the age old subjectivity problem with the doctrine of unconscionability. The forfeiture of a deposit of 25% may not seem reasonable, but it is not necessarily unconscionable. Unconscionability denotes a very high level of unreasonableness.

The Singapore position is therefore not as wide as it may seem at first blush. If the facts of *Union Eagle* (which was decided after *Pacific Rim*) were to be decided under Singapore law, the outcome should be the same. The forfeiture of 10% of the price for not meeting a time limit by ten minutes may be harsh, but is not necessarily unconscionable.

3. *Why Specific Performance?*

One practical way to deal with the basic issue here is to consider the nature of the forfeiture. This is because an order for specific performance is essentially to prevent an interest from being forfeited. If the forfeiture will be neither penal nor unconscionable, then specific performance should not be ordered. If the forfeiture is penal or unconscionable, then there may be two ways to deal with it. One is to grant relief against forfeiture and order specific performance (by not recognising the termination of the contract). Another is to grant relief against forfeiture only (and recognizing that the contract is terminated lawfully).

If the order for specific performance is really to prevent an unfair forfeiture, then it should be asked why this should be done indirectly through an order for specific performance, rather than directly by addressing the forfeiture itself alone. In fact, it can be argued that specific performance is too much in favour of the defaulting party, who basically gets all that he wanted despite his breach. The innocent party may then even lose his right to forfeit a deposit for the breach.

[76] *Ibid*, at 23.

Relief from the forfeiture of money alone can sometimes suffice to prevent an injustice. It has the added advantage of leaving the property in the hands of the innocent party, who may then resell or keep the property as his own. In a contract for the sale of land, any injustice can sometimes be prevented by granting relief from the forfeiture of money paid, rather than relief from the forfeiture of the interest in land which arose on the making of the contract. There are however cases where the interest in the land held by the purchaser needs to be protected, *eg*, when the vendor has taken possession, paid a large portion of the purchase price, and spent a large sum of money on renovations and improvements before defaulting in a payment. It may be that in some cases, there is a property interest (*eg,* a lease) that would otherwise be forfeited, and the only way to protect the plaintiff is to allow him to retain the right.

In principle, a court which feels that judicial intervention is warranted should therefore also additionally consider why relief should be granted in the form of an order for specific performance. Specific performance should not follow automatically. This issue will be especially important if the value of the property in question has risen appreciably.

In any case, specific performance is not possible unless the purchaser is able and willing to perform the contract. A jurisdiction that can be invoked in the absence of willingness or ability to perform the contract is also necessary. This will require a jurisdiction to relieve against the forfeiture of money.

In *Union Eagle,* the Privy Council suggested that as the Law of Restitution has now been acknowledged, it should now be possible, in appropriate cases, to consider restitution as an alternative to specific performance.[77] This will be discussed later.[78]

B. *Penalty Rule*

The penalty rule is quite well established in the law, and is often invoked by parties facing forfeiture clauses. On the authority of *Linggi* and *Dojap*, it is possible to label an unreasonable deposit as a penalty and grant relief on that basis without stepping into a potentially wider jurisdiction that deals with the forfeiture of instalments or money in general. Under this approach, although the court would be ostensibly exercising the jurisdiction to interfere based on the penalty rule, it would not be applying the definition of a penalty as based on the distinction between liquidated damages and a penalty. This is because "reasonableness" would be based on the reasonableness of the

[77] *Supra,* note 46, at 347.
[78] *Infra,* Part IV(D).

forfeiture of such a sum for the breach, rather than a reasonable estimate of the probable loss.

The penalty rule today is based primarily on a search for a reasonable pre-estimate of the probable loss. The test seems to assume that an agreed sum payable upon breach is either liquidated damages or a penalty, with no intermediate third category.[79] In theory, a sum which does not constitute an estimate of loss may nevertheless not act *in terrorem* until it reaches a certain size. However, the existence of an *in terrorem* element is not part of the modern practical test for a penalty. Lord Radcliffe in *Bridge* v *Campbell Discount Co Ltd*[80] expressed the view that a definition based on fear and threat is quite unhelpful as "penalties may quite readily be undertaken by parties who are not in the least terrorised by the prospect of having to pay them and yet are [as his Lordship understood it], entitled to claim the protection of the court when they are called upon to make good their promise." This is really due to the penalty rule having become a mechanical rule which is not based directly on the existence of an element of unconscionability.

The penalty rule itself has been subject to criticism.[81] It can sometimes be avoided by suitable drafting.[82] Lord Eldon in *Astley* v *Weldon*[83] actually lamented the existence of case law which stated that an agreement to pay enormous and excessive liquidated damages should be considered as a penalty. In 1983, the House of Lords even refused to extend the penalty rule by endorsing the strict position that it did not apply to payments made by third parties upon breach, and that it only applies to "a prior agreement by the parties to a contract as an amount to be paid by a party in breach to the other party in respect of that breach".[84] In *Else (1982) Ltd* v *Parkland Holdings Ltd*,[85] the Court of Appeal refused to extend the common law rule on penalties in a case involving shares. The court drew an illogical

[79] An earnest may be seen as a third category: see *NLS Pty* v *Hughes* (1966) 120 CLR 583, where Barwick CJ (at 589) said that an agreed amount which is not a penalty may not necessarily be liquidated damages, *ie,* it could be an earnest of performance.

[80] [1962] AC 600, at 622. Words in brackets are added.

[81] See Treitel, *Remedies for Breach of Contract, A Comparative Account* (1988), at 233.

[82] *Eg*, with a substitute performance clause as in *Deverill* v *Burnell* (1873) LR 8 CP 475 and *Moss' Empires Ltd* v *Olympia* [1939] AC 544; reimbursement as in *Alder* v *Moore* [1961] 2 QB 57; option or price for terminating a contract as in *Associated Distributors Ltd* v *Hall* [1938] 2 KB 83, and *Bridge* v *Campbell Discount Ltd, supra*, note 80.

[83] (1801) 2 Bos & P 346, 126 ER 1775.

[84] As *per* Lord Diplock in *Bernstein (Philip) (Successors) Ltd* v *Lydiate Textiles Ltd* (1962, unreported), cited and approved in *Export Credits Guarantee Department* v *Universal Oil Products Co* [1983] 1 WLR 399 at 403-4.

[85] [1994] 1 BCLR 130.

distinction, by refusing to apply the penalty rule to an agreement to transfer property (rather than to pay money) upon a breach of contract.[86] All these indicate little enthusiasm for the penalty rule. One common argument is that parties should be allowed, within limits, to provide for sums that are not based on compensation.

The House of Lords decision in *Dunlop Pneumatic Tyre* v *New Garage*[87] is often cited as the leading modern authority on the penalty rule. Although it is often used as a case that provides mechanical tests for identifying penalties, it actually contains clear repeated references to unconscionability. Lord Dunedin's judgment is the most often cited for distinguishing a penalty from liquidated damages: "the essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damages."[88] This seems to assume that there is no third possibility, in that an agreed sum must be either a genuine pre-estimate or a penalty. However, his Lordship also summarized various tests for identifying penalties. Under these, a sum will be a penalty if the sum stipulated is "extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach".[89] There is also a presumption of a penalty when a single lump sum is payable for several possible breaches of different consequences.[90] Lord Atkinson found nothing "unreasonable, unconscionable, or extravagant" in the agreement,[91] and Lord Parker thought that to justify interference, "there must be an extravagant disproportion between the agreed sum and the amount of any damage capable of pre-estimate".[92] These references to presumption, extravagance and unconscionability are not always emphasised by those who cite *Dunlop Tyre*, even though they provide the crucial justification for intervention.[93]

86 Distinguishing *Johnson* v *Johnson* [1989] 1 WLR 1026, which held that the penalty rule could operate on the transfer of property rather than of money.

87 *Supra*, note 1.

88 *Ibid*, at 86, citing *Clydebank Engineering and Shipbuilding* v *Don Jose Ramos Yzquierdo y Castañeda* [1905] AC 6.

89 *Supra,* note 1, at 87.

90 Citing *Lord Elphinstone* v *Monkland Iron and Coal Co* (1886) 11 App Cas 332. See also *Kemble* v *Farren* (1829) 6 Bing 141; *Magee* v *Lavell* (1874) LR 9 CP 107 at 111; *Ford Motor Co* v *Armstrong* (1915) 31 TLR 267; *Willson* v *Love* [1896] 1 QB 625.

91 *Supra,* note 1, at 97.

92 *Ibid*, at 101.

93 One possible historical view is that the House of Lords in *Dunlop Tyre* was actually trying to de-emphasise the element of unconscionability. Some other cases have emphasised the unconscionability element. *Eg*, see *AMEV-UDC Finance* v *Austin* [1986] 162 CLR 170, especially at 190 and 193.

More recently, in *Philips Hong Kong* v *The Attorney-General of Hong Kong*,[94] the Privy Council seem to accept some of the criticism of the penalty rule.[95] More important, it unequivocally re-emphasised the unconscionability element in the penalty jurisdiction. Lord Woolf, on behalf of the Board, said:[96]

> Except possibly in the case of situations where one of the parties to the contract is able to dominate the other as to the choice of the terms of a contract, it will normally be insufficient to establish that a provision is objectionably penal to identify situations where the application of the provision could result in a larger sum being recovered by the injured party than his actual loss. Even in such situations so long as the sum payable in the event of noncompliance with the contract is not extravagant, having regard to the range of losses that it could reasonably be anticipated it would have to cover at the time the contract was made, it can still be a genuine pre-estimate of the loss that would be suffered and so a perfectly valid liquidated damages provision. The use in argument of unlikely illustrations should therefore not assist a party to defeat a provision as to liquidated damages.

This statement is significant for its emphasis on extravagance. It continues the primary reliance on the idea of a reasonable pre-estimate of loss made at the time that the contract is made; but it is no longer sufficient to attack an agreed damages clause by simply showing that it may allow the recovery of a greater sum than the expected loss. Any potential excess must be extravagant in order to make the agreed sum a penalty. As the gap must be extravagant, there is therefore a wide latitude for pre-estimation, and consequently, a mild penalty that is within the latitude may even be upheld. Although the case does not go as far as to create a "reasonable penalty" test for agreed sums payable upon breach, it does emphasise the role of unconscionability which was not rejected in *Dunlop Tyre* itself, and which had been part of equity jurisprudence in previous centuries.[97]

94 (1993) 61 BLR 49.

95 *AMEV-UDC Finance Ltd* v *Austin*, *supra*, note 93, at 193 (HC of Australia); *Escanda Finance Corporation Ltd* v *Plessing* [1989] ALJ 238 (HC of Australia); *Elsey* v *JG Collins Insurance Agencies Ltd* (1978) 83 DLR (3d) 1 at 15.

96 *Supra*, note 94, at 58-9. This is not new within the Commonwealth, *eg*, see *Elsey* v *Collins Insurance Agencies Ltd*, *supra*, note 95, at 15.

97 The existing jurisdictions to relieve against forfeiture developed from jurisdictions that were very broadly defined. For historical accounts of some, see Simpson, *A History of the Common Law of Contract* (1987), especially at 118-122; Turner, *The Equity of Redemption* (1931), Ch 2; Yale, *Lord Nottingham's Chancery Cases* (Vol 2) in Vol 79, *Publications of the Seldon Society* (1961), at 7-30; Randall, *Story on Equity* (3rd English ed, 1920), Ch 33.

The gap between the penalty rule and the reasonable penalty test for true deposits would seem to have been narrowed by the decision. Many deposits may be identified as penalties under the penalty rule because they could cover a range of possible breaches of different consequences. It may now be argued that unless an extravagant difference can be shown, they should escape classification as an unenforceable penalty.

A similar approach has been adopted in England by Colman J in *Lordsvale Finance* v *Bank of Zambia*.[98] The case involved a loan agreement, which had a clause covering the interest payable upon default in repayment. The interest payable upon default was in part compensatory, as it included the cost of funds and also a profit margin. However, there was also an unexplained 1% uplift, which was difficult to explain other than as a pure penalty for breaching the contract. Despite this, the agreed rate was upheld by Colman J. In his view, a modest 1% increase was not sufficient to justify the label of a penalty. It was not an exceptionally large increase whose dominant function was *in terrorem* of the borrower.[99]

The decision itself was seen as a commercially necessary one by the judge because such uplifts were commonly employed in the world of finance.[100] The case can be read on a broader basis as sanctioning reasonable penalties in the form of agreed damages for breach.

However, at this stage it may be too optimistic to conclude that the penalty rule has clearly evolved into "reasonable penalty" rule. It is generally still based on a reasonable pre-estimate of loss. It also does not openly acknowledge the "incentive to perform" argument which can be made not just in the context of deposits, but also to all agreed sums payable upon breach.

The "reasonable penalty" test of *Linggi* and *Dojap* is theoretically more suitable because it addresses the issue directly. One could also argue that it should also apply to agreed sums payable upon breach, and that this could go to establish a single "reasonable penalty" test.

Considering some of the recent case law, this is not an unlikely future development. Such a development will not mean that the case law on liquidated damages will then become irrelevant. The search for a reasonable

98 [1996] 2 All ER 158.

99 *Ibid*, at 167 and 170. A distinction was drawn between a prospective increase in the interest rate, and a retrospective increase upon a breach. The latter would be penal. There are authorities for holding that the former is not penal: see *Burton* v *Slattery* (1725) 5 Brown 233, 2 ER 648, *Herbert* v *Salisbury and Yeovil Railway Co* (1866) LR 2 Eq 221, *Downey* v *Parnell* (1886) 2 OR 82, *David Securities* v *Commonwealth Bank* (1990) 93 ALR 271.

100 *Supra*, note 98, at 169-70. Another reason is the possible impact on London as a centre for banking if the ruling had been otherwise.

pre-estimate of the loss can still be the starting point because the forfeiture of a reasonable pre-estimate of the loss will be reasonable, and any later test based on the reasonableness of the forfeiture cannot ignore the likely loss. In practice, one would often consider the extent to which the forfeited sum exceeded the likely loss as it is a measure of the penal element.

The practical problem with the "reasonable deposit or penalty" test is its subjectivity. Different people may draw different lines to separate reasonableness and unreasonableness. A case by case determination based on the facts may result in undesirable commercial uncertainty. These problems explain the attempt in *Dojap* to establish a prima facie test based on long continued usage. Any test based on reasonableness cannot be totally free of uncertainty, but in the context of deposits, it cannot be said that the uncertainty generated is of a higher degree than with other legal concepts which require judicial line-drawing. Obvious relevant factors would include the expected loss, the nature of the market, the current practice, and the conduct and relative positions of the parties. In practice, when the expected loss is difficult to quantify, there is much latitude in pre-estimation, and there will not be any obvious difference between a test based on the reasonableness of the pre-estimation, and one based on the reasonableness of the forfeiture.

C. *General Equitable Jurisdiction*

As argued earlier, there can be logical coherence only if a single set of rules were to apply to the whole financial arrangement prescribed in the event of breach.[101] This would involve a jurisdiction similar to that described by the majority in *Stockloser*, which deals specifically with the forfeiture of instalment payments, but which is broad enough to cover the forfeiture of all forms of money in general.

In *Stockloser*, an attempt was made to recover instalments of the contract price that had been paid under a contract which provided for forfeiture on breach of contract. Somervell LJ thought that in order to be able to recover the instalments he had paid, the applicant would have to satisfy the court that it was unconscionable for the vendor to retain the money. In his view, (1) when instalments are paid over a period of time and the applicant had the use of the subject-matter, the burden would not be easily discharged;[102] and (2) a plaintiff need not be financially able to complete the contract in order to receive relief,[103] *ie*, the equitable jurisdiction extends beyond

[101] *Supra*, Part III(D).
[102] *Supra*, note 17, at 484.
[103] *Ibid*, at 487-8.

merely giving more time to perform. Denning LJ accepted a distinction between penalty clauses and the case in question, where the seller was not seeking to exact a penalty, but to keep that which already belonged to him.[104] He said that there could be equitable relief from the forfeiture of money if the forfeiture clause is penal in that it is out of proportion to the damage, and it would be unconscionable for the sum to be retained.[105] His Lordship also agreed with Somervell LJ on the possibility of equitable relief even when the applicant is not able to complete the contract.[106] It can be seen that in both the judgments, a fairly broad jurisdiction to prevent unconscionable sums from being forfeited or recovered can be identified. Denning LJ in particular dealt with penalties, large deposits and large prepayments in the same breath. The fact that there is a jurisdiction does not mean that it will be readily exercised. It was not exercised on the facts of the case.

Both judgments allow the court to consider the facts at the time of forfeiture, which would include conduct subsequent to the making of the contract. This may seem undesirable in that it introduces more difficult factors for subjective evaluation. However, the difficulty can be minimized by placing primary emphasis on the facts as of the time that the contract was made, and to take subsequent factors into account only in extreme circumstances, for example, with fraudulent or reprehensible behaviour.[107]

In contrast, the third judgment of Romer LJ placed greater emphasis on the agreement, and his Lordship thought that there was no jurisdiction to interfere except, following the general logic of *Kilmer's* case,[108] in giving more time to complete the contract, which is of no consequence unless there is an ability to perform the contract. However, it was also said that "no relief of any other nature can properly be given, in the absence of special circumstances such as fraud, sharp practice or other unconscionable conduct".[109]

There are two advantages in using the majority approach in *Stockloser* instead of the penalty rule or the reasonable deposit rule. First, it can be interpreted to cover the forfeiture of money in general, which would allow all the financial consequences of breach to be taken into account, whatever the labels used. Second, the court would have greater freedom to consider

[104] *Ibid*, at 489.
[105] *Ibid*, at 490.
[106] *Ibid.*
[107] Equitable relief is discretionary. A well know maxim requires those who ask for equity to come with clean hands.
[108] *Supra*, note 62.
[109] *Supra,* note 17, at 501.

all the circumstances, including the facts and conduct after the contract is made.

The broader approach identified in *Stockloser* has been accepted or applied in Australia,[110] Canada,[111] and Malaysia (where *Linggi* originated).[112] It has not been expressly accepted in Singapore, but has been cited without disapproval.[113] However, judges in the House of Lords and the Privy Council have been careful not openly to accept or deny it.[114] Even in *Dojap*, the approving reference to *Stockloser* was to an example of a 50% deposit, and not the wider example of a 90% prepayment of the contract price.[115] The majority view on the lack of the need to show an ability to perform the contract was left open.

The inclination in England to avoid dealing openly with unconscionability, and to place greater emphasis on freedom of contract, has resulted in the strict confinement of some established jurisdictions,[116] of which the penalty rule is one. Some of the established rules, like the penalty rule, have evolved into rules that may also prevent the enforcement of freely agreed terms which cannot be said to be unconscionable. This raises a difficult conceptual problem as there would then be judicial interference even in the absence of unconscionability. This will be an incongruous position if there is no scope for judicial interference when there is unconscionability.

One possible approach is to reject and deny the already confined jurisdiction completely, and to uphold freedom of contract literally. Few would want this to happen. It would not only be radical, it would certainly lead to an unacceptable proliferation of harsh if not unconscionable terms, especially when comprehensive legislation to deal with the resulting void is not likely. The logical choice then is between leaving such a jurisdiction as it is, *ie*, not directly based on unconscionability, and striking at terms

[110] See *Smyth* v *Jessep* [1956] VLR 230, where Lord Denning's approach was applied to a 40% deposit. The court had no difficulty in finding it to be unreasonable.

[111] See Waddams, *The Law of Contract, supra*, note 72, at para 460, and the cases cited in note 85 therein.

[112] *K Umar Kandha Rajah* v *EL Magness* [1985] MLJ 116 (Federal Court), with respect to an 11% deposit and subsequent instalment payments, on the basis of sharp practice and unconscionability. This was based on conduct subsequent to the making of the contract. The case (at 120) seems to use all the identified approaches in *Stockloser*, including Romer LJ's exception for sharp and unconscionable practice.

[113] *Pacific Rim Investments* v *Lam Seng Tiong, supra,* note 74, at 16.

[114] Prior to *Dojap*, support had been given in England to Romer LJ's stricter approach: see *Galbraith* v *Mitchenall Estates* [1965] 2 QB 473.

[115] Made by Denning LJ, *supra*, note 17, at 491.

[116] Even by drawing difficult distinctions if necessary. See *supra*, note 69.

that may not even be unfair; or logically limiting it further still. The only way to limit such a jurisdiction logically is to re-emphasise the unconscionability element. This will ironically involve the very concept avoided at the beginning.

In the context of forfeiture of money, a general approach along the lines of the majority view in *Stockloser* would be the most suitable and logical. As far as deposits are concerned, it is possible in many cases to avoid such a wide ranging debate by simply falling back on the reasoning based on the nature of a deposit, as did the Privy Council in *Dojap.* However, basic conceptual problems will remain if this approach is used.

Although this article is strictly concerned with the forfeiture of deposits, it has been shown that as far as deposits are concerned, it will be difficult not to consider a more general question of the forfeiture of money. The argument can be taken one step further, in the sense that there can be no logical distinction between the forfeiture of money and other rights and interests. This is, once again, part of a wider problem of unconscionability, and is beyond the scope of this article. The acceptance of the *Stockloser* approach would, however, bring the law a step closer towards a general doctrine of judicial relief covering forfeiture in general.

D. *Restitution of Unjust Enrichment*

There is another possible approach based on restitution of unjust enrichment. The immediate attraction of an unjust enrichment analysis is the avoidance of an approach which is either based on or which may lead to a general doctrine of unconscionability. It will also be free of the artificial technical distinction made in *Dojap* and *Linggi*.

Since money is involved, it will be easy to identify an enrichment. But there will be problems with the "unjust" factor. Whether an enrichment derived from the forfeiture of a deposit will be unjust to retain involves an evaluation of the agreement for forfeiture in the context of the facts. It will involve a consideration of the probable loss at the time the contract was made, the relative bargaining power of the parties, and the actual loss suffered. Any unjust enrichment in the context of deposits will essentially arise from, or be traceable back to, an unfair agreement. So even though the ostensible approach may be different, the basic considerations will be similar to those under a reasonable deposit or penalty test.

The nature of the restitution here will not be without difficulties. For example, there will be a question of whether the whole sum should be restored, or whether there should be restitution only to the extent that it would be unjust to retain the sum in question. On the whole, it is not obvious that it will be profitable to develop a new approach based on unjust enrichment to deal with the forfeiture of deposits and other prepayment. From the above

analysis, it can be concluded that the case law for a broad jurisdiction already exists, and it is only a matter of acknowledging and developing it.

However, when more than a deposit or other prepayment is involved, restitution may play a useful role. The Privy Council in *Union Eagle* practically invited future litigants to claim restitution as an alternative to specific performance in appropriate cases.[117] An example of a case where this is likely will be where the subject matter of the terminated contract has been improved by the contract breaker. To allow termination in such cases will allow the vendor to take the benefit of the improvements, which could even be a new building, or a renovated flat. It is for this reason that specific performance is sometimes granted as opposed to mere relief from the forfeiture of money. The difficulty with an order for specific performance is that it is too much in the contract breaker's favour: he will get all that he bargained for despite his breach of a condition. With restitution as an option, specific performance need not be ordered, and the court can recognize the termination, but order the restitution of any benefits that the vendor may enjoy on the return of the property.

This approach has the potential to ensure individual justice, and is very flexible. It is beyond the scope of this article to deal in detail with it as it has limited impact on the forfeiture of deposits. It should however be pointed out that it may raise as much uncertainty as the commercial certainty stand in *Union Eagle* was intended to avoid. There will be problems with subjective valuations, and it may even discourage vendors from terminating contracts if they have to pay for improvements they do not want. Finally, there will also be the issue of whether restitution can be excluded by contract, as any competent lawyer who has read *Union Eagle* will try to do the next time he drafts a contract for a vendor.

V. Transaction and Jurisdictional Differences

It is hoped that there will be greater acceptance of the broader approach in *Stockloser*, so that it can be developed. Because of the current position in England, some of the statements of principle in *Stockloser* have, for want of better authority, been interpreted almost as statutory provisions.[118] Ultimately, a general jurisdiction to deal with the forfeiture of money, under whatever label, is logically unavoidable.

[117] *Supra,* note 77.

[118] The judgment of Denning LJ in particular. A statute-like interpretation of the individual judgments in *Stockloser* has been avoided here.

However, there is a possibility that a 10% deposit may, because of the lack of clear local judicial pronouncements, be used as the starting point in many smaller common law jurisdictions like Singapore. It is wrong in principle to do so. Various factors have to be considered in assessing reasonableness, and an obvious one would be the state of the relevant market, which will vary from jurisdiction to jurisdiction. The property market can be used to illustrate this. In a jurisdiction with stable property prices, a 10% deposit would have a very different complexion from a similar deposit in a jurisdiction with fast rising or fluctuating property prices. In Singapore and many other fast developing countries for example, annual price increases of 20% to 40% have been experienced before in recent years. In some situations, the trend of the market will also be relevant. A 10% deposit in an ever sharply rising market is not the same as similar deposits in stable, dropping or unpredictable markets. There should therefore not be any assumption that a deposit which is reasonable in Jamaica or England would be reasonable elsewhere; or that what is not reasonable in Jamaica or England would be equally unreasonable elsewhere.[119]

If an approach based on "long continued usage" were to be adopted as suggested in *Dojap*, a deposit of 10% could nevertheless become an acceptable base with the passage of time, in different jurisdictions, for different types of transactions. The real risk at the end of the day then is in the establishment of yet another practically mechanical rule, based on a *de facto* 10% standard. Although this would be quite wrong in principle, it has to be conceded that it offers the advantage of commercial certainty, and for this reason, it is likely that this will happen, if it has not already.

SOH KEE BUN*

[119] In Hong Kong, which has high property prices in an active market, the customary 10% deposit in land sales has been accepted as reasonable under the *Dojap* approach: see *Cheer King* v *Gary Investments* [1995] 1 HKC 663.

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