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Vendor and Vendee—Specific Performance

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would not be a relevant consideration, and the Court could objectively view the transaction to determine if legal ties exist between the two sales. Any other interpretation would be tenuous and could not, in light of the plain language of the statute prohibiting a sale within six months of purchase, be justified upon the mere grounds of literal interpretation.

A further query raised by *Reliance* is whether a change in applicable SEC reporting requirements will affect the result of the instant case. Though the Court devoted some time to the inconsistencies in certain SEC rules and releases, it does not appear that the discussion was particularly material to the holding.³⁹ Thus an immediate promulgation of amended reporting requirements by the SEC should not limit to any extent the instant holding.

In *Reliance Electric Co. v. Emerson Electric Co.*, form has prevailed over substance and a 10% beneficial owner is now liberated from certain 16(b) constraints. As such, he may waltz merrily away from section 16(b) liability to the tune of a rhythmic "two step."

VENDOR AND VENDEE—SPECIFIC PERFORMANCE—CALIFORNIA POLICY AGAINST FORFEITURES PRECLUDES DENYING THE RIGHT TO SPECIFIC PERFORMANCE TO A WILLFULLY DEFAULTING VENDEE WHERE THE LAND SALE CONTRACT HAS BEEN SUBSTANTIALLY PERFORMED AND NO DETRIMENT WILL BEFALL THE VENDOR BY THE VENDEE'S CONTINUED PERFORMANCE OF THE CONTRACT—*MacFadden v. Walker*, 5 Cal. 3d 809, 488 P.2d 1353, 97 Cal. Rptr. 537 (1971).

In April 1953, Mrs. Claudia Walker (vendee) entered into an installment real estate contract with Ellsworth MacFadden (vendor) to purchase eighty acres of unimproved land. The contract provided for an initial payment to be made, followed by monthly installments. It also provided that time was of the essence and that upon any default by the vendee in her monthly payments the vendor could terminate all of the vendee's rights under the contract and retain all executed payments as the reasonable rental value of the land. The vendee occupied the land, made improvements, and paid the installments as they became due. In late 1963 the vendee, upon discovering that

39. See note 12 *supra*.

timber had been cut and removed from the land, discontinued paying the monthly installments. The vendee alleged that the vendor was responsible for the removal and claimed that she was entitled to a credit for the proceeds purportedly received by him. Nevertheless, after the filing of a quiet title action by the vendor the vendee paid into court an amount sufficient to satisfy the remainder due on the contract plus interest, and cross-complained seeking specific performance. Finding the contract fair, the consideration adequate, and the vendee in good faith and in substantial performance of the contract, the trial court held that the vendee's breach was not grossly negligent, willful or fraudulent and granted her specific performance under California Civil Code section 3275.¹ The California Supreme Court, applying a different rationale, affirmed.² The court found that since there was insufficient evidence to sustain the finding that the breach was not willful, relief was not available under section 3275.³ Reaffirming its holding in *Freedman v. The Rector*⁴ that section 3275 was not the exclusive source of the right to relief from forfeiture, the court held that the anti-forfeiture policy established in *Freedman* justified the award of specific performance to a willfully defaulting vendee in certain circumstances.⁵ The *MacFadden* court noted that the contract had been substantially performed prior to the breach, and that the vendor, if specific performance were granted, would receive nothing less than the benefits he bargained for. Under these circumstances, the court affirmed the decree for specific performance.

1. CAL. CIV. CODE § 3275 (West 1970):

Whenever, by the terms of an obligation a party thereto incurs a forfeiture, or a loss in the nature of a forfeiture by reason of his failure to comply with its provisions, he may be relieved therefrom, upon making full compensation to the other party, except in case of a grossly negligent, willful, or fraudulent breach of duty.

2. *MacFadden v. Walker*, 5 Cal. 3d 809, 811, 488 P.2d 1353, 1353-54, 97 Cal. Rptr. 537, 537-38 (1971).

3. *Id.* at 813, 488 P.2d at 1355, 97 Cal. Rptr. at 539. In order to qualify for relief under section 3275 the vendee has the burden of pleading and proving facts that will justify its application. *Barkis v. Scott*, 34 Cal. 2d 116, 120, 208 P.2d 367, 370 (1949).

4. 37 Cal. 2d 16, 230 P.2d 629 (1951).

5. 5 Cal. 3d at 813-14, 488 P.2d at 1355-56, 97 Cal. Rptr. at 539-40. Civil Code section 3294 limits punitive damages to actions for the breach of obligations not arising from contract. Sections 1670 and 1671 preclude the setting of liquidated damages for possible future breach of a contract unless it would be impracticable or extremely difficult to fix the actual damage. Section 3369(1) prohibits the granting of specific or preventive relief to enforce a penalty or forfeiture in any case. These code sections have been construed to formulate a policy against forfeiture where the forfeiture bears no reasonable relationship to the damage suffered by the vendor. *Freedman v. The Rector*, 37 Cal. 2d 16, 21-22, 230 P.2d 629, 632-33 (1951).

In 1957 the Court of Appeals for the Ninth Circuit in *Ward v. Union Bond & Trust Co.*,⁶ reaffirmed a district court decision which granted a willfully defaulting purchaser specific performance under a land sale contract. This decision subsequently led various commentators to conjecture whether the state courts would accept *Ward's* interpretation of California law.⁷ *MacFadden* now puts an end to such conjecture and marks the culmination of a long history of "judicial legislation" on the subject of the defaulting purchaser's remedies under a land sale contract.

Originally the rule in California was that forfeitures would be enforced in land sale contracts where time was of the essence.⁸ Recognizing the harshness of this rule, the courts adopted various rationales to circumvent its application.⁹ However, it was not until the Supreme Court's decision in *Barkis v. Scott*¹⁰ that this rule was finally abandoned. There, section 3275¹¹ was found to be a valid basis upon which to enable a purchaser, who in *good faith* breached a land sale contract providing that time was of the essence, to be relieved of a forfeiture and to have his contract rights restored.¹²

In *Baffa v. Johnson*,¹³ the California Supreme Court affirmatively es-

6. 243 F.2d 476 (9th Cir. 1957).

7. Several authors had anticipated a determination by California courts of the merits of granting a willfully defaulting vendee the remedies of specific performance or reinstatement of the contract. *E.g.*, Smith, *Contractual Controls of Damages in Commercial Transactions*, 12 *HAST. L.J.* 122, 134-37 (1960-61); Comment, 10 *STAN. L. REV.* 355, 360-61 (1957-58); Comment, 2 *U.S.F. L. REV.* 329, 335-36 (1967-68).

8. *Glock v. Howard & Wilson Colony Co.*, 123 Cal. 1, 55 P. 713 (1898).

9. *E.g.*, *Ebbert v. Mercantile Trust Co.*, 213 Cal. 496, 2 P.2d 776 (1931) (granting relief from forfeiture on the grounds that the breach was of a condition subsequent and not of a condition precedent as in the *Glock* decision); *Collins v. Eksoozian*, 61 Cal. App. 184, 214 P. 670 (1923) (denying forfeiture on the grounds of estoppel, but justifying *Glock's* refusal to apply section 3275 on the basis of section 1492 which purportedly precludes relief under 3275 where the contract provides that time is of the essence; *accord*, *Henck v. Lake Hemet Water Co.*, 9 Cal. 2d 136, 143, 69 P.2d 849, 852 (1937); *Grattian v. Coleman*, 86 Cal. App. 2d 266, 268, 194 P.2d 728, 729 (1948)); *Gonzalez v. Hirose*, 33 Cal. 2d 213, 200 P.2d 793 (1948) (forfeiture denied on the grounds of waiver or estoppel); *Flanery v. Mudd*, 86 Cal. App. 2d 250, 194 P.2d 806 (1948) (same); *Fickbohm v. Knaust*, 103 Cal. App. 443, 284 P. 692 (1930) (same); *McDonald v. Kingsbury*, 16 Cal. App. 244, 116 P. 380 (1911) (same).

10. 34 Cal. 2d 116, 208 P.2d 367 (1949).

11. Note 1 *supra*.

12. 34 Cal. 2d at 12-24, 208 P.2d at 371-72. The *Barkis* court noted that section 3275 was not discussed in *Glock* as a possible means of relief from forfeiture. While the court refused to overrule *Glock* because of this and other distinctions, the validity of the *Glock* decision must be seriously questioned in light of the current court's strong stance against forfeitures.

13. 35 Cal. 2d 36, 216 P.2d 13 (1950).

tablished that where section 3275 is inapplicable because of a purchaser's willful default, section 3369(1)¹⁴ will deny a forfeiture to a vendor if the purchaser can prove that the vendor has received more than the benefit of his bargain and has refused to return the excess to the purchaser.¹⁵ Thereafter, in *Freedman v. The Rector*,¹⁶ the court espoused the principle that section 3275 was not the exclusive source of relief from forfeiture and held that, under the anti-forfeiture policy of the law, the willfully defaulting vendee was entitled to restitution in the amount that his previous payments exceeded the damages caused to the vendor as a result of the breach.¹⁷

The court's decisions in *Barkis*, *Baffa*, and *Freedman* substantially contributed to the elimination of the vendor's preferred position under the land sale contract.¹⁸ Nevertheless, no court had yet considered whether the purchaser who willfully defaulted on his land sale contract could require specific performance or reinstatement of the contract. In *Ward v. Union Bond & Trust Co.*,¹⁹ however, the ninth circuit court, relying primarily on *Freedman*, affirmed the lower court holding that a willfully defaulting purchaser was entitled to a decree of specific performance.²⁰ The circuit court prefaced its decision by stating that the ultimate aim in equity is to save the parties from harm and to do what is just and equitable to permit them as vendor and purchaser to have the benefit of their respective bargains.²¹ Though the decision seemed the logical progression of California law following the *Barkis*, *Baffa*, and *Freedman* decisions, the result was not unanimously accepted.²² Nevertheless, the *MacFadden* court followed the *Ward* precedent when it relied upon the anti-forfeiture policy recognized in *Freedman* to hold that the willfully defaulting vendee was entitled to specific performance of the land sale contract.²³ This judicial

14. CAL. CIV. CODE § 3369(1) (West 1970), which provides in part that "[n]either specific nor preventive relief can be granted to enforce a penalty or forfeiture in any case. . . ."

15. 35 Cal. 2d at 39, 216 P.2d at 14.

16. 37 Cal. 2d 16, 230 P.2d 629 (1951).

17. *Id.*

18. See Hetland, *Real Property and Real Property Security: The Well-Being of the Law*, 53 CALIF. L. REV. 151, 152-59 (1965); Smith, *Contractual Controls of Damages in Commercial Transactions*, 12 HAST. L.J. 122, 134-36 (1960-61); Comment, 10 STAN. L. REV. 355 (1957-58); Comment, 2 U.S.F. L. REV. 329 (1966-68); Note, 40 CALIF. L. REV. 593 (1952).

19. 243 F.2d 476 (9th Cir. 1957).

20. *Id.* at 478-81.

21. *Id.* at 480.

22. *E.g.*, Comment, 10 STAN. L. REV. 355, 359-61 (1957-58).

23. 5 Cal. 3d at 814, 488 P.2d at 1356, 97 Cal. Rptr. at 540. In reaching this decision the court distinguished *Honey v. Henry's Franchise Leasing Corp.*, 64 Cal. 2d 801,

clarification of the remedies available to the willfully defaulting vendee had been anticipated by most commentators.²⁴

The *MacFadden* decision arguably affords vendees a broader ambit of protection than did the previous specific performance decisions, and should not be limited in application to its specific fact situation. Language in *Barkis* would appear to limit the remedy of specific performance to only those situations where the land sale contract had been substantially performed or where the vendee had made substantial improvements on the property.²⁵ The *Barkis* court reasoned that permitting the vendor to terminate the vendee's rights under the contract and to keep the installments that have been made could only result in the harshest sort of forfeiture where the vendee has substantially performed or made substantial improvements in reliance on his contract.²⁶ While the vendee in *MacFadden* had similarly made substantial improvements on the property and had substantially performed the contract, a close reading of that opinion indicates that such actions by the vendee may not be prerequisites for the imposition of the equitable relief.

In affording specific performance the *MacFadden* court underscored the anti-forfeiture policy established in *Freedman*. There, the vendee willfully defaulted after making the down payment. He had

415 P.2d 833, 52 Cal. Rptr. 18 (1966). There, the vendee sought rescission of a land sale contract on the basis of a material misrepresentation. The trial court, however, found the vendee in default because there were no grounds for the rescission, and entered judgment quieting title in the vendor on condition that he pay the vendee the difference between the amount paid by the vendee under the contract and the rental value of the property while in his possession. *Id.* at 802-03, 415 P.2d at 834, 52 Cal. Rptr. at 19. The California Supreme Court reversed the trial court on the measure of damages, stating that the proper measure was the benefit of the bargain to the vendor. The vendor was permitted to quiet title on condition that he refund the excess of the payments received, if any, over the amount necessary to give him the benefit of his bargain. *Id.* at 805, 415 P.2d at 836, 52 Cal. Rptr. at 21. The vendor in *MacFadden* contended that this holding established that restitution of the excess of the part payments over the damages caused by the breach was the exclusive remedy available to the willfully defaulting vendee. This contention was properly refuted on the grounds that the *Honey* decision was limited to a discussion of the alternative measures of restitution and not the alternative remedies available to a defaulting vendee where specific performance is sought. 5 Cal. 3d at 815, 488 P.2d at 1356, 97 Cal. Rptr. at 540. See Comment, 2 U.S.F. L. REV. 329, 336 (1966-68), as support for this distinction.

24. E.g., Smith, *Contractual Controls of Damages in Commercial Transactions*, 12 HAST. L.J. 122, 134-36 (1960-61); Comment, 2 U.S.F. L. REV. 329 (1966-68).

25. 34 Cal. 2d at 122, 208 P.2d at 371. *Accord*, *Scarbery v. Bill Patch Land & Water Co.*, 184 Cal. App. 2d 87, 104, 7 Cal. Rptr. 408, 418 (1960); *Lucientes v. Bliss*, 157 Cal. App. 2d 565, 572, 321 P.2d 526, 531 (1958).

26. 34 Cal. 2d at 122, 208 P.2d at 371.

neither substantially performed the contract nor made improvements on the property.²⁷ Yet, the *MacFadden* court inferred that specific performance would have been an available remedy in *Freedman* if the vendor had not sold the property to a bona fide purchaser prior to the vendee's suit.²⁸ Thus, notwithstanding the willfully defaulting vendee's culpability, where the damage caused by the breach has no reasonable relationship to the remedy of forfeiture, specific performance should remain a viable remedy. If the damage to the vendor is slight and he is assured of receiving the benefit of his bargain by specific performance, there is then no equitable reason, barring some equitable defense such as laches or unclean hands,²⁹ not to allow such relief.³⁰ Specific performance is therefore an arguable alternative to the willfully defaulting vendee's remedy of restitution even where the contract has not been substantially performed nor improvements made on the property.

MacFadden also raises the possibility of affording additional relief to a willfully defaulting vendee based on the concept espoused by Professor John Hetland that the land sale contract should be treated similarly to any other security device involving land.³¹ So viewed, the vendee should have the right to *reinstate* the contract whether his default was willful or non-willful.³² Although the *MacFadden* court declined to consider this possibility, it approvingly cited Hetland's opinion on the subject, thereby inferring that in a proper case this view will be adopted to provide an additional remedy to a willfully defaulting vendee.³³ The court has evidenced a concern with maintain-

27. *Freedman v. The Rector*, 37 Cal. 2d 16, 18, 230 P.2d 629, 630 (1951).

28. 5 Cal. 3d at 814, 488 P.2d at 1355-56, 97 Cal. Rptr. at 539-40.

29. It must be noted that the remedy of specific performance will only be awarded where equity deems it appropriate and fair to the party against whom it is being invoked. *Id.* at 815, 488 P.2d at 1356-57, 97 Cal. Rptr. at 540-41.

30. Such relief would be in conformity with the statement by the Ninth Circuit Court of Appeals in *Ward v. Union Bond & Trust Co.*, 243 F.2d 476 (9th Cir. 1957), that the primary aim of equity proceedings in the context of relief under a land sale contract is to permit the vendor and vendee to each have the benefit of their respective bargains. *Id.* at 480.

31. J. HETLAND, CALIFORNIA REAL ESTATE SECURED TRANSACTIONS 105-06 (C.E.B. 1971).

32. *Id.*

33. 5 Cal. 3d at 816, 488 P.2d at 1357, 97 Cal. Rptr. at 541. See *Newhouse v. Upchurch*, 22 Cal. App. 3d 204; 99 Cal. Rptr. 436 (1971), wherein the court of appeals, in allowing reinstatement of a land-sale contract in favor of a defaulting purchaser, took notice of the *MacFadden* court's apparent propensity to view a land sale contract as any other security device: "In *MacFadden v. Walker*, . . . the Supreme Court has recognized the applicability of principles governing security foreclosures to installment land sales contracts." (citation omitted). *Id.* at 212, 99 Cal. Rptr. at 441.