

## PART XIII – EQUITABLE REMEDIES

### I INTRODUCTION

#### A *History of Equitable Remedies*

The division between equity and the common law gives rise to the varying remedies available for breach of contract under each body of law. The distinction is primarily historical. Originally, separate courts with exclusive jurisdictions administered the rules of each; however, with the introduction in the 1870s (and, about one century later, in New South Wales) of the *Judicature Act*, the separate application of equitable and common law remedies came to an end.

#### B *Types of Available Remedies*

There are three principal remedies available to a party in equity:

- 1 **Specific performance**  
Peculiar to contract enforcement, this compels performance of the terms
- 2 **Injunctions**  
A general remedy designed to prevent or compel breach or compliance
- 3 **Equitable damages**  
*Lord Cairns' Act* provides for a statutory right to damages

Of these three, only specific performance is peculiar to contract law. The other remedies are not so limited, and available in the context of other causes of action.

#### C *Characteristics of an Equitable Remedy*

Remedies in equity are discretionary (*Dowsett v Ried* per Griffith C.J). This may be contrasted with common law damages, a right to which is prima facie conferred upon the breach of a contract, even if no loss can be demonstrated (in which case nominal damages are awarded). Being discretionary, the court is the ultimate arbiter of whether a petition is successful. It is able to deny the granting of the remedy even if application of the established equitable principle is apparently successful. The statutory provision here considered also merely confers a discretionary right. The true nature of the discretion (and the factors which motivates its exercise) is somewhat mysterious.

Equitable remedies are designed to be ancillary to common law remedies; they supplement the common law and are invoked only where the common law remedy is so inadequate as to warrant their application. Oliver Wendell-Holmes offers an example of a situation in which it may be appropriate to grant an equitable remedy; namely, where the contract provides an option to perform or pay damages. (This may be compared to the European approach in such a circumstance, where the right to compel performance is a primary remedy under the *UNIDROIT Principles of International Commercial Contracts*; however, the factors relevant to the success of the remedy are similar to those considered in equity).

The initial position in Australia is that there is no equitable right to performance. However, on satisfying a court that an equitable remedy of specific performance should be applied, performance can be compelled.

Worth noting is the concept of an 'efficient breach' (as mentioned by the fictitious Posnier J in the fictitious case of *Pratt*). Where a breach allows for more efficient allocation of resources, the victim of the breach should only be entitled to damages for expectation loss and performance should not be compelled. For example, where A contracts with B to supply 250 yams at price X, if C subsequently offers to pay 2X, the resources (yams) should be allowed to flow to the party valuing them more highly. It is submitted that this hinges on questionable economic and legal logic, it rarely being efficient to break a contract (owing to litigation costs, and potentially high and largely uncertain liabilities in respect of damages) and promoting unprincipled and unconscionable business practices. Allowing 'efficient breaches' may also undermine the certainty of the contractual apparatus; this is likely to have the effect of increasing transaction costs and lowering the confidence of both parties in the other.

## II SPECIFIC PERFORMANCE

Specific performance is an order to do some definite thing required to perform the contract (*Dougan v Ley* per Dixon J). It has been characterised as

*a remedy to compel the execution in specie of a contract which requires some definite thing to be done before the transaction is complete and the parties' rights are settled and defined in the manner intended (JC Williamson Ltd v Lukey & Mulholland per Dixon J).*

More generally, specific performance describes a court order compelling the performance of a contract by the parties. Equitable orders are flexible; they can be made conditional on the occurrence or non-occurrence of some event, for example.

### ***Dougan v Ley* (1946) HCA:**

#### Facts:

- Ley, the buyer seeks specific performance of a contract for the sale of a taxi
- Dougan, the seller, argues that specific performance cannot be granted because the buyers had to perform certain acts that would require the supervision of the court
  - The buyer was required to satisfy the Transport Commissioner of their fitness and suitability to operate a taxi cab

#### Issue:

- Can Ley obtain specific performance?

#### Decision:

- The court makes a degree of specific performance conditional upon Ley satisfying the commissioner of the required elements

Though equitable principles are generally interpreted and applied flexibly, several requirements have emerged as prerequisites to the making of an order for specific performance.

### A Consideration

A promisee cannot obtain specific performance unless valuable consideration has been provided in return for the promisor's offer. Importantly, contracts recorded in a deed are validly formed without consideration. Where a deed is executed without consideration, no decree for specific performance will be given.

However, there are cases in which specific performance has been awarded in the absence of consideration that would be acceptable at common law. For example, reliance has been found to be sufficient to satisfy the requirement (*Dilwin v Dewelyn*; applied in *Beaton v McDivitt*). These cases suggest that the requirement is not as absolute as is sometimes claimed.

### B Inadequacy of Damages

More strictly, specific performance will not be granted unless common law damages are unavailable or inadequate. This requirement is unfailingly adhered to by courts.

#### ***JC Williamson Ltd v Lukey & Mulholland (1931) HCA:***

Facts:

- The owner of a sweets shop is given the exclusive right to sell sweets in a theatre
- JC Williamson reneges on this promise; however, the *Statute of Frauds* prevents the award of damages because the contract is oral and its duration greater than one year

Issue:

- Are common law damages inadequate?

Decision:

- Yes, they aren't available at all, according to statute

Note that acts of part-performance can still attract equitable relief, where damages are unavailable for a breach by the other party.

Damages may also be inadequate because there is no substitute for performance available to be purchased on the market (*Dougan v Ley*).

#### ***Dougan v Ley (1946) HCA:***

Facts:

- [See above Part II]

Issue:

- Are common law damages inadequate?

Reasoning:

- Damages are supposed to enable the victim of the breach to go out to market and buy

replacement materials of which the other's breach have deprived him or her

- Damages will therefore be inadequate where there is no available substitute with which to replace the originally promised performance
- For example, there is no substitute for a piece of land, which is unique and cannot be replaced with another
  - Specific performance is thus routinely granted in the context of contracts for the sale of land
  - This may be compared with contracts for the sale of goods, where a substitute may be available from many sources
- Here, there are not other taxis available
- The evidence is that there are 6 eager buyers for every willing seller; additionally, their sale and operation is restricted to a certain number each year
- It is not just a car, but a unique means to a livelihood

Decision:

- Damages are inadequate

Where a contractual provision stipulates a requirement that, if broken, renders the provision worthless and non-compensable, damages are likely to be inadequate (*Curro v Beyond Productions Pty Ltd*).

***Curro v Beyond Productions Pty Ltd (1993) NSW SC:***

Facts:

- Curro is a television producer working for Beyond Productions
- By means of an exclusivity provision in her contract of employment, she agrees not to work for any other network
- Curro subsequently accepts work with Channel 9

Issue:

- Can Beyond Productions obtain an injunction to prevent Curro working for Channel 9?

Decision:

- Damages are clearly inadequate, because exclusivity can't be compensated and 'reobtained elsewhere'

Another circumstance in which damages will be unavailable is where the doctrine of privity prevents a third party sustaining loss from bringing an action under the contract (See Part IX – Privity). Actions brought by the promisee in such cases may be able to obtain specific performance from the promisor on the basis that it is necessary to confer the benefit upon the third party (which damages could not confer).

### C Discretionary Factors

Once the two preliminary requirements are met, a court will have a prima facie discretion to compel performance. The remainder of the enquiry consists of determining whether the discretion will in fact be exercised.

1 *Mutuality*

This is generally the most important factor relevant to the exercise of the discretion to award specific performance. Essentially, one party is only entitled to specific performance if the other party is also entitled to it. If, for some reason, the defendant could not sue the plaintiff for specific performance, the plaintiff cannot sue the defendant for such a remedy either. Problems of mutuality are the most frequent bars to specific performance. Several examples follow.

***JC Williamson Ltd v Lukey & Mulholland (1931) HCA:***Issue:

- Can the owner prevent the sweets vendor from obtaining an order for specific performance on the basis that there is no mutuality?

Reasoning:

- The plaintiff must show mutuality (ie, that both parties can obtain specific performance)
- Here, the theatre owner could not have obtained specific performance from the vendor because the supervision factor (see below) would likely prevent the granting of the remedy

Decision:

- It is necessary to look at the issue of specific performance from the points of view of *both* parties
- On the facts, the owner could not have obtained specific performance so neither can the sweets vendor

***Dougan v Ley (1946) HCA:***Reasoning:

- The seller argues that there is no mutuality because the seller of the taxi could not force the buyer thereof to apply to the Commissioner (owing to the supervision requirement)

***Curro v Beyond Productions Pty Ltd (1993) NSW SC:***Issue:

- Can Beyond Productions obtain specific performance despite Curro not being able to do the same in the event that they were in breach?

Reasoning:

- Curro points to the rule that an injunction cannot be granted so as to in effect obtain specific performance where specific performance would normally be unavailable
- Curro also argues that Beyond Productions could not enforce the contract against Curro (which was for personal services), so there is no mutuality

Decision:

- However, the Court appears to ignore the lack of mutuality

The justification for considering mutuality appears to be that it would be unfair to grant specific performance against a defendant when the court could not enforce similar performance by the plaintiff.

## 2 Delay

Delay between breach and action (laches) militates against the party seeking specific performance (*Fitzgerald v Masters*).

### ***Fitzgerald v Masters* (1956) HCA:**

#### Issue:

- Does the 16 year delay prevent specific performance from being granted?

#### Reasoning:

- R emerges after *16 years* and demands J perform the contract
- J argues that specific performance should not be awarded because of the delay
- Dixon CJ and Fullagar J:
  - The delay advantages the vendor since he benefits from the improvements made to the premises

#### Decision:

- The Court disagrees: specific performance is ultimately granted despite the delay

### ***Taylor v Johnson* (1983) HCA:**

#### Issue:

- Is the delay such as to prevent an award of specific performance?

#### Reasoning:

- Delay normally prevents specific performance

#### Decision:

- Here there was no delay because the *Moratorium Act* made the buyer disobliged to pay

## 3 Actual and anticipatory breach

Where the person claiming specific performance is in breach of the contract, this is a prima facie indication that specific performance will not be granted. However, the requirement is often ignored (see, eg, *Fitzgerald v Masters*).

### ***Fitzgerald v Masters* (1956) HCA:**

#### Issue:

- Can the buyer obtain specific performance notwithstanding the fact that he is in breach of the contract for the sale of land?

**Facts:**

- The buyer ceased to pay, failing to complete within the 5 years required
- He is therefore in breach when suing for specific performance

**Decision:**

- The buyer stopped paying at the request of the seller, so although he is in breach, there is an explanation
- This is not a breach of the kind that would prevent an award of specific performance

The basis for considering the plaintiff's breach is the equitable maxim, 'a person who comes to equity must come with clean hands.'

#### 4 *Readiness and Willingness*

The plaintiff must also be ready and willing to perform their obligations under a contract. This embodies the equitable maxim, 'a person who seeks equity must do equity.'

#### 5 *Hardship*

Specific performance is often resisted on the basis that it would cause undue hardship to the defendant (see *Suttor v Gundowda Pty Ltd*). It has been successfully argued in *Norton v Angus*.

***Suttor v Gundowda Pty Ltd (1950) HCA:*****Issue:**

- Would the seller suffer undue hardship if the property was sold?

**Reasoning:**

- The seller was told that the price paid would cover an outstanding tax liability
- In fact, the amount was insufficient to cover the tax debt
- The buyer's agent knew that the seller would not be covered, but did not disclose this to the seller
- The seller would suffer hardship if the property was sold because he would not obtain enough money
- However, the vendor cannot resist specific performance on the basis that it would simply be difficult to perform
- The seller must point to some 'sharp practice' or unconscionable conduct as causing the hardship

**Decision:**

- Here, the failure to disclose was not unconscionable and specific performance is not to be denied on the basis that the vendor would suffer hardship

*Meriton Apartments* suggests that some unconscionable conduct must connect the award of specific performance to the hardship that would be suffered.

**Meriton Apartments v McLaurin & Tait (1979) HCA:**Issue:

- Can the seller force the buyer to perform even though the green bans prevent their planned development of the property?

Reasoning:

- The buyer argues that it would be harsh to order require performance
- This argument is rejected
  - There has been no unconscionable conduct by the seller
  - The green bans were a risk of which the buyer should have been aware and which he accepted through his conduct

Decision:

- The buyer would have needed to have pointed to some unconscionable conduct linking hardship to the specific performance

6 *Mistake*

In addition to providing a basis on which to request lawful rescission of a contract, mistake may also play a remedial role in resisting specific performance (*Taylor v Johnson*).

**Taylor v Johnson (1983) HCA:**Reasoning:

- If it had been found that the contract was not invalidated by mistake, Johnson could have argued that specific performance is not the appropriate remedy because Johnson made a mistake

However, the scope of an equitable mistake is wider than that which would justify rescission at common law (*Tamplin v James*). The basis for the mistake may even be a misrepresentation (*Slee v Warke*).

7 *Impossibility*

This is not necessarily an excuse, but can be used to resist specific performance.

8 *Illegality*

If performance would be illegal (thus exposing the performer to penalties), this militates against awarding specific performance.

9 *Futility*

Specific performance may be resisted on the grounds that there is no longer any point enforcing the contract because its performance is not worthwhile. There might not be any benefit to be derived by requiring performance (other than costs to be incurred by the performing party); there

also might be discretionary elements in the contract or an intervening event such as to excuse or otherwise diminish the value of performance.

### 10 Supervision

If performance involves acts of a kind requiring the continued supervision of a court, specific performance is unlikely to be granted on the basis that it would strain the court's resources. A contract for the provision of personal services is very likely to be unenforceable by means of specific performance because it would require continued checks to ensure that the service is actually being provided.

Specific performance of a contract for personal services is granted only in 'exceptional circumstances' (*Byrne v Australian Airlines* per Brennan CJ, Dawson and Toohey JJ). This will generally prevent the performance of agency, partnership and employment contracts from being specifically compelled by a court of equity.

#### ***JC Williamson Ltd v Lukey & Mulholland (1931) HCA:***

##### Issue:

- In satisfying the requirement of mutuality, the owner must have been able to obtain specific performance from the sweets vendor
- Could the theatre owner have obtained specific performance?

##### Reasoning

- Assurance of the acts of the sweets vendor require supervision in respect of the following aspects of performance
  - Ensuring he and his staff behave and conduct themselves according to the rules of the theatre
  - Verifying that the sweets are served and sold
  - Dressing the agents of the vendor in an appropriate manner
  - [It is actually rather difficult to find an aspect of *personal* supervision relevant to the work; the above elements of performance would be relatively easy for the theatre owner to verify]

##### Decision

- The work requires personal supervision so specific performance would not be available in respect of its performance

Even where one of the parties is obliged to take particular steps or act in a certain way, specific performance will still be granted if it is easy to determine whether the steps or acts have, in fact, been undertaken (*Dougan v Ley*).

#### ***Dougan v Ley (1946) HCA:***

##### Issue

- Would specific performance of the contract require supervision to ensure that the buyer satisfies the Commissioner of his suitability for the role of taxi cab operator?

##### Reasoning

- The decree is made conditional on approval being granted
- Williams J:
  - Here, the acts are definite enough not to require supervision
  - It is easy to tell whether the application to the Commissioner has been made
  - No supervision is therefore required

Decision

- Specific performance is granted; there is no supervisory component to performance

The Court may also classify a personal services component of a contract as an ancillary or purely consequential aspect of performance.

***Suttor v Gundowda Pty Ltd (1950) HCA:***

Issue:

- Given that the contract requires the services of three employees to be retained, is the contract one of personal services and does it require supervision?

Reasoning:

- The sale is made conditional on retaining the services of the employees
  - The farm is not instantly sold
  - It is instead contingent on the provision of personal services
- However, the Court re-characterises the contract as one containing no direct requirement of employment
  - It is only an agreement to execute a deed whereby the employees will be reconsidered

Decision:

- Because the contract only requires execution of a further deed, no curial supervision is required and specific performance is not to be restricted on that basis

A contract providing for exclusive employment rights must surely necessitate some level of supervision.

***Curro v Beyond Productions Pty Ltd (1993) NSW SC:***

Reasoning:

- The contract provides for a long-term relationship involving the continued provision of personal services

The justification for consideration whether supervision would be required is practical in nature. Essentially, courts have expressed unwillingness to watch over the performance of a contract, particularly where it involves the provision of 'personal services'.

### III INJUNCTIONS

#### A Positive Duties

An injunction is an order of the court forbidding or commanding the performance of an act.<sup>1</sup> Injunctions are normally granted to ensure compliance with individual terms (as compared with specific performance, which typically involves enforcement of the entirety of the contract). The granting of an injunction involves considering two elements *additional* to those considered in respect of specific performance.

Injunctions in respect of positive obligations are only granted in ‘exceptional circumstances’. The damages that the plaintiff would have obtained for breach must not provide sufficient remedy (*Burns Philp Trust v Kwikasair Freightlines Ltd*). Courts are reluctant to issue mandatory injunctions requiring compliance with a positive duty because this effectively imposes specific performance.

#### B Negative Duties

Injunctions to enforce a negative duty (ie, a duty not to do X) restrain a party from doing something (ie, X). The granting of an injunction in respect of a negative duty may be contrasted with specific performance, which compels a party *to do* something.

The party seeking an injunction will seek to characterise the term as one imposing a negative duty. In determining whether a term imposes a positive or negative duty, courts have regard to the *substance* of the obligation, rather than the *form* of its expression. A term will be said to impose a negative duty where compliance demands inactivity of the party.

#### ***JC Williamson Ltd v Lukey & Mulholland (1931) HCA:***

##### Issue:

- Is an injunction available such as to prevent the theatre owner from revoking the license of the vendor to sell sweets in the foyer?

##### Reasoning:

- The sweets vendor alleges that the theatre owner cannot revoke the license based on its acts of part-performance
- However, the vendor cannot establish that there is a negative duty operating to prevent the owner allowing others to sell sweets on the premises
- It is important to find a negative duty which the injunction would enforce

##### Decision:

- An injunction is not available because there is no clear negative duty not to revoke the license

Meagher, Gummow and Lehane suggest that legal usage alone (and not ‘strict’ logic) will decide whether an order can or cannot be the subject of an injunction.

<sup>1</sup> 730-202 *Contracts*, ‘Printed Materials’ (The University of Melbourne, 2004) 221.

In the context of negative injunctions, the requirement that damages be inadequate is not a strict prerequisite (but relevant still relevant to the enquiry). The test applied in respect of negative injunctions is 'whether it is just to confine the plaintiff to her or his remedy in damages' (*Evans Marshall v Bertola*). Having satisfied this test, discretionary considerations may still be relevant (as for specific performance).

Breach of a negative stipulation in an employment contract may be the subject of an injunction (*Lumley v Wagner*, where Wagner, a singer, was prevented from breaching a provision requiring her not to 'use her talents at any other theatre' during her contracted period with Mr Lumley). However, where granting an injunction would force the defendant to perform a contract for personal services, an injunction will not be granted (*Page One Records v Britton*, where an injunction is refused on the basis that the defendant would be forced to employ the plaintiffs).

### ***Curro v Beyond Productions Pty Ltd (1993) NSW SC:***

#### Facts:

- A clause provides that Curro will not seek work elsewhere
- Beyond Productions seeks to restrain C from working for Channel 9
- Curro relies on a rule that injunctions should not be granted if their effect would be to produce a decree of specific performance of a contract which is not susceptible to specific performance
- Because specific performance is unavailable (contract for personal services), Curro argues that an injunction would have the effect of forcing her to go back to Beyond Productions, effectively requiring performance of the contract

#### Issues:

- Would granting an injunction have the effect of compelling performance of the contract?
- If not, can an injunction be granted?

#### Reasoning:

- There is an exception to the rule in *Lumley v Wagner*
  - This kind of promise (not to work for someone else) will be enforceable – even if it results in an injunction amounting to specific performance – if the case is one of 'special services'
  - Special services are contracts made by famous performers, actors or journalists
  - I.e., it is legitimate for providers of special services to be forced to honour promises of exclusivity
- The application of this exception is subject to reasonability via the restraint of trade doctrine, a form of illegality that may apply in certain circumstances

#### Decision

- This is not a case in which restraint is unreasonable; it is therefore valid to restrain Curro from working for Channel 9
- Because this is a special service, the appellant's argument fails
- *Lumley v Wagner* is a valid rule of law and an exception to the principle that an injunction cannot normally effect specific performance
- In any case, *even if* the exception was not applicable, the effect here would not be to impose specific performance, since Curro has many other employment opportunities

## IV EQUITABLE DAMAGES

### A Lord Cairns' Act

Section 38 of the *Supreme Court Act (Vic)* states that if a court has jurisdiction to grant an injunction or award specific performance, the court may award damages in addition to or in substitution for the equitable remedy. The section is still known by the name of the member of the House of Commons who moved the motion to pass the *Chancery Amendment Act 1858 (UK)*, of which the now s 38 was then s 2:

#### **s 38 – Lord Cairns' Act:**

If the court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.

The historical reason for the provision is that it allowed the Court of Chancery to give monetary awards (equitable compensation) where equitable relief would normally have been refused, thus saving the plaintiff the hassle of having to recontest their claim for damages at the common law courts.

### B Equitable Right to Damages

A right to equitable damages under *Lord Cairns' Act* only arises where the court has jurisdiction to entertain an injunction or specific performance. This means that the plaintiff must have established one of two things:

- That an injunction or specific performance has been obtained; or
- That the preliminary requirements for an injunction or specific performance have been satisfied, but an equitable or discretionary factor has prevented it being granted
  - Certain discretionary factors will also prevent the award of equitable damages
    - Eg, readiness and willingness
  - However, discretionary defences to specific relief will not operate to bar recovery
    - Hardship
    - Delay

For example, in *JC Williamson*, neither specific performance nor an injunction could be granted because the requirements were not satisfied. Damages in equity are therefore unavailable.

Newer cases, such as *Madden v Keevereski* (per Helsham CJ), distinguish *JC Williamson* and take a broader view of the section; they hold that as long as the prerequisites are satisfied, equitable damages *may* (at the court's discretion) be available. Having established that equitable prerequisites are met, the discretion to award damages under s 38 arises and the same factors may apply to determine whether damages are actually to be awarded.

Where equitable damages are awarded in aid of common law rights (*Wenham v Ella*) or in substitution for specific performance (*Johnson v Agnew*), the measure of damages is the same as at common law (ie, expectation loss). They must amount to a true substitute for specific performance (*Wroth v Tyler*).