

UNIT 8: EQUITABLE REMEDIES

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- Specific performance
- Rectification
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UNIT 8: LEARNING OUTCOMES

- Summarise the various remedies offered in equity and their scope
- Explain the availability of injunctions
- Compare injunctions with specific performance
- Apply learning to shape SQE style questions

EQUITABLE REMEDIES AVAILABILITY

- When Equitable Remedies Will Be Available
 - 1. Common law remedy of damages would be inadequate
 - 2. Where there has been a breach of an equitable obligation
 - *E.g.*, a breach of trust
 - *Act in personam* — affect the conduct of the wrongdoer
 - do not usually bind third parties
 - Equitable remedies are discretionary
 - Factors the court will consider:
 - Clean hands and an absence of delay on the part of the claimant
 - Whether awarding an equitable remedy will cause undue hardship for the defendant
 - Whether the equitable remedy can be granted in practical terms
- Injunctions
 - Specific performance
 - Subrogation
 - Rectification
 - Rescission
 - Tracing

INJUNCTIONS

- Injunction = court order *either*:
 - Compels the defendant to refrain from particular conduct; *or*
 - Orders him/her to engage in specific conduct
- Interim v. Final
 - Interim injunctions — to prevent matters from getting worse pending trial
 - Final injunctions —final resolution of the dispute
- Types:
 - 1. Prohibitory (restrictive)
 - 2 .Mandatory
 - 3. *Quia Timet* ('he who fears') (threatened conduct)
- When granted? **s37 Senior Courts Act 1981**
 - (1) HC may by order when it appears to the court to be just and convenient to do so.
 - (2) made either unconditionally or on such terms and conditions as the court thinks just.

INJUNCTIONS IN PRACTICE

- Granted when:
 - Where the damage is continuous/ongoing
 - Where damages would be inadequate
- BUT NOT
 - Where the defendant must provide a service personally
 - Where the defendant's obligation is ongoing – e.g., carrying on a business
 - Where the injury to the claimant is small
 - Where the hardship to the defendant would be disproportionate to the loss sustained by the claimant

INTERIM INJUNCTIONS

- To ensure that a course of action is not closed off before judgment can be made
 - Will be framed as narrowly as possible — objective only to prevent further injury until matter can be determined
- Examples:
 - Adoption — Re B [2012] Fam. 210
 - Medical treatment
 - Destruction of evidence
 - Disposal of assets
 - Libel
- Test: ***American Cyanamid v. Ethicon Ltd.* [1975] AC 396:**
 - 1. There must be a serious question to be tried
 - 2. The balance of convenience favours the claimant
 - 3. Claimant must give an undertaking in damages

FREEZING INJUNCTIONS

- Formally known as a *Mareva* Injunction
 - ***Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 All ER 213**
- Freezes the defendant's assets to stop them being 'disappeared'
- Now covered by section 37(3), Senior Courts Act, 1981
- Used in order to prevent the defendant from hiding property before trial — e.g., by removing it from the jurisdiction
- Can be used before proceedings have begun, during the litigation, or after judgment
- Made without notice being given to the defendant

FREEZING INJUNCTIONS

- *Third Chandris Shipping Corporation v. Unimarine S.A.* [1979] Q.B. 645:
 - 1. The claimant must make full and frank disclosure of all material matters within his knowledge
 - 2. The claimant must give particulars of a good, arguable case
 - 3. There should be assets within the jurisdiction
 - 4. There is a risk that those assets may be disappeared before trial
 - 5. The claimant must give an undertaking in damages

SEARCH ORDERS

- Formally known as an *Anton Pillar* Order
- Used in order to prevent evidence from being destroyed pending trial
- Gives the applicant the power to enter the respondent's premises, in order to inspect and remove documents and other evidence
- Made without notice being given to the respondent
- ***Anton Piller KG v Manufacturing Processes Ltd. [1976] Ch 55***
 - • "There are three essential pre-conditions for the making of such an order, in my judgment. First, there must be an extremely strong prima facie case. Secondly, the damage, potential or actual, must be very serious for the applicant. Thirdly, there must be clear evidence that the defendants have in their possession incriminating documents or things, and that there is a real possibility that they may destroy such material before any application inter partes can be made."
 - • The applicant must also give an undertaking in damages

FURTHER JUDICIAL SAFEGUARDS

- Further Safeguards Developed By The Courts
- ***Columbia Pictures Industries v Robinson* [1987] Ch 38**
 - The applicant is under a strict duty to make a full and frank disclosure of all matters that could be relevant; and
 - Must neither act oppressively nor abuse their power in executing the order
- ***Rank Film Distributors Ltd. v Video Information Centre* [1982] AC 380**
 - Privilege against self-incrimination
- Practice Direction, Part 25A, Civil Procedure Rules

SPECIFIC PERFORMANCE

- Court order requiring the defendant to perform the contract according to its terms
- Arises in contract type claims (include conveyancing)
- But only where damages are an inadequate remedy
- ***Co-operative Insurance Society v Argyll Stores (Holdings) Ltd* [1997] 3 All ER 297**
 - *Specific performance is traditionally regarded in English law as an exceptional remedy, as opposed to the common law damages to which a successful plaintiff is entitled as of right. ...the power to decree specific performance was part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the remedies available at common law were inadequate. This is the basis of the general principle that specific performance will not be ordered when damages are an adequate remedy. (Lord Hoffman)*

WHERE DAMAGES INADEQUATE

- Where damages inadequate:
 - Subject matter is unique — cf. the treatment of:
 - *Personal property — Falcke v. Gray (1859) 4 Drew 651*
 - *Real property — AMEC Properties Ltd. v. Planning Research and Systems P.L.C. [1992] BCLC 1149*
 - *Obtaining a replacement is practically impossible*
 - *Sky Petroleum v. VIP Petroleum [1974] 1 All E.R. 954*
- Where it would be difficult to *quantify* how much should be payable in damages
- Where any damages awarded would be nominal

SPECIFIC PERFORMANCE – INAPPROPRIATE

- Contracts of employment / personal services: *Page One Records Ltd. v. Britton* [1967] 3 All E.R. 822
- The carrying on of a business: *Ryan v. Mutual Tontine Westminster Chambers Association* [1893] 1 Ch. 116
 - *Co-operative Insurance Society v. Argyll Stores (Holdings) Ltd.* [1997] 3 All E.R. 297
 - But cf. *Posner v. Scott-Lewis* [1987] Ch. 25
 - Whether or not a specific performance order should be made seems to me to depend on the following considerations:
 - a) Is there a sufficient definition of what has to be done in order to comply with the order of the court?
 - b) Will enforcing compliance involve superintendence by the court to an unacceptable degree?
 - c) What are the respective prejudices or hardships that will be suffered by the parties if the order is made or not made?
- Agreements lacking consideration: 'Equity will not assist a volunteer'.
 - **Penn v. Lord Baltimore (1750) 1 Ves Sen 444**
- Contracts where the terms are insufficiently precise
- Contracts for transient interests: *Watts v. Spence* [1975] 2 All E.R. 528

SPECIFIC PERFORMANCE OR MANDATORY INJUNCTION

- Two share many characteristics; **but**
 - The **mandatory injunction** is much broader in scope
- **Specific performance:**
 - Only applies in relation to positive contractual obligations
 - Awarded on a final basis
- **Mandatory injunction:**
 - Not restricted to contract cases — e.g. the Search Order
 - Available in some cases where a contract has been breached and it is a more appropriate remedy
 - Can be granted on an interim basis
 - Can be granted to prevent the subject matter of the contract from being removed from the jurisdiction — e.g. ***Hart v Herwig* (1873) 8 Ch App 860**
- May be appropriate where court unwilling to compel specific performance: Warner Brothers v. Nelson [1937] 1 K.B. 209
- ***Lumley v Wagner* (1852) 5 De G & Sm 485**

SUBROGATION

- When a third party (C) pays a debt owed by a debtor (A) to a creditor (B)
- Equity may order that A is required to repay C instead of B
 - The third party (C) can then claim any assets the debtor (A) gave [B] as security for the loan
- ***Filby v Mortgage Express (No. 2) [2004] EWCA Civ 759***
 - Mr and Mrs Filby obtain a mortgage loan from A to buy a house
 - Mr Filby forges Mrs Filby's signature and obtains a second loan from B
 - B's loan is used to repay A's loan
 - Mrs Filby argues that she has no obligation to repay B's loan
 - Subrogation means that B's loan has replaced A's loan & house is now security for B's loan
- Mrs Filby is obliged to repay

RECTIFICATION

- Equity orders a contractual agreement to be *amended* to ensure that it reflects the parties' intentions
- Provides relief where a mistake or fraud has been operative
- ***Joscelyne v Nissen* [1970] 2 QB 86**
- **Note:** normally only applies where document fails to reflect the *common intention* of the parties, not where there is a unilateral mistake by just one of them

RECISSION

- Puts the parties back into their **original**, pre-contract position (*status quo ante*)
- **Voidable** — subsists unless it is voided
- **Common law**
- A *self-help* remedy, e.g. for duress
- **Equity**
 - A *judicial* remedy, e.g. for undue influence: ***Cooper v Phibbs* (1867) LR 2 HL 149**
- **Bars To Rescission**
 - 1. Restitutio in integrum is impossible
 - 2. Affirmation
 - 3. Delay
 - 4. Third party has acquired rights in property in good faith and for value

ACTIVITY 1: CREATE YOUR OWN SQE QUESTION

- In pairs, create an SQE style question on resulting trust. Have a short scenario, question and produce 5 SBA answers.

ACTIVITY 2: SBA IMPLIED TRUSTS (SBA) 1

In litigation relating to the payment of taxes due, the claimant revenue authorities are concerned that the defendant will transfer their assets overseas as they have strong connections in the Cayman Islands. The claimant is concerned that this will prevent a full assessment of taxes due and the court from being able to make an award.

Which of the following best describes the advice that should be provided to the claimant?

- a) The claimant should be told that they cannot apply for any order. The risk of asset dissipation is inherent to any litigation.
- b) The claimant should be told that they do not need to apply for any order as in the event that the defendant cannot pay any compensation due, compensation will be paid by the state.
- c) The claimant should be told that they can apply to the court for a pre-litigation adjudication order in which the court indicates the level of compensation they would order should the claimant's case be successful, and orders that this amount be deposited to the court and held on trust pending the outcome of proceedings. This amount would then be paid as compensation to the claimant in the event that their case succeeds.
- d) The claimant should be told that they can apply to the court for a search order to enter the defendant's premises to collate all of defendant's assets
- e) The claimant should be told that they can apply to the court for an ex parte freezing injunction

ACTIVITY 2: SBA IMPLIED TRUSTS (SBA) 2

In resolution of a dispute between two parties, the High Court issued an injunction, preventing the landowner from building a caravan on their field. Given the landowner could not use the land as they wished, they sold the land to a third-party purchaser. Unaware of the injunction, the third-party built a caravan on the land while the claimant was away.

Which of the following best describes the enforceability of the injunction against the third-party purchaser?

- a)The injunction was not binding against the third-party purchaser as it was only enforceable against the original legal landowner.
- b)The injunction was not binding against the third-party landowner. They would only have been bound by the injunction if they were aware of it.
- c)The third-party purchaser owed no duty to the party with an equitable interest as disposal of the land to a third party automatically terminates the trust.
- d)The injunction was enforceable against the third-party purchaser. All rights and obligations of the original legal landowner were transferred to the third-party upon sale of the property.
- e)The injunction was enforceable against the third-party purchaser as an injunction operates to protect the trust property, in this case preventing any person from destroying it.

ACTIVITY 2: SBA IMPLIED TRUSTS (SBA) 3

A claimant involved in commercial litigation believes that the defendant holds crucial incriminating evidence to their upcoming litigation. The claimant believes that the defendant will destroy this evidence prior to a request for disclosure being made.

Which of the following best describes the remedy the claimant may seek from the court.

- a) No remedy is available. The risk of evidence being destroyed is inherent to all litigation.
- b) No remedy is required. The court will take the claimant's word that the evidence exist in any upcoming dispute.
- c) The claimant can apply for an Anton Pillar order and can apply to the court for such an order on an ex parte basis.
- d) The claimant can apply for a Mareva injunction and can apply to the court for such an order on an ex parte basis.
- e) The claimant can apply for warrant to search for evidence from the court under Police and Criminal Evidence Act 1984 (PACE).

ACTIVITY 2: SBA IMPLIED TRUSTS (SBA)

4 A claimant has bought the freehold estate of a property. This property benefits from a covenant which states that the neighbouring landowner will not use their property for commercial purposes. The neighbouring landowner (not the original covenantor) has built a marque and started to run a restaurant from it on their land. This has resulted in significant noise and traffic.

Which of the following best describes the advice to be given to the claimant in respect of any remedy they might apply for.

- a) The claimant can seek an order of specific performance, compelling the defendant to cease their commercial activities as damages would prove inadequate.
- b) The claimant can seek a mandatory injunction, compelling the defendant to cease their commercial activities as damages would prove inadequate.
- c) The claimant can only be awarded financial compensation, to account for the impact of the breach of covenant on them.
- d) No remedy is available to the claimant as the defendant was not the original covenantor.
- e) No remedy is available to the claimant as they have not suffered any damage because of the breach of covenant

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RECAP

UNIT 8: READING MATERIALS

- You can draw on the following chapters of your textbooks to deepen your understanding of the topics discussed in this unit.
 - Watt (2023) chapter 16
 - Ramjohn and Bray (2024), chapter 7, 8 and 9
 - Barr and Pearce (2022) chapters 17