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# Equitable remedies for breach of contract

The influence of equity in our modern legal system must not be underestimated. There has been a resurgence of equity in the last 15-20 years, beginning with the High Court's seminal decision on promissory estoppel in *Walton Stores*. Despite this, equity is often overlooked as a remedy for breach of contract.

Equity remains a rule of conscious, coming to relief when unconscionability would otherwise prevail – it "mitigates the rigours of strict law" (Lord Denning in *Crabb v Arun District Council* [1976] Ch 179, 187 and enables "complete justice" to be achieved among the parties. Equitable remedies are broad in scope, flexible, direct in application and supplement the common law. Unlike common law remedies, equitable remedies are not constrained by concepts such as remoteness of damage or causation, thereby enabling equity to go beyond the common law in redressing loss and damage.

Given the many advantages of equitable remedies, it is important for practitioners to have a good understanding of how the common law and equitable remedies intersect and to know when and how to deploy equitable remedies to achieve "complete justice".

## Key issues

- Equitable remedies have an important role to play in supplementing common law remedies and should not be overlooked in breach of contract cases.
- The need for court's ongoing supervision remains a relevant factor in the exercise of the court's discretion to grant specific performance, but it is longer determinative against an order for specific performance. Court looks at whether the party that is subject to the order knows with precision what is required.
- Court must assess the merits of each case and decide whether the plaintiff's case has sufficient strength to justify granting the injunction sought.
- The purpose for which a performance bond was provided alters the context in which the court must exercise its discretion whether to grant an injunction in respect of that bond.

# Introduction – fusion fallacy

The Judicature Acts enabled courts to exercise both equitable and common law jurisdictions, thereby avoiding the inconvenience of litigating in two courts. The Acts did not create a new 'fused' body of law, nor did they transform equitable interests into legal interests.

This 'fusion' has however increased the uptake of equitable principles by the common law.

A number of recent cases have concerned the equitable remedies of specific performance, injunctions and equitable damages in the context of a breach of contract. These cases have brought into focus the important role and scope of equitable remedies for breach of contract. We consider some of these seminal cases.

## Specific Performance

***Netline v QAV Pty Ltd (No 2)* [2015] WASC 113**

The plaintiffs owned an apartment, and contracted with the defendant to provide caretaking and letting services. The court characterised these agreements as giving rise to an agency. Justice Beech of the Supreme Court of Western Australia found that the defendant had wrongfully terminated the agreements and awarded damages in favour of the plaintiff, but refused to order specific performance.

Factors against an order for specific performance included:

- plaintiffs failed to prove that damages would not be an adequate remedy;
- the long term nature of the agreements; with at least one potentially having 13 years to run;
- the fiduciary nature of the relationship between the parties and the substantial trust and confidence reposed by the plaintiffs in the defendant; and
- if specific performance was ordered, it would likely generate ongoing conflict and contempt proceedings given the breakdown of trust and confidence between parties, rather than ensuring finality.

Beech J said the need for courts to supervise performance by the parties remains a relevant consideration, but is no longer determinative of whether specific performance will be ordered. Court looks at whether the party subject to the order knows with precision what is required.

This case is significant for two reasons: (a) it highlights that despite their breadth and flexibility, there are limits to the scope of equitable remedies. The court will not seek to preserve a commercial relationship, where the basis of trust and confidence between the parties has broken down; (b) ongoing court supervision is not determinative of whether the court will exercise its discretion to order specific performance, but the orders sought must be framed with precision.

***York Civil Pty Ltd v Coleman Rail Pty Ltd* [2014] SASC 112**

This case concerned a joint venture dispute, in which the contract had come to an end. An order for specific performance of cl 17.1 of the joint venture was sought, which required the parties to arrange a final audit after termination of the contract. The contract provided that certain specified clauses of the contract would survive termination of the contract - clause 17.1 was not among the surviving provisions.

The court held that no rights had accrued under clause 17.1 prior to termination of the contract, and as the contract has come to an end, specific performance of obligations yet to be performed under the contract was no longer available. The court noted that, even if the contract had still been on foot, equitable remedies such as specific performance are discretionary and equity will not intervene to where:

- the obligation of the defaulting party was not sufficiently defined;
- specific performance of only part of the contract is sought, in circumstances where doing so would produce a result that was different from what the parties intended; and
- to do so would be futile - in this case neither party agreed to be bound by the result of the audit, so there was no utility in requiring specific performance of the audit obligation.

This case is a good example of the equitable maxim that 'equity does not require an idle gesture', and is also a salutary reminder that contractual obligations should be clearly defined.

***Evans v Robocorp* [2014] QSC 26**

Appellant was entered into a contract for the sale of land to the respondent. The respondent subsequently became impecunious, and was unable to complete the transaction. The question for determination was whether an specific performance should be ordered in circumstances where it would cause great hardship to the other party.

The court held that exercising its equitable jurisdiction, it would not order specific performance if the act in question cannot be performed – the court will not order the respondent to do what cannot be done, even though the respondent's own acts or omissions created the obstacles to performance.

On the question of hardship, the court said:

- equity must take account of all circumstances at the time when the order is made, and circumstances likely to occur subsequently, when deciding whether specific performance will

cause disproportionate hardship and injustice; and

- hardship will not be ignored merely because it did not exist at the time when parties entered into the contract.

The court was satisfied that the respondent did not have the financial capacity to perform its contractual obligations under the contract; and refused to order specific performance. This case is another good example of the equitable maxim that 'equity does not order the impossible to be done".

## Injunctions

***Mineralogy v Sino Iron*** **[2016] WASCA 105**

Mineralogy held mining tenements and a general purpose lease in the Pilbara. It entered into Mine Right/Site Lease Agreements (MRSLAs) with Sino Iron and Korean Steel (**Sino**) granting Sino right to mine and a site lease for the construction and operation of processing facilities.

The central issue in the proceedings was whether a royalty was payable by Sino to Mineralogy under the MRSLAs and the amount of that royalty. Mineralogy applied for a mandatory interlocutory injunction:

- compelling Sino to immediately pay to Mineralogy US$48 million, alleged to be due to Mineralogy for unpaid royalties; and
- permitting Sino to operate the project on condition Sino made the above payment and made ongoing royalty payments to Mineralogy.

Mineralogy's application was dismissed at first instance. It appealed that decision, having previously sought similar orders on two previous occasions. In each case relief was refused.

Three principal issues arose for consideration in the appeal.

**Question 1:** is a mere finding of a prima facie case sufficient basis to grant an injunction, or must the court undertake an evaluative task to determine the strength of the party's case?

The judge at first instance held that Mineralogy had a serious question to be tried as to its entitlement to royalty payments, but he was not in a position to assess the strength of Mineralogy's claims, and hence made no such assessment. The Judge said he was constrained by the detailed and technical nature of the expert evidence presented for calculating royalty payment (put on at short notice), and that in his view it was unfair to the other parties to make an assessment of the evidence when they had inadequate opportunity to adduce expert evidence in response.

The Court of Appeal allowed Mineralogy's appeal, finding that it is not enough for the court simply to conclude that Mineralogy had a prima facie case – the Judge must undertake an evaluative assessment of the merits of the plaintiff's case and decide whether the plaintiff's case has sufficient strength to justify granting an injunction and had to take into account the strength of case when assessing balance of convenience.

The Court of Appeal found there was adequate material before the primary Judge on which he could make an assessment, despite the stated difficulties. These difficulties did not relieve the court from assessing the strength of Mineralogy's case as best it could.

**Question 2:** are the tests for a mandatory and prohibitory injunction the same?

The Court of Appeal answered this question in the affirmative: "*both principle and the weight of recent authority lead to the conclusion that no different standard applies in respect of an application for a mandatory injunction...*"

**Question 3:** is the value of an undertaking as to damages assessed as a stand-alone consideration, or as part of larger balance of convenience test?

The Court of Appeal concluded that the question whether Mineralogy's undertaking as to damages was meaningful cannot be resolved in isolation – it is part of a wider balance of convenience enquiry, including the probability of Mineralogy's ultimate success at trial.

In Western Australia, at least, is reflective of the courts' current approach to applications for interim or interlocutory injunctions.

***Duro Felguera v Samsung*** **[2016] WASC 119 (appeal pending)**

In this case, Duro sought an injunction restraining Samsung from taking steps to obtain payment under a performance bond provided in the context of the Roy Hill Project. The court held that on its proper construction, the purpose of the performance bond was risk allocation. That commercial purpose would be defeated if an injunction was granted.

The court said the purpose of the bond altered the context in which the court must exercise its discretion whether to grant an injunction "*by changing the complexion of the status quo and raising the prospect of substantial injustice if the purpose of the provision is defeated. That is, the status quo becomes what the parties had agreed to as to which of them should bare the financial risk pending final determination ...*"

As such, the court held an injunction should not be granted unless the applicant establishes a *"strong case, and not merely an arguable case"* that the other party did not consider, acting bona fide, that it is or will be entitled to recover from the party seeking the injunction.

## Equitable damages

Equitable damages are available for breach of contract where the breach is deliberate or intended to inflict harm on the plaintiff; and common law damages are not adequate. Generally if the plaintiff has an arguable case for specific performance or for an injunction, then equitable damages are available: *Ferguson v Wilson* (1866) 2 Ch App 77.

Equitable damages are compensatory in nature - they put the plaintiff in the position it would have been in had specific performance or an injunction been granted: *Madden v Kevereski* [1983] 1 NSWLR 305.

**Advantages of equitable damages**

Equitable damages are available:

- where there is no cause of action at common law, and hence no possible award of common law damages;
- in substitution for an order for specific performance or a mandatory injunction, even in the case of a purely equitable claim;
- in actions for breaches of fiduciary duty (*Commonwealth Bank of Australia v Smith* (1991) 102 ALR 453 at 480);
- as compensation for a threatened injury (*Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851); and
- for breaches of contract that do not amount to anticipatory breach.

**Timing of assessment of equitable damages**

The time at which equitable damages are assessed is flexible and at the discretion of the court. In exercising that discretion, the court looks at what is just and appropriate in the circumstances. Unlike general damages for breach of contract at common law (which are assessed at the date of breach), equitable damages can be assessed at the date of the judgment: *Mills v Ruthol Pty Ltd* (2004) NSWLR 1, 14; *ASA Constructions Pty Ltd v Iwanov* [1975] 1 NSWLR 512, 518. This flexibility can have a material impact on the parties' obligations, especially in a fluctuating market.

**Assessing equitable damages**

When damages are awarded in substitution for specific performance, the court recognises that the plaintiff is entitled to have the contract performed. The plaintiff is to be awarded the net benefits that he would have received had specific performance been decreed, so as to put the plaintiff as nearly as possible in the position he would have been in had the contract been performed: *Rosser v Maritime Services Board (No.2)* (1998) 14 BCL 375.

The power to award equitable damages in substitution for specific performance, "*at least envisages that the damages awarded will in fact constitute a true substitute for specific performance*": *Wroth v Tyler* [1974] Ch 30 at 58. In other words, damages are assessed on the basis of what would have been prevented had the injunction been granted; *Leeds Industrial Co-operative Society Ltd v Slack* [1924] AC 851 at 857.

## Limits to equitable relief

- Equitable remedies are constrained by considerations of reasonableness and proportionality: *Thompson v Geminder Holdings Pty Ltd* [2016] VSC 495, [430], [433]-[434].
- Equity cannot underwrite unrealistic expectations/wishful thinking, and should not operate as an instrument of injustice: *Crown Melbourne Ltd v Cosmopolitan Hotel (Vic) Pty Ltd* [2016] HCA 26, [153].
- Equity is subject to terms of parties' contract and can be excluded by contract: *Ozton Pty Ltd v Cromwell Seven Hills Pty Ltd* [2016] NSWSC 1339.

## Conclusion

Equitable remedies are broad in scope, flexible and direct in application, and supplement remedies provided by common law. As demonstrated by the cases considered above, equity continues (rightly) to play an important role in the remedies available to parties in a commercial context – and is something that should not be overlooked in approaching a case for breach of contract.

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