

1 Specific Performance

- McMahon v Ambrose: has been described as two-tiered process
 - 1. compel the creation of a legally binding agreement; and
 - 2. require the *performance* of that agreement.
- Zhu v Treasurer of NSW: it is not true to say that if you do not perform you must pay damages and nothing else.
- **ELEMENTS**
- 1. an agreement;
 - Tanwar v Cauchi – not available in that case as contract had been terminated – e.g. contract must be on foot.
 - Trident v McNiece – generally only parties to contract may be proper parties in suit for SP (not an absolute rule – legislation etc may empower 3rd parties)
 - **Part Performance – “to enlarge part perf into complete perf” – JC Williamson v Lukey & Mulholland**
 - McBride v Sandilands: acts should be unequivocally and of their own nature referable to **some such** contract as the general nature of the one alleged.
 - Khoury v Khouri: acts of PP have almost always been closely related to possession or tenure on land or being put into possession by owner.
 - Damages always inadequate because axiomatically they are not available where transaction is unenforceable at law (nature of PP!)
 - 7.7 text – usually unavailable where damages adequate, requires constant supervision of court or for personal services.
 - Regent v Millett: act in question must be one permitted but not necessarily required by terms of oral agreement – e.g. not a term to move items into a property but anticipated by alleged agreement – possession key.
 - but, e.g. buying furniture and arranging moving would likely not be PP.
 - Cooney v Burns: act merely preparatory for performance not amount to PP.
 - **Act of reliance upon contract needs to be distinguished from act of PP** – e.g. Dellaca: relinquishing lease in reliance on promise not PP
- 2. breach or threatened breach by D;
 - P must show D did not perform contract according to terms – 7.12 text
 - Turner v Bladin: breach of *threatened* breach
 - Hasham v Zenab: if anticipatory breach and P does not accept repudiation then SP may not be ordered until time for performance arrives.
 - Ferguson v Wilson: if performance is impossible court refuse remedy – special jurisdiction
 - Kennedy v Vercoe: even if D caused impossibility
 - Norton v Angus: or illegality
 - consent of third party see 7.13-7.14 text.

- futility and impossibility based upon maxim ‘**equity does nothing in vain**’
- 3. common law damages inadequate remedy; and
 - Adderley v Dixon: ‘because damages in a particular case may not afford a *complete* remedy’
 - SP always available for the contracts for sale of **land**.
 - Adderley: peculiar value thus damages not complete remedy
 - Turner v Bladin: available to vendor and purchaser
 - SP generally **not** awarded for payments of **money**; damages adequate remedy.
 - exceptions see 7.19 text
 - Trident: real issue is whether damages adequate or not (**caution** – apparent approval!)
 - **Goods** = generally no, market value can be compensated by damages.
 - Antiquities, rarities = SP may be granted, also e.g. IP rights SP ordered due to uniqueness.
 - Shortage of supplies = no guarantee of SP
 - Chattels relating to business, see *Doulton Potteries v Bronotte* – **7.26 text**