Contents

Gain Based Wrongs (Account of Profit and Reasonable Fee)

Introduction

- Compensation vs Restitution
    - Compensation looks at the plaintiff's loss
    - Restitution looks at the gain that the defendant has made.
        - Disgorgement is a type of restitution as it puts the defendant in the position they would have been in had they not breached the duty.
        - Restitution is generally when the defendant has gained at the plaintiff's expense, and disgorgement is when they have gained without causing the plaintiff loss.
- Edelman said there are two types of awards for gain based wrongs, restitution and disgorgement
    - Restitutionary damages
        - Reverse wrongful transfers from plaintiff to defendant
        - Objective gain from plaintiff
        - Restoration of wealth
        - Giving back
        - Generally available
    - Disgorgement damages
        - Strip away profits made from wrong by defendant against plaintiff
        - Irrelevant whether gain came from plaintiff
        - Giving up
        - 2 scenarios
            - Where there was a view to make a gain, deliberately made. Where the profit exceeds loss.
            - Breaches of fiduciary duty.
        - Less generally available. They are only necessary where compensatory remedies are inadequate. They are about deterrence
    - The different awards that you generally get depend on how they are classified
        - **Account of profits (disgorgement damages)**
        - **Reasonable fee awards (restitutionary damages)**
            - It has been said that these are actually compensatory remedies. There is controversy.
- When are these awards available? There have been many different theories. Edelman says that:
    - Restitutionary damages available in all cases of wrongful transfer
    - Disgorgement damages available where compensatory remedies inadequate for deterrence and 1 of two conditions is satisfied
        - (1) Wrong committed with view to gain
        - (2) Fiduciary relationship
- According to Barnett and Harder, the account of profits is a deterrent and prophylactic (preventative). Although when it is for breach of intellectual property rights it is said to be stopping unjust enrichment.

When is an Account of Profits Available?

- Identify the course of Action
    - Is it Equitable or is it Common Law?

Equity: Breach of Fiduciary Duty

- *Warman International Ltd v Dwyer* (1995) (HCA)
    - This was a Breach of fiduciary duty case. Disgorgement damages were awarded, in the form of an account of profits. An account of profits strips away (disgorges) the profits (gains) made because of the breach.
    - Facts
        - Warman was a distributor for Bonfiglioli. Bonfiglioli wanted Warman to manufacturer their products in Australia as well. But Warman wasn't interested.
        - Dwyer, a manager at Warman, was interested in this. He entered into negotiations to go into a joint venture and persuaded staff to join him.
        - B entered into a joint venture with Dwyer and terminated their relationship with Warman, with 3 months notice. This was after secret negotiations. They entered into a 20 year deal to assemble and sell.
        - Breach of fiduciary duty by Dwyer. Warman sought an account of profits. It was found that while with Warman, Dwyer tried to undermine them.
        - The new company made vastly more profits than Warman had lost.
    - The court made some **points about Account of Profits** (disgorgement damages):
        - It is an Equitable remedy
        - It is Difficult in practice. Nevertheless, it must do its best.
        - It is a Personal liability
        - It is available for breach of fiduciary duty, it encourages them to act in accordance with their duties.
        - It is discretionary, but in accordance with settled principles. Will be defeated by usual defences to equitable remedies.
            - Unavailable if: (the court seemed to approve of dicta in Chan v Zacharia)
                - Unconscionable for plaintiff to assert liability on part of defendant OR,
                - No possible conflict between interests and it is in principal's interest that fiduciary obtain profit
        - **Plaintiff cannot stand by and allow plaintiff to work**
        - The remedy should be fashioned to fit the case
    - Two approaches were possible
        - Fiduciary liable for proportion only of profits (Only those that flowed from the breach. This is more favourable for the fiduciary).
        - Fiduciary liable for all profits less an allowance for skill and effort. This is the harsher one, as all the profits get taken (less the allowance)