

# LAWS5105: Remedies Exam Notes

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# 1 INTRODUCTION TO REMEDIES

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## 1.1 RIGHTS VS REMEDIES

### 1.1.1 REMEDIES AS SECONDARY RIGHTS

- Remedies presupposes some kinds of rights (rights → remedies)
- Remedy is also a right (and a duty in the defendant)
- Prior to action there was a right to performance (P) and duty to perform (D)
- Rights of a different kind or class
  - o rights giving rise to a cause of action: *primary* rights
  - o remedial rights: *secondary* rights
- **Photo Production Ltd v Securicor Transport Ltd:**
  - o Lord Diplock: generally, a failure to perform a primary obligation in a contract automatically gives rise to a secondary obligation to pay damages by operation of law, but the parties have the power to limit or exclude that secondary obligation

## 2 RESTITUTIONARY REMEDIES

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[REDACTED]

### 2.1 GAIN BASED AWARDS FOR WRONGS

#### 2.1.1 INTRODUCTION

##### 2.1.1.1 TWO REMEDIES AVAILABLE UNDER GAIN-BASED AWARDS FOR WRONGS: (EDELMAN)

[REDACTED]

##### 2.1.1.2 DISTINCTION – RESTITUTION, DISGORGEMENT AND GAIN-BASED REMEDIES:

- **Restitutory Remedy:**
  - o Restitution arises where the D makes a gain at the P's expense
    - Reverses the transfer of value – corrective in nature
    - No requirement that the P has lost anything

- Therefore, restitutionary remedies seek to strip away the defendant's gain
  - Restitution responds to wrongs and 'not-wrongs' (i.e. unjust enrichment)
    - Whereas compensatory remedies only respond to wrongs
- **Disgorgement:**
  - Disgorgement looks to the gain made by the D as a result of a breach of duty
  - Nature:
    - The D must give up the gain made, so that the D is in the same position as if the duty was never breached
    - No necessity that the P has lost anything (*Boardman*), D MUST make a gain
    - Usually awarded as a monetary sum
  - Rationale:
    - Deterrence – by stripping the D of profit made, the incentive for future breach is removed (*Dart*)
- **Gain-Based Remedy:**
  - The remedy operates to strip away a profit from the D
  - In AU, it is available in the form of an AOP for breaches of equitable obligations (i.e. FD)
    - But subject to allowances and bars to relief
  - Controversial:
    - When awarded for CL causes of action like contract and tort.
      - Generally, not awarded here because it has been suggested that they are not restitutionary but rather compensatory (but assume that they are restitutionary)
    - Australian courts are less willing to award AOP for CL breaches.
  - The primary difference between restitutionary damages and an AOP is that the former is a common law remedy and hence available as of right, whereas the latter is an equitable remedy and hence discretionary

## 2.1.2 WHEN ARE GAIN-BASED AWARDS FOR WRONGS AVAILABLE?

### 2.1.2.1 EQUITY

#### 2.1.2.1.1 Breach of FD

- **AOP (*Warman International Ltd v Dwyer*)**

#### 2.1.2.1.2 Breach of confidence

- **(1) AOP**
  - ***AG v Guardian Newspapers* [1990]**
    - Facts- Sunday Times had published extracts from books Memoirs of Peter Wright- published in breach of confidence owing to the government
    - HOL- AOP is available for breach of confidence
      - Remedy would serve deterrence
      - AOP was alternative to compensatory to Lord Cairns
      - No one should gain from their wrong
- **(2) Reasonable fee award**
  - ***Vercoe v Rutland Fund Management Ltd* [2010]**
    - HC - remedy was restitutionary remedy not AOP
    - Court awarded 'reasonable buy out fee' which could have been demanded for release of plaintiff's rights. The cost of buying out the P's right was a saved expense and therefore a gain to the D.

### 2.1.2.2 COMMON LAW- TORT

- General rule: at CL restitutionary remedies is not available for common law wrongs
  - There are some exceptions

#### 2.1.2.2.1 (1) Property torts

- By reason of wrong done to P, D gains use of P's property
- Eg trespass to land or goods, conversion, detinue etc
- D may also make profit from using D's property

2.1.2.2.1.1 (a) Goods

(i) Reasonable fee award

*Olwell v Nye & Nissen Co*

*Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd*

2.1.2.2.1.2 (b) LAND

*Penarth Dock Engineering Co Ltd v Pounds*

*\*Hampton v BHP Billiton Minerals Pty Ltd*

*\*LJP Investment Pty Ltd v Howard Chia Investments Pty Ltd*

LJP

*Edwards v Lees Administrator*

2.1.2.2.2 (2) Deceit (fraudulent misrep)

*Halifax Building Society v Thomas*

2.1.2.2.3 (3) Inducing breach of contract

*Hospitality Group Pty Ltd v Australian Rugby Union Ltd*

**2.1.2.3 COMMON LAW: BREACH OF CONTRACT**

***Wrotham Park Estate Co Ltd v Parkside Homes Ltd***

***Morris-Garner Ltd v One Step (Support) Ltd***

***Wrotham Park***

***AG v Blake***

***Wrotham Park***

***\*Hospitality Group Pty Ltd v Australian Rugby Union Ltd***

*Blake*

*Robinson & Harman*

#### 2.1.2.4 STATUTE

##### 2.1.2.4.1 i) Intellectual property statutes

##### 2.1.2.4.2 ii) Australian Consumer Law

#### 2.1.3 STRUCTURE FOR QUESTION:

*Hospital Products*

*Warman*

#### 2.1.4 ACCOUNT OF PROFITS

##### 2.1.4.1 STEP 1: IDENTIFY THE WRONG

- X breached his fiduciary obligations to Y

##### 2.1.4.2 STEP 2: IDENTIFY THE REMEDY

- An AOP is available for the breach of FD (*Warman*)
- An AOP is an equitable remedy, at court's discretion
- Availability
  - o Equity:

- AOP is an equitable remedy and is awarded primarily in cases of equitable wrongdoing:
  - Breach of FD (*Warman*)
  - Breach of confidence (*AG v Guardian Newspapers*)
  - Diversion of business opportunity
- AOP unavailable if (*Chan v Zacharia*)

## 5 APOLOGIES & CORRECTIONS

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### 5.1 CORRECTIONS

- Only relevant where someone has published something that is wrong: it is intended to 'set the record straight'. Whilst its main civil law application is defamation, it's more likely to come up as a public-interest matter (such as in false advertising).
- What does it do?
  - Vindicate the plaintiff's rights (reputation, privacy, freedom from discrimination...)
  - Redress injury to reputation, feelings, dignity, restore esteem and social standing thus reducing the quantum of damages needed to vindicate the right
  - Promote the public interest by:
    - 'Informing those influenced by the contravening conduct of the wrongdoing involved; helping to negate the dissemination of racial prejudice' (*Eatock v Bolt*)
    - Consumer protection eg, by upholding the right to privacy, educating the public about the right and potentially deterring others from breaching the right to privacy (ALRC Serious Invasion Final Report)
- Not to punish

### 5.2 CORRECTIONS AND APOLOGIES: WHEN MORE THAN A CORRECTION IS REQUIRED

- Just correcting facts can be insulting- needs apology
- D publishes a story that incorrectly refers to P as a sex offender -
  - 'We confirm that Baby P's father is not a sex offender and he has not been convicted of any sex offence, or indeed any offences'. Judge said this is not enough.
  - Effective offer of amends requires the correction, AND an apology- 'We apologise to Baby P's father for making this error and for the very considerable distress and embarrassment our article caused him offences'.
- *KC v MGN Limited* [2012] EWHC 483 (QB) (Bean J) - defamation
- In our jurisdiction we are only required to make correction not apology

### 5.3 WHY NOT MAKE A CORRECTION/APOLOGISE?

- Don't think about it
- Afraid it will be evidence of an admission of liability
- Not admitting wrongdoing so inappropriate
- Avoid appearance of weakness, loss of 'face'
- Consider it too late
- Fear it won't be accepted

### 5.4 APOLOGIES

- An apology is an expression of regret or remorse for actions
- **Partial**- expression of regret
  - I am sorry that you were hurt when my car hit you.
  - I regret that my car hit you.