

REMEDIES

WEEKLY/FINAL EXAM NOTES

CONTENTS PAGE

WEEK #1: INTRODUCTION TO REMEDIES.....	5
NATURE OF REMEDIES.....	5
CLASSIFICATION OF REMEDIES.....	5
RELATIONSHIP BETWEEN RIGHTS AND REMEDIES.....	6
LEGAL AND EQUITABLE REMEDIES	6
<i>HARRIS V DIGITAL PULSE PTY LTD</i>	7
<i>PHOTO PRODUCTION LTD V SECURICOR TRANSPORT LTD</i>	7
 WEEK #2: RESCISSION	8
OVERVIEW.....	8
RESCISSION IN EQUITY	8
<i>ALATI V KRUGER</i>	8
REQUIREMENTS FOR RESCISSION	9
<i>RESTITUTIO IN INTEGRUM</i>	9
VITIATING FACTORS	10
MISREPRESENTATION.....	10
MISTAKE.....	10
<i>MCRAE V COMMONWEALTH DISPOSALS COMMISSION</i>	11
DURESS.....	11
ELECTION.....	12
BARS TO RESCISSION	12
PARTIAL RESCISSION.....	12
<i>VADASZ V PIONEER CONCRETE (SA) PTY LTD</i>	12
SUMMARY OF CONTENT.....	13
 WEEK #3: COMPENSATION IN CONTRACT.....	15
GENERAL PRINCIPLES OF COMPENSATION.....	15
COMPENSATION NOT THE SOLE PURPOSE.....	15
REQUIREMENTS FOR A CLAIM OF BREACH OF CONTRACT.....	15
CAUSATION.....	16
<i>ALEXANDER V CAMBRIDGE CREDIT CORP</i>	16
REMOTENESS	16
<i>HADLEY V BAXENDALE</i>	17
<i>VICTORIA LAUNDRY V NEWMAN INDUSTRIES</i>	17
DATE OF ASSESSMENT OF DAMAGES	18
ONCE AND FOR ALL RULE	18
MITIGATION.....	18
HEADS OF DAMAGE.....	19
<i>COMMONWEALTH V AMANN AVIATION</i>	19
<i>FLAMINGO PARK PTY LTD V DOLLY DOLLY</i>	20

DIFFICULTY IN ASSESSING DAMAGES	20
SUMMARY OF CONTENT	21
WEEK #4: DAMAGES IN TORT	23
GENERAL PRINCIPLES	23
CAUSATION.....	23
APPORTIONMENT.....	24
CAUSATION UNDER THE <i>CLA</i>	24
RE MOTENESS & FORESEEABILITY	25
<i>WAGON MOUND NO 1</i>	25
<i>WAGON MOUND NO 2</i>	25
<i>NADER V URBAN TRANSIT AUTHORITY</i>	26
MITIGATION.....	26
DATE OF ASSESSMENT	26
MITIGATION.....	27
ONCE AND FOR ALL RULE	27
PROPERTY DAMAGE.....	27
SPECIAL AND GENERAL DAMAGES.....	27
GENERAL ECONOMIC LOSS.....	27
ECONOMIC LOSS/PAIN & SUFFERING	28
ECONOMIC LOSS/LOSS OF EARNING CAPACITY	28
COST OF CARING FOR THE PLAINTIFF.....	29
NERVIOUS SHOCK AND DISTRESS	29
TAXATION.....	29
AGGRAVATED AND EXEMPLARY DAMAGES	29
SUMMARY OF CONTENT	30
WEEK #5: EQUITABLE COMPENSATION AND DAMAGES IN EQUITY.....	32
NATURE OF EQUITABLE COMPENSATION	32
THE EXCLUSIVE JURISDICTION.....	32
THE AUXILIARY JURISDICTION.....	33
<i>WENTWORTH V WOOLLAHARA</i>	34
PUNITIVE/EXEMPLARY DAMAGES IN EQUITY	35
<i>HARRIS V DIGITAL PULSE</i>	35
SUMMARY OF CONTENT #1.....	35
SUMMARY OF CONTENT #2.....	36
WEEK #6: RESTITUTION.....	38
RESTITUTION IN EQUITY.....	38
RESTITUTION AT COMMON LAW	38
CONCEPT OF UNJUST ENRICHMENT	38
COMMON LAW ACTIONS FOR MONEY HAD AND RECEIVED	39
<i>AUSTRALIA AND NEW ZEALAND BANKING GROUP</i>	39
<i>ROXBOROUGH V ROTHMANS OF PALL MALL</i>	40
<i>BALTIC SHIPPING CO V DILLON</i>	40
<i>QUANTUM MERUIT</i>	41

<i>W COOK BUILDERS PTY LTD V LUMBERS</i>	41
<i>PAVEY & MATTHEWS</i>	42
<i>SUMPTER V HEDGES</i>	42
DEFENCES TO CLAIM FOR RESTITUTION.....	43
SPECIFIC RESTITUTION	43
SUMMARY OF CONTENT.....	44
WEEK #7: ACCOUNT OF PROFITS	47
NATURE OF THE REMEDY	47
COMPONENTS	47
REQUIREMENTS	47
BREACH OF A PRIMARY RIGHT AT COMMON LAW	48
<i>ATTORNEY GENERAL V BLAKE</i>	48
BREACH OF A STATUTORY RIGHT	49
ASSESSMENT	49
ELECTION	50
TRACING	50
SUMMARY OF CONTENT	50
WEEK #8: CONSTRUCTIVE TRUSTS	52
NATURE AND PURPOSE	52
REMEDIAL OR INSTITUTIONAL	53
INTERMEDDLERS WITH TRUST PROPERTY	53
TRANSACTIONS VOIDABLE IN EQUITY	54
MUTUAL WILLS	54
<i>BIRMINGHAM V RENFREW</i>	54
DOMESTIC RELATIONSHIPS.....	55
EQUITABLE ESTOPPEL.....	55
SUMMARY OF CONTENT	55
WEEK #10: SPECIFIC PERFORMANCE	57
NATURE OF SPECIFIC PERFORMANCE	57
EXECUTORY AND EXECUTED CONTRACTS	57
MANDATORY INJUNCTIONS AND GENERAL SPECIFIC PERFORMANCE	58
REQUIREMENTS FOR SPECIFIC PERFORMANCE	58
A BINDING CONTRACT	58
READY, WILLING OR ABLE.....	59
ACTUAL OR ANTICIPATORY BREACH.....	59
INADEQUACY OF DAMAGES	59
<i>COULLS V BAGOT'S EXECUTOR & TRUSTEE CO</i>	59
CONTRACT FOR THE SALE OF LAND	60
SPECIFIC PERFORMANCE NOT AWARDED	60
<i>JC WILLIAMSON V LUKEY</i>	61
DOCTRINE OF PART PERFORMANCE	62
SUMMARY OF CONTENT	62

WEEK #11: INJUNCTIONS	65
NATURE OF REMEDY	65
CLASSIFICATION	65
USES OF INJUNCTIONS	66
JURISDICTION.....	66
THE EXCLUSIVE JURISDICTION	66
THE AUXILIARY JURISDICTION	66
ADEQUACY OF DAMAGES.....	67
SPECIAL CIRCUMSTANCES.....	67
DISCRETIONARY FACTORS.....	68
CONSIDERATIONS.....	68
UNDERTAKINGS AS TO DAMAGES.....	69
EFFECT OF NON-COMPLIANCE	69
SUMMARY OF CONTENT.....	69
CLASS NOTES.....	71
 WEEK #12: DECLARATIONS, RECTIFICATION, DELIVERY UP	73
DECLARATIONS.....	73
JURISDICTION.....	73
LOCUS STANDII	74
<i>AUSTRALIAN CONSERVATION FOUNDATION INC V COMMONWEALTH</i>	74
DISCRETIONARY FACTORS	74
RECTIFICATION.....	75
REQUIREMENTS FOR RECTIFICATION.....	76
<i>MARALINGA PTY LTD V MAJOR ENTERPRISES PTY LTD</i>	76
<i>COMMISSIONER OF STAMP DUTIES (NSW) V CARLENKA PTY LTD</i>	76
<i>SLEE V WARKE</i>	77
DELIVERY UP	77
SUMMARY OF CONTENT – DELIVERY UP	77
SUMMARY OF CONTENT - RECTIFICATION	78
 WEEK #13: AUSTRALIAN CONSUMER LAW	79
<i>CONTRACTS REVIEW ACT</i>	79
AUSTRALIAN CONSUMER LAW	80

WEEK #1: INTRODUCTION TO REMEDIES

NATURE OF REMEDIES

Remedies are often defined as cures that are used to respond to a wrong or proposed wrong. The most common wrongs arising in private law are torts, breaches of contracts and breaches of equitable obligations. Legal remedies are usually judicial, in the sense that they depend on a court of law issuing an order in legal proceedings requiring the defendant to do, or refrain from doing, some act, such as paying money (damages), and so forth. Most remedies considered are judicially controlled in the sense that they are contingent on the issue of a court order. Some remedies, known as **self-help remedies**, operate when the plaintiff involves them without seeking recourse to the courts first.

In other words, a remedy provides redress, or a 'cure' arising from a cause of action and is usually awarded by a court. A cause of action is simply a factual situation of which the existence entitles one person to obtain from the court a remedy against another person – *Letang v Cooper* [1965]. A cause of action arises when a person has suffered a wrong, either it be physical, financial, or equitable. When the wrong occurs, s/he immediately acquires the right to go to court to seek a remedy.

CLASSIFICATION OF REMEDIES

There are a number of ways in which remedies can be classified. These are discussed briefly below:

- I. Statute.
- II. Equity or.
- III. Common law.

Remedies are derived from all 3 parts of the tripod and may be described according to their origin. Therefore, there are equitable remedies, common law remedies and statutory remedies.

The three types of remedies are interrelated and interact within the legal system. Common law and equitable remedies are available pursuant to statute, for example, personal injuries, the *Corporations Act* (Cth) and commercial law and the ACL, and the *Contracts Review Act 1980* (NSW).

Further, the indicia for an equitable or common law remedy may be used by a court when deciding whether to award a statutory remedy. For instance, when determining whether a contract is unfair or unjust pursuant to the *Contracts Review Act* or the ACL.

Therefore, when considering a remedy suitable for a cause of action, it is important to determine whether a statutory remedy is also available.

Remedies may also be classified according to their **purpose**, therefore remedies may be:

- Compensatory (common law damages, equitable compensation, damages in equity (*Lord Cairns Act* damages), damages pursuant to statute).
- Restitutionary (counts of money had and received, *quantum meruit* and *quantum valebat*, account of profits, restitutionary damages, equitable compensation, constructive trusts, statutory restitution).
- Declaratory (remedies arising when a court makes a declaration as to the facts of a case and/or the rights of the parties and may include nominal damages).
- Punitive (exemplary damages, statutory penalties).
- Coercive (sometimes called 'specific relief', include injunctions, specific performance, action for the agreed sum, statutory enforcement orders).

Remedies may also be classified according to whether they are **self-help** or **judicial**. It is important to note that, self-help remedies, possibly excluding rescission, tend to operate outside the legal system, unless the party subjected to the remedy complains either to the police or the court.

Self-help remedies include:

- Ejection of a trespasser.
- Abatement of a nuisance.
- Eviction (sometimes).
- Termination of a contract (although these usually end in court proceedings).
- Rescission (ditto).

The self-help remedies above involve the unilateral action of one of the parties, who takes action to remedy the wrong they believe they have suffered. However, self-help remedies are problematic because they are governed by legal principles which require a person to act with reasonable care and within the law. Many people are not aware of this and sometimes 'take the law into their own hands.' If they over react to a situation, their actions may result in them being charged with a criminal offence. For example, when a householder shoots an intruder. Judicial remedies are those handed down by the various courts.

RELATIONSHIP BETWEEN RIGHTS AND REMEDIES

The word 'remedy' derives from the Latin word **remedium** meaning medicine, or means of relief. This is what remedies do – they give some form of relief to the plaintiff. In fact, when a person goes to the court to ask for a remedy, it is often called 'seeking relief' for the violation of a right, as expressed in the quote. However, remedies are also types of rights. John Austen distinguished between remedies or secondary rights, and legal or equitable rights or primary rights as follows, 'those which I call primary [rights] do not arise from injuries, or from violations of other rights and duties. Those which I call secondary [rights] arise from violations of other rights and duties, or from injuries, delicts [torts], or offences. **Therefore, when a primary right is breached, a secondary right – a remedy – is created.**

In other words, a remedy can constitute a right in the sense of imposing on the defendant a correlative duty to the plaintiff, for example, a duty to pay damages to him or her or to perform a contract, such where secondary rights exist as they are brought in being for the protection of another, as a prior legal right, such as the right to performance of a contract.

LEGAL AND EQUITABLE REMEDIES

Equitable remedies are available in aid of both equitable rights, known as the **exclusive jurisdiction** of equity, and legal rights, the **auxiliary jurisdiction** of equity. They are only available as rights where the legal remedy is inadequate in the judgement of a court of equity. The legal remedy, such as compensation, is generally referred to as the 'primary remedy' with the equitable right, such as equitable compensation or specific performance, as the 'secondary remedy.' Equitable remedies are only available at the discretion of the court, no one has a 'right' to equitable remedies. They have the ability to seek the discretion of the court. They have a right to **seek** a remedy.