

Topic 3: Remedial Equity

- Concurrent or exclusive jurisdiction:
 - o Exclusive jurisdiction: where equity on its own is involved.
 - Rights in a trust recognized in equity but not common law, so they are in an exclusive equitable jurisdiction.
 - o Concurrent jurisdiction: equity in providing these sorts of remedies is also acting in circumstances where there are other common law rights involved.
 - Injunction to prevent nuisance.
 - Equity is providing a remedy in respect of common law rights.

A. Specific Performance

- The remedy of specific performance is used as an order to perform a contract, i.e., it is the principal means by which contractual obligations are enforced in equity.
 - o Can be ordered even though a breach of contract has not yet occurred.
- Basis:
 - o “the power to decree specific performance was part of the discretionary jurisdiction of the Court of Chancery to do justice in cases in which the remedies available at common law were inadequate” – Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998]
 - o Specific performance is in personam in nature, i.e., the remedy attaches to the person of the defendant, rather than to his or her property (in rem).
 - Provided the defendant is within the jurisdiction of the court, specific performance can be ordered even though the property that is the subject of the contract may be outside the court’s jurisdiction.
 - o A defendant who fails to comply with the order will be guilty of contempt of court with the ultimate consequence of being imprisoned for such contempt.

General principles

- (1) **Valuable consideration** - an agreement which is not for valuable consideration will not be specifically performed.
 - o **KEY**: A court has no jurisdiction to grant specific performance of a promise not supported by valuable consideration.
 - o You need valuable consideration.
 - A nominal sum of money such as \$1 is not consideration for the purposes of this rule.
 - o Instance of the maxim: Equity will not assist a volunteer.
- (2) **Inadequacy of damages at common law** – Damages need to be an inadequate remedy.
 - o **KEY**: If a plaintiff can be adequately compensated by an award of damages at common law, the court has no jurisdiction to order specific performance.
 - o If common law damages would suffice, then it was thought equity could not order specific performance.
 - o In England there has been a move towards regarding the issue of adequacy of damages as a discretionary matter.
 - Treated as an element in the Court’s discretion as to whether to order specific performance.
 - However, this approach has not been supported in Australia.

Contracts for the sale of personalty

- In certain contexts, particularly contracts to sell land, the Court basically assumes that damages are not an adequate remedy.
 - o An **agreement to sell or transfer chattels** is not normally specifically performable.
 - Contracts for the sale of shares or chattels will not be specifically enforced if substitute shares or chattels are readily available in an open market.
- However, where you cannot go buy another, damages might not be adequate – Aristoc Industries Pty Ltd v RA Wenham (Builders) Pty Ltd.

- **Principle:** contracts involving chattels that are rare or unique will be enforced in equity because the rarity or uniqueness of the chattel is one aspect of the general question of the inadequacy of damages at common law.
- If the shares or chattels are not readily available in an open market, damages at common law will be inadequate and the court will have jurisdiction to specifically enforce the contract in question.
- If damages at common law are an inadequate remedy, there is no principle which will prevent enforcement in equity simply because the subject matter of the contract is a chattel.
- E.g., a purchaser of all of a company's shares has a particular interest in the due performance of the contract, or contracts for the sale of chattels or unusual beauty or rarity or of special sentimental significance to the purchaser.
- **Dougan v Ley** (1946)
 - Dougan contracted to sell a taxicab together with his registration and operator's license to Ley and Nash.
 - Dougan refused to go through with the sale and Ley and Nash sought an order for specific performance.
 - The HCA granted the order. Dixon J: "where chattels are sold or otherwise disposed of by contract as part of the particular equipment of a business, there is ground for equity granting specific reliefIn the present case I think we should have no difficulty in concluding that, because of the limited number of vehicles registered and licensed as taxi-cabs, because of the extent to which the price represents the value of the license, and because of the essentiality to the purchasers' calling the chattel and the license attached thereto, we should treat the contract within the scope of the remedy of specific performance.
 - The registration of the cab and license to operate was considered sufficiently difficult to obtain that the Court was prepared to order specific performance.
 - Despite the fact that the D had actually managed to obtain another license to obtain a cab after the contract was entered into.

Contracts to pay or lend money

- Generally, contracts to pay or lend money are ones where a P will be adequately compensated by an award of damages at common law, i.e., you can always go somewhere else and borrow from someone else.
- But NOTE: **Wight v Haberdam Pty Ltd**- Kearney J ordered specific performance of such a contract. Damages at common law were not an adequate remedy because of the complex questions that would have arisen, the delay and expense involved, and the fact that damages would be extremely difficult, if not impossible to assess with reasonable accuracy.

Land contracts

- **KEY:** Damages at common law have almost invariably been seen as inadequate in contracts involving land, based upon the unique nature of each parcel of land.
- Principle that common law damages are inadequate in contracts involving the purchase of land- **Pianta v National Finance & Trustee Ltd** (1964) HCA authority
 - HCA ordered specific performance of a contract to a purchaser of land in circumstances where the purchaser was buying the land solely for the purpose of developing it for resale at a profit.
 - Hence, even if a purchaser is a property developer, still specific performance can be ordered.
 - The real interest in that piece of land is making money.
 - Pain and suffering in finding new land and negotiating.
 - Sufficiently unique that damages would not be an adequate remedy.
 - If this is the case for property developers, pretty safe if you are buying the property for you to live in, given your interest is less than just making money from that land.
 - Land is 3 dimensional.
 - Even an apartment block is unique.
 - Different view, different features and layouts.
 - Unique in the sense of precisely where they are.
 - Enough for damages not to be an adequate remedy.
- **Paramadevan v Semelhago** (Supreme Court of Canada)
 - The traditional approach of viewing common law damages as inadequate in cases of land contracts has been questioned.
 - Court deciding that not all land is unique.

- Not necessarily the case that you will always get specific performance of a contract to sell land.
- The general rule still applies in Australia: land was considered unique and so specific performance will be order, because damages will not be an adequate remedy.
- **NOTE:** If you have a contract to sell land, you know that that contract needs to be evidenced in writing.
 - If you do not have writing the contract can still be enforced if you have part-performance.
 - Specific performance would be available to enforce the contract by virtue of part-performance.

Test of inadequacy of damages

- **KEY:** you do not need damage/loss in order to get specific performance, the test is whether damages will be an adequate remedy for any loss you might suffer? - Adderley v Dixon (1824)
 - Vice-Chancellor said: “Courts of Equity decree the specific performance of contracts, not upon any distinction between realty and personalty, but because damages at law may not, in the particular case, afford a complete remedy. Thus, a Court of Equity decrees performance of a contract for land, not because of the real nature of the land, but because damages at law, which must be calculated upon the general money value of land, may not be a complete remedy to the purchaser, to whom the land may have a peculiar and special value. So a Court of Equity will not, generally, decree performance of a contract for the sale of stock or goods, not because of their personal nature, but because damages at law, calculated upon the market price of the stock or goods, are as complete a remedy to the purchaser as the delivery of the stock or goods contracted for; inasmuch as, with the damages, he may purchase the same quantity of the like stock or goods.”
 - Courts of equity decree specific performance not on any distinction between land and chattels.
 - Not because of the real nature of the land but because damages at law may not be a complete remedy for the purchaser to whom the land may have a peculiar and special value.
 - A court of equity will not generally decree performance for a contract of sale of stock or goods (chattels).

Contracts conferring a benefit on a third party

- Situation where damages might be inadequate:
 - If A and B enter into a contract under which B agrees with A that B will make a payment to C and C is not a party to that contract. If B refuses to perform, so A could sue B for damages, but A has not suffered loss because the payment should be made to C not A. So, prima facie, A’s remedy would be nominal damages only.
 - Could A instead get an order for specific performance to force B to make the payment to C?
 - **KEY:** A Court will have jurisdiction to order specific performance of such a contract because common law damages do not satisfy the demands of justice.
- Coulls v Bagot’s Executor and Trustee Co Ltd (1967)
 - The majority thought that the agreement was not of the sort as outlined above.
 - They said the actual agreement was a contract between A and B that B would make a payment to A and then pass it on to C.
 - Windeyer J disagreed (obiter) and thought the contract was between A, B and C.
 - ‘complete and perfect justice to a promise may well require that a promisor perform his promise to pay money or transfer property to a third party’.
 - If C is a party, then C can enforce the contract.
 - But what if C is not a party to the contract and the agreement was between A and B that B would pay C?
 - In that sort of situation damages would be inadequate and therefore specific performance could be ordered.
 - Barwick CJ: also agreed that in that sort of situation you could get specific performance too because of that reason.
- Beswick v Beswick [1968] HoL
 - Involved a situation where you have A, B and C.
 - PB contracted with his nephew, JB. By the terms of the contract, Peter was to transfer his business to John and John agreed to employ Peter for the rest of his life and after Peter’s death, to pay Peter’s wife an annuity for the rest of her life.
 - Part of the purchase agreement is that the purchaser will pay an annuity to the husband’s wife, C, who is not a party to the contract.
 - After Peter’s death, John refused to make the payments to Ruth.

- Ruth, as administrator of Peter's estate, brought an action for specific performance of the obligation to pay the annuity.
- Issue: A died, and the question is can A's administrator get an order for specific performance to force B to make a payment to C?
- The House of Lords said yes, common law damages were an inadequate remedy.
- To deny equitable relief would 'fulfil no other object than that of aiding the wrongdoer'.
- **Trident General Insurance v McNiece Bros (1988)**
 - The HCA held that in an insurance contract situation if A and B agree that a payment will be made to C, then C can enforce that obligation.
 - Exception to the privity rule which only applies to insurance contracts in Australia.
 - That leaves us with the relevance of *Beswick v Beswick* in other types of contract arrangements.

Discretionary Factors for Refusing an Order for Specific Performance

3. Constant Court Supervision

- **KEY:** Contracts in which the parties' obligations are imprecisely defined will generally not be specifically enforced, i.e., contracts requiring the constant supervision of the courts will not attract equitable relief.
- Specific performance is inapplicable when the continued supervision of the court is necessary to ensure the fulfilment of the contract- **Co-operative Insurance Society v Argyll Stores.**
- Issue:
 - Whether an anchor tenant who, in breach of its lease, shuts down its business, can be forced to continue to operate its business by an order for specific performance?
- Facts:
 - Co-operative Insurance Society (CIS) owned a shopping centre and Argyll Stores was the tenant of the centre's supermarket.
 - With 19 years of the lease remaining, Argyll gave notice to CIS of its intention to close the supermarket.
 - The supermarket in that shopping centre was the largest store in that shopping centre, the anchor store to benefit other stores in shopping centre.
 - CIS requested Argyll to keep operating the supermarket until a new supermarket operator could be found to take over the premises.
 - Argyll decided to close the supermarket because it was losing money.
 - CIS sought specific performance of the lease obligation to operate the supermarket during normal business hours.
 - Court of Appeal ordered specific performance of the covenant.
- House of Lords:
 - Unanimous HoL refused the application for specific performance – enforcement of the obligation to carry on the supermarket business would require the constant supervision of the court.
 - Lord Hoffman explained this constant supervision doctrine:
 - "There has, I think, been some misunderstanding about what is meant by continued superintendence. ... It is the possibility of the court having to give an indefinite series of such rulings in order to ensure the execution of the order which has been regarded as undesirable. Why should this be so? A principal reason is that ... the only means available to the court to enforce its order is the quasi-criminal procedure of punishment for contempt. ... The prospect of committal or even a fine, with the damage to commercial reputation which will be caused by a finding of contempt of court, is likely to have at least two undesirable consequences. First, the defendant, who ex hypothesi did not think that it was in his economic interest to run the business at all, now has to make decisions under a sword of Damocles which may descend if the way the business is run does not conform to the terms of the order. ... Secondly, the ... possibility of repeated applications over a period of time means that, in comparison with a once-and-for-all inquiry as to damages, the enforcement of the remedy is likely to be expensive in terms of cost to the parties and the resources of the judicial system."
 - Order would have required constant superintendence by the Courts and the activity could not be framed clearly enough to be an Order that the Court is prepared to make.

- Lord Hoffman drew a distinction between 2 types of orders:
 - (1) An order that requires the D to carry on of particular activities
 - For obligations of an ongoing nature, specific performance would not generally be ordered because of the threat of repeated litigation arising from disputes as to whether at any particular time the D was complying with the order.
 - **HERE:** Argyll's obligation to keep the supermarket open was of an ongoing nature.
 - (2) An order that requires the D to achieve a specific result.
 - If the result was defined with sufficient precision, specific performance would be ordered because the possibility of subsequent wasteful litigation would be minimised.
 - The Court can and will order the D to achieve a specific result.
 - E.g., contract to build a building or repair covenant in a lease. Courts can and do order specific performance of those sorts of contracts.

4. Personal services contracts

- **KEY:** Equity will not enforce a contract if to do so would result in compelling the D to maintain a personal relationship with the P.
 - E.g., employment contracts and partnership agreements.
- Specific performance is not available where the contract requires personal services from the D - **CH Giles & Co Ltd v Morris [1972]**
- Facts:
 - Mr Morris ran an insurance business and did so through a company called Invincible.
 - He agreed to sell the shares in Invincible to Giles company, so it will then own Invincible.
 - The sale agreement said the company would then appoint Mr Giles as the managing director and then be employed.
 - The board of Invincible did not want him to be appointed as the managing director.
 - But they cannot stop Mr Morris from selling the shares.
 - Giles company therefore seeks specific performance of the agreement to appoint him as the managing director.
 - Specific performance was ordered by consent but was then not complied with.
- Issue:
 - Whether there should be committal for contempt of Court?
 - Whether specific performance is available given there is a personal service element in the agreement by entering into a personal employment contract with Mr Giles?
- Megarry J:
 - Held the Ds were in contempt.
 - "The distinction between an order to perform a contract for services and an order to procure the execution of such a contract seems to me to be sound both in principle and on authority. I do not think that the mere fact that the contract to be made is one of which the court would not decree specific performance is a ground for refusing to decree that the contract be entered into."
 - There is on the authorities a distinction between ordering the parties to sign a contract and order the parties to perform a contract.
 - He would have been prepared to order specific performance of the contract in the sense of ordering the parties to enter into the employment contract but would not have been prepared to order specific performance of the employment contract itself.
- Why wont the Court order a performance of a personal services contract?
 - (1) concern with slavery: "the Courts are bound to be jealous, lest they should turn contract of service into contracts of slavery"
 - (2) superintendence type problem: "the reasons why the court is reluctant to decree specific performance of a contract for personal services are firmly bottomed on human nature..."
 - Will we need to be constantly superintending whether you are performing the agreement or not?

5. Lack of mutuality

- **KEY:** Specific performance is not available to a P unless the D could also have obtained relief against the P. Generally, for a specific performance order, you need mutuality between the P and D.
- If a P is seeking specific performance of an agreement, then we won't order specific performance if the P themselves has not performed and if an order of specific performance could not be granted against that P for the D.
- (1) Contract with a minor- If that person enters into a contract, the contract cannot be enforced against the minor but can be enforced by the minor.
 - o The minor will be unable to receive an order for specific performance against the other party, as that person will be unable to insist upon his or her rights against the minor.
 - o Thus, there is a lack of mutuality which impairs the minor's own ability to seek the equitable remedy.
 - o Specific performance there will not be ordered against the other party in favour of the minor because there is no mutuality.
 - o **Boyd v Ryan** is authority for that idea that you cannot get specific performance.
- (2) Mutuality might also mean that if the D could have obtained specific performance then that weighs in favour of the Plaintiff also being able to obtain it – **Beswick v Beswick**.
 - o Lord Pierce's speech: emphasized that the D who was the person buying the coal merchant business, the D could have forced the transfer of the business because of its unique nature.
 - o That is a reason why the P could have gotten specific performance and force the D to make the payments to the wife.
- Mutuality works as a bar to specific performance, but the other idea in **Beswick v Beswick** is a little less established.
- Cases where there isn't strict mutuality and yet specific performance has been ordered – **Price v Strange**.
 - o Held that the critical time for mutuality to be present is the date on which the court is to make the order for specific performance. The fact that mutuality may not have existed at an earlier time is irrelevant.
 - o **HERE:** mutuality was not present at the time of the breach of the contract because the P's obligation to repair and renovate an apartment would have required the constant supervision of the court, thus precluding the D from obtaining specific performance, However, by the time of the hearing, the repairs and renovations had been completed, so there was no reason why the D would not have been able to obtain specific performance against the P. Mutuality was present at the date of hearing, and the P obtained his order for specific performance.
- Mutuality is treated as a matter which goes to the Courts discretion as to whether it would award specific performance.
 - o Court can grant specific performance of that can be done without injustice or unfairness to the D.

6. Discretion/hardship

- Even if other factors are in place, these are reasons that the Court might refuse to order specific performance.
- The discretion element goes to whether the order will create hardship if it is made.
- (1) The court will refuse specific performance if the terms of the order are **too vague**- **Brace v Wehnert**.
 - o Contract to build a house to a specific value.
 - o That created hardship for the D if they ordered specific performance of that agreement, because it is too hard for the D to know what house should be built, it is too vague.
 - o Remedy is imprisonment for contempt and is too harsh a remedy to impose when the agreement is too vague.
 - o The D won't know what to do.
- (2) A court will not enforce a contractual obligation that is **impossible for the D to comply with** - **Brown v Heffer**.
 - o If the D cannot comply with the order, then the Court will not make an order.
 - That is the case if even that the impossibility has arisen because of the Ds conduct.
 - o Sometimes difficulties arise because you need a 3rd parties' consent.

- Court can still make an order but will make it conditional on the consent.
- (3) If specific performance of the contract would be **futile**, a court will not order specific performance of it.
 - The court 'will not readily grant a decree which would involve a pointless waste of time and money by compelling the doing of acts which could readily be reversed or which would apparently benefit no one'.
 - One reason would be if it would be impossible to comply with- see above.
 - Another reason is e.g. if the Court would order the parties to enter into a lease arrangement – **New Brunswick v Muggeridge**.
 - If the tenant is already in breach of covenants that exist in that lease.
 - Then the landlord can terminate that lease for the breach of covenants.
 - Most commonly, because the landlord does not want to enter the lease.
 - If the other party is already in breach, then the party ordered to enter into the lease could terminate it immediately.
- (4) When we talk about hardship to the D, the mere fact that a **contract is unfair** to the D is **not the relevant sort of hardship**- **Axelsen v O'Brien**.
 - E.g. a slightly unbalanced contract.
 - **Dowsett v Reid**
 - If the contract will work great hardship on the D, that is the sort of situation where the Court might think about refusing specific performance.
 - Mere unbalance/unfairness is not enough to avoid specific performance.
- (5) A P must be **ready, willing and able to perform his or her own obligations** before a court will grant an order of specific performance.
 - Can be established either by an admission on the pleadings or by evidence.
 - Applies at the time the equitable relief is sought.
 - In order to get specific performance of an agreement regarding land, the P needs to plead and prove that they are ready and willing to perform- **Bahr v Nicolay (No 2)**
 - An application of the maxim: he who seeks equity must do equity; the Ps conscience needs to be clean.
 - Plead and prove it as a P.
 - You have to come with clean hands - **Mehmet v Benson**
 - A P who was a purchaser of land under an instalment contract, and who during the currency of the contract was declared bankrupt.
 - The P obtained a discharge from bankruptcy and was successful in seeking an order for specific performance before the HCA.
 - You need to have performed as a P any conditions precedent that exists to the obligation you are seeking to have specifically performed.
 - It is the **essential terms** of the contract which the P must be ready and willing to perform.
 - Slight breaches will be overlooked – a person in breach of inessential terms may be granted specific performance.
- (6) If you will argue about clean hands, the **uncleanliness has to relate to the remedy** that is being sought – **Dering v Earl of Winchelsea**
 - P seeking contribution from people who had guaranteed an obligation.
 - P had encouraged the party whose obligations were guaranteed to get involved in gambling and other irregularities.
 - Court said that did not matter, not relevant to obligations between co-sureties.
- **Example- Hope v Walter**- Court refusing specific performance on the basis of hardship.
 - Contract to buy a house and the house included a shop.
 - Entire building was being bought.
 - Tenant in the shop; shop let out to a quarterly tenant.
 - The buyer found out before completion that the tenant was using the shop to run a brothel.
 - Rescission was not available, because the vendor did not know that the shop did not know the shop was being used as a brothel at the time the contract was entered into.
 - Both purchaser and vendor did not know at the time the contract was entered into.
 - Contract remained on foot and was binding.
 - Court refused specific performance, because it was not appropriate to force someone into the position where they would be the landlord of a brothel.

- It would be a hardship on the D.

B. Injunctions

- 1. Is there a right that has been protected.
- 2. Is it a legal right or equitable right?
 - Legal right- auxiliary, statutory or concurrent jurisdiction
 - Are damages available?
 - Auxiliary- will damages be an adequate remedy?
 - Equitable right- then that question does not arise.
- **Injunctions:** orders made by the courts either restraining or requiring performance of a specific act in order to give effect to the legal rights of the applicant.

Nomenclature

- Prohibitory (negative) vs mandatory (positive) injunctions
 - Prohibitory injunction: stopping someone from doing something or continuing to do something.
 - Mandatory injunction: are the converse; they are an order that a person must do something, you must comply with it.
- Final (or perpetual) vs interim (or interlocutory) injunctions
 - Distinguishing the injunctions that are issued at the end of the trial from those that are issued before the trial takes place.
 - Final injunction: one that is given at the end of the trial and so it is one that settles the dispute finally.
 - But it might be issued only for a limited time.
 - Interim injunction: given before the trial takes place to preserve the position until you get to trial or until further order of the Court.
- Quia timet injunctions
 - Injunctions that are granted where the wrong has not happened yet but it is apprehended.
 - Will not be granted if there is no realistic/real prospect of the wrong occurring or occurring again.
 - Maxim: equity does not act in vain.
 - If the court considers an injunction to be appropriate, it will be issued quia timet.
 - Serves to prevent the wrong from occurring.
 - BUT equity does not want to interfere with Ds freedom of action.
 - P might not have a clear conscience themselves.
 - E.g. harming the Ds business.
- Inter partes (with notice) vs ex parte (without notice) injunctions
 - Referring to how the injunction is obtained.
 - Ex parte injunction: where the P goes to the Court without giving notice of that to the D.
 - The D does not turn up at Court.
 - For obvious reasons, the Court is wary about granting an injunction because the other side is not present.
 - (1) the Court is often only going to grant an ex parte injunction for a short period of time.
 - You give notice to the other side by serving them the injunction.
 - That then enables both parties to go back to go Court to have an inter partes argument about whether the injunction should continue.
 - (2) there is an obligation of disclosure on the P when they seek an ex parte injunction.
 - They have to make full disclosure any arguments the D might raise in argument against the injunction.
 - If they do not do that, that weighs against their injunction in the ex partes discussion.
- **NOTE:** you can combine different elements of these different types of injunctions.
 - E.g. a quia timet injunction in an interim application or seeking it ex parte if there is an element of urgency.
 - Final injunction might be mandatory or prohibitory.

General principles

1. Protection of legal or equitable rights

- **KEY:** Injunctive relief will not be ordered if there has been no violation of the P's rights.
- You have to show you want to protect a legal or equitable right before you can get an injunction - **ABC v Lenah Game Meats Pty Ltd**
 - o The Ps, the meat processing factory, had no cause of action against the ABC to prevent publication of the film.
 - o Without a cause of action there was no basis on which the Court could grant an injunction to prevent publication of the film.
 - o P tried to argue that s 66 means the Court has a broader jurisdiction.
 - o Court said no: you have to point to the right in law or equity, Argument about s 66 was rejected in this case.
 - o **Gummow and Hayne JJ:** 'where an interlocutory injunction is sought, it is necessary to identify the legal (including statutory) or equitable rights which are to be determined at the trial and in respect of which final relief is sought'.
 - o Cause of action for trespass for the people that took the film but has nothing to do with the publication of the film so not sufficient to support an injunction regarding the publication.
- NOTE: **S 66** of *Supreme Court Act (NSW)*
 - o The Court's power to issue an injunction requires that there be enforceable rights to the protected.
- You need a legal right before you can get an injunction- **Day v Brownrigg**.
 - o The P house had a name: Ashford Lodge.
 - o The P house had been called that for 60 years.
 - o The Ps neighbour had a house called Ashford Villa, for 40 years.
 - o The neighbour decides they want to call their house Ashford Lodge.
 - o The P seeks an injunction to stop the D from calling their house that.
 - o The Court said they have no legal right to the name of their house, so they cannot get an injunction.
- Recent case- **Smethurst v Commissioner of Police** [2020] HCA 14
 - o P was a journalist, whose house the AFP raided looking for evidence of what they alleged were crimes involving publication of articles about the intelligence services.
 - o The AFP gets a warrant and raids Mrs Smethurst's house and takes information from her phone, from a USB stick.
 - o The warrant that the AFP had used was invalid.
 - It hadn't adequately stated what crime they were investigating.
 - o The P did not want damages, what she wanted was to get the information on the USB stick back.
 - o She could have tried to argue that the information was confidential, that is a cause of action, then she could seek the return.
 - BUT does not want to make that argument because it admits she might have breached the intelligence statutes.
 - o She also did not run an argument about privacy.
 - She is employed by Newscorp, they do not want a right of privacy in Australia because it restricts their ability to report.
 - o Because the warrant was invalid, the conduct of the AFP involved a trespass both to land and to goods, her phone, etc.
 - There was a claim here which potentially could support an injunction.
 - o The problem was that that tort was already complete.
 - Relevance of a tort being complete.
 - o You need a cause of action in order to pursue a claim for an injunction.
 - o She chose trespass, which had consequences.

2. Exclusive and Auxiliary Jurisdictions

A. Final/perpetual injunctions

- These points apply to all injunctions, but additional points applying to other injunctions.
- **Final/Perpetual injunction:** an injunction granted after a full hearing of the claim on its merits.
 - o Can be confined to a particular period of time.

3 jurisdictions

- **3 jurisdictions:** equity's exclusive jurisdiction, equity's auxiliary jurisdiction, statutory common law jurisdiction.
 - o **Exclusive equitable jurisdiction:** injunctions granted to protect equitable rights only.
 - E.g., equitable obligation of confidence, or beneficiary's rights under a trust.
 - o **Auxiliary equitable jurisdiction:** injunctions granted in aid of common law rights, e.g., restraint of breaches of contract or tortious wrongs, or statutory rights.
 - o **Statutory jurisdiction:** by statute common law got the power to grant injunctions
 - Common Law Procedure Act 1854

Reasons for distinction

- **(1)** In the auxiliary jurisdiction, a P must establish that damages at common law are an inadequate remedy to get an injunction.
 - o If you are seeking an injunction in the exclusive equitable jurisdiction you do not need to show that damages are inadequate, i.e., there are no damages in the equitable jurisdiction.
 - Statutory jurisdiction, not a question they ask there either.
- **(2)** Now clearly recognized that injunctions can be awarded in respect of non-proprietary rights including in auxiliary jurisdiction- **Cardile v LED Builders**.

Inadequacy of damages in equity's auxiliary jurisdiction

- The requirement that **damages be inadequate** is a negative condition.
 - o i.e., the fact that damages will be inadequate does not mean you will get an injunction.
 - o **KEY:** inadequacy of damages is a **necessary but not sufficient condition to get an injunction**
 - o **'irreparable injury':** if we do not issue an injunction here, there will be irreparable injury.
- Examples of situations where damages are inadequate:
 - o (1) difficulty of detection of breaches of the obligation
 - If it would require a multiplicity of claims to fully remedy the wrong.
 - i.e. if the breach is ongoing and continuing.
 - Will have to keep going to Court to get more damages.
 - o (2) Damage to goods more commonly able to be remedied by damages.

Examples

- Cases about building contracts, designed to show that it is not always easy to work out whether damages will be adequate or not.
- **Aristoc Industries v RA Wenham Builders** – illustrative case of the inadequacy of damages in the context of injunctive relief
 - o Aristoc, pursuant to a subcontract with a builder, delivered certain chairs that it had manufactured for installation at a new hall being built at RPA hospital.
 - o Before they were installed it became clear that Aristoc would not be paid due to the builder's financial difficulties.
 - o Aristoc sought an injunction against Wenham, the assignee of the builder's contract, to restrain Wenham from in any way dealing with the chairs or obstructing Aristoc's attempt to recover possession of the chairs.
 - o Aristoc seeks an injunction to force the D to give back the chairs.
 - o Jacobs J held that damages at common law were inadequate, Aristoc was more likely to be better off by recovering possession of and then disposing of the chairs than it was by pursuing any tortious remedy it might have had in relation to them.
 - o If the D fits the chairs into the hall, they become a fixture and title to those chairs passes to the D, which is conversion.
 - o There would be a claim for the tort of conversion.
 - o Because the chairs were specifically designed for the hall, they did not have much value market, so the damages for conversion would be low.
 - o It puts pressure on the D to actually pay the contract price, when the P has the chairs back.

- Chairs having a special value to the P, protecting his right to be paid for the contract.
- **Graham v KD Morris & Sons Pty Ltd**
 - Involved the Ps land which was next to and adjoined a building site.
 - The building site had a massive crane on it, which was left to blow in the wind.
 - It kept going over the Ps house, which is a trespass to land.
 - The Court was prepared to order an injunction to prevent that trespass.
 - Damages would be an inadequate remedy because of the danger the crane was causing to the P and his house.
- Even if damages are inadequate, the Court still has a discretion whether to grant the injunction; that is where **hardship** comes in.
 - Role of hardship- **Graham v KD Morris & Sons Pty Ltd**
 - Builder argued that an injunction would cause hardship, because D would need to dismantle the crane and put it up somewhere else.
 - Court rejected that argument, since they brought it on themselves by putting it up on a point where you are trespassing on the land.

B. Interim/interlocutory injunctions

- **Interim/interlocutory injunction:** a provisional order made at an early stage in the proceeding.
 - Special rules apply, because the Court has not yet had a chance to finally determine the rights of the parties.
 - E.g., if D is a mining company and wants to extract minerals from the ground, it takes time for the hearing to come to trial and for the matter to be fully determined in the trial.
 - Lack of clarity as to Ds rights to extract minerals, makes Court cautious about these injunctions.
- **KEY:** In considering whether an interlocutory injunction should be granted, the Court must apply the **test** set out in **Beecham Group v Bristol Laboratories**, where the HCA sets out **two requirements**:
 - **1.** Whether the P has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability at the trial of the action the P will be held entitled to relief?
 - **2.** Whether the inconvenience or injury which the P would be likely to suffer if an injunction were refused outweighs or is outweighed by the injury which the D would suffer if an injunction were granted?
 - Involves a balance of convenience between the parties.

(1) *Prima Facie case requirement (i.e, serious question to be tried)*

- 'how strong the probability needs to be depends, no doubt, upon the nature of the rights the P asserts and the practical consequences likely to flow from the order he seeks' - **Beecham Group v Bristol Laboratories**.
- You don't necessarily need to show that you will win - **Australian Broadcasting Corp v O'Neill** [2006] HCA 46 at [65]:
 - "By using the phrase 'prima facie case', their Honours [in Beecham] did not mean that the plaintiff must show that it is more probable than not that at trial the plaintiff will succeed; it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial."
- **American Cyanamid Co v Ethicon Ltd**
 - House of Lords suggested that in order to satisfy the serious question to be tried element 'the court no doubt must be satisfied that the claim is not frivolous or vexatious, i.e., that there is a serious question to be tried.'
- This suggestion was emphatically rejected by Gummow and Hayne JJ in **Australian Broadcasting Corp v O'Neill**
 - you need to show a sufficient likelihood of success: "the requisite strength of the probability of ultimate success depends upon the nature of the rights asserted and the practical consequences likely to flow from the interlocutory order sought"
 - **HERE:** Case of trying to prevent the broadcast of a film. The P said the film was defamatory of him, so the P sought an injunction preventing the film from being aired until they have had a chance to go to trial and determine whether there was defamation. HCA said if they give the injunction it will interfere with free speech. So, the P needs to show a sufficient likelihood of success.

(2) The balance of convenience

- **KEY:** The Court must weigh up the comparative injury that will arise from granting or withholding an injunction pending trial of the action, seeking out the major risk of damage and, in particular, of any irreparable damage and in some cases, evaluating the strength of the P's case for final relief.
- If P gets the injunction the D is prevented from acting until trial.
- It is about the **balance between the P and D in particular:**
 - o If the P then wins that trial, is it fair to leave the P to damages as their remedy or should we be granting an injunction?
 - o If the P loses at trial, is it fair to have prevented the D from doing something that is lawful all along?
- Involves the Court's assessment of the likely harm to the P, if no injunction is granted, and its assessment of the adequacy of damages as a remedy.
- Involves questions about adequacy of damages.
 - o If P wins and damages would be adequate, weighs against granting the injunction.

Undertaking as to damages

- Because an injunction is equitable relief, the Court can impose terms on the grant of the injunction.
- In the context of interim relief, there is always a risk that if the injunction is granted the P might lose.
- Normally, the Court will impose a condition on the injunction that the P must give an undertaking as to damages.
 - o The undertaking operates to protect the D or any other person affected by the operation of the injunction should the court later rule that the interlocutory injunction should not have been granted.
 - o The P undertakes that if the P loses at trial, the P will pay damages to the D for any loss in the interim when the injunction prevented the D from acting.
 - o ASK: Will a damages remedy for the D protect the D adequately for their harm?
 - o BUT if P has no money that will be useless.
- **Cambridge Credit v Surfers Paradise**
 - o The P was insolvent and sought an injunction.
 - o An undertaking given by an insolvent company that was in receivership was taken to be worthless and interlocutory relief was denied.
 - o Court said undertaking of damages is useless because they are insolvent.
- **Castlemaine Tooheys v South Australia**
 - o When the Court is balancing the rights, it can potentially include in that balance, the rights of third parties.
 - o The P, Castlemaine, was attacking legislation saying that it was discriminatory and therefore in breach of the Constitution.
 - o They sought an injunction preventing the government from bringing the legislation into force.
 - o Difference between re-fillable and non-refillable bottles.
 - o Consideration of waste in the environment and that re-fillable bottles lasted longer and were less likely to break.
 - o When considering whether to grant the injunction preventing the legislation from coming into force, it weighed in the balance the protection of the environment and the protection of health and safety.
 - o Court weighed in the balance the protection of the public interest.
 - o More likely in cases involving constitutional elements.

C. Mandatory (positive) injunctions

- These are of two broad types of mandatory injunctions:
 - o (1) **mandatory enforcing injunction:** Injunction requiring the performance of a promise.
 - A lot like specific performance, determined according to the principles we have looked at for specific performance.
 - o (2) **mandatory restorative injunction:** an injunction to restore the situation that existed before a wrong was committed.
 - To obtain such an injunction, the P must show that, had the wrongful act not occurred but was merely threatened, her or she would have obtained a prohibitory injunction in relation to the apprehended wrong.

- E.g., in a situation where a house has been built in contravention of statutory planning approval requirements, a mandatory restorative injunction will be granted requiring the D to demolish it, provided that the P can establish that he or she would have obtained a prohibitory injunction before the house was built, preventing the D from building it.
- Requires the D to take positive steps to put back the situation that was there before the wrong was committed.
 - E.g, a building against a restrictive covenant; D would be required to remove the offending part of the building.

Interlocutory stage

- At the **interlocutory stage** the Courts view is that mandatory injunctions involve a higher risk of injustice, because they require positive action from the D - Business world Computers v Australia Telecommunications, Shepherd Homes v Sandham
 - Requires time and money to be expended by the D that was not justified.
 - Something the Court weighs in the balance for the Beecham inquiries of prima facie case and balancing convenience.
 - Does not mean that there is a special principle for mandatory injunctions.
- Make the point that there isn't a special principle for mandatory interlocutory injunctions, it is the higher risk of injustice involved in interlocutory injunctions gets weighed in the balance of the Beecham principles - Films Rover International v Cannon Film Sales; Bradto v Victoria; Burke v Frasers Lorne Pty Ltd.

Final/perpetual stage

- 2 things the Court is concerned about at this stage:
- (1) will the cost of complying with the injunction be out of all proportion to the advantage that the plaintiff will get?
 - Balancing the interests of the P with those of the D.
 - P will get some advantage out of the mandatory injunction.
 - Is the Ps advantage outweighed by the detriment to the D in having to comply with it – Redland Bricks Ltd.
 - Some detriment is acceptable but is it out of all proportion.
- (2) to consider the stance or attitude that the D in the conduct which has led to the question, should there be an injunction.
 - If the D has acted unreasonably in the way they have behaved, then the Court is less concerned about whether the cost will be disproportionate to the D.
 - If the D has acted reasonably, then the Court is more likely to leave the P to their remedy in damages.
 - Final stage after the trial: where we know now that the D has acted wrongly.
- Redland Bricks Ltd v Morris [1970] HoL
- Facts:
 - Morris carried on a business as a market gardener.
 - On adjoining land, Redland Bricks conducted a quarrying business that caused subsidence to Morris's land.
 - As part of his claim against RB, Morris sought a mandatory injunction to have the land restored to its original state.
 - The cost of doing so was 30,000 pounds, whereas the future damage to Morris, if no injunction were granted, amounted to 1500 pounds.
 - The House of Lords declined to grant the injunction.
- Lord Upjohn:
 - First, it must be shown that there is a 'very strong probability on the facts that grave damage will accrue to the P in the future'.
 - Second, damages at common law have to be inadequate.
 - Third, the cost to the D of preventing future occurrences needs to be taken into account so that, if he or she has acted 'wantonly' or 'unreasonably', the injunction can be granted even if the cost of remedial work is out of proportion to the actual gain flowing to the P from such expenditure being incurred.

- However, if the D has acted reasonably the cost of complying with the injunction and the hardship it creates for the D must be weighed up against the loss suffered by the P.
- Fourth, the injunction if granted must be clearly worded so that 'the D knows exactly in fact what he has to do'.
- P is entitled to damages for loss of support of land, but D had acted reasonably in the way it had behaved, it took advice from engineers, who were wrong.
- That weighed against the order for a mandatory injunction, so the Court did not award one.
- House of Lords overturned the injunction in part because it was too vague, so the D did not know what it needed to do to comply with the injunction.
- Point about the D's stance or attitude in the conduct that led to the trial.
- **Smethurst v Commissioner of Police**
 - Indicates where that suggestion fits in.
 - Police took information from the journalist's home but turned out the search warrant was invalid.
 - Execution of the search warrant was a trespass.
 - Journalist wants a mandatory injunction to force the AFP to give the information back.
 - Invalidity of warrant meant the AFP had committed trespass to land and to goods.
 - The problem for her was that those torts were now complete.
 - Normally when a tort is complete, your remedy is damages, not a mandatory injunction to restore the situation before the tort was committed.
 - It is possible to get a mandatory injunction following a tort, where the damage is ongoing and extreme or at least serious.
 - That explains what Redland Bricks was talking about in their suggestion.
 - In order to prevent further damage from occurring.
 - If the tort is complete you don't normally get a mandatory injunction.
 - The minority thought there was an injury in the form of a trespass and thought that injury needed to be redressed through an injunction because nothing was going to repair the breach.
 - The majority however thought that there was no injury because the only injury she could point to, was the possibility of being investigated for an offence. That cannot be an injury because it would be against public policy.
 - Nettle J added that it might depend on the way the police had acted.
 - If the police had deliberately flouted the law, that behaviour would mean that there was an injury that needed to be remedied.
 - The police had not acted that way here, they thought they had a valid warrant and were acting bona fide in that belief.
 - Gageler J added a constitutional element to it, saying the Court needs to be able to control the Executive when they are misbehaving.
 - Finds a power in the Constitution to issue injunctions, the others don't.

D. Quia timet injunctions

- **KEY:** quia timet injunctions can be granted in relation to circumstances where there has not yet been an infringement of rights, provided that the risk to the P's rights is both imminent and real, i.e., injunctions granted on the basis that there is such a threat to the P's rights.
 - Serve to prevent a wrong being committed.
- **Redland Bricks Ltd v Morris**
 - Where quia timet injunctions come in, is when the damage has not yet been suffered.
 - You can seek a quia timet injunction because that damage is anticipated.
 - Quia timet injunction is an injunction to prevent an apprehended legal wrong.
 - Lord Upjohn quia timet injunctions **arise in two types of case:**
 - (1) a situation where no harm to the P has occurred but it is threatened or intended, i.e., the D is threatening to do things which will render irreparable harm to the P or their property.
 - Prohibitory injunction to prevent that conduct from happening.
 - (2) where harm has been done by the earlier actions of the D and the P has been compensated for the damage caused, but the P fears that future wrongs may be committed by the D.

- Quia timet injunction- a mandatory injunction to replace the support for the Ps land.
- They apprehended further damage to their property from the support that had been withdrawn.
- Court is wary about granting quia timet injunctions, because the P hasn't as yet suffered loss or damage, so in order to get a quia timet injunction you need to show a very strong probability that there will be grave damage in the future.
- That was shown in this case, so they did make out the necessary threshold for making out a quia timet injunction.
- BUT that injunction was refused on the basis of the reasonable conduct of the D and that it was a mandatory injunction which was being sought.
- As to the necessary loss or damage that is threatened, it has been said by the Courts that it must be 'grave damage', 'substantial' and 'very substantial'.