

TOPIC 3: REMEDIAL EQUITY

3.1 SPECIFIC PERFORMANCE

[Intro]

- Specific performance is an equitable remedy compelling a party to perform contractual obligations.

[1] Is there a binding contract?

- Specific performance will only be ordered in respect of a party's obligations under a contract. Therefore, there must be a binding contract supported by valuable consideration for specific performance to be awarded (TB p.729; *Roxborough v Rothmans of Pall Mall Australia*).
 - o *Per the facts, there [is/ is not] a binding contract [and/ or] valuable consideration, evidenced by [X].*

[2] Are damages inadequate? (Jurisdictional hurdle)

- If P can be adequately compensated by common law damages, court does not have jurisdiction to order specific performance (TB p.730; *Argyll Stores; Lucas Stuart v Hemmes Hermitage*).
- [a] Contracts for sale of land:
 - o Common law damages are almost invariably inadequate to satisfy breaches of contracts for the sale of land (TB p.733; *Pianta v National Finance & Trustees Ltd*). Land is considered unique and is thus routinely subject to specific performance (*Adderley v Dixon; Flureau v Thornhill; Bain v Fothergill*).
- [b] Contracts for the sale of personalty:
 - o Generally, goods obtainable on the open market do not attract specific performance because damages suffice. The question is whether [THE GOOD] is more like an ordinary chattel (replaceable) or land (unique). Damages are inadequate – and equity will grant specific performance – in respect of contracts for the sale of personalty where the shares/chattels are of peculiar or exceptional value and not readily available on the open market (*Dougan v Ley*).
 - **[numerically limited chattels]:** In *Dougan v Ley (1946) 71 CLR 142*, the HC ordered specific performance of a contract for the sale of a taxi licence and cab because the licence was made unique and irreplaceable by strict government controls on the number of licences issued. One could not simply go into the market and obtain an equivalent, giving it peculiar value and justifying equitable relief.
 - **[rarity/ beauty]:** Damages are inadequate in respect of contracts for the sale of chattels of unusual rarity of beauty (*Falcke v Gray*).
- [c] Contracts conferring benefit on a third party:
 - o Damages will be inadequate where A and B contract for B to confer a benefit on C, and B fails/refuses to do so (*Beswick; Coulls*). This is because damages for A would be nominal; A cannot recover damages for losses sustained by a third party to the contract (*Albacruz v Albarzera*).
 - **[Third party]:** In *Beswick v Beswick [1968] AC 58*, Peter Beswick transferred his business to his nephew John in return for John's promise to employ him during his life and pay his widow £5 per week thereafter. After Peter's death, John defaulted. The House of Lords held that Mrs Beswick could not sue in her personal capacity (due to privity – she wasn't a party to the agreement, so she couldn't enforce it personally) but could enforce the promise as administratrix of Peter's estate. The Court ordered **specific performance**, as damages would have been inadequate: the estate had no substantial interest in damages, and only performance could ensure the widow received her annuity.

- The principle is that equity may grant specific performance to prevent injustice, particularly where third-party beneficiaries would otherwise be left without a remedy.
- **[Joint promisees]:** In *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460, Mr Coulls contracted with O'Neil Constructions for quarrying rights, with royalties expressed as payable to him and his wife Doris. After his death, the High Court held (majority) that royalties were payable only to the estate; they had not been properly assigned to Mrs Coulls. However, Barwick CJ (in the minority, but with the majority agreeing with his reasoning) held that in circumstances where a promise is made to joint promisees, either can enforce the contract even though consideration only moved from one.
 - As Doris was a joint promisee, even if only Mr Coulls provided consideration, O'Neil's promise was to both, making it enforceable by either. **The principle:** where a promise is made to joint promisees, one may enforce even without providing consideration, but absent such status, third parties cannot enforce due to privity.

[3] If damages are inadequate, are there any discretionary reasons against granting specific performance?

- [a] Supervision:
 - If the obligations are not sufficiently precisely defined, the court will not make an order of specific performance, as it would require court supervision (*Tito v Wardell* per Megarry VC)
 - Landlord's obligation to provide a porter to a building was not specifically enforced as actual responsibilities and duties of porter too imprecisely defined & liable to change from day-to-day (*Ryan v Mutual Tontine*)
 - Cf obligation to maintain central heating system & remove rubbish: sufficiently precise to order specific performance (*Posner v Scott-Lewis*)
 - Where the obligations concern the ongoing performance of specific activities, as opposed to an obligation to achieve a result, specific performance is unlikely to be ordered (*Argyll Stores*)
 - This is because if SP were ordered, there would be a constant threat of contempt hanging over the party
 - Thus order to require party to continue to perform lease until new tenant found not made (*Argyll*)
 - In *Co-operative Insurance v Argyll Stores* [1998] AC 1, the House of Lords refused to order specific performance of a lease covenant requiring Argyll to keep its supermarket open. CIS argued closure would harm other tenants, but the court held that such an order would demand constant judicial supervision and could only be enforced through contempt proceedings. Lord Hoffmann stressed that this would be oppressive to the defendant and costly to the legal system. The case illustrates that specific performance is discretionary and will not be granted for ongoing obligations requiring supervision, with damages being the appropriate remedy.
- [b] Contracts for personal services:
 - Contracts for personal services will generally not be enforced due to the risk of imperfections in performance (*Lumley v Wagner*).
 - Though contracts for employment concerning large-scale corporations where it is the employee seeking to enforce the contract *may* be specifically performed (*Turner v Australasian Coal; Tradition Australia v Gunson*)

