

## REMEDIAL EQUITY

### Specific Performance

1. Are the jurisdictional factors satisfied?
  - 1.1. Is the contract for valuable consideration?
  - 1.2. Are damages inadequate?
    - 1.2.1. Damages are usually inadequate if the item is rare, or of specific commercial value (*Dougan v Ley*)
    - 1.2.2. Damages often inadequate if contract is for the benefit of a third party (*Coulls v Bagot's*)
2. Are there any discretionary grounds to refuse relief?
  - 2.1. Supervision
    - 2.1.1. Obligations of an ongoing nature are generally not specifically performable (*Co-Operative Inns v Argyll Stores*)
    - 2.1.2. However N.B this is only a discretionary factor (obiter in *Patrick Stevedoring*)
  - 2.2. Personal Services Contracts
    - 2.2.1. Courts tend not to award specific performance for personal service contracts (*GH Giles v Morris*)
  - 2.3. Lack of Mutuality (*Lumley v Ravenscroft*)
  - 2.4. Hardship
    - 2.4.1. Balanced against hardship to plaintiff if no relief is ordered (*Dowsett v Reid*)

### Injunctions

1. Is there a legal or equitable right to protect? (*Cowell v Rosehill Racecourse*)
2. What kind of injunction is being sought?
  - 2.1. Mandatory Restorative (*Redland Bricks*)
    - 2.1.1. Is there a strong probability that grave damage will accrue to the plaintiff in the future?
    - 2.1.2. Are damages inadequate?
    - 2.1.3. Has the defendant acted wantonly or unreasonably?
    - 2.1.4. Balance of convenience to both parties
  - 2.2. Interlocutory
    - 2.2.1. Is there a prima facie case? (*Beecham v Bristol Laboratories*)
    - 2.2.2. Consider balance of convenience (*Beecham v Bristol Laboratories*)
    - 2.2.3. Is there an overriding public interest in not awarding an injunction (*ABC v O'Neill*)
  - 2.3. Quia Timet
    - 2.3.1. Is there an imminent and real infringement of rights?
    - 2.3.2. Is the higher threshold for the balance of convenience met? (*Redland Bricks*)
  - 2.4. Freezing/Mareva (*Glenwood Management v Mayo*)
    - 2.4.1. Is there a strong arguable case?

- 2.4.2. Is there a risk of dissipation of assets?
- 2.4.3. Look at the balance of convenience, including whether proceedings had been brought expeditiously (*Cardile v LED Builders*)
- 2.5. Search/Anton Pillar (*Anton Pillar*)
  - 2.5.1. Is there a strong potential case?
  - 2.5.2. Is there strong potential damage?
  - 2.5.3. Is there clear evidence both of possession and of risk of destruction?

## Equitable Damages

1. Cases where equitable damages may be available
  - 1.1. In lieu of specific performance (*Johnson v Agnew*)
  - 1.2. In lieu of an injunction (*Shelfer v London Electric Lighting*)
    - 1.2.1. Where injury to plaintiff's rights is small and capable of being assessed in money
    - 1.2.2. Would be oppressive to grant an injunction
  - 1.3. Other cases where common law damages wouldn't be appropriate
  - 1.4. Breaches of purely equitable rights?
    - 1.4.1. Query this. Refer to *Giller v Procopets*, obiter in *Wentworth*
2. Assessment of damages
  - 2.1. Flexibility in approach—may be restorative or may follow the common law (*Wroth v Tyler*)
  - 2.2. Normally restorative when issued in lieu of specific performance (*Wroth v Tyler*)

## THE NATURE AND CONSTRUCTION OF TRUSTS

1. Certainty of intention?
  - 1.1. This is an objective test (*Byrnes v Kendle*)
  - 1.2. Is there an intention to create a trust or another legal relationship?
    - 1.2.1. Where a gift with a condition precedent, is presumed to be a gift (*Re Gardiner*)
    - 1.2.2. Gifts can create equities in personam (*Gill v Gill*)
  - 1.3. The word trust doesn't have to be used, but it helps (*Associated Alloys*)
2. Certainty of Subject Matter?
  - 2.1. Property covered must be certain, or able to be made certain (*Re Golay*)
  - 2.2. A trust over a bulk or sum not sufficient, unless is capable of being made certain by being of the same value (*White v Shortall*)
3. Certainty of objects
  - 3.1. Fixed trusts require list certainty (*Re Gulbenkian*)
    - 3.1.1. Mere difficulty is no bar (*Re Gulbenkian*)
  - 3.2. Discretionary trusts require criteria certainty (*McPhail v Doulton*)
4. Does it satisfy the beneficiary principle?
  - 4.1. Purpose trusts generally not valid (*Morice v Bishop of Durham*)
  - 4.2. Is it for the benefit of an unincorporated association?
    - 4.2.1. Valid if actually for the benefit of current and future members (*Bacon v Pianta; Neville Estates v Madden*)
  - 4.3. Is it a charitable trust?
    - 4.3.1. Does it fall under one of the *Pemsell* heads?
    - 4.3.2. Is it for the public benefit?
    - 4.3.3. Is it a mixed purpose trust?
    - 4.3.4. If it fails, can it be saved by cy pres?

## OPERATION OF EXPRESS TRUSTS

### Duties, Powers, Rights and Liabilities of Trustees

1. Trustee's Duties
  - 1.1. Duty to learn and obey the terms of the trust
    - 1.1.1. Strict duty—court will not permit a deviation even if it would improve the trust's performance (*Chapman v Chapman*)
    - 1.1.2. But discretion to allow sale of trust property where would otherwise fall into disrepair or cease to exist (*Perpetual Trustees v Godsall*)
  - 1.2. Duty to keep accounts and give information
    - 1.2.1. Previously came from proprietary rights of beneficiaries in the trust (*Re Londonderry*)
    - 1.2.2. Now comes from court's supervisory jurisdiction (*Schmidt v Rosewood*)
  - 1.3. Duty to exercise due care and skill
    - 1.3.1. Standard is of an ordinary, prudent person of business (*Re Speight*)
  - 1.4. Duty to exercise power of investment in the best interest of future and present beneficiaries
    - 1.4.1. This means financial performance, not ethical investments (*Cowan v Scargill*)
    - 1.4.2. Unless this would be anathema to the trust (*Harries v Church Commissioners for England*)
2. Trustee's Rights and Liabilities
  - 2.1. Right to use trust funds to secure personal liability
    - 2.1.1. Was the liability a legitimate trust expense? (*Re Raybould*)
    - 2.1.2. If the trust funds are used up, the beneficiary may be liable for the trust expense (*Hardoon v Belilos*)
  - 2.2. Beneficiary's right of falsification
    - 2.2.1. Beneficiary is entitled to falsify any transaction in breach of trust
    - 2.2.2. The trustee must restore the trust, even if this means paying more than was lost (*Re Dawson*)
    - 2.2.3. Common law principles of causation, remoteness, not relevant (*Youyang v Minter Ellison*)
      - 2.2.3.1. However N.B in England they are (*Target Holdings v Redfern*)
    - 2.2.4. The court may relieve the trustee where it would be just to do so, and they acted honestly (s85 *Trustee Act*)

### Rights of Beneficiaries

1. In order to terminate the trust, the beneficiaries must be (*Saunders v Vautier*)
  - 1.1. Adult
  - 1.2. Acting Together
  - 1.3. Absolutely and indefeasibly entitled
2. One beneficiary can take their own interests out, if doesn't result in detriment to other beneficiaries (*Manfred v Maddrell*)

## FIDUCIARY OBLIGATIONS

1. Is there a fiduciary relationship?
  - 1.1. Classic categories of fiduciary relationships
    - 1.1.1. Trustee/Beneficiary
    - 1.1.2. Agent/Principal
    - 1.1.3. Solicitor/Client
    - 1.1.4. Director/Company
    - 1.1.5. Partner/Partner
  - 1.2. Expanded categories of fiduciary relationships
    - 1.2.1. Civil servant/Crown? (*AG for HK v Reid*)
    - 1.2.2. Doctor/Patient? Probably not (*Breen v Williams*)
    - 1.2.3. Close commercial relationships generally don't lead to a fiduciary relationship (*Hospital Products v US Surgical Corporation*)
      - 1.2.3.1. But a fiduciary duty may be owed to potential partnerships, before the partnership is finalised (*UDC v Brian*)
2. Is there a breach of fiduciary duty?
  - 2.1. Is there a conflict or potential conflict (*Chan v Zacharia*)
  - 2.2. Has the fiduciary relationship has been used to make a gain? (*Chan v Zacharia*)
    - 2.2.1. Even if this doesn't result in a loss (*Chan v Zacharia*)
    - 2.2.2. Even where the opportunity for the gain has been turned down by the beneficiary (*Boardman v Phipps*)
3. Are any defences available?
  - 3.1. Has there been fully informed consent (*Boardman v Phipps*)?
  - 3.2. The conflict must be fully explained—level of explanation depends on parties' circumstances, business acumen etc. (*Maguire v Makaronis*)
4. What remedies may be available?
  - 4.1. Rescission
    - 4.1.1. Parties are put back into original position—which means beneficiaries must return any gain as well (*Maguire v Makaronis*)
  - 4.2. Account of profits
  - 4.3. Constructive trust (*Boardman v Phipps*)
  - 4.4. Equitable compensation to recover loss (*Nocton v Lord Ashburton*)