

# Remedies

- **First Ask what the client want.**

- **TYPES**

- **Declaration:**

- Authoritative statement as to the rights and obligations of the parties to the litigation.
- Prevent dispute
- 25(6) Supreme Court Act: Rules of law upon certain points.
  - No action shall be open to objection on the ground that a merely declaratory judgment is sought thereby, and it shall be lawful for the Court to make binding declarations of right without granting consequential relief.
- Quick and inexpensive.
- Useful in:
  - Ascertaining proprietary rights and interests;
  - Construction of documents legislation etc.
- May be used in a pre-emptive way.

- ★ ◦ **Monetary Compensation; OR**

- **Equitable compensation;** and
  - Award compensation for financial loss suffered as a result of a *purely equitable duty*.
  - **Aim:** place parties in a position as *nearly* as possible to that in which they would be if there had been no breach.
  - **Discretionary** – not available as of right;
  - **Full benefit of hindsight:** Judged at the date of trial not at the date of breach;
  - A '**causal link**' requirement: 'but for' + *March v Stramare* 'common sense';
  - The foreseeability, remoteness, and the requirement to mitigate **do not apply**;
  - Defences of contributory negligence and voluntary assumption of risk **do not apply**;
  - **No equivalent to 'exemplary damages'** – 'equity and punishment are strangers'.
  - **When to use:** F obligation and breach of confident
  - Examples:
    - ◆ *Nocton v Lord Ashburton* (lawyer [N] advise L to sell the mtg property for own benefit) where solicitor had to compensate client for damage caused pursuant to the fiduciary's conflict of interest.
    - ◆ *McKenzie v McDonald*: where real estate agent purchased his client's farm in breach of fiduciary duty, but the conveyance could not be rescinded.
    - ◆ *Commonwealth Bank v Smith* (Couple want to buy pub and manager advice to buy property of their client): The bank manager was held to have acted as the customer's investment adviser.
- **Damages in E:** Calculated the same way as CL damages; put the parties in *exactly* the same position they would've been if not for breach.
  - **When to use**
    - ◆ Est.
    - ◆ UI/UD
    - ◆ WSE
  - Damages + Special Performance or injunction
    - ◆ **Additional:** When special remedy sought will not fully compensate the P
    - ◆ **Substitution:** Equitable damages are discretionary.
      - ◇ **Guideline** [*Shelfer v City of London Electric Lighting Co* ; *Smith LJ*]
        - ▶ Where the damages to P's rights was small.
        - ▶ The injury is capable of being estimated in money.
        - ▶ The injury is capable of being compensated by a small monetary payout.
        - ▶ In the circumstances, it would be oppressive to grant an injunction against D.

- ★ ◦ **Account of Profits**

- Othersider made a profit from the breach.
- ▶ **Only profit that flow from the breach.**
  - Onus on D to prove that Profit didn't flow from the breach
- **Irrelevant that:**
  - P had or hasn't suffered lost;
  - P could've never made any profit or P did make profit the breach [*Broadman v Phipps: Company in problem, so buy company and sold assist to make profit*] or P made more profit than D from breach.
    - ◆ Focus on D's profit
  - D's motive or state of mind aren't dishonest [*Broadman v Phipps*]
- ▶ **Can't take ALL the money made by D due to breach . ONLY take profit so total \$ - (cost + expenses)**

- ★ ◦ **Rescission**

- **Total:** Setting aside all of the K [*Amadio: Setting aside guarantee*]
- **Partial:** Setting aside part of K while leaving the remainder valid and enforceable. [*Vadasz v Pioneer Conerete*]

- ★ ○ **Delivery Up and Cancellation** - relevant whenever rescission is relevant.
  - Where a doc is void or voidable.
  - Not ordered if the invalidity is apparent on the face of the document.
  
- **Rectification**
- **Specific Remedies**
  - ***Specific Performance***
    - Relates to K; and
    - Where damages not be good remedy.
  - ***Specific Restitution of Chattels***
    - Like SP, but overlay Tort.
    - Where someone detained someone's goods. And want the good back
- ★ ○ **Injunction**
  - Retained from doing something or compelling them to do something.
  - S25(9) Supreme Court Act: have to prove that the it will be Just and covenant to grant the injunction.
  - Types
    - ◆ Mandatory: Compelling them to do something.
    - ◆ Prohibitory: Stopping someone from doing something
    - ◆ Interlocutory: granted immediately before the trail; something that can't be resolved by damages.
      - ◇ PS: if granted until particular date, called an *interim* injunction.
      - ★ ◇ Prove [*Aus Broadcasting Corporation v O'Neill*]
        - ▶ Serious Q to be tried [*American Cyanamid v Ethicon*]; and
          - P made out prima facie case, so that if the evidence remained the same, there is a possibility that at the trial P would be held to be entitled to the relief sought.
        - ▶ Balance of covenant is on your side
          - More harm to be done if they don't grant the injunction.
      - ◇ Takes into account:
        - ▶ Adequacy of other remedies (eg that damages would be an adequate damages).
        - ▶ The conduct of both parties.
        - ▶ Hardship to both sides and to third parties.
        - ▶ Public interest (if relevant).
        - ▶ Overall justice of the case.
  - ◆ Final/perpetual: an injunction get after the trail.
  - ◆ Ex parte: injunction granted w/out giving prior notice to D
    - ◇ Granted when there is a risk the D will simply take steps to avoid the court's order.
    - ◇ Notice is given one the injunction is granted.