

**EQUITY AND TRUSTS  
SUMMARY  
2010**



**LAWSKOOL.COM.AU**

**LAWSKOOL PTY LTD**

# CONTENTS

<b>01 SPECIFIC PERFORMANCE</b>	<b>6</b>
1.1 DEFINITIONS AND ISSUES	6
1.2 JURISDICTION TO MAKE THE ORDER	6
1.2.1 <i>Is there a legally enforceable agreement between the parties?</i>	6
1.2.2 <i>Are damages at common law an inadequate remedy?</i>	6
1.3 DISCRETIONARY FACTORS	8
1.3.1 <i>Detailed Supervision</i>	8
1.3.2 <i>Mutuality</i>	8
1.3.3 <i>Hardship</i>	9
1.3.4 <i>'Ready and Willing'</i>	9
1.3.5 <i>Other Factors</i>	10
<b>02 INJUNCTIONS</b>	<b>10</b>
2.1 DEFINITION AND CLASSIFICATION	10
2.1.1 <i>Classification</i>	10
2.2 JURISDICTION	11
2.3 DISCRETION – FINAL INJUNCTIONS IN THE AUXILIARY JURISDICTION	12
2.3.1 <i>Is there a negative stipulation?</i>	12
2.3.2 <i>Will the court enforce the negative stipulation</i>	13
2.4 DISCRETION – INTERLOCUTORY INJUNCTIONS	15
2.4.1 <i>Is there a serious question to be tried?</i>	16
2.4.2 <i>Where does the balance of convenience lie?</i>	16
<b>03 LORD CAIRNS' ACT DAMAGES</b>	<b>18</b>
3.1 ISSUES AND BACKGROUND	18
3.1.1 <i>The Legislation</i>	19
3.2 WHEN WILL THE COURT HAVE POWER TO AWARD LCA DAMAGES?	19
3.3 WHEN WILL THE COURT DECIDE TO AWARD DAMAGES?	20
3.4 HOW ARE DAMAGES ASSESSED	22
3.4.1 <i>If common law and equity overlaps</i>	22
3.4.2 <i>If no common law rules apply</i>	22
<b>04 EQUITABLE ASSIGNMENT</b>	<b>24</b>
4.1 ISSUES AND BACKGROUND	24
4.1.1 <i>Unassignable Rights</i>	25
4.2 HOW ARE RIGHTS ASSIGNED?	26

4.2.1 <i>Is There Any Present Property?</i>	26
4.2.2 <i>Classifying the Right</i>	28
4.2.3 <i>Have the Rules Been Complied With?</i>	29
4.3 ASSIGNMENT AND LIMITATION PERIODS	33
<b>05 FIDUCIARY OBLIGATIONS</b>	<b>36</b>
5.1 WHAT AND WHY	36
5.2 IS THERE A FIDUCIARY RELATIONSHIP?	37
5.2.2 <i>Fact-based relationships</i>	42
5.3 WHAT IS THE SCOPE OF THE FIDUCIARY RELATIONSHIP?	45
5.4 HAS THE FIDUCIARY RELATIONSHI BEEN BREACHED?	46
5.4.1 <i>Breach</i>	46
5.4.2 <i>Defences</i>	47
5.5 WHAT REMEDIES ARE APPROPRIATE?	48
5.5.1 <i>Account of Profits</i>	48
5.5.2 <i>Constructive Trust</i>	49
5.5.3 <i>Equitable Compensation</i>	51
<b>06 EXPRESS TRUSTS</b>	<b>53</b>
6.1 DESCRIPTION AND CONCEPT	53
6.2 CERTAINTY OF INTENTION	54
6.2.1 <i>Ascertaining Intention: Language</i>	55
6.2.2 <i>Trusts vs other types of arrangements and legal relationship</i>	57
6.3 CERTAINTY OF SUBJECT MATTER	62
6.4 CERTAINTY OF OBJECTS	63
6.4.1 <i>Test of certainty for fixed trusts</i>	64
6.4.2 <i>Test of certainty for discretionary trusts</i>	65
6.4.3 <i>Unincorporated associations</i>	68
6.4.4 <i>Purpose trusts &amp; charitable purposes</i>	71
6.5 FORMALITIES AND LEGISLATIVE REQUIREMENTS	74
6.6 ILLEGALITY	75
6.4.3 <i>Purpose trusts &amp; charitable purposes</i>	75
6.4.3 <i>Purpose trusts &amp; charitable purposes</i>	77
<b>07 ADMINISTRATION OF TRUSTS</b>	<b>78</b>
7.1. TYPES OF TRUSTEES, APPOINTMENT AND REMOVAL	78
7.2 POWERS, DUTIES AND RIGHTS OF TRUSTEES	80
7.2.1 <i>Powers</i>	80
7.2.2 <i>Challenging an exercise of discretion</i>	81

7.2.3 Trustees' duties	81
7.2.4 Trustees' rights	83
7.3 TERMINATION OF TRUSTS	84
<b>08 RESULTING TRUSTS</b>	<b>85</b>
6.4.3 Purpose trusts & charitable purposes	85
8.2 PURCHASE PRICE RESULTING TRUSTS	86
8.2.1 Is there a presumption of a resulting trust	87
8.2.2 Is the presumption rebutted?	88
8.2.3 Illegality and the presumption	90
<b>09 CONSTRUCTIVE TRUSTS</b>	<b>90</b>
9.1 INTRODUCTION AND THEORETICAL PERSPECTIVES	90
9.1.1 Institutional vs remedial constructive trusts	91
9.2 THE COMMON INTENTION CONSTRUCTIVE TRUST (ALLEN V SYDYER)	92
9.3 THE UNCONSCIONABILITY CONSTRUCTIVE TRUST (MUSCHINSKI; BAUMGARTNER)	93
9.4 TIMING OF THE CONSTRUCTIVE TRUST	98
<b>10 THIRD PARTY LIABILITY</b>	<b>99</b>
10.1 WHAT IS IT?	99
10.2 RECIPIENT LIABILITY	100
10.3 ACCESSORY LIABILITY	102
<b>11 REMEDIES FOR BREACH OF TRUST/FIDUCIARY DUTY</b>	<b>105</b>
11.1 OVERVIEW	105
11.2 REMEDIES FOR BREACH OF TRUST	106
11.2.1 A loss to the trust estate	107
11.2.2 A gain made in breach of trust	107
11.2.3 In relation to a third party	107
11.3 EQUITABLE COMPENSATION FOR BREACH OF TRUST	107
11.4 ACCOUNT OF PROFITS	109
11.5 DEFENCES/EXCLUSION OF LIABILITY	110
<b>12 TRACING</b>	<b>111</b>
12.1 INTRODUCTION	111
12.1.1. Some unhelpful dichotomies	111
12.2 TRACING RULES	112
12.2.1 Is there a pre-existing fiduciary relationship?	112
12.2.2 Can the property be identified	113
12.2.3 Has the property been given to a third party?	116

## 01 Specific Performance

### 1.1 Definitions and Issues

*'A decree of specific performance directs a party to a contract to perform her or his obligations under it according to its terms.'* (p940)

Part of equity's auxiliary jurisdiction: where equitable remedies supplement CL (e.g. contractual obligations)

Traditionally – primary remedy for breach of contract is **damages at common law**.

- 
- E.g. Holmes J in *Harvard LR* – a contract is an agreement either to perform its terms *or* pay damages.

*An order for SP will only be made if damages would be an inadequate form of compensation: McIntosh v Dalwood (No 4)*

- E.g. Windeyer J in *Coulls*, cited in *Wight v Haberdan*.

*Specific performance is a discretionary remedy, although discretionary factors are fairly settled. However P cannot get SP as a right.*

- 
- The penalty for not complying with an SP order is contempt of court – which is too serious to be used in many situations (*Argyll Stores*)

### 1.2 Jurisdiction to Make the Order

#### 1.2.1 Is there a legally enforceable agreement between the parties?

*Usually this is a valid and enforceable contract supported by consideration between the parties: Zucchiatti v Ferrara*

*However, the doctrine of part performance may be available in the absence of a contract.*

## 1.2.2 Are damages at common law an inadequate remedy?

*Depends on type of contract and the circumstances of the case – the relevant inquiry is whether justice will be done by leaving the plaintiff with only damages as a remedy (Wight v Haberdan Pty Ltd):*

- Sale of land – damages generally inadequate, even if purchased for investment (*Turner v Bladin*)

Traditionally: all land unique; now: costly/lengthy process of finding alternative land (*Waimor Holdings Ltd v Dean*).

Vendor is also entitled to SP (wants not only money but divestment of land)

But, a court will not automatically order SP for a contract for the sale of land – the applicant for SP must still show that damages would be an inadequate remedy in the circumstances

- Sale of goods – damages generally adequate unless goods are rare/unique (*Dougan v Ley*)

E.g. *Dougan* – taxi licence: limited number, difficult to obtain.

*Borg v Howlett (No 2)* – specific performance was ordered to enforce a contract for the purchase of a race horse, on the basis that damages would be too difficult to estimate given the inability to predict the horse's possible winnings

- To pay or lend money – finance agreements: damages generally adequate (*Loan Investments Corp*)

Loss easily assessable in monetary terms.

Exception – contracts for the sale of land (where purchaser will pay vendor money), depends on circumstances of case: where it is difficult to assess cost to plaintiff – *Wight v Haberdan*.

- Personal services – courts reluctant to order SP (*Giles v Morris*)

Futile to compel co-operation from a hostile party (amounts to personal servitude, which is against public policy)

Also – how would court assess adequacy of the performance?

If damages are inadequate – then will court exercise its discretion?

### **1.3 Discretionary Factors**

#### **1.3.1 Detailed Supervision**

Courts are unwilling to order SP if detailed supervision by the court would be required – *Argyll Stores*.

- Distinguish between (i) orders to carry on a business/activity (detailed supervision may be necessary) and (ii) orders to achieve a result (unlikely to require supervision).
- Can the terms of the order be precisely drawn – i.e. are D's expectations clear?
- Rationale: avoid potential for continuing disputes about compliance or meaning of order.

#### **1.3.2 Mutuality**

There must be mutuality before P can get SP. That is – although P is seeking the order, *switch places* and consider perspective of D – would D be likely to have received SP if it had tried to enforce the P's obligations?

- Equity will not compel SP by a D unless performance or compensation for any outstanding obligations of the P can be assured.
- i.e. (i) P must have already performed their obligations or (ii) D would be entitled to SP
- Where P has already performed – no issue of mutuality.
- This is judged at the date of the order – *Price v Strange*.
- Example: contract where one party is underage (can be unenforceable against the minor). Even if minor is enforcing the contract against the other party, no SP will be obtained because of lack of mutuality.

*Price v Strange* [1978]

- Facts: D had leased out a flat to P. Term of lease was that P would do certain repairs. P did internal repairs and was ready/willing to do external repairs.

However, D did not want P in the flat so repudiated contract and did external repairs herself.

- Issue: P sought SP, but D argued lack of mutuality (if D were to enforce contract against P, it could not be obtained – too much supervision).
- Held: D's argument was unsuccessful anyway, because repairs had already been done (P has already performed), therefore P was entitled to SP.

### 1.3.3 Hardship

An SP order would not be given if the order would lead to undue hardship suffered by D, judged at the time when the order would be given – *Longtom v Oberon Shire Council*.

- Consider position of D if they had to pay CL damages as opposed to performing the contract.

Hardship is difficult to establish: must be some **unconscionable bargaining or compassionate grounds**. An extreme situation – generally financial hardship alone is not sufficient.

- Unconscionability as applied from *Amadio* – one function of the doctrine is to *refuse* SP: i.e. where it would be unconscionable to enforce performance.

*Longtom v Oberon Shire Council* (1996)

- Facts: Council bought rural land from P, intended to use it for a gravel pit. Clear term that C would restore the land to its previous condition once gravel was extracted – a significant term. Later, C refused to restore land, arguing that cost is prohibitive (would become insolvent). However, not a problem for P, who could not see the gravel pit anyway.

Is it hardship where the only harm to the P is a failure to fulfil intentions of parties, with no further harm?

- Held (Young J): Unusual to allow hardship on purely financial grounds (but council's evidence about hardship was treated sceptically).
- Critique: If P could obtain CL damages, what harm did they suffer? Not much – only nominal damages would be received. But SP could allow negotiation of the

order, placing P in a more advantageous position (contrary to what Hoffman LJ was against in *Argyll* – cannot give an additional benefit to P).

### 1.3.4 'Ready and Willing'

The party seeking SP must be ready and willing to perform the contract – P cannot SP if they are themselves in breach (*he who seeks equity must do equity*).

- This relates to the substantive obligations under the contract.
- *Green v Sommerville* –

Facts: Contract for the sale of land, but parties were in dispute about an interest payment. P sought SP for the sale but D argued that vendor (P) was not ready and willing.

Held: Rejected D's argument – look at substance of contract. P was disputing the terms in good faith, it was not the case that they were not ready and willing.

### 1.3.5 Other Factors

Other discretionary factors include:

- Illegality – court will not order D to do something illegal (*Warrington v Miller*)
- Futility – SP will not be granted where it would be futile (*Hercy v Birch*)
- Impossibility – no SP if D cannot perform their obligations (*Wenham v Ella*)
- Mistake – may be grounds for ordering payment of damages instead (*Slee v Warke*)
- Delay – lengthy delay by P may defeat their claim to SP (*Lamshed v Lamshed*)

## 02 Injunctions

### 2.1 Definition and Classification

‘An order, historically of an equitable nature, restraining the person to whom it is directed from performing a specific act, or, [exceptionally], requiring him to perform a specified act.’ (Spry, Equitable Remedies)

Injunctions are **remedies** – not rights in themselves, therefore must show an existing right.

#### 2.1.1 Classification

1. Classification by the **time** at which order is made –

Final injunctions

After a full hearing of the matter (final resolution of a dispute)

Interlocutory/interim injunctions

Preserve status quo until full hearing, given on less evidence, often ex parte

Quia timet injunctions

‘Because s/he fears’ – prevent an apprehended wrong (no breach yet, injunction sought to prevent it happening)

2. Classification by the **form** of the order –

Prohibitory injunctions – prevent the doing of an act

Mandatory injunctions – order an act to be done

3. Classification by the **jurisdiction** of the court –

Exclusive jurisdiction

Show (threatened) infringement of an *equitable* right (e.g. breach of trust)

Auxiliary jurisdiction

In aid of CL rights: restrain infringement of a *legal* right (e.g. contract, tort: nuisance, trespass or defamation)

- NB common law injunctions do exist but are forgotten: practically irrelevant

Statutes may provide injunctive relief – e.g. *TPA*



**If you have any queries regarding the equity and trusts summary  
please email - [info@lawskool.com.au](mailto:info@lawskool.com.au)**

**SAMPLE ONLY**