

REMEDIES FOR BREACH 2 - EQUITABLE REMEDIES

INTRODUCTION

Sometimes the remedy of damages will be inadequate compensation to the victim of a breach of contract. For example, the plaintiff may have contracted to purchase a particular plot of land from the defendant for which compensation cannot provide a satisfactory equivalent in the event of the defendant's breach. Equity therefore developed a number of remedies, discretionary in nature, directed towards ensuring that a plaintiff was not unjustly treated by his being confined to the common law remedy of damages. Two such remedies will now be considered: specific performance and injunctions.

SPECIFIC PERFORMANCE

An order for specific performance will compel the addressee to fulfil the terms of a contract. These terms must be positive in nature, whereas negative stipulations are normally enforced by an injunction.

Any case concerning specific performance inevitably requires a consideration of three issues:

(1) DAMAGES INADEQUATE

If the plaintiff can show that damages are inadequate, then the court may grant his claim for specific performance. Damages will be inadequate in the following circumstances:

(i) Where the plaintiff cannot get a satisfactory substitute:

Nutbrown v Thornton (1804) 10 Ves 159

Cohen v Roche [1927] 1 KB 169.

(ii) Where the award of damages would be unfair to the plaintiff:

Beswick v Beswick [1968] AC 58.

(iii) Where the quantum of damages is difficult to assess.

(iv) Under s52 SGA 1979, the seller refuses to deliver 'specific or ascertained' goods.

(2) JUDICIAL DISCRETION

"Equity will only grant specific performance if, under all the circumstances, it is just and equitable to do so" (*Stickney v Keeble* [1915] AC 386). However, the exercise of this discretion is circumscribed by a number of well-known rules:

(i) There must be mutuality before specific performance is available. "The court does not grant specific performance unless it can give full relief to both parties" per Lord Cranworth LC in *Blackett v Bates* (1865) LR 1 Ch App 117.

(ii) Specific performance will not be ordered if it is impossible for the defendant to comply with the order, eg, in a contract for the sale of land not owned by the vendor as in *Watts v Spence* [1976] Ch 165.

(iii) Specific performance will be refused if the plaintiff has acted unfairly or dishonestly. The equitable principle is that the plaintiff must come to equity with clean hands. See:

Walters v Morgan (1861).

(iv) Specific performance will be refused if the plaintiff fails to perform a promise which induced the defendant to contract. See:

Lamare v Dixon (1873) LR 6 HL 414.

(v) Specific performance will be refused if it would cause severe hardship to the defendant. See:

Patel v Ali [1984] 1 All ER 978.

(3) TYPE OF CONTRACT

The final consideration is the type of contract as traditionally equity will not order specific performance of contracts involving personal service and building contracts.

(i) The court will not order specific performance of personal service contracts. Also note that s16 of the Trade Union and Labour Relations Act 1974 states that no court shall compel an employee to do any work by ordering specific performance of a contract of employment, or by restraining the breach of such contract by injunction.

An employer cannot be forced to employ somebody against his wishes, and the general rule is that the court will not order reengagement of an employee, but will instead award compensation. Note that an industrial tribunal can order reinstatement or re-engagement under the Employment Protection (Consolidation) Act 1978.

(ii) The court will not generally order specific performance of building contracts. The justification is that damages may be an adequate remedy as the plaintiff can engage another builder, the difficulty of continually supervising the building work and the building specifications are often too imprecise. However, for an exceptional case see:

Wolverhampton Corp v Emmons [1901] 1 KB 515.

The difficulty of a court's supervising continuous contractual duties may also prevent specific performance in a variety of other situations. For example, an agreement to provide a porter for a block of flats. Contrast the following cases:

Ryan v Mutual Tontine Assoc [1893] 1 Ch 116

Posner v Scott-Lewis [1987] 3 All ER 513.

The most recent case is the decision of the House of Lords in:

Co-Op Insurance v Argyll Stores [1997] 3 All ER 297.

(iii) Finally, if the contract is entire and cannot be severed, the court will not order specific performance of part of that contract, as in *Ryan v Mutual Tontine* (1893).

INJUNCTION

A court may be able to restrain a party from committing a breach of contract by injunction. There are three types of injunction:

- Interlocutory injunctions are designed to regulate the position of the parties pending a hearing.
- A prohibitory injunction orders a defendant not to do something in breach of contract.
- A mandatory injunction requires a defendant to reverse the effects of an existing breach.

With prohibitive injunctions, a court, in the exercise of its discretion, will not be influenced by the fact that the defendant's compliance with the injunction would be unduly onerous or that the breach would cause the plaintiff little prejudice. However, with mandatory injunctions, a court will apply the 'balance of convenience' test, refusing relief if the hardship caused to the defendant by compliance with the order outweighs the consequential advantages to the plaintiff.

The general rule is that an injunction will not be granted if the effect is to directly or indirectly compel the defendant to do acts for which the plaintiff could not have specific performance. For example, to require performance of a contract for personal services. See:

Page One Records v Britton [1968] 1 WLR 157.

However, there are some important exceptions to this rule:

(i) A service contract may contain negative obligations which can be enforced by injunction without compelling positive performance of the whole contract. See:

Lumley v Wagner (1852)

(ii) A negative stipulation which is too wide can be severed and enforced in part. See:

Warner Bros v Nelson [1937] 1 KB 209.

DAMAGES IN LIEU

Damages were originally only available at common law. However, s2 of the Chancery Amendment Act 1858 (Lord Cairns Act), gave the Court of Chancery a discretion to award damages in lieu of, or in addition to specific performance provided the contract is of a type that is specifically enforceable.

This power is now contained in s50 of the Supreme Court Act 1981. Where the Court of Appeal or High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.

For an example of damages being awarded in addition to specific performance, see:

Grant v Dawkins [1973] 1 WLR 1406.