

REMEDIES IN COMMERCIAL LITIGATION

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Introduction

- 1 As trite as it may sound, any practitioner who comes before the court seeking relief on either an interlocutory or final basis must know exactly the remedy that they seek and whether it is available. It is not the court's role to ascertain which remedy it is that the plaintiff wants, nor to present the facts in such a way as to be satisfied that the case warrants that relief. Many of the remedies in equity are mutually exclusive and many require the party seeking the relief to offer its own undertaking or make clear its good faith. This last point is particularly true for parties seeking interlocutory relief, to which I will turn in a moment.

- 2 I propose today to confine my address to a few specific topics. I intend only to address remedies commonly sought in the Equity Division of the Supreme Court of New South Wales, more particularly, those arising in the Commercial and Technology and Construction lists, where I am one of three judges assigned to hear disputes on a fulltime basis. I will not discuss all of the remedies available in the Equity Division – many are beyond the scope of this discussion. Restitution, for example, deserves an address on its own. Similarly, I will not address remedies available under the now Australian Consumer Law, except to note that many of those remedies are similar to remedies in equity. I propose to touch on

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interlocutory relief, specific performance, account of profits and equitable compensation. I will also make some comments on the use of the constructive trust, and (if time permits) other proprietary remedies. Each of those remedies relies on the exercise of judicial discretion – I will offer some observations on that discretion and what it requires of a judge.

Interlocutory relief

- 3 Interlocutory orders are those sought not at final hearing, but at a point along the passage of a particular matter through the courts. Interlocutory hearings usually carry some urgency. In approaching the court for interlocutory relief, it is important to remember that equity has a wide discretion to grant relief in a way that will assist the parties. While flexible, this approach also means that parties have an obligation to make clear the relief that they seek and to disclose all material facts to the court. I will now turn to some of the major types of interlocutory relief sought in New South Wales. The most common perhaps are interlocutory injunctions.

Injunctions

- 4 Injunctions come in several forms. Most often, an injunction (often called a prohibitory or negative injunction) is ordered to restrain or prohibit a party from doing a certain thing, such as, for example, to restrain a publishing house from publishing a book, or to restrain the publication of confidential information. A freezing order is specific type of prohibitory injunction – it restrains a party from disposing of certain assets or from removing them from the jurisdiction. Injunctions can also be of a mandatory nature: to compel a party to do a particular thing, for example to remove an encroachment from neighbouring land. It is unusual for a mandatory injunction to be granted on an interlocutory basis, as this will often have the effect of a final decision. However, a search order, a specific type of mandatory injunction which compels a party to give access to certain documents or records, is of its nature interlocutory.

- 5 If a final injunction is sought relating to a matter within equity's exclusive jurisdiction, it is up to the plaintiff to satisfy the court both that it has an equitable cause of action and that the court should exercise its discretion and grant the injunction. If an injunction is sought relating to a matter in equity's auxiliary jurisdiction (that is, a matter affecting common law or statutory rights) then the plaintiff must show that it has a cause of action, that damages would be an inadequate remedy and that the court should exercise its discretion and grant the injunction.
- 6 Where the injunction sought is interlocutory, other matters must be satisfied. The court considers the consequences of granting interlocutory relief, and seeks to balance them against the consequences of refusing it. For an interlocutory injunction to be granted, the applicant must show:
- (a) that there is a serious question to be tried;
 - (b) that there is a likelihood of injury for which damages is not an appropriate remedy;
 - (c) that the balance of convenience is in favour of the grant of the injunction; and
 - (d) it can give an effective undertaking as to damages.
- 7 What is a "serious question to be tried" is not susceptible of determination by some fixed formula. As I have said already, the court must take into account both the consequences (to the restrained party) of granting relief and the consequences (to the applicant) of refusing it. In circumstances where the effect of granting relief on an interlocutory basis is finally to decide the dispute between the parties, the court would normally not grant relief: at least, unless satisfied that the plaintiff was almost certain to succeed on a final hearing. Usually, an expedited hearing is the best way to deal with such cases. For a recent and clear exposition of the way in which the "serious question to be tried" is assessed, see the judgment of Gummow and Hayne JJ in *Australian Broadcasting Corporation v O'Neill*

(2006) 227 CLR 57 at [65] and following and my analysis of that decision in *Ozefax v Telco Edge* [2013] NSWSC 1506 at [25] - [27] and *Gana Holdings v Renshaw* [2013] NSWSC 381 at [40] – [41].

Receivers

- 8 Where parties are in dispute over the ownership of, or entitlement to profits from, property that is in the hands of one of them (a situation that frequently arises in partnership disputes), the court is often called upon to consider the way in which the benefit of the property, or the proceeds, should be protected whilst the dispute is fought to a conclusion. Sometimes, it will be sufficient to leave the property where it is, on the basis that the court can be satisfied that it will be properly cared for, or that there will be proper accounts kept of the revenues derived. On occasion, it may be appropriate to make it a condition of relief (or refusing relief) that the person having charge of the property bank the revenues into a controlled account.

- 9 Where the parties are totally distrusting of each other, or where there is real reason to fear that the property may not be properly cared for or the revenues may be dissipated, the court may, as an alternative, appoint a receiver. The effect of this is to take the property out of the hands of the parties and to keep it in the custody of someone who will, for remuneration, take good care of it.

- 10 There are advantages and disadvantages involved. The advantage is that the warring parties are separated from the subject of their battle, so that it can be preserved for the ultimate victor. The disadvantage is that the receiver will charge handsome fees for his or her receivership. Further, if the property is a business (or assets of a business), there is at least a risk that the business will not be run as effectively by the receiver as it might have been by the parties.

- 11 In general, the considerations to be taken into account in deciding whether to appoint a receiver on an interlocutory basis are very similar to those considered in deciding whether to grant or refuse interlocutory injunctive relief.

Points for practice

- 12 As I mentioned earlier, with the court's wide discretion to award equitable relief comes an increased reliance by the court on the parties to provide all relevant information and to act in good faith. The remedies available in the equity jurisdiction can cause significant commercial implications for the party affected restrained and as a result, the party seeking the relief must be prepared to assist the court. Practitioners seeking interlocutory relief ought to keep a number of points in mind:

- (a) move quickly, or the relief you seek may be futile and in any event the court may refuse to give it;
- (b) have explicit written instructions to give the usual undertakings as to filing fees and damages; and
- (c) be alive to the possibility that your client may be asked to give security for costs, or for the undertaking as to damages, and explain to them the possible implications.

Declarations of right

- 13 The power to grant declarations of right is extremely useful. The jurisdiction was originally statutory, not part of the traditional body of equitable practice. A declaration may be granted as to the proper construction of a contract (or term of a contract), or as to entitlement to property or its revenues. The jurisdiction is broad, and the only real fetter on its exercise is that the declaration should relate to a real and existing controversy, and not to some merely hypothetical or theoretical question.

- 14 Because the declaration is not a traditional equitable remedy, it is not attended by the usual discretionary considerations. Once it is shown that the grant of declaratory relief is justified, and will quell a real and existing controversy, there is no real residual discretion left to refuse to grant the relief. See, generally, *Bass v Permanent Trustee Company Limited* (1999) 198 CLR 334 at [43] and following.
- 15 It follows, from the nature of the remedy and the constraints on its grant, that it will rarely be used on an interlocutory basis. Indeed, off the top of my head, I am unable to think of circumstances where one might grant an interlocutory declaration. (Of course, if parties agree that certain questions should be decided separately from and before other issues in the proceedings – UCPR r 28.2 – the court may, as a consequence of deciding the separate question, embody the outcome in a declaration of right. Such a decision is, strictly speaking, “interlocutory” – because it is not final – but it is distinct to the types of interlocutory hearing that I have been discussing earlier.)

Specific Performance

- 16 An order for specific performance is a discretionary remedy that has the effect of directing a party to an agreement to perform its obligations under the agreement according to its terms. Dixon CJ explained the remedy of specific performance in *J C Williamson Ltd v Lukey & Mullholland* (1931) 45 CLR 282 at 297:

Specific performance, in the proper sense, is a remedy to compel the execution in specie of a contract which requires some definite thing to be done before the transaction is complete and the parties' rights are settled and defined in the manner intended. Moreover, the remedy is not available unless complete relief can be given, and the contract carried into full and final execution so that the parties are put in the relation contemplated by their agreement.

- 17 When the court is faced with an application for specific performance, it will look to whether there is a binding agreement on foot between the parties;

whether the defendant has breached or threatens to breach that agreement; and whether common law damages would be an adequate remedy for the breach. However, satisfaction of these factors is not the end of the enquiry. As I mentioned earlier, specific performance is a discretionary remedy. Even if the preliminary questions just mentioned are answered in the affirmative, the court may still refuse to grant relief on the basis of some discretionary consideration.

- 18 The discretion of the court is broad. For example, the remedy may be refused where to grant it would have an adverse effect on the rights of third parties. The court is also likely to deny specific performance in circumstances where the defendant is entitled to rescind the contract, for example, where the contract has been entered into by mistake, or as a result of undue influence or unfair conduct on the part of the plaintiff. An analysis of some of the cases is a useful way to illustrate how the court has historically exercised its discretion.

The court's discretion

- 19 The starting point for exercise of any form of equitable relief, is the familiar equitable maxim that a party seeking equity must also do equity. In the context of specific performance, this means that the court will likely be unwilling to award relief where the plaintiff itself is in breach of contract, or where it is not ready and willing to perform.
- 20 This was one of the many problems that prevented me from granting the relief sought in a case I heard two years ago called *Sugar Australia Ltd v Conneq* [2011] NSWSC 805. That was a case where the plaintiff, as principal, had entered into a contract with the defendant, as contractor, for the defendant to design and construct an upgrade of the plaintiff's sugar refinery in Victoria. However, the plaintiff was in breach of the contract and had not acceded to the defendant's attempts (by use of the dispute resolution processes in the contract) to compel the plaintiff to remedy its

breaches. As a result, the defendant had sought to terminate the contract. The plaintiff brought the application to restrain the defendant from doing so. The plaintiff sought specific performance to compel the defendant to proceed.

- 21 Specific performance may be refused if the decree would require the performance of personal services or force the maintenance of personal relationships. The rationale behind this position is that it is not in the interests of the court to compel continuing co-operation between two hostile parties.
- 22 In a similar vein, the court is unlikely to compel ongoing co-operation between commercial parties in circumstances where, to ensure the proper performance of the agreement, the court would be required to continually supervise performance. Building contracts are one such area where the courts are unlikely to order specific performance because of the continual supervision required, although there are exceptions. One exception is, as the authors of *Meagher, Gummow and Lehane* (referring to what Romer LJ had said in *Wolverhampton Corporation v Emmons* [1901] 1 KB 515 at 524–525) accept, that specific performance may be granted if among other things, the work was so clearly and particularly defined that the court could sufficiently see what is its exact nature. In *Crouch Developments Pty Ltd v D&M (Aust) Pty Ltd* [2008] WASC 151 at [21] - [23], Martin CJ said that the court would only be justified in granting relief in such cases by way of interlocutory injunction and even then only in "exceptional circumstances" where "the plaintiff had made out a very strong case indeed; a case in respect of which the court could have a high degree of satisfaction that it would ultimately succeed at trial". I accepted these comments in *Sugar Australia Ltd v Conneq* [2011] NSWSC 805, where I said that at least at the level of general application, the courts are unwilling to order specific performance of a building contract and will do so only in extraordinary circumstances.

23 Specific performance should not be sought unless the plaintiff seeks to have the whole contract enforced. Clarke JA stated the general rule, in *Bridge Wholesale Acceptance Corp (Australia) Ltd v Burnard* (1992) 27 NSWLR 415 as, that “an order for specific performance is an order that the whole of the contract, not individual obligations under it, be carried into effect.”¹ In that case, however, the general rule did not apply. That was a case where the contract the subject of the dispute had already been partially executed and the appellant sought to have the respondent carry out one key remaining aspect of the bargain. The fact that specific performance was sought of part only of the contract was another reason that the application put in *Sugar Australia Ltd v Conneq* [2011] NSWSC 805 could not succeed.

Equitable Compensation and Account of Profits

24 Equitable compensation and account of profits are among the range of remedies available for breaches of equitable obligations. The clearest examples of situations in which those remedies may be available are breaches of fiduciary duty (of which, of course, breaches of trust are the paradigm example).

25 Equitable compensation looks to the plaintiff's loss and seeks to make it good. By contrast, account of profits looks to the defendant's gain. Equitable compensation, much like its common law equivalent, requires that the plaintiff has suffered some damage as a result of the defendant's conduct. An order for account of profits on the other hand is a restitutionary remedy and does not require that the plaintiff has suffered loss as a result of the defendant's conduct. It is particularly important for practitioners to understand that these remedies are alternatives and that the plaintiff must elect which remedy he or she proposes to pursue before final judgment. Each can be sought, in the alternative, so that the election can be made with a full appreciation of the likely outcomes.

¹ *Bridge Wholesale Acceptance Corp (Australia) Ltd v Burnard* (1992) 27 NSWLR 415 at 423-424.

Account of Profits

- 26 It is not necessary, for the court to order an account of profits, that the plaintiff should have suffered loss. The basis for making the order is that the accounting party has made a profit which, as between it and the plaintiff, it may not in conscience retain.
- 27 An order for account of profits requires a defendant to account to the plaintiff for profits made out of its wrong. The account is taken under supervision of the court. The 'wrongs' that might warrant the order have not been stated exhaustively, but commonly include breach of trust and breach of fiduciary duty. An order for account of profits is often given in respect of infringement of intellectual property rights.

Equitable Compensation

- 28 An order for equitable compensation may be made where loss has been suffered by the plaintiff as a result of an equitable wrong committed by a defendant. Equitable compensation has often been awarded in cases of breach of trust or breach of fiduciary duty where the plaintiff has suffered actual loss as a result of the trustee/fiduciary's breach.
- 29 It is important to note that, although the remedy of 'compensation' has parallels with the common law remedy of damages, there are some notable differences between common law damages and equitable compensation. One of those is the concept of causation. Equitable compensation is not subject to the same tests of remoteness as the common law. So much was said by Spigelman CJ in *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262, where his Honour said that to qualify for equitable compensation, there need only be a:

...sufficient connection, irrespective of the identification of a separate and concurrent cause, when the loss would not have occurred if there had been no breach of duty²

Damages in Equity

30 Traditionally, the remedy of damages was unknown to equity. Equity granted monetary relief through equitable compensation or account of profits. However, by what is often referred to as Lord Cairns' Act (21 & 22 Vict c 27), courts of equity were given the power to order damages in lieu of or in addition to the grant of specific performance or injunction. That jurisdiction survives in s 68 of the *Supreme Court Act* 1970 (NSW). It is important to note that damages in equity are confined to the circumstances set out in s 68 of the *Supreme Court Act*.

The Constructive Trust

31 So far, I have looked at monetary remedies for breaches of equitable duties. But in appropriate circumstances, equity may also grant what are often called proprietary remedies. The so called remedial constructive trust is one example of a proprietary remedy. Other examples are equitable charges and equitable liens.

32 Underlying the concept of proprietary remedies in equity is the idea that the defendant – the defaulting fiduciary, for example – has acquired, through his or her default, property which in justice should be held for the plaintiff, or in which the plaintiff should have some lesser interest. Such situations arise, for example, where an employee has stolen money from his or her employer (you will remember that the relationship of employee and employer is one of the status based fiduciary relationships) and used that money to acquire property. The stolen money can be traced into the property and the employee may be required to hold that property on trust, for the benefit of the employer.

² *O'Halloran v RT Thomas & Family Pty Ltd* (1998) 45 NSWLR 262 at 277.

33 The imposition of a constructive trust will require one party, the constructive trustee, to hold property on trust for another. The constructive trust was explained, by Deane J in *Muschinski v Dodds* (1985) 160 CLR 583 at 613, as a device:

...imposed, as a personal obligation attaching to property, to enforce the equitable principle that a legal owner should not be permitted to use his common law rights as owner to abuse or subvert the intention which underlay his acquisition and possession of those rights.

34 The constructive trust arises because, in some circumstances, equity acts on the conscience of someone who has a legal interest in property and requires that person to hold the benefit of the property on trust for another. The difference between the constructive trust and express trusts is that the constructive trust is raised by operation of law, often 'regardless of the intention'³ of the parties.

35 There have been competing views expressed on whether the constructive trust is 'remedial' or 'institutional'. The 'institutional' view of constructive trusts (sometimes also called the 'confirmatory' view) is that the constructive trust arises automatically upon the occurrence of an event and that any court order, which declares it to exist, is merely a retrospective recognition of what already exists. The 'remedial' view, (sometimes called the 'creative' view) of constructive trusts, is that the creation of the trust depends on an existence of a court order to that effect. The salient difference between the two has been thought to be that the remedial view treats the constructive trust as a remedy exercisable by the courts upon application of the parties, whereas the institutional view considers the trust to exist irrespective of any such application.

36 However, recent Australian cases appear to assert that both forms of constructive trust are known to the law, and that it is not a "one or the

³ *Muschinski v Dodds* (1985) 160 CLR 583 at 613.

other” dichotomy. In *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, the High Court (Gummow, Hayne, Heydon, Kiefel and Bell JJ) said at [47], [48] (omitting citations):

[47] In this situation assistance is afforded by a point emphasised by four members of the Court in the joint reasons in *Giumelli v Giumelli* when considering the constructive trust as a remedial response to a claim to equitable intervention. The point is that the term “constructive trust” may be used not with respect to the creation or recognition of a proprietary interest but to identify the imposition of a personal liability to account upon a defaulting fiduciary.

[48] In *Jones v Southall & Bourke Pty Ltd*, after reviewing the authorities, Crennan J said that they:

“make plain [that] the term ‘constructive trust’ covers both trusts arising by operation of law and remedial trusts. Furthermore, a constructive trust may give rise to either an equitable proprietary remedy based on tracing or, whether based on or independently of tracing, an equitable personal remedy to redress unconscionable conduct. The equitable personal remedies include equitable lien or charge or a liability to account.”

Earlier in her reasons her Honour had noted that the term “constructive trust” had been applied to include the enforcement of the obligation of a defaulting fiduciary to make restitution by a personal rather than a proprietary remedy.

37 In *Willis v the State of Western Australia [No 3]* [2010] WASCA 56, Buss JA, with whom McLure P and Owen JA agreed, said at [51], [52]:

[51] The word “constructive”, in the context of the term “constructive trust”, is derived from the verb “construe”. The court construes the facts and circumstances of a particular case by explaining or interpreting them. See *Scott on Trusts*, 4th ed (1989), Vol 5, s 462.4; *Giumelli v Giumelli* [1999] HCA 10 ; (1999) 196 CLR 101 [2] (Gleeson CJ, McHugh, Gummow & Callinan JJ).

[52] As Gleeson CJ, McHugh, Gummow and Callinan JJ noted in *Giumelli*, the term “constructive trust” is used in a variety of senses when identifying a remedy provided by a court of equity [4]. Some constructive trusts create or recognise no proprietary interest but, instead, impose a personal liability. See *Bofinger v Kingsway Group Ltd* [2009] HCA 44 ; (2009) 239 CLR 269 [47] (Gummow, Hayne, Heydon,

Kiefel & Bell JJ); *Greater Pacific Investments Pty Ltd (in liq) v Australian National Industries Ltd* (1996) 39 NSWLR 143 at 152–153 (McLelland AJA, Priestley & Meagher JJA agreeing).

- 38 The basic analysis that in appropriate circumstances equity acts on the conscience of a person who holds a legal interest in property to hold the benefit of the property on trust for another applies, as it seems to me, in both suggested categories of constructive trust. The question of real practical importance is one of remedy and the discretionary considerations that attend the granting of equitable relief. The recent cases to which I have referred make that clear.
- 39 The key questions are: what conditions are sufficient to give rise to a constructive trust; and how it should be enforced. The Court may look to whether there are other remedies available, for example, compensation, injunctive relief, specific performance or statutory remedies, or whether there are any specific discretionary considerations that are relevant. Ultimately, the facts will dictate whether the imposition of a constructive trust is appropriate.
- 40 The grant of remedy by way of constructive trust is not automatic, even where the breach of fiduciary duty, or its proceeds, has resulted in the defaulting fiduciary obtaining specific property. One of the matters to be considered is whether some remedy short of granting a constructive trust is sufficient: see *Bathurst City Council v PWC Properties Pty Limited* (1998) 195 CLR 566 and *Giumelli v Giumelli* (1999) 196 CLR 101.
- 41 In *John Alexander's Clubs Pty Limited v White City Tennis Club Limited* (2010) 241 CLR 1, the sole remedy sought was proprietary. The court held that it was not appropriate to grant proprietary relief. Since no other relief had been sought, the claimant was left empty handed.
- 42 Proprietary relief may be (and usually will be) refused where the rights of third parties, who take for value and without notice of the equitable wrong,

have intervened. In those circumstances, the claimant may be left to what other remedies are available. This is clear, particularly, in cases where the subject of the dispute is land held under the *Real Property Act 1900* (NSW). In those cases, questions of indefeasibility will arise; and the rights of a registered proprietor who is not affected by fraud will trump the equitable right of the original owner. For a discussion of the conflict between equity and indefeasibility, note *Registrar of Titles (WA) v Franzon* (1975) 132 CLR 611.

Other forms of proprietary relief

- 43 As I indicated earlier, there may be other appropriate forms of proprietary relief falling short of the imposition of a remedial constructive trust. For example, where the breach of duty has resulted in the defaulting fiduciary (a convenient example) acquiring property, but where there are intervening circumstances that make it inappropriate to order a remedial constructive trust, the claimant may be given equitable compensation. Nonetheless, the consequences of the breach of duty may be recognised by ordering that, in equity, the compensation be charged upon the defaulting party's interest in the property, or that the plaintiff have an equitable lien over that interest to secure payment.
- 44 Likewise, where a defaulting fiduciary has profited from the breach and an account of profits is ordered, an equitable charge or lien may be imposed over property acquired with those profits, so that the order for accounts will be satisfied.
- 45 The grant of proprietary relief is not automatic. In general, the court is concerned to mould relief so that it best achieves the purpose of vindicating the plaintiff's rights. Where that can be done by an order short of a constructive trust, the court will not impose the constructive trust. Equally, if it can be done without granting any proprietary remedy, the court will not usually impose one.

Relief is fact-based

- 46 It will be apparent from what I have said that the imposition of equitable relief requires very close attention to the facts of the particular case. Equitable relief is moulded to the facts of each case. Minds may vary as to what (if any) relief is appropriate in any particular case. *Warman International Ltd v Dwyer* (1995) 182 CLR 544 provides a striking example. The trial judge declined to impose a remedial constructive trust, but ordered an account of profits (with allowances), quantified by reference to (among other things) goodwill. The Court of Appeal, by majority, set aside that order, and remitted the matter for assessment of compensation on the basis of actual loss. The High Court unanimously allowed the appeal. It held that there should be an account of profits, but on a very different basis to the account ordered by the trial judge.
- 47 The moral of the story is: pay very close attention to the facts of each case. Decided cases will often expose or illuminate the relevant principles. But only rarely will they dictate the result; only rarely will any two cases have relevantly identical facts.

Conclusion

- 48 I hope that I have demonstrated that the traditional remedies of equity are alive and well today. They have ongoing relevance to commercial law in particular. When considering your client's rights, you should always bear in mind whether they are rights that require no more than vindication by way of damages, or whether, in all the circumstances of the case, some additional or alternative equitable relief is appropriate.