

Chapter 2: Equitable Remedies: Specific Performance

Outline	2.1	Introduction	2.5	Defences to a specific performance action
	2.2	Equitable remedies: general nature	2.6	Damages in lieu of, or in addition to, specific performance
	2.3	Specific performance: general nature	2.7	Specific performance and third parties
	2.4	Situations where specific performance will not be ordered	2.8	Summary



Aims of this Chapter

This chapter will enable you to achieve the following learning outcome from the ILEX syllabus:

- 2 Understand equitable remedies

2.1 Introduction

The common law remedy of damages is available as of right, but it has often proved inadequate. Damages are not very helpful if the subject-matter of the contract that has been breached is something unique or irreplaceable. Nor are they very helpful if the breach of contract involves continuing conduct or a harm that once done cannot be reversed.



Jenny wins the lottery

Jenny has recently won a large sum on a lottery. She decides to buy a country house with room to keep a pony, and would like to live close to her parents. She finds a beautiful Elizabethan manor house just a few minutes from her parents' home. It is perfect and there is nothing similar to it in the area. After the seller and Jenny have exchanged contracts, the seller receives another offer for the house. It is twice as much as Jenny was going to pay. The seller decides that he can afford the compensation he will have to pay Jenny for breaking the contract and tells her the sale is off. Jenny does not want compensation, though: she wants the house, because no other house will meet her requirements.



David and Victoria

David and Victoria are well-known personalities. Their nanny has signed a confidentiality agreement, stating that she must not reveal any information about the family. The nanny breaks this agreement and sells a story to a newspaper alleging that David and Victoria's marriage is in trouble. If the story is published, it will have a serious affect on their reputation. David and Victoria are not going to be satisfied with receiving damages for the financial loss caused by their nanny's breach of contract. What they want is to stop publication of the article in the newspaper. Once it has been published, it will be too late because the damage cannot be reversed.

Equity has developed a number of special remedies that can be used when damages are not adequate.

The most important equitable remedies are decrees of specific performance and injunctions. Under an order of specific performance, one party to a contract is ordered to perform their contractual obligations. This is the remedy Jenny would want in the scenario above, as this would mean she could get the house she wants. An injunction is a court order to a party to refrain from doing (or possibly to do) a particular act. In the scenario about David and Victoria, the remedy they would want is an injunction preventing the newspaper from printing the story about their marriage. Other equitable remedies include rescission, rectification, delivery up and cancellation of documents, accounts, and appointment of receivers.

This chapter briefly outlines the main equitable remedies, explains some common features of equitable remedies and then explains specific performance in more detail.

2.2 Equitable remedies: general nature

The remedies developed by the courts of equity differ from the remedies developed by the common law courts in a number of ways.

Equitable remedies supplement rather than compete with common law remedies. They are not available in every single case where a claimant has suffered a wrong. In particular:

- equitable remedies are only available if the relevant common law remedy is insufficient to protect the claimant or remedy the wrong they have suffered;
- equitable remedies are always discretionary; and
- the courts will not make an order that cannot be observed . This is an application of the maxim, "Equity will do nothing in vain".

2.2.1 Remedy available only if remedy at law is inadequate

It is a precondition of the award of an equitable remedy that the remedy at law (usually damages) is inadequate. For more detail on whether damages will be adequate or not, see **2.4.2** (specific performance) and **Chapter 3**.

2.2.2 Equitable remedies are discretionary

The common law remedy must be inadequate but this is not enough, by itself, to guarantee that specific performance or an injunction will be ordered.

The common law remedy of damages for breach of contract is an example of a remedy that is available “as of right”. If the claimant establishes their case that the defendant has broken the terms of a contract and the claimant has suffered damage as a result, then the court will award damages. There are also legal mechanisms to ensure that the defendant complies with the award of damages, and these are available whenever damages are awarded. The court does not have any discretion as to whether to award damages or assist in their collection.

If the claimant is seeking an equitable remedy such as specific performance, the court has a **discretion** – a choice – whether to award that remedy. Although the court’s discretion is wide, it is exercised in line with established rules and principles, so that it should be possible to predict whether an injunction or specific performance will be available on any given facts

2.2.3 “Equity will do nothing in vain”

Equitable remedies will be refused if the court cannot ensure that they will be observed. The defendant must be in a position to comply with the order made.

The operation of this rule is illustrated by *Jones v Lipman [1962]*. L changed his mind about selling land to J, even though they had a binding contract. L knew that if J brought an action for specific performance, J would probably be successful and L would have to transfer the land. With this in mind, L sold the land to a third party, hoping that the court would refuse to make an order for specific performance and award damages instead. This strategy relied on the rule that equity will not make a pointless order: since L did not own the land any more, L could not transfer it to J.

However, L’s strategy failed. This was because L did not sell the land to an innocent third party. L sold it to a company that he had bought for the purpose of buying the land. As L controlled the company, he was able to make it complete the contract with J. An order for specific performance was not therefore pointless. The court made the order against both L and the company. The result would have been different if he had sold the land to someone else.

2.3 Specific performance: general nature

A decree of specific performance is one of the most important equitable remedies. It is a court order directed to someone who is party to a contract. It instructs them to perform their obligations under the contract. Refusal to carry out the order is a contempt of court.

Note the following features of the decree of specific performance:

- it is an order *in personam* (see **2.3.1**);
- the remedy is discretionary (see **2.3.2**);
- the appropriate remedy at law must be inadequate (see **2.3.3**).

2.3.1 Equity acts *in personam*

Because the order to perform the contract is issued against an individual defendant, this is an order or remedy made *in personam*. This contrasts with a remedy *in rem*, which relates to the property that is the subject-matter of the remedy. As a result, it does not matter where the subject-matter of the contract is, so long as the defendant is within the court's jurisdiction.

For example, suppose that Jones and Cox enter a contract for the sale and purchase of chickpeas from Australia. They are both resident in England. Due to a worldwide shortage of chickpeas, the price increases dramatically. Jones finds another buyer who will pay a lot more than Cox agreed to pay, and refuses to supply Cox with the chickpeas at the contract price. Although the chickpeas are still in Australia, Cox can bring an action against Jones in an English court because Jones is within the court's jurisdiction (***Penn v Lord Baltimore [1750]***). Cox is likely to seek an order for specific performance rather than damages because he cannot now obtain chickpeas at the price he contracted to pay for them.

2.3.2 The remedy is discretionary

As with the other equitable remedies, a decree of specific performance is discretionary, that is, the court may refuse to issue the decree in certain circumstances. This discretion is not exercised arbitrarily, but in well-defined situations, for instance, where the contract is one that requires constant supervision or where the claimant has not behaved properly themselves.

For example, in the Jones and Cox scenario above, suppose that the real reason why Jones originally looked for another buyer was because Cox was imposing new conditions regarding the payment method. Originally, Cox was to pay in full on delivery but Cox was short of money and requested a delayed payment method. Jones was willing to negotiate but Cox kept delaying, hoping that the price would be reduced in order to save the sale. It was only when Jones decided to sell the chickpeas elsewhere that Cox obtained a loan in order to pay for them. The court in this situation may well decide to exercise its discretion to refuse to order specific performance because Cox himself did not have "clean hands".

2.3.3 The remedy at law must be inadequate

It is a precondition of a decree of specific performance that the remedy at law (usually damages) is inadequate.

Where the subject-matter of the contract is something unique or in short supply, damages are likely to be inadequate because the purchaser is not able to obtain the property they bargained for from anyone other than the seller. If the property is something that can be obtained on the open market, then the purchaser will be adequately compensated if they receive the value of those goods or property so that they can purchase them from another seller.

Examples of contracts where damages would not be an adequate remedy are shown in the following table.

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