Equitable Relief – An Outline

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FINAL RELIEF

1. Declarations
The power to make declarations is very wide in its scope and very beneficial in its nature. The power has had a difficult history in New South Wales but it is now clearly established. There is virtually no situation in respect of which a declaration cannot be made, e.g.

   (i) matters of status or membership of bodies private or otherwise;

   (ii) questions of title or right to possession to property;

   (iii) existence of a contract or whether a breach has occurred or the terms of a contract;

   (iv) the existence of a right to indemnity under a policy of insurance;

   (v) master and servant;

   (vi) construction of instruments.

All of the above involve disputes between subjects. The Court also has a supervisory jurisdiction in relation to the Crown and agencies of the Crown, e.g.

   (i) validity of statutes and subordinate legislation;

   (ii) the powers of statutory authorities;

   (iii) review of the conduct of statutory authorities;
(vi) review of inferior courts. (c.f. ADJR Act as to federal power)

The advantages of declarations are numerous. For example:

(i) A declaration is a speedy remedy and, accordingly, relatively inexpensive. In particular, in a contractual situation, it may avoid the risk of acting in a repudiatory manner.

(ii) Negative relief can be given, e.g.

(1) no breach of covenant is involved in some conduct;

(2) if a plaintiff is not a trustee in relation to particular property;

(3) if a plaintiff is not bound to pay money which may not be recoverable if paid.

(iii) A declaration may be made when no other relief would be available, e.g.

(1) where the dispute has not reached a stage where either party yet has a traditional cause of action;

(2) where the alternative remedy would not really determine the real dispute between the parties;

(3) where there is no other remedy available, e.g. - validity of committal proceedings - validity of disqualification of a jockey or professional athlete.

There are limitations on the availability of the remedy:

(i) statutory prohibition against any right to review, e.g. Workers Compensation Act; right determined by statute as to, e.g., compensation on resumption; ADJR Act; Income Tax Assessment Act but excluded only when the statute is in express language or by necessary implication.
(ii) Court, as a matter of discretion, may not make declaration as to commission of a crime - but it could in some circumstances, e.g. in a succession or probate case.

(iii) Court may decline if another equally or more appropriate remedy is available e.g. mining titles, landlord and tenant.

(iv) If the issue is purely hypothetical therefore there is no genuine dispute in existence.

(v) Declaration does not finally resolve the dispute between the parties. In *Neeta (Epping) Pty Ltd v. Phillips* 131 CLR 286 reference was made to s63 of the Supreme Court Act - Parties not agreed as to the consequences which flowed from a declaration.

(vi) Lack of any sufficiently defined interest on the part of the plaintiff in the subject matter of the proceedings i.e. plaintiff must show that a private right of the plaintiff’s is involved, ie. plaintiff must have standing.

(vii) Traditional equitable bars to relief e.g. unclean hands, plaintiff not doing equity.

It is important to take great care in the framing of a declaration.

2. **Specific Performance**

Specific performance is an order whereby a party to a contract is directed to perform obligations thereunder according to its terms.

It is necessary to distinguish between executory and executed contracts. The traditional specific performance remedy applies to the former, that is, something is required to be done to fulfil the agreement, e.g. contract to assure property – an executed contract is one which does not require some further juridical act.

The distinction may not matter in most instances but the "equity" supporting the remedy differs: in one case Equity gives effect to the contract; in the other, Equity provides a remedy where the Law is inadequate.
Specific Performance requires the existence of a binding contract, and a breach (actual or anticipatory) of that contract.

Equity will not grant specific performance if damages are an adequate remedy, however, the cases are not limited to particular categories. The test is whether justice is done in awarding damages only. Nevertheless, there are some traditional categories:-

(i) Dispositions of interests in land.
(ii) Sale of unique personality but not of goods available in the market.
(iii) Contracts to pay money or lend money are usually not specifically performable - but may be where, for example, the promise is to pay to a third party.

Defences to a claim for specific performance arise where:

(i) the contract is for performance of personal services - or an obligation which entails the maintenance of a personal relationship - even if it is otherwise a contract which is traditionally specifically performable.
(ii) the remedy would require continual supervision by Court (c.f. Trade Practices Act) - detail and complexity of obligation - building contracts, however, can be if obligation is sufficiently specific and defendant in possession.
(iii) Contract made by mistake or misrepresentation.
(iv) Enforcement would impose undue hardship on defendant, e.g. risk of prosecution if a trustee and breach of trust involved.
(v) Plaintiff is not ready willing and able to perform - or is in substantial breach.
(vi) Order will not be made as to part only of the contract.
(vii) Performance is impossible or futile.
(viii) Traditional equitable defences apply e.g. plaintiff has unclean hands, laches

3. Injunction

An injunction is an order by the Court forbidding or commanding a person to whom it is addressed to do something - but not all orders are injunctions e.g. to pay costs.

Note the distinction between prohibitory and mandatory injunctions, and final and interlocutory injunctions.

Injunctions may be sought ex parte and inter partes.

Note also the distinction between equitable and legal injunctions. Injunctions may be granted pursuant to

(i) the exclusive jurisdiction i.e.- where plaintiff seeks only equitable relief (common injunction, or where there is exclusive federal jurisdiction);

(ii) the auxiliary jurisdiction (to prevent multiplicity of actions or to restrain infringement of a legal right).

(iii) the common law s66 Supreme Court Act.

A quia timet injunction is to prevent apprehended or threatened wrongs.

Some examples of injunctions:

(i) Waste

(ii) Nuisance

(iii) Trespass to land

(iv) Injurious falsehood
(v) Injury to industrial property
(vi) Wrongful removal from office
(vii) Misuse of confidential information
(viii) Mortgagee exercising power of sale
(ix) Companies
(x) Restraint of trade
(xi) Breaches of contract
(xii) Wrongful revocation of licences.

Limits of scope of injunctive relief:

(i) Courts will rarely order final injunctions if circumstances require ongoing supervision.
(ii) Courts are careful not to order injunctive relief which is overly wide in ambit. It is essential to carefully draft forms of required injunction.
(iii) Injunctions unlimited as to time or geographic application will rarely be approved.

Refusal of injunction – traditional equitable concepts apply – laches, clean hands.

4. Rectification

Rectification is available – in limited circumstances, in the case of unilateral mistake.

Where the written form of a document embodies a mistake, the court may rectify it, that is, it does not express the common intentions of the parties to it. e.g. conveyance, contract, insurance policy, bill of exchange, lease.
The remedy is not to rectify an omission or mistake on the part of a party to a contract. i.e. it
does not take the place of an implied term.

The remedy is to correct a clerical mistake, or a drafting mistake, such that the instrument does
not record what the parties actually agreed.

It may be that construction is in issue - the resolution of meaning may eliminate need for
rectification.

It must be possible to formulate without doubt the amendment to be made to the instrument.
There are documents which equity (absent of fraud) will not rectify, eg. wills, and memorandum
or articles of association.

5. Receivers

A Receiver is a person appointed to take into possession, get in or recover property for the
benefit of persons who are ultimately determined to be entitled to it. Receivers may also be
given powers of management, principal object is the preservation of property (are then known
as Receiver and Manager).

There are traditional categories where Court will appoint Receivers –

(i) Partnership - almost as a matter of course.

(ii) Mortgages - particularly equitable.

(iii) Companies.

(iv) Judgment creditors.

(v) Executors, trustees - pending probate.

(vi) Vendor and purchaser - where rights in dispute and property in jeopardy.
6. Other Remedies include

(a) Damages

(b) Rescission

(c) Account

(d) Delivery and Cancellation of Documents

INTERLOCUTORY RELIEF

The purpose is to preserve the *status quo* pending final determination of a dispute so as to ensure that there will be some utility in the Court deciding the dispute. The interlocutory relief may be in similar terms to the final relief sought - or it might be quite different simply to ensure that the ultimate relief will be useful. Interlocutory Relief is dealt with in UCPR Parts 25 and 26 (formerly SCR Parts 28-29).

The Court must deal with the issues on a provisional basis. Hence hearsay is usually permitted and credit is not normally decided, s75 EA allows hearsay.

The plaintiff must show some prospect of success which is variously described as establishing a prima facie case, or an arguable case, or showing some probability of success or that there is a serious question to be tried (this operates as a threshold test). The question then is what the balance of convenience requires.

The strength of the defendant’s case may also be taken into account together with questions of laches and delay.

The adequacy of damages as a remedy must be considered together with the availability of other remedies. If damages are considered to be adequate compensation an injunction is unlikely.
The balance of convenience must also be weighed. The Court will require an Undertaking as to Damages, (practical note – it is important to explain this adequately to a client as it can be a prohibitive requirement on occasion).

Interlocutory injunctive relief can be sought inter partes or ex parte. If sought ex parte, the party seeking the injunction must be aware of requirements that all relevant factors (whether supportive of the plaintiff’s case or not) be put before the Court.

In relation to some specific cases of interlocutory relief, the following should be noted:

(a) for a quia timet it may be harder to prove genuine threat.

(b) in case of patents, plaintiff’s case must be particularly strong e.g. monopoly.

(c) in defamation, plaintiff must show verdict for defendant would be perverse.

(d) mandatory injunctions are rare.

Other forms of interlocutory relief include:

(a) Mareva injunctions (now described as Freezing orders under the UCPR).

(b) Anton Pillar Injunctions (Search orders) - copyright

(c) appointment of receivers.