

LAW OF REMEDIES

SUMMARY



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1. Introduction to Civil Remedies

1.1 Overview

1.1.1 The Law of Remedies

- The law of remedies is essentially concerned with the range of options available to a plaintiff who can establish a successful cause of action against the defendant. This notion has been described along the following lines:
 - The violation of a legal right (which is established by the cause of action) gives rise to a remedy (*Letang v Cooper* [1964] 2 All ER 292 per Diplock LJ). The flaw in this line of reasoning is that remedies are another species of rights (“secondary rights”) which are available when a “primary” right is violated.
 - The failure to perform a primary obligation, whether the obligation arises in contract, tort or equity, constitutes a breach of contract to which a secondary obligation arises on the part of the Defendant to rectify the wrong that has been made (e.g. to pay damages to the Plaintiff - *Photo Production Ltd v Securior Transport Ltd* [1980] UKHL 2 per Lord Diplock).

1.1.2 Exceptions to the General Principle

- There are exceptions to the notion that remedies are only available where a cause of action can be established. These exceptions include:
 - the pleading of restitution for unjust enrichment which is not concerned with the loss sustained by the Plaintiff as a result of breach but with the unjust gain of the Defendant caused by no fault of his/her own (i.e. where money is paid to the Defendant by mistake to the Plaintiff); and
 - no fault statutory compensation schemes including workers compensation (*Safety Rehabilitation and Compensation Act 1988* (Cth); *Workers Compensation Act 1987* (NSW)), motor accidents (*Motor Accidents Compensation Act 1999* (NSW)), victims of crime (*Victims Support and Rehabilitation Act 1996* (NSW)) and sporting injuries (*Sporting Injuries Insurance Act 1978* (NSW)).

1.1.3 Categories of Civil Wrongs

- There are three categories of civil wrongs. The breach of a civil wrong will lead to a remedy. The categories are:
 1. legal common law wrongs (breach of torts and breach of contract) – the remedies available are outlined by the common law which include damages (as of right) and/or equitable remedies which are available as a matter of discretion in the auxiliary jurisdiction of equity;
 2. legal statutory wrongs (misleading or deceptive conduct under Schedule 2 of the *Australian Competition and Consumer Act 2010* (Cth); intellectual property infringements; and wrongful death actions) – the range of available remedies are exclusively prescribed by the requisite statute; and

3. equitable wrongs (breach of trust, breach of fiduciary duty, breach of confidence (i.e. confidential information); unreasonable restraint of trade)
– equitable remedies are available in the exclusive jurisdiction of equity.

1.1.4 Alternative and Cumulative Remedies

- In particular situations, the Plaintiff may have a range of remedies available with respect to his/her successful cause of action. These remedies can either be alternative remedies or cumulative remedies.
- Alternative remedies require the Plaintiff to elect which remedy he/she desires when judgment is entered in his/her favour (*Personal Representatives of Tang Mang Sit v Capacious Investments Ltd* [1996] 1 AC 514 per Lord Nicholls). Examples of alternative remedies include:
 - rescission/specific performance of a contract and damages (compensatory or restitutionary); and
 - account of profits and damages (compensatory).
- Cumulative remedies involve the Plaintiff electing to have more than one remedy with respect to a cause of action. This situation can arise in the following scenarios:
 - where more than one remedy is available against one defendant (i.e. where the defendant breaches a condition of a contract, the Plaintiff can set aside the contract and claim damages for breach); or
 - where the Plaintiff has a cause of action against two persons with respect to the same loss (however it is important to note that in this situation, the Plaintiff can only recover from both Defendants the full amount of the damages such that double recovery is prohibited).

1.1.5 Limitation Periods

- The Plaintiff must be aware of the relevant limitation periods that outline the time before which a cause of action must be commenced against the Defendant. It is important to note that the cause of action does not accrue until the Plaintiff suffers actual loss or damage (*Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514).
- Statutory actions may prescribe a specific period, such as:
 - the *Australian Competition and Consumer Act 2010* (Cth) which in Division 2 outlines limitation periods, the general rule in s 87 being a period of three years for an action in personal injury damages;
 - the *Copyright Act 1968* (Cth) (s 134) and the *Patents Act* (s 120) which both outline a limitation period of six years for copyright and patent infringements;
 - the *Workplace Injury Management and Workers Compensation Act 1988* (NSW) outlines a limitation period of six months for personal injury/death workers compensation claims pursuant to s 65 (note that this period can be extended pursuant to s 65D); and

- the *Workers Compensation Act 1987* (NSW) outlines a limitation period of three years for employment-related damages claims for personal injury/death pursuant to s 151D, which may be extended under s 151DA.
- Additionally, where the Defendant is a statutory body, a statute establishing the particular body may prescribe a specific limitation period which must be observed by a Plaintiff.
- In general, the *Limitation Act 1969* (NSW) provides for the following limitation periods:
 - 3 years for personal injury and death claims (ss 18A, 19 – may be extended under ss 50A – 50F);
 - 1 year for defamation claims (s 14B – may be extended under s 56A);
 - 6 years for tort actions, contract actions, actions for restitution for unjust enrichment (s 14);
 - 12 years for deeds (s 16); and
 - 2 years after accrual of contribution claim or 4 years after expiration of limitation period for principal claim, whichever occurs first (s 26).
- The limitation period may be suspended during a period of legal disability and cases of fraud or mistake (ss 52, 55 and 56).
- Equitable remedies are generally not subject to limitation periods with some exceptions such as breach of trust (ss 47 – 50).

1.2 Common Law and Equity

- The remedies which are available to a successful Plaintiff are either legal or equitable in origin. However, the equitable remedies (i.e. injunctions/specific performance) are available in the following circumstances:
 - where there has been a breach of an equitable wrong; or
 - where there has been a breach of a legal wrong and the legal remedy of damages is inadequate according to a court of equity (i.e. a discretionary remedy).
- The historical background between the interaction of common law and equity can be explained on the following basis:
 - Equity developed as a court of conscience to perfect the inadequacies of the common law by creating causes of action which did not exist at common law and by creating new remedies where damages were inadequate.
 - Equity and the common law were administered in separate courts such that common law courts could not order equitable remedies and courts of equity could not order common law remedies.
 - The *Supreme Court of Judicature Act 1873* effectively fused the two systems so as to enable one court to administer both equitable and common law remedies.

1.2.1 The Fusion Fallacy

- The fusion of the two systems has led to criticism from academics that the merging of the systems has merged legal and equitable doctrines which should be kept separated. The term 'fusion fallacy' has hence developed to describe what are deemed to be errors in judicial reasoning. These occur when judges fail to appreciate the administrative effect of the *Supreme Court of Judicature Act 1873* and instead mix or fuse together rules and principles from the separate jurisdictions of equity and common law. The fusion fallacy hence assumes that when equity and the common law were fused at an administrative level, their doctrines were also fused. An example of the fusion fallacy arises where a judge applies a common law remedy to an equitable cause of action.
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- In *Harris v Digital Pulse* (2003) 56 NSWLR 298, the majority of the NSW Court of Appeal held that the fusion of the two systems created by the *Supreme Court Act 1970* (NSW) does not have the effect that the doctrines in each jurisdiction are fused as well. The reasoning behind this notion is captured in the seminal statement of Ashburner that "the two streams of jurisdiction, though they run in the same channel, run side by side and do not mingle their waters". Accordingly, it was held that the common law remedy of exemplary damages is not available to an equitable action based on breach of fiduciary duty.
- President Mason dissented in this judgment and followed the approach taken by the UK, NZ (*Day v Mead* [1987] 2 NZLR 443), and Canada on the basis that procedural reforms cannot have the effect of preventing areas of judge-made law evolving by reference to other areas of law. His Honour stated that the "principles of equity are not so invincibly superior to the concepts of common law that equity cannot occasionally profit from common law ideas".

2. Non-Judicial Remedies - Self-Help Remedies

2.1 Overview

- Self-help remedies are essentially those remedies which are not awarded by the judiciary but are lawfully available to individuals in particular situations.



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