

Chitty on Contracts 32nd Ed.
Consolidated Mainwork Incorporating Second Supplement
Volume I - General Principles
Part 8 - Remedies for Breach of Contract
Chapter 27 - Specific Performance and Injunction ¹
Section 1. - Introduction

Generally

27-001

The common law did not specifically enforce contractual obligations except those to pay money. ² Specific enforcement of contractual obligations other than to pay money was available only in equity. For the claimant, this was often a more advantageous remedy than the common law remedy of damages. With reference to this equitable remedy, Fry L.J. in his work on Specific Performance wrote:

“If a contract be made and one party to it make default in performance, there appears to result to the other party a right at his election either to insist on the actual performance of the contract, or to obtain satisfaction for the non-performance of it. It may be suggested from this that it follows ... that it ought to be assumed that every contract is specifically enforceable until the contrary be shown. But so broad a proposition has never, it is believed, been asserted by the judges of the Court of Chancery or their successors in the High Court of Justice, though if prophecy were the function of a law writer, it might be suggested that they will more and more approximate to such a rule.” ³

This prophecy has not been fulfilled, for the scope of the remedy remains subject to many limitations.

Bases of limitations on the remedy

27-002

These limitations are based on a number of factors. The first is said to be “the heavy-handed nature of the enforcement mechanism,” ⁴ by reason of which specific enforcement leads (more readily than an award of damages) to attachment of the defendant’s person. ⁵ But this is an important factor only where the contract calls for “personal” performance, by the defendant himself, when, anyway, courts will typically not award specific performance. ⁶ Where the contract is not of this kind, it can be specifically enforced without personal constraint ⁷: e.g. by sequestration, the appointment of a receiver ⁸ or by the execution of a formal document by an officer of the court. ⁹ The second is that the specific enforcement of certain contracts, especially of those for the sale of goods or shares for which there is a market, could, in effect, conflict with the requirement that the claimant must mitigate his loss by making a substitute contract where this was reasonably possible. ¹⁰ Other limitations include, for example, that in certain situations specific relief is either unnecessary or impracticable. ¹¹ In a number of later authorities, some of these reasons are no longer regarded as entirely convincing, so that these cases support some expansion in the scope of the remedy. ¹² However, the more recent decision of the House of Lords ¹³ on the point may foreshadow some degree of return to a more restrictive view, though with modern justifications.

Scope of the remedy

27-003


⚠ The jurisdiction to order specific performance of a contractual obligation is based on the existence of a valid, enforceable contract. The scope of the remedy is in one respect wider than that of an action for damages, in that specific performance may be ordered even before there has been any breach.¹⁴ and the court can, in principle, direct the defendant to take steps before the date of performance in order to meet its obligations on that date.¹⁵ ⚠ It will not be ordered if the contract suffers from some defect, such as failure to comply with formal requirements or mistake or illegality, which makes the contract invalid or unenforceable: these matters are discussed elsewhere in this book. But even if the contract is unimpeachable in these respects, specific performance will not necessarily be ordered; and the present chapter is mainly concerned with limitations on the availability of the remedy where the contract is not defective.

Meaning of “specific performance”

27-004

The term “specific performance” is here used in its traditional sense, to refer to the remedy available in equity to compel a person actually to perform a contractual obligation. Where a person has under a contract become liable to pay a fixed sum of money, the actual performance of that obligation can be enforced by bringing an action for that sum, e.g. where a seller of goods sues for the price, where a person who has done work sues for the agreed remuneration, or where the landlord sues for the agreed rent. These actions are based on the contractual obligation undertaken rather than the wrong of breach and hence are regarded as actions in debt, rather than for damages.¹⁶ The action in debt may have advantages over one for damages since a claimant need not prove any *loss* caused by the defendant’s breach, merely that he has *earned* the sum. In addition, the claim cannot be reduced for being too remote or for the claimant’s failure to mitigate loss.¹⁷ But such actions are not usually described in English law as actions for specific performance and are not subject to the limitations on the scope of that remedy which are considered in the following sections¹⁸ of the present chapter.

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1. Fry, *Specific Performance*, 6th edn (2012); Jones and Goodhart, *Specific Performance*, 2nd edn (1996); Sharpe, *Injunctions and Specific Performance*, 2nd edn; Spry, *Equitable Remedies*, 5th edn (1997).
 2. See above, paras 26-042, 26-104; below, para.27-004.
 3. See now 6th edition, p.21; cf. Burrows (1984) 4 L.S. 102.
 4. *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, 12.
 5. cf. *Enfield LBC v Mahoney* [1983] 1 W.L.R. 749, where even imprisonment failed to induce compliance with an order for specific restitution. “Lawful arrest or detention of a person for noncompliance with the lawful order of a court” is permitted by Human Rights Act 1998 Sch.1 Pt I art.5(1)(b).
 6. See below, para.27-027.
 7. cf. Corbin, *Contracts*, para.1138.
 8. *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443, 494, 497.
 9. *Astro Exito Navegacion SA v Southland Enterprise Co Ltd (The Messiniaki Tolmi)* [1983] 2 A.C. 787.

- [10.](#) Above, para.26-081; *Buxton v Lister* (1746) 3 Atk. 383, 384; *Re Schwabacher* (1908) 98 L.T. 127; cf. *Colt v Nettervill* (1725) 2 P.Wms. 301 (defendant given option of transferring shares or paying the difference between contract and market price on date fixed for performance). See also *Whiteley Ltd v Hilt* [1918] 2 K.B. 808.
- [11.](#) e.g. below, paras 27-013, 27-030.
- [12.](#) e.g. below, paras 27-005, 27-015, 27-026.
- [13.](#) *Co-operative Insurance Society Ltd v Argyll Stores Ltd* [1998] A.C. 1.
- [14.](#) *Roy v Kloepper Wholesale Hardware and Automotive Co* [1951] 3 D.L.R. 122; *Thomas Feather & Co v Keighley Corp* (1953) 52 L.G.Rev. 30; *Hasham v Zenab* [1960] A.C. 316; (1960) 76 L.Q.R. 200. And see below, para.27-084 n.541.
- [15.](#)  *Airport Industrial GP Ltd v Heathrow Airport Ltd* [2015] EWHC 3753 (Ch) at [113]. Morgan J. recognised that this would be applicable to many cases of anticipatory breach.
- [16.](#) *Bartoline Ltd v Royal & Sun Alliance Insurance Plc* [2007] 1 All E.R. (Comm) 1043 at [77].
- [17.](#) *Jervis v Harris* [1996] Ch. 195 at 202. See discussion of remoteness and mitigation below, paras 26-079—26-138.
- [18.](#) The mitigation rules may sometimes be relevant to the issue whether the action for the agreed sum is available: see above, para.26-086. For the relevance of these rules to claims for specific performance, see above, para.27-002 at n.10.

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Section 2. - The “Adequacy” of Damages

Appropriateness of the remedy

27-005

The historical foundation of the equitable jurisdiction to order specific performance of a contract is that the claimant cannot obtain a sufficient remedy by the common law judgment for damages. ¹⁹ Hence the traditional view was that specific performance would not be ordered where damages were an “adequate” remedy. ²⁰ Typically, this would be the case where the claimant could readily make a substitute contract for a performance that is equivalent to that promised by the defendant: the claimant would then be adequately compensated by damages based on the difference between the cost (or market price) of the substitute, and the contract price. Indeed, an award of specific performance in such a case could conflict with the mitigation requirement and may be considered to be oppressive to the defendant. ²¹ In *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* ²² Lord Hoffmann expressed the concern that in some circumstances an award of specific performance may allow “the plaintiff to enrich himself at the defendant’s expense” by negotiating an excessive price for releasing the defendant from performance; one that exceeds the value of performance to the plaintiff and approaches the cost of performance to the defendant. ²³ Some of the early authorities ²⁴ approach this problem by asking whether damages would *in fact* adequately compensate the claimant. At a later stage in the development of the subject, the courts tended rather to ask whether damages were *likely* to be an adequate remedy for breach of the *type* of contract before the court. ²⁵ Later again, the courts have asked whether specific performance was the most *appropriate* remedy in the circumstances of each case ²⁶ and whether specific performance will “do more perfect and complete justice than an award of damages”. ²⁷ The point was well put in a case in which an interim injunction was sought: “The standard question ..., ‘Are damages an adequate remedy?’ might perhaps, in the light of the authorities in recent years, be rewritten: ‘Is it just, in all the circumstances, that a plaintiff should be confined to his remedy in damages?’”. ²⁸

Where action for agreed sum available

27-006

A similar approach has been adopted to the analogous question whether specific performance could be ordered where the common law action for the agreed sum is also available. At one time, a negative answer was given to this question, apparently because the common law remedy was regarded as “adequate”. ²⁹ But where it is not “adequate”, the current view is that specific performance can be ordered in cases of this kind, if in all the circumstances it is the most appropriate remedy. ³⁰

Land

27-007

The law takes the view that the purchaser of a particular piece of land or of a particular house

(however ordinary) cannot, on the vendor's breach, obtain a satisfactory substitute, so that specific performance is available to the purchaser.³¹ It seems that this is so even though the purchaser has bought for resale. Even a contractual licence to occupy land, though creating no interest in the land³² can be specifically enforced.³³ A vendor of land, too, can get specific performance³⁴; for damages will not adequately compensate him if he cannot easily find another purchaser or if he is anxious to rid himself of burdens attached to the land. However, it seems to make no difference that the land is readily saleable to a third party; or even that after contract but before completion a compulsory purchase order is made in respect of it.³⁵ In such cases damages (based on the difference between the contract price and the resale price, or the compensation payable on the compulsory acquisition) would seem normally to be an adequate (in the sense of an entirely appropriate) remedy, as some other common law jurisdictions have begun to recognise.³⁶

Difficulty of quantifying damages

27-008

In a number of other situations damages are considered to be an inadequate remedy because of the difficulty of quantifying them. For this reason specific performance may be ordered of a contract to execute a mortgage in consideration of money advanced at or before the time of the contract,³⁷ and of a term of a contract of loan giving the creditor the right to have the loan repaid out of specific property³⁸: the value to the creditor of obtaining security for a debt cannot be precisely quantified. For the same reason, specific performance can be ordered of a contract to pay (or to sell) an annuity,³⁹ of a contract to indemnify,⁴⁰ of a sale of debts proved in bankruptcy⁴¹ and of a promise in a letter of indemnity to secure the release of a ship in the event of her being arrested by reason of the shipowner's delivering the goods without production of the bill of lading.⁴²

Damages nominal, not recoverable, or excluded

27-009

⚠ In *Beswick v Beswick*⁴³ specific performance was ordered of a promise to pay an annuity to a third party. One reason⁴⁴ for granting this form of relief was that damages were an inadequate remedy since (in the view of the majority of the House of Lords) they would be purely nominal, the promisee or his estate having suffered no loss.⁴⁵ The point here is not that the promisee would be inadequately compensated by damages. It is rather that the party in breach would be unjustly enriched (if damages were the sole remedy) by being allowed to retain the entire benefit of the promisee's performance, while rendering only a small part of his own. Damages may also be an inadequate remedy because the claimant's loss is difficult to prove⁴⁶ (though this factor is not decisive as "such difficulties arise frequently in litigation"⁴⁷), or because certain items of loss⁴⁸ are not, or may not be, legally recoverable, or because a term of the contract restricts the damages recoverable for that breach,⁴⁹ or because of the difficulty of enforcing a judgment for damages in a foreign country,⁵⁰ or because of the delays which may occur (even in a domestic case) in securing the actual payment of damages,⁵¹ or quite simply because the defendant may not be "good for the money".⁵² Damages may also be inadequate where the infringement of the interest that a party is trying to protect by way of an injunction is a person's privacy or reputation.⁵³ ⚠

Availability of substitute

27-010

Damages are considered to be an adequate remedy where the claimant can readily get the equivalent of what he contracted for from another source. For this reason specific performance is not generally ordered of contracts for the sale of commodities,⁵⁴ or of government stock,⁵⁵ or of shares which are readily available in the market⁵⁶. damages (based on the difference between the contract and the market price) are generally a satisfactory remedy in such cases. On the other hand, a contract to subscribe for shares in a company is specifically enforceable⁵⁷; and so is a contract to buy

shares which are not readily available in the market,⁵⁸ even (it seems) although the directors of the company have a discretion to refuse to register the transfer.⁵⁹

Loans of money

27-011

A contract to lend money cannot, as a general rule, be specifically enforced at the suit of either party⁶⁰; it is assumed that damages, based on current rates of interest, are an adequate remedy. However, s.740 of the Companies Act 2006 provides that a contract to take up and pay for debentures in a company may be specifically enforced.⁶¹

Sale of goods: “unique” goods

27-012

The remedy of specific performance is available in cases in which the claimant could not get a satisfactory substitute because the goods were “unique”. For the purpose of specific relief, heirlooms, great works of art and rare antiques were regarded as “unique”⁶²; and it seems that the courts went some way towards recognising a concept of commercial “uniqueness”. Thus a contract to supply a ship, or machinery or other industrial plant which could not readily be obtained elsewhere might be specifically enforced.⁶³ Another special factor which may induce the court to order specific performance of a contract for the sale of goods is that the goods form the contents of a house which is being sold by the same seller to the same buyer, either by the same contract or by a separate contemporaneous one.⁶⁴ The court is particularly ready to order specific performance in such a case if removal of the goods would damage the land, but the remedy is not limited to such circumstances.⁶⁵

Non-delivery of “specific or ascertained goods”

27-013

Section 52 of the Sale of Goods Act 1979 gives the court discretion to order specific performance where an action is brought “for breach of a contract to deliver specific or ascertained goods”. The object of s.52⁶⁶ was to enlarge the scope of the remedy. Although the section deals only with cases in which this remedy is sought by the buyer, the court also has power to order specific performance at the suit of the seller.⁶⁷ However, while the discretion to order specific performance under s.52 is no longer limited to cases in which the goods are “unique”, the courts at one time nevertheless took the view that the discretion should be sparingly exercised. One reason for this view is that the specific enforceability of a contract for the sale of goods might give the buyer an equitable interest in the goods,⁶⁸ and this could adversely affect third parties who had only constructive (but no actual) notice of that interest: e.g. it could give the buyer priority over not only unsecured but also secured creditors where he had paid for the goods and the seller had then become insolvent.⁶⁹ But a restrictive view of the scope of specific performance in contracts for the sale of goods has been taken even where no such prejudice to third parties was likely to result. For example, in *Cohen v Roche*⁷⁰ the court refused specific performance to the buyer of a set of Hepplewhite chairs, saying that they were “ordinary articles of commerce and of no special value or interest”.⁷¹ This seems to amount to a refusal to exercise the discretion under s.52 on the ground that the goods were not “unique” in the sense of the old law.⁷²

“Specific or ascertained” goods

27-014

Section 52 refers to goods which are “specific or ascertained”.⁷³ The section therefore does not apply where the goods are unascertained because they are purely generic (e.g. where the sale is of “1,000

tons of wheat"). Where the goods are unascertained because they form an undifferentiated part of an identified bulk, a distinction must, as a result of amendments to the Sale of Goods Act made in 1995,⁷⁴ be drawn between two types of cases. The first consists of cases in which the part sold is expressed as a *fraction or percentage* of the bulk: e.g. half the cotton shipped on the *Peerless*. Such a contract is one for the sale of specific goods so long as the bulk was identified and agreed on when the contract was made,⁷⁵ and the court therefore has a discretion to order specific performance of it under s.52 of the 1979 Act. The second consists of cases in which the part sold is expressed as a *specified quantity* of unascertained goods to be taken from an identified bulk⁷⁶: e.g. 5,000 bales out of the cargo of cotton shipped or to be shipped on the *Peerless*, on which 10,000 bales are shipped in bulk. In such a case⁷⁷ the buyer can become owner in common of the goods to the extent that he has paid for them⁷⁸ and so he would have less need⁷⁹ to seek specific performance of the seller's promise to deliver in order to secure priority over other creditors in the event of the seller's insolvency. He would, however, acquire such ownership, not because the goods were specific or ascertained, but in spite of the fact they remained unascertained.⁸⁰ Cases of this kind are therefore not covered by the words of s.52, which refer to the court's discretion to order specific performance of a contract to deliver "specific or ascertained" goods. It is also doubtful whether s.52 applies to a contract to deliver goods to be manufactured or produced by the seller, since such goods may not be "specific or ascertained". However, it has been suggested that the court could specifically enforce a contract for the sale of growing timber (so long as it was ascertained) which was to be severed, whether by the vendor or by the purchaser.⁸¹

Specific enforcement of contracts not within section 52

27-015

Section 52 does not in terms say that specific performance is available to a buyer *only* where the contract is one to deliver goods which are "specific or ascertained"; and, where the goods are not of this kind, it is arguable that the remedy should be available on the general principle governing its scope. It should, in other words, be available where, in the particular case, the buyer cannot in fact obtain a substitute or be adequately compensated by damages. This might, for example, be the case where a person who had agreed to make and supply components for a manufacturer then repudiated his undertaking to do so. In such a case, damages for the manufacturer's loss of profits might not be adequate since they "would be a poor consolation if the failure of supplies forces a trader to lay off staff and disappoint his customers (whose affections may be transferred to others) and ultimately forces him towards insolvency ..."⁸² The view that specific performance could be ordered on such grounds⁸³ seemed at one stage to have been abandoned⁸⁴, but more recent cases give it fresh support. During a steel strike in 1980 a manufacturer of steel obtained an order for the specific delivery of a quantity of steel belonging to him against a rail carrier who (in fear of strike action⁸⁵) had refused to allow it to be moved.⁸⁶ Specific delivery was ordered because during the strike "steel [was] available only with great difficulty, if at all".⁸⁷ In such circumstances specific enforcement of a seller's duty to deliver should similarly be available to a buyer. This view is supported by a case in which, during the "energy crisis" in 1973 an interim injunction was granted to stop an oil company from cutting off supplies of petrol to a garage, since alternative sources of supply were not available.⁸⁸ The goods in this case were purely generic and the case supports the view that an obligation to deliver goods may be specifically enforced in a case that, because the goods are not "specific or ascertained", is not covered by s.52.⁸⁹

27-016

This view is further supported by *Thames Valley Power Ltd v Total Gas and Power Ltd*⁹⁰ where A had in 1995 contracted to be supplied with gas by B for 15 years at a price which was to vary after the first two years according to a formula depending on the movement of various indices; B knew⁹¹ that A (a "single purpose company"⁹²) needed the supply to perform a contract with C. In 2005, B purported to invoke a force majeure clause as justifying their refusal to continue to supply gas under the contract. Christopher Clarke J held that B's refusal was not so justified; and he further held (though it was "not strictly necessary to decide the point"⁹³) that B's obligation to supply gas under the contract was specifically enforceable. One reason for this view was that the basis of the contract was to assure A "of a source of supply from a first-rate supplier for a 15-year term", so that if they were confined to a claim for damages they would be deprived of "substantially the whole benefit that the contract was intended to give them".⁹⁴ This amounts to saying that damages were not an adequate remedy

because no substitute was available.⁹⁵ Another reason for the availability of specific performance was that the task of assessing damages was “almost impossible”⁹⁶ in view of the uncertainty about the movement, over the unexpired term of the contract, of the indices that were to determine the price. And a third reason for the inadequacy of damages lay in the delay likely to be encountered in securing their actual payment, which might have led to A’s insolvency before the end of the 15 year term.⁹⁷ No reference is made in the judgment to s.52; but where, for reasons such as those given above, damages are not a satisfactory remedy, then it is, with respect, consistent with the principles governing specific relief⁹⁸ to hold that such relief is available even in cases not falling squarely within the section.

Non-delivery of goods to consumers

27-017

The Consumer Rights Act 2015⁹⁹ disapplies s.52 of the Sale of Goods Act 1979¹⁰⁰ to contracts “for a trader to supply goods to a consumer”.¹⁰¹ The latter category includes a “sales contract”, which is further defined as a contract by which “the trader transfers or agrees to transfer ownership of goods to the consumer ... and the consumer pays or agrees the price ...”.¹⁰² Section 19 of the 2015 Act sets out the consumer’s remedies for delivery which is *defective* in the sense that the goods do not conform to the requirements of the contract¹⁰³ and envisages the possibility that, in addition to remedies such as repair, replacement or price reduction,¹⁰⁴ the consumer may seek “specific performance”.¹⁰⁵ These words seem here to refer to an order to make good the non-conformity and not to an order to deliver the goods where the trader has failed to perform his duty to deliver, so as to be in breach of the obligation “to deliver the goods” imposed on him by the Act.¹⁰⁶ The remedies for non-delivery, as set out in s.28,¹⁰⁷ are mainly those of treating the contract as at an end¹⁰⁸ and of recovering back any payments that he may have made.¹⁰⁹ However, s.28(13) goes on to provide that “This section does not prevent the consumer seeking other remedies *when it is open to the consumer to do so*”. The enigmatic words here italicised may be intended to refer, *inter alia* to specific performance. If so, the disapplication of s.52 of the 1979 Act, which no doubt was intended to make the position of the consumer better, could have the opposite effect since he will be shut out from s.52, and will have to bring his case within the group of cases in which specific enforcement of a contract for the sale of goods was available to contracts *not* within s.52 of the 1979 Act. The disapplication of that section was, with respect, unnecessary for the apparently intended purpose.

Defective delivery of goods to consumers

27-018

Goods delivered under a contract may be defective in the sense of not being in conformity with the contract. By virtue of amendments to the Sale of Goods Act 1979 made in 2002,¹¹⁰ a buyer who deals as consumer and to whom goods are sold by a commercial seller may, if the goods are not in conformity with the contract, require the seller to repair or replace them.¹¹¹ The remedy of specific performance is made available to enforce the seller’s duty to comply with such a requirement,¹¹² and is consistent with the principles governing specific relief in English law. Damages are unlikely to be the most appropriate remedy for a consumer who has bought (for example) an appliance which malfunctions; while hardship to the seller is avoided by a number of restrictions on the remedies described above. Thus repair or replacement cannot be ordered if either remedy is impossible,¹¹³ nor can one of these remedies be ordered if it is “disproportionate” to the other.¹¹⁴ Specific performance can also be refused where another of the remedies (such as price reduction) provided by the amendments¹¹⁵ is “appropriate”,¹¹⁶ i.e. more appropriate than specific relief.¹¹⁷ For contracts that were made on or after October 1, 2015, the 2002 amendment to the Sale of Goods Act¹¹⁸ is revoked by the Consumer Rights Act 2015,¹¹⁹ and the Supply of Goods and Services Act 1982 is also extensively amended.¹²⁰ In their place, new regimes are put in place for three categories of cases: sale of goods, sale of digital content and supply of services. These are discussed in the following paragraphs.

Non-conformity in sale of goods to consumers

27-019

Chapter 2 of Pt 1 of the Consumer Rights Act 2015 applies to “a contract for a trader to supply goods to a consumer”, ¹²¹ a phrase that includes a “sales contract”, and also certain other contracts, such as a contract for the hire of goods and a hire-purchase agreement. ¹²² For the sake of brevity, the following discussion is confined to cases of sale. The 2015 Act sets out certain “statutory rights” of the consumer. Such a contract is, for example, “treated as including a term” that the goods are of satisfactory quality, are fit for a particular purpose, match their description, or match the sample or model by reference to which they are sold. ¹²³ If the goods “do not conform to the contract because of the breach of” any such term, then one of the consumer’s “rights to enforce” ¹²⁴ the term broken is the “right to repair or replacement” ¹²⁵; if the consumer “requires the trader to repair or replace the goods” then the trader “must ... do so”. ¹²⁶ The 2015 Act further provides that, “in addition to” (inter alia) repair or replacement, ¹²⁷ Ch.2 of the Act “does not prevent the consumer from seeking other remedies”, ¹²⁸ and one such remedy is “specific performance”. ¹²⁹ Since “repair or replacement” are in their nature forms of specific relief, the relationship between them and specific performance is not entirely clear. One possibility is that the “right of repair or replacement” is a *right* and specific performance a *remedy*, but this argument is inconsistent with the repeated use of the phrase “other remedies”, ¹³⁰ where “other” must mean other than (inter alia) “repair or replacement” in s.19(3)(b) and (4)(a).

Non-conformity in sale of digital content to consumers

27-020

Chapter 3 of Pt 1 of the Consumer Rights Act 2015 deals with contracts “for a trader to supply digital content to a consumer”. ¹³¹ The structure resembles the structure of a consumer’s remedies for non-conformity in the case of a contract to supply goods (discussed above). Thus, Ch.3 also sets out the “statutory rights ... under a digital content contract” ¹³² which the consumer will have; these resemble such rights under a “sales contract”. ¹³³ If the digital content fails to comply with such a term, then the consumer has “the right of repair or replacement”, ¹³⁴ but again, this does not “prevent the consumer from seeking other remedies” for the breach, ¹³⁵ including specific performance. ¹³⁶

Non-conformity in supply of services to consumers

27-021

Chapter 4 of Pt 1 of the Consumer Rights Act 2015 deals with contracts “for a trader to supply a service to a consumer”. ¹³⁷ The structure again resembles the structures of a consumer’s remedies for non-conformity in the case of a contract for the sale of goods. ¹³⁸ Chapter 4 sets out a number of “statutory rights”, ¹³⁹ most of which, as in Chs 2 and 3 (discussed above), are rights of the consumer that arise out of terms which the contract “is to be treated as including”. ¹⁴⁰ If the service does not conform to these terms, ¹⁴¹ the consumer has “the right to require repeat performance” ¹⁴²; but again, the existence of this “right” does not “prevent the consumer seeking other remedies” ¹⁴³ and one such remedy, if “open to the consumer in the circumstances” ¹⁴⁴ is “specific performance”. ¹⁴⁵

Discretion and consumer’s choice between repair and replacement

27-022

⚠ The 2015 Act places restrictions on the consumer’s rights of “repair or replacement” relating to goods and digital content. ¹⁴⁶ ⚠ It also places restrictions on the consumer’s right to “repeat performance” which applies to services, ¹⁴⁷ ⚠ but the restrictions are different. In the case of goods and digital content, ss.23(3) and 43(3) of the 2015 Act provide that the consumer cannot require the trader to repair or replace the goods or digital content if “that remedy” is (a) “impossible” or (b) “disproportionate compared to the other of those remedies”, i.e. if it “imposes costs on the trader

⚠ It seems from the wording of these provisions that “repair” and “replacement” are here treated as separate rights or remedies and that these provisions are concerned with the power of the court to choose *between them*. By contrast, where services do not conform to the contract, the consumer’s right or remedy that corresponds to “repair or replacement” is “the right to require repeat performance”

¹⁴⁹ ⚠; and since this is a single right there can be no question of its being “disproportionate” to anything else. However, repeat performance cannot be required where completing performance would be impossible. ¹⁵⁰ ⚠

Discretion to award price reduction: digital content and services

27-022A

⚠ Where ordering either repair or replacement (in the case of digital content ¹⁵¹ ⚠) or repeat performance (in the case of services) would be disproportionate or even cause severe hardship to the defendant, ¹⁵² ⚠ the court can instead award a price reduction. ¹⁵³ ⚠ This is provided under s.58.

When the customer claims to exercise any of the above “rights” ¹⁵⁴ ⚠ (or “remedies”), ¹⁵⁵ ⚠ “on the application of the consumer, the court may make an order requiring specific performance of” ¹⁵⁶ ⚠

the trader’s obligation to repair or replace goods ¹⁵⁷ ⚠ or digital content ¹⁵⁸ ⚠ or to repeat performances of services. ¹⁵⁹ ⚠ Further, s.58(3) and (4) provide that “if the exercise of another right is appropriate” ¹⁶⁰ ⚠ then “the court may proceed as if the consumer had exercised that other right”




¹⁶¹ ⚠; and the other rights are defined so as to include, in each case, price reduction. ¹⁶² ⚠ The effect is that if the consumer claims repair or replacement, the court may instead order (if it is more appropriate than either repair or replacement) another of the remedies provided by the Act. In respect of digital content and services, that can only be a price reduction. ¹⁶³ ⚠ These provisions differ from those discussed in the previous paragraph ¹⁶⁴ ⚠ by which the consumer cannot require (for example) repair if that is “impossible” or “disproportionate” ¹⁶⁵ ⚠ because it imposes unreasonable costs on the trader or because the “other remedy” would cause “significant inconvenience to the consumer”. The choice that the consumer is required to make under those provisions is between repair and replacement. In contrast, the “powers of the court” ¹⁶⁶ ⚠ are wider: under s.58 the court could, for example, refuse to order repair or replacement or repeat performance and instead order a

price reduction. ¹⁶⁷ ⚠ There is also no requirement under s.58 ¹⁶⁸ ⚠ that the remedy sought by the consumer must be “disproportionate”, but it is hard to see on what other ground it would be appropriate for the court to do so. It would not be appropriate for the court to refuse to order repair or replacement or repeat performance, and instead order a price reduction, simply on the ground that damages would be an adequate remedy. That would render the provisions giving the consumer the right to repair or replacement or repeat performance nugatory.

No discretion to award price reduction: goods

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⚠ In the case of goods, for the court to exercise its discretion under s.58 to order price reduction ¹⁶⁹ ⚠ on the grounds that it is more appropriate than either repair or replacement would be inconsistent with the requirements of Directive 1999/44/EC, ¹⁷⁰ ⚠ which Ch.2 of the Consumer Rights Act is designed to implement. ¹⁷¹ ⚠ The consumer’s right to repair or replacement of goods under the

Consumer Rights Act must be interpreted in the light of the interpretation of the Directive in *Weber and Putz* ¹⁷²  by the Court of Justice of the EU, at least while the United Kingdom remains in the EU. ¹⁷³  The Court's assumption that the consumer's specific rights under the Directive were enforceable in kind against the seller has three consequences. First, on the facts of the case, it was decided that national law should not allow the trader to refuse replacement on the ground of disproportionality with the value of conforming goods and with the significance of the non-conformity, even though it meant that the trader had to bear the costs of the removing the goods installed by the consumer and the reinstallation of the replacement goods. Second, it suggests that English courts should not refuse specific performance in support of the consumer's right to repair or replacement because damages would be an adequate remedy, since this would then replace the consumer's "European rights" and so render them ineffective. Third, it suggests that, in the case of "sales contracts", use of the court's powers to substitute another "appropriate right" under s.58 is incompatible with the 1999 Directive except in the two situations referred to in the Directive: where the choice is between repair or replacement or where neither repair nor replacement is possible. ¹⁷⁴  The corollary is that courts should not apply other "bars" to specific performance not mentioned in the Directive itself.


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1. Fry, *Specific Performance*, 6th edn (2012); Jones and Goodhart, *Specific Performance*, 2nd edn (1996); Sharpe, *Injunctions and Specific Performance*, 2nd edn; Spry, *Equitable Remedies*, 5th edn (1997).
 19. *Harnett v Yielding* (1805) 2 Sch. & Lef. 549, 553.
 20. *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, 11; *Bankers Trust Co v P.T. Jakarta International Hotels Development* [1999] 1 Lloyd's Rep. 910 at 911. See also *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] 2 All E.R. 622 at [158]; *Ashworth v Royal National Theatre* [2014] EWHC 1176 (QB) at [31], see n.165.
 21. See *Re Schwabacher* (1908) 98 L.T. 127 and other authorities cited in para.27-002 n.10. For oppression in cases of specific relief by way of injunction, see also below, para.27-069.
 22. [1998] A.C. 1.
 23. [1998] A.C. 1 at [15].
 24. e.g. *Adderley v Dixon* (1824) 1 S. & S. 607, 610.
 25. e.g. *Cohen v Roche* [1927] 1 K.B. 169.
 26. *Beswick v Beswick* [1968] A.C. 58, 88, 90-91, 102; cf. *Coulls v Bagot's Executor and Trustee Co* [1967] A.L.R. 385, 412.
 27. *Tito v Waddell (No.2)* [1977] Ch. 106, 322; *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch. 64 at 72-73.
 28. *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 W.L.R. 349, 379 (and see the subsequent proceedings: [1975] 2 Lloyd's Rep. 373); *Araci v Fallon* [2011] EWCA Civ 668 at [42], where the reference to "Chapter 27" of the 30th edition of this book seems to be to its para.27-005 (still so numbered in the present edition); cf. in a different but analogous context *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443.
 29. e.g. *Crampton v Varna Ry* (1872) L.R. 7 Ch. App. 562, 567 ("a money contract not enforceable in this court").
 30. e.g. *Beswick v Beswick* [1968] A.C. 58; the burden is on the claimant to show that the common law remedy is not adequate: *C.N. Maritime Inc v Stena Line A/B (The Stena Nautica)* (No.2)

[1982] 2 Lloyd's Rep. 336, 348.

31. Fry, *Specific Performance*, para.62; unless he elects to claim damages, as in *Meng Long Development Pte Ltd v Jip Hong Trading Co Pte Ltd* [1985] A.C. 511. Damages are, however, an adequate remedy for breach of a "lock-out" agreement relating to land (above, para.2-128) since such an agreement is intended merely to protect the prospective purchaser from wasting costs and does not give him any right to insist on conveyance of the land: *Tye v House* [1997] 2 E.G.L.R. 171.
32. See *Ashburn Anstalt v Arnold* [1989] Ch. 1; overruled on another ground in *Prudential Assurance Co Ltd v London Residuary Body* [1992] A.C. 386.
33. *Verrall v Great Yarmouth B.C.* [1981] Q.B. 202. cf. *Dutton v Manchester Airport Plc* [1999] 2 All E.R. 657, where the claim by the licensee was not against the landlord but against a trespasser.
34. *Lewis v Lechmere* (1722) 10 Mod. 503, 505; *Kenney v Wexham* (1822) 6 Madd. 355; *Adderley v Dixon* (1824) 1 S. & S. 607, 622; *Clifford v Turrell* (1841) 1 Y. & C.C.C. 138; *Walker v Eastern Counties Ry* (1848) 6 Hare 594; *Miliangos v George Frank (Textiles) Ltd* [1976] A.C. 443, 496; cf. *Amec Properties v Planning Research & Systems* [1992] 1 E.G.L.R.70 (specific performance against prospective lessee). Where the purchaser has been allowed to go into possession and has then failed to complete, and the vendor has not elected between rescission and specific performance, the court may (unless the contract otherwise provides) order the purchaser either to perform or to vacate the premises: see *Greenwood v Turner* [1891] 2 Ch. 144; *Maskell v Ivory* [1970] Ch. 502; *Attfield v D.J. Plant Hire & General Contractors* [1987] Ch. 141.
35. *Hillingdon Estates Co v Stonefield Estates Ltd* [1952] Ch. 627. (The actual decision may be explicable on the ground of the purchaser's delay.) But specific performance cannot be ordered where the land is sold with vacant possession and before the time for completion the land is requisitioned and possession of it is taken by the requisitioning authorities, for in that case the vendor will be unable to perform his contractual obligation to give possession: *Cook v Taylor* [1942] 1 Ch. 349; cf. *James Macara Ltd v Barclay* [1945] K.B. 148 (action for return of deposit); contrast *Re Winslow Hall Estates Co* [1941] Ch. 503 (possession not taken); the last two cases are not easy to reconcile on the issue of exactly when possession was taken by the acquiring authority. The contract is not frustrated by the mere making of the order (above, para.23-057) but after title to the land has vested in the acquiring authority by virtue of the compulsory purchase, the vendor's remedy is in damages and not by way of specific performance: *E. Johnson & Co (Barbados) v NSR Ltd* [1997] A.C. 400.
36. See, in Canada, e.g. *Semelhago v Paramadevan* (1996) 136 D.L.R. (4th) 1 (SC); in New Zealand, e.g. *Landco Albany Ltd v Fu Hao Construction Ltd* [2006] 2 N.Z.L.R. 174 (CA); and in Singapore *EC Investment Holding Pte Ltd v Ridout Residence Pte Ltd & Ors* [2011] SGCA 50, [2012] 1 S.L.R. 32 (CA).
37. *Ashton v Corrigan* (1871) L.R. 13 Eq. 76. cf. *Swiss Bank Corp v Lloyds Bank Ltd* [1982] A.C. 584, 595, affirmed at 610; above, para.18-144; below, n.37.
38. *Swiss Bank Corp v Lloyd's Bank Ltd* [1979] Ch. 548; reversed [1982] A.C. 584 but on the ground that the contract did not, on its true construction, contain any such term. This was also the position in *Kingcroft Insurance Co Ltd v H.S. Weaver (Underwriting) Agencies Ltd* [1993] 1 Lloyd's Rep. 187, 193; cf. *Napier & Ettrick v Hunter* [1993] 1 A.C. 713 recognising that an insurer's right of subrogation gives him an equitable interest in the insured's rights of action.
39. *Kenney v Wexham* (1822) 6 Madd. 355; *Swift v Swift* (1841) 31 I.R.Eq. 267; *Beswick v Beswick* [1968] A.C. 58, below, para.27-055.
40. *Ranelagh (Earl) v Hayes* (1683) 1 Vern. 189; *Sporle v Whayman* (1855) 20 Beav. 607; *Anglo-Australian Life Assurance Co v British Provident Life and Fire Society* (1862) 3 Giff. 521; *Ascherson v Tredegar Dry Dock & Wharf Co Ltd* [1909] 2 Ch. 401. The terms of the decree in *Ranelagh (Earl) v Hayes*, above, were disapproved insofar as they related to future contingent liabilities in *Lloyd v Dimmack* (1877) 7 Ch. D. 398 and in *Hughes-Hallett v Indian Mammoth Gold Mines Co* (1882) 22 Ch. D. 561; and see Fry, *Specific Performance*, 6th edn (2012),

para.1612. But the court may (it seems) grant a declaration in such a case: *Household Machines Ltd v Cosmos Exporters Ltd* [1947] K.B. 217.

41. *Adderley v Dixon* (1824) 1 S. & S. 607.
42. *Laemthong International Lines Co Ltd v Artis (The Laemthong Glory)* [2004] EWHC 2738 (Comm), [2005] 1 Lloyd's Rep. 632 at [47], [49], [51]; affirmed [2005] EWCA Civ 519, [2005] 1 Lloyd's Rep. 688, where there was no reference to the issue of specific enforceability and the shipowner's claim is said at [19] to be one for a declaration that the promisors were obliged by the letter of indemnity to take specified steps to secure the release of the ship. For enforceability of the letter of indemnity by the shipowner as a third party (that letter having been addressed by the receiver of the goods to the charterer of the ship), see above, para.18-095. See also *Farenco Shipping Co Ltd v Daebo Shipping Co Ltd (The Bremen Max)* [2008] EWHC 2755 (Comm), [2009] 1 Lloyd's Rep. 81 (specific performance ordered of time charterer's undertaking to ship-owner to give security to prevent the arrest of the ship or to secure her release); for this case, see also below, para.27-035.
43. [1968] A.C. 58; above, para.18-022; below, para.27-055. For the effect on such facts of the Contracts (Rights of Third Parties) Act 1999, see above para.18-096.
44. For others, see above, para.27-008 at n.38; below, para.27-055.
45. [1968] A.C. 58, 81, 102; cf. 73, 83; above, para.18-049. Lord Pearce thought that damages would be substantial: [1968] A.C. 58, 88 above, para.18-049 n.294.
46. *Decro-Wall International SA v Practitioners in Marketing Ltd SA* [1971] 1 W.L.R. 361; *Hollis & Co v Stocks* [2000] I.R.L.R. 712; cf. *The Laemthong Glory* [2004] EWHC 2738 (Comm) at [47] (damages for detention of a ship "never an entirely straightforward matter"), on which above n.41; *Thames Valley Power Ltd v Total Gas & Power Ltd* [2005] EWHC 2208 (Comm), [2006] 1 Lloyd's Rep. 441 (below, para.27-015) at [64] ("the almost impossible task in calculating any damages"); *J.M. Finn Ltd v Holliday* [2013] EWHC 3450 (QB), [2014] I.R.L.R. 102 (injunction granted against summary resignation of employee of stockbroking firm with a view to joining a competitor because the loss that would be suffered by the employers would "not be readily quantifiable in terms of damages" at [75]); and see para.27-072; *SAB Miller Africa v East African Breweries* [2009] EWHC 2140 (Comm), [2010] 1 Lloyd's Rep. 392 at [178]-[202], leave to appeal refused [2009] EWCA Civ 1564, [2010] 2 Lloyd's Rep. 442 (damages not an adequate remedy for breach of agreement in restraint of trade between brewers); *Lauffer v Barking Havering and Redbridge University Hospitals NHS Trust* [2009] EWHC 2360 (QB) (damages not an adequate remedy for dismissal of consultant surgeon in a way that had deprived him of a chance of clearing his name); *Araci v Fallon* [2011] EWCA Civ 668 at [46] (difficulties of causation) and [71] ("problematic" calculation of loss; for this case, see below, para.27-067).
47. *Société des Industries Metallurgiques SA v Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep. 465, 468.
48. See *Hill v C.A. Parsons Ltd* [1972] 1 Ch. 305; *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 W.L.R. 349 (injury to employment prospects or reputation were formerly regarded as items of loss which could not be recovered by an employee: see now *Malik v B.C.C.I.* [1998] A.C. 20); *Araci v Fallon* [2011] EWCA Civ 668 at [72] (damages could not adequately compensate for "the right to own a Derby winner").
49. *AB v CD* [2014] EWCA Civ 229, [2014] 3 All E.R. 667 at [25]-[27], following Mance L.J. in *Bath and North East Somerset DC v Mowlem Plc* [2004] EWCA Civ 115, [2004] B.L.R. 153, especially at [15]. The existence of such a term was one factor to be taken into account in answering the question put (in the passage quoted in para.27-005) by Sachs L.J. in *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 W.L.R. 349 at 379, viz whether it was "just in all the circumstances that a [claimant] should be confined to his remedy in damages": *AB v CD* [2014] EWCA Civ 229 at [32].
50. *The Laemthong Glory* [2004] EWHC 2738 (Comm) at [47] ("the enforcement of judgments in

- Yemen is a matter of some difficulty"). Likewise, where the defendant "has no presence here" and the acts which he is required by the contract to do are to be performed abroad, these facts will also be a ground for refusing specific enforcement since in such a case "none of the traditional methods of enforcement will work": *SSL International Plc v TTK LIG Ltd* [2011] EWCA Civ 1170, [2012] 1 All E.R. (Comm) 429, citing (and approving at [95] and [97]) the judgment of the court below ([2011] EWHC 1695 (Ch) at [91]).
51. *Thames Valley Power Ltd v Total Gas and Power Ltd* [2005] EWHC 2008 (Comm), [2006] 1 Lloyd's Rep. 441 at [64], below, para.27-016.
 52. *Evans Marshall & Co Ltd v Bertola SA* [1973] 1 W.L.R. 349, 380. cf. *Associated Portland Cement Manufacturers Ltd v Teigland Shipping A/S (The Oakworth)* [1975] 1 Lloyd's Rep. 581, 583; *Eximenco Handels AG v Partrederiet Oro Chef (The Oro Chef)* [1983] 2 Lloyd's Rep. 509, 521; *Araci v Fallon* [2011] EWCA Civ 668 at [48]; but not merely because the defendant has no assets in the jurisdiction: *Locobail International Finance Ltd v Agroexport (The Sea Hawk)* [1986] 1 W.L.R. 657, 665; *Lawrence David Ltd v Ashton* [1989] I.C.R. 123, 134. See also *Themehelp Ltd v West* [1996] Q.B. 84; *Kall-Kwik Printing (UK) v Bell* [1994] F.S.R. 674.
 53.  *PJS v News Group Newspapers* [2016] UKSC 26 at [43]; *Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group* [2016] EWHC 1393 (TCC) at [15].
 54. *Buxton v Lister* (1746) 3 Atk. 383, 384; above, para.27-002; cf. *Garden Cottage Foods Ltd v Milk Marketing Board* [1984] A.C. 130 (no injunction against refusal, in violation of art.86 (now art.82) of the European Community Treaty, to supply butter to a distributor, as his loss of profits could easily be assessed); and see below, para.27-015.
 55. *Cud v Rutter* (1719) 1 P.Wms. 570.
 56. *Re Schwabacher* (1908) 98 L.T. 127, 128; *Chinn v Hochstrasser* [1979] Ch. 447; reversed on other grounds [1981] A.C. 533.
 57. *Odessa Tramways Co v Mendel* (1878) 8 Ch. D. 235; *Sri Lanka Omnibus Co v Perera* [1952] A.C. 76.
 58. *Duncuft v Albrecht* (1841) 12 Sim. 189; *Cheale v Kenward* (1858) 3 De G. & J. 27; *Langen & Wind Ltd v Bell* [1972] Ch. 685; *Jobson v Johnson* [1989] 1 W.L.R. 1026; cf. *Pao On v Lau Yiu Long* [1980] A.C. 614, where this point was conceded; *Harvela Investments Ltd v Royal Trust Co of Canada (C.I.) Ltd* [1986] A.C. 207 (shares not available in the market and giving a controlling interest in the company); *Grant v Cigman* [1996] 2 B.C.L.C. 24; *Pena v Dale* [2003] EWHC 1065, [2004] B.C.L.C. 508 at [135] (option to purchase shares in a private company specifically enforced). The question of the availability of a substitute arose in a different context in *Araci v Fallon* [2011] EWCA Civ 68 (below, para.27-067), where the "difficulty of obtaining a substitute jockey" (at [57]) was not (as it is in the authorities considered in the present paragraph (27-010)) that of the other party to the contract (the claimant) but that of a third party, and *this* difficulty was no bar to the grant of an injunction to restrain the jockey's breach. The claimant *had* obtained a substitute jockey, though one who, unlike the defendant, had "not previously ridden" the horse in question (at [20]).
 59. *Hawkins v Maltby* (1867) L.R. 3 Ch.App. 188, 194; *Stray v Russell* (1859) 1 E. & E. 888 but see *Birmingham v Sheridan*, *Re Waterloo Life Assurance Co (No.4)* (1864) 33 Beav. 660; *Poole v Middleton* (1861) 29 Beav. 646. Specific performance of a contract to buy shares will not (save in exceptional circumstances) be ordered against a purchaser after an order has been made for the company to be wound up since the transfer of the shares would be void against the company: *Sullivan v Henderson* [1973] 1 W.L.R. 333.
 60. *Rogers v Challis* (1859) 27 Beav. 175; *Sichel v Mosenthal* (1862) 30 Beav. 371; cf. *Handley Page Ltd v Commissioners of Customs & Excise* [1970] 2 Lloyd's Rep. 459.
 61. *Reversing South African Territories v Wallington* [1898] A.C. 309.









- [62.](#) *Pusey v Pusey* (1684) 1 Vern. 273; *Somerset v Cookson* (1735) 3 P.Wms. 390; *Lowther v Lowther* (1806) 3 Ves. 95; a slightly wider view may have been taken by *Falcke v Gray* (1859) 3 Drew. 651, 658.
- [63.](#) See *Nutbrown v Thornton* (1804) 10 Ves. 159; *North v G.N. Ry* (1860) 2 Giff. 64; *Behnke v Bede Shipping Co* [1927] 1 K.B. 649 the latter decision might have been, but was not, based on the fact that the subject matter was a ship: see *Bathynay v Bouch* (1881) 50 L.J.Q.B. 221 and cf. Lord Simon's statement in *Mardorf Peach & Co Ltd v Attica Sea Carriers Corp of Liberia (The Laconia)* [1977] A.C. 850, 873-874 that "In some respects the law of contract already treats a ship as if she were a piece of realty". See also *Lingen v Simpson* (1824) 1 S. & S. 600 (pattern books); cf. *Land Rover Group Ltd v UPF (UK) Ltd* [2002] EWHC 3183; [2003] B.C.L.C. 222 at [52] (mandatory injunction to enforce obligation to supply chassis to car manufacturer); contrast *Soc. des Industries Metallurgiques SA v Bronx Engineering Co Ltd* [1975] 1 Lloyd's Rep. 465 (machinery available from another source). See also *C.N. Marine Inc v Stena Line A/B (The Stena Nautica)* (No.2) [1982] 2 Lloyd's Rep. 336, where the Court of Appeal recognised that "specific performance can be made in the case of ship" (at 347) but refused to make such an order as the claimant had failed to show that he had a special need for the ship or that damages would not be an adequate remedy; *Eximento Handels AG v Partrederiet Oro Chef (The Oro Chef)* [1983] 2 Lloyd's Rep. 509, 520-521; *Allseas International Management Ltd v Panroy Bulk Transport Ltd (The Star Gazer)* [1985] 1 Lloyd's Rep. 370; *Gyllenhammer Partners International v Sour Brodogradevna* [1989] 2 Lloyd's Rep. 403, 422. And see below, para.2-014.
- [64.](#) *Record v Bell* [1991] 1 W.L.R. 853, 862.
- [65.](#) *Record v Bell* [1991] 1 W.L.R. 853, 862.
- [66.](#) And of its precursor, s.2 of the Mercantile Law Amendment Act 1856, which gave effect to a recommendation in the 2nd Report of the Mercantile Law Commission (1855). See Vol.II, para.44-440.
- [67.](#) *Astro Exito Navegacion SA v Southland Enterprise Co Ltd (The Messiniaki Tolmi)* [1982] Q.B. 1248; affirmed without reference to this point [1983] 2 A.C. 787 (sale of ship). For earlier authorities on the availability of the remedy to the seller, contrast *Shell-Mex Ltd v Elton Cop Dyeing Co* (1928) 34 Com. Cas. 39, 47 with *Elliott v Pierson* [1948] 1 All E.R. 939, 942. One practical effect of an order of specific performance at the suit of the seller would be to enable the seller to get the price in a case falling outside s.49 of the Sale of Goods Act 1979. Another practical effect of such an order would be to compel the buyer to perform his duty to take delivery: cf. *P & O Nedlloyd BV v Arab Metals Co* [2006] EWCA Civ 1717, [2007] 2 All E.R. (Comm) 401 where it was assumed that the obligation to take delivery of goods imposed by a contract of carriage could be specifically enforced by the carrier at the end of the carriage operation. In the context of a contract of sale, the point could be significant where the seller wanted to clear his storage space, or had some other commercial interest in securing actual performance of the buyer's duty to take delivery, as opposed to merely getting damages for the buyer's refusal to take delivery under Sale of Goods Act 1979 s.37.
- [68.](#) For the view that specific enforceability does not necessarily give rise to an equitable interest, see *Tailby v Official Receiver* (1888) 13 App. Cas 523, 548; *Re London Wine Co (Shippers)* [1986] P.C.C. 121, 149. cf. also *Leigh & Silavan Ltd v Aliakmon Shipping Co (The Aliakmon)* [1986] A.C. 785, where it was said at 812-813 that equitable "ownership" or "title" did not pass under a contract for the sale of unascertained goods on "appropriation" of particular goods to the contract; but damages for breach of the contract would clearly have been an adequate remedy (above, para.27-010) so that the question whether an equitable interest in goods can pass under a specifically enforceable contract for the goods remains an open one.
- [69.](#) It was the fear of giving the buyer priority over secured creditors that was the main reason why specific performance was refused in *Re Wait* [1927] 1 Ch. 606: see especially 640. The buyer's problems in that case arose from the general rule, laid down by Sale of Goods Act 1979 s.16, that property under a contract of sale cannot pass in goods which are unascertained: see *Re Goldcorp Exchange Ltd* [1995] 1 A.C. 74; contrast *Re Stapylton Fletcher* [1994] 1 W.L.R. 1181, where the goods were segregated from the seller's own stock after sale. The buyer's interests

are now in turn protected by a statutory exception to the general rule in s.16: see s.20A, discussed in para.27-014 below after n.72. Insolvency of the defendant is not a ground for refusing specific performance where the remedy is normally available as a matter of course: *Amec Properties v Planning Research and Systems* [1992] 1 E.G.L.R. 70.

- 70. [1927] 1 K.B. 169.
- 71. At 181; contrast *Phillips v Lamdin* [1949] 2 K.B. 33 (Adam style door). And see *Rawlings v General Trading Co* [1921] 1 K.B. 635 where specific performance of an undertaking to deliver a quantity of shell cases was ordered without argument as to the remedy. The actual decision in that case has been reversed by the Auctions (Bidding Agreements) Act 1927 on a point unconnected with specific performance.
- 72. i.e. before the enactment of its precursor in 1856: see above, n.64. For criticism see Treitel [1966] J.B.L. 211.
- 73. "Specific" refers primarily to goods "identified and agreed on at the time a contract of sale is made." Sale of Goods Act 1979 s.61(1); for an extension of the definition, see below at n.73. "Ascertained" is not defined in the Act but seems to mean "identified in accordance with the agreement after the time a contract of sale is made." *Re Wait* [1927] 1 Ch. 606, 630; or identified in any other way: *Thames Sack & Bag Co Ltd v Knowles* (1918) 88 L.J.K.B. 585, 588. Where a contract for the sale of part of a manufacturer's output did not enable the court to "point to a quantity of [goods] and know that they are ... the subject of the contract of sale", it was held that the contract was not one for the sale of "ascertained" goods within s.52: *TTK LIG Ltd* [2011] EWCA Civ 1170, [2012] 1 All E.R. (Comm) 429 at [89]. The goods in that case were also neither "specific" as "they ... did not exist at the date of the contracts in question" (at [89]); nor were they "generic goods which can be sold in any country" since, once they had been "packaged for a given country, it [was] difficult, if not impossible, to sell them elsewhere" (at [18]).
- 74. By Sale of Goods (Amendment) Act 1995.
- 75. Sale of Goods Act 1979 s.61(1), definition of "specific goods" as amended by s.2(a) of the 1995 Act; the bulk must (as in our example) be identified and agreed on when the contract was made.
- 76. As in *Re Wait* [1927] 1 Ch. 606.
- 77. Sale of Goods Act 1979 s.20A(1), as inserted by s.1(3) of the 1995 Act.
- 78. Sale of Goods Act 1979 s.20A(2).
- 79. The buyer's property acquired by virtue of s.20A(2) would not necessarily prevail against a competing interest such as that of a bank to which documents of title representing the goods had been pledged, as in *Re Wait*, above n.74; and where it did not so prevail the court would be unlikely to order specific performance to disturb this state of affairs: see Benjamin's Sale of Goods, 8th edn (2010), paras 18-342, 19-221.
- 80. Sale of Goods Act 1979 s.20A(1) refers to the goods (in a case of the present kind) as "a specified quantity of *unascertained* goods".
- 81. *Jones v Tankerville* [1909] 2 Ch. 440, 445.
- 82. *Howard E. Perry & Co v British Railways Board* [1980] 1 W.L.R. 1375, 1383; for this case, see below at n.84.
- 83. Supported by some early cases: see *Taylor v Neville* (unreported), cited with approval in *Buxton v Lister* (1746) 3 Atk. 386 and in *Adderley v Dixon* (1824) 1 S. & S. 607; but disapproved in *Pollard v Clayton* (1855) 1 K. & J. 462.

- [84.](#) See *Fothergill v Rowland* (1873) L.R. 17 Eq. 137; *Pollard v Clayton* (1855) 1 K. & J. 462; *Dominion Coal Co v Dominion Iron and Steel Co* [1909] A.C. 293. Contrast *Donnell v Bennett* (1883) 23 Ch. D. 835 taking a more liberal view.
- [85.](#) cf. below, para.27-036.
- [86.](#) *Howard E. Perry & Co v British Railways Board* [1980] 1 W.L.R. 1375.
- [87.](#) *Howard E. Perry & Co v British Railways Board* [1980] 1 W.L.R. 1375 at 1383.
- [88.](#) *Sky Petroleum Ltd v V.S.P. Petroleum Ltd* [1974] 1 W.L.R. 576; cf. also *Total Oil Great Britain Ltd v Thompson Garages (Biggin Hill) Ltd* [1972] 1 Q.B. 318. *Wake v Renault, The Times*, August 1, 1996 could be explained on the same ground, though the case gives rise to difficulties discussed in para.27-077 at n.519, below.
- [89.](#) This possibility was doubted in *Re London Wine Co (Shippers)* [1986] P.C.C. 121, 149; but in that case it was not necessary to reach a conclusion on the specific enforceability of a contract for the delivery of goods which were not “specific or ascertained” since on the facts damages were clearly an adequate remedy: cf. above, para.27-010.
- [90.](#) [2005] EWHC 2208 (Comm) [2006] 1 Lloyd’s Rep. 441.
- [91.](#) [2005] EWHC 2208 (Comm) at [49].
- [92.](#) [2005] EWHC 2208 (Comm) at [49].
- [93.](#) [2005] EWHC 2208 (Comm) at [63]. B had indicated that, if they were held not to be protected by the force majeure clause, then they would continue to supply gas to A under the terms of the contract between A and B, at [58].
- [94.](#) [2005] EWHC 2208 (Comm) at [63].
- [95.](#) See para.27-010 above.
- [96.](#) *Thames Valley Power* case, above n.88, at [64]; cf. para.27-008 above.
- [97.](#) *Thames Valley Power* case, above n.88, at [64]; cf. para.27-010 at n.50.
- [98.](#) Especially with the principles stated in paras 27-008 and 27-010.
- [99.](#) For general discussion of the 2015 Act, which applies to contracts made on or after October 1, 2015, see below Ch.38, especially paras 38-431—38-547 on consumer rights in respect of goods, digital content and services.
- [100.](#) s.60 and Sch.1 para.29 of the Consumer Rights Act 2015 adds a new subs.(5) to s.52 of the Sale of Goods Act 1979; this subsection provides that “this section does not apply to a contract to which Chapter 2 of Part 1 of Act applies”. This is stated in s.3(1) of the 2015 Act to apply to “a contract for a trader to supply goods to a consumer”. See generally paras 38-408 to 38-413.
- [101.](#) s.3(1) of the Consumer Rights Act 2015. For the definitions of “consumer”, see below, Vol.II, paras 38-038 to 38-039, 38-044, and “trader” paras 38-053—38-054
- [102.](#) s.5(1) of the Consumer Rights Act 2015.
- [103.](#) See in particular s.19(1) and (9) of the Consumer Rights Act 2015. And see for the meaning of “goods conforming to a contract” see below, Vol.II, paras 38-458 to 38-476.
- [104.](#) s.19(4) of the Consumer Rights Act 2015; see below, Vol.II, paras 38-477 to 38-488.
- [105.](#) s.19(11)(b) of the Consumer Rights Act 2015.

- [106.](#) s.28(2) of the Consumer Rights Act 2015.
- [107.](#) See below, Vol.II, para.38-489.
- [108.](#) See s.28(6), (8) of the Consumer Rights Act 2015. See below, Vol.II, para.38-489.
- [109.](#) s.28(9) of the Consumer Rights Act 2015.
- [110.](#) Made by Sale and Supply of Goods to Consumers Regulations 2002 (SI 2002/3045), implementing Directive 1999/44/EC, [1999] O.J. L171/12. The Regulations provide similar remedies where goods are supplied to a consumer under a contract other than one of sale: see the amendments made to the Supply of Goods and Services Act 1982 by reg.9 of the above Regulations. For the sake of brevity, the following discussion is confined to cases of sale. See also Harris, (2003) 119 L.Q.R. 541.
- [111.](#) Sale of Goods Act 1979 ss.48A(2)(a) and 48B, as inserted by reg.5 of the 2002 Regulations (above, n.108); for dealing as consumer, see Sale of Goods Act 1979 s.61(5A).
- [112.](#) Sale of Goods Act 1979 s.48E(2), as inserted by reg.5 of the 2002 Regulations (above, n.108).
- [113.](#) Sale of Goods Act 1979 s.48B(3)(a); cf. below, para.27-035.
- [114.](#) Sale of Goods Act 1979 s.48B(3)(b); cf. below, para.27-036.
- [115.](#) For price reduction, see the s.48C, inserted by reg.5 of the Regulations referred to in n.108, above.
- [116.](#) Sale of Goods Act 1979 s.48E(3) and (4).
- [117.](#) Above, at para.27-005.
- [118.](#) See above n.108.
- [119.](#) See s.60 and Sch.1 para.53 of the Consumer Rights Act 2015. The 2015 Act also provides that Pt 5A of the Sales of Goods Act 1979 is to be omitted. All the provisions of ss.48A, 48B, 48C and 48E of the 1979 Act (which relate to the consumer's right to repair, replacement or price reduction) are included in Pt 5A of that Act and will therefore cease to have effect. Section 61(5A) of the 1979 Act (cited in n.109) is also to be omitted: see 2014 Act s.60 and Sch.1 para.35(A). See generally below, Vol.II, paras 38-431 to 38-440.
- [120.](#) s.60 and Sch.1, ss.37 to 52 of the Consumer Rights Act 2015.
- [121.](#) s.3(1) of the Consumer Rights Act 2015.
- [122.](#) s.3(2)(b)(a)-(c) of the Consumer Rights Act 2015. See below, Vol.II, paras 38-451—38-457.
- [123.](#) ss.9-11, 13-16 of the Consumer Rights Act 2015. See below, Vol.II, paras 38-458—38-470.
- [124.](#) Heading before s.19 of the Consumer Rights Act 2015.
- [125.](#) s.19(3)(b) of the Consumer Rights Act 2015. See below, Vol.II, para.38-482.
- [126.](#) s.23(2)(a) of the Consumer Rights Act 2015.
- [127.](#) See s.19(10)(a) of the Consumer Rights Act 2015.
- [128.](#) s.19(9) of the Consumer Rights Act 2015. See below, Vol.II, para.38-486.
- [129.](#) s.19(11)(b) of the Consumer Rights Act 2015.

- [130.](#) In ss.19(9), (10) and (11) of the Consumer Rights Act 2015.
- [131.](#) s.33(1) of the Consumer Rights Act 2015. See below, Vol.II, paras 38-496—38-503.
- [132.](#) See heading before s.34 of the Consumer Rights Act 2015.
- [133.](#) For example, a digital contents contract is to be “treated as including a term” that (inter alia) the quality of the digital content is satisfactory (s.34(1)), that the digital content is reasonably fit for the consumer’s “particular purpose” (s.35(1), (3)), and that the digital contract will match “any description of it given by the trader to the consumer” (s.36(1)). See below, Vol.II, paras 38-504 to 38-516.
- [134.](#) ss.42(2)(a) and 43 of the Consumer Rights Act 2015. See below, Vol.II, para.38-518.
- [135.](#) s.42(6) of the Consumer Rights Act 2015. See below, Vol.II, para.38-522.
- [136.](#) s.42(7)(c) of the Consumer Rights Act 2015.
- [137.](#) See below, Vol.II, paras 38-527 to 38-529.
- [138.](#) Further points that arise in relation to the specific enforceability under the Act of a contract for the performance of services are discussed below, Vol.II, para.27-027.
- [139.](#) Heading before s.49 of the Consumer Rights Act 2015.
- [140.](#) For example, a term that the trader must perform the contract with reasonable skill (s.49(1)) and a term that specified information given by the trader to the consumer is to be treated as included as a term in the contract (s.50(1)). See below, Vol.II, paras 38-530 to 38-539.
- [141.](#) See s.54(2)(a) and (b) of the Consumer Rights Act 2015.
- [142.](#) ss.54(3)(a) and 55 of the Consumer Rights Act 2015. See below, Vol.II, para.38-541.
- [143.](#) s.54(6) of the Consumer Rights Act 2015. See below, Vol.II, para.38-544.
- [144.](#) s.54(7) of the Consumer Rights Act 2015.
- [145.](#) s.54(7)(c) of the Consumer Rights Act 2015.
- [146.](#)  Consumer Rights Act 2015 s.23(3) applies to goods and s.43(9) applies to digital content.
- [147.](#)  Consumer Rights Act 2015 s.53(3).
- [148.](#)  Taking into account a list of factors specified in the Consumer Rights Act 2015 ss.23(4) and 43(4).
- [149.](#)  Consumer Rights Act 2015 ss.54(3)(a), 55(1).
- [150.](#)  Consumer Rights Act 2015 s.55(3).
- [151.](#)  But not in the case of goods: see below, para.27-022B.
- [152.](#)  cf. below, para.27-036.
- [153.](#)  To which the consumer is entitled under ss.19(3)(c) (goods), 42(2)(b) (digital content) and

54(3)(b) (services) under the Consumer Rights Act 2015.

154.

! i.e. “the right to repair or replacement of goods (s.19(3)(b)) or of digital content (s.42(2)(a)) or the “right to require repeat performance” of a service (s.54(3)(a)) Consumer Rights Act 2015. In addition, “specific performance” is listed among “other remedies” (ss.19(10), 42(7) and 54(7)) which the consumer may seek. In those situations, the word “other” suggests that the reference to “specific performance” is not to the right to repair or replacement, or repeat performance but is to cover the (unlikely) possibility that specific performance might be available under the normal principles governing that remedy.

155.

! A term used in this context to mean the same thing as rights: see, for example, the use of the phrase “other remedies” in the Consumer Rights Act 2015 ss.19(10), 42(7) and 54(7).

156.

! Consumer Rights Act 2015 s.58(2).

157.

! Consumer Rights Act 2015 s.23.

158.

! Consumer Rights Act 2015 s.43.

159.

! Consumer Rights Act 2015 s.55.

160.

! Consumer Rights Act 2015 s.58(3).

161.

! Consumer Rights Act 2015 s.58(4). See below, paras 38-485, Vol.II, paras 38-520, 38-543.

162.

! Consumer Rights Act 2015 s.58(8).

163.

! There is no right to treat a contract for digital content as at an end for non-conformity: s.42(8) (contrast the right to reject goods and treat the contract as at an end: see ss.19(3) and s.20(4)). In contracts for services the consumer's right to treat the contract as at an end is preserved, and in both contracts for digital content and for services so too is the right to damages (see ss.42(7) and 54(7)), but these are not “right[s] under the relevant remedies provisions” within s.58(3) and so cannot be ordered by the court instead of specific performance. See Vol.II, para.38-486.

164.

! Above, para.27-020.

165.

! Consumer Rights Act 2015 ss.23(3) and (4), 43(3) and (4).

166.

! Heading before Consumer Rights Act 2015 s.58.

167.

! See the references to Consumer Rights Act 2015 ss.24, 44 and 56 in s.58(8).

168.





! As there is under Consumer Rights Act 2015 ss.23(3)(b) and 43(3)(b).

169.

! Or equally to make an order as if the consumer had claimed to reject the goods and treat the contract as at an end, see s.19(3) and s.20(4).

170.

! Directive on certain aspects of the sale of consumer goods and associated guarantees [1999] O.J. L171/99, p.12, art.3(2). See Vol.II, paras 44-006—44-013.

- [171.](#)  See below, para.38-485. And see Whittaker (2017) 133 L.Q.R. (forthcoming). On the Consumer Sales Directive 1999 generally, see Vol.II, para.38-400. On “sales contracts” see Vol.II, paras 38-452—38-454.
- [172.](#)  *Gebr Weber GmbH v Wittmer, Putz v Medianess Electronics GmbH (C-65/09 and C-87/09) [2011] 3 C.M.L.R. 27, [63]–[78].*
- [173.](#)  See above, paras 1-013A et seq.
- [174.](#)  The Directive only mentions impossibility and disproportionality compared to the other specific remedy. Directive 1999/44/EC art.3(3) is reflected in 2015 Act s.23(3)–(4) and see Vol.II, para.38-482.

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Volume I - General Principles
Part 8 - Remedies for Breach of Contract
Chapter 27 - Specific Performance and Injunction ¹
Section 3. - Contracts not Specifically Enforceable

General

27-023

Specific performance of certain types of contracts may be refused even if damages are an inadequate remedy. In these cases the reason for refusing specific relief is not that it is unnecessary, but that it may be undesirable to grant it or impracticable to enforce it.

Contracts involving personal service

27-024

It has long been settled that a contract of personal service (or employment) will not, as a general rule, be specifically enforced at the suit of either party. ¹⁷⁵ The principle applies where a company director's service agreement is wrongfully determined by the company ¹⁷⁶; but the court may by injunction restrain one director from interfering with the exercise by another director of his powers as such. ¹⁷⁷

Contracts of employment

27-025

The reason why specific enforcement is not available against an employee is that such an order is thought to interfere unduly with his personal liberty: it is this ground of policy which accounts for the rule, so that "questions of the adequacy of damages are irrelevant to this issue". ¹⁷⁸ Legislative force is given to this principle by the Trade Union and Labour Relations (Consolidation) Act 1992, s.236 of which provides 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 a contract by injunction. ¹⁷⁹ Conversely, an employer could not be forced to employ: it was thought to be difficult or undesirable to enforce the continuance of a "personal" relationship between unwilling parties. This principle is also reflected in the provisions of the Employment Rights Act 1996 ¹⁸⁰ as to the remedies for "unfair" dismissal (which is not normally a breach of contract at all). Under the Act, a tribunal may order the reinstatement or reengagement of the employee, but if such an order is not complied with, the employer can, in the last resort, only be ordered to pay compensation. ¹⁸¹ In practice, reinstatement is "effected in only a tiny proportion of ... cases" ¹⁸² so that it is compensation which is the employee's "primary remedy". ¹⁸³ Where an employee is dismissed in breach of contract, his normal remedy is a claim for damages or a declaration that the dismissal was *wrongful*: not specific enforcement, or a declaration that the dismissal was *invalid*. ¹⁸⁴ The statutory right to return to work ¹⁸⁵ after maternity, parental or paternity leave appears likewise not to be specifically enforceable. ¹⁸⁶

Exceptions

27-026

The principle stated in para.27-024 is subject to a growing list of exceptions. ¹⁸⁷ A person who is dismissed from a public office in breach of the terms of his appointment may be entitled to reinstatement ¹⁸⁸; and the visitor of a university has power to order the reinstatement of a wrongfully dismissed lecturer (even where such a remedy would not be available in the ordinary courts), ¹⁸⁹ such a dismissal being, if it amounts to a violation of the university's statutes, not merely wrongful but also invalid. ¹⁹⁰ The continuance or creation of a "personal" relationship may be enforced where an injunction is granted against expulsion from a social club, ¹⁹¹ or against the refusal of a professional association to admit a person to membership. ¹⁹² The right to exclude persons from membership of certain charitable associations ¹⁹³ is also restricted; for though such bodies have the right to exclude persons whom they in good faith regard as likely to damage their objectives, they must not adopt arbitrary procedures to that end: they may, for example, be required to invite persons who are about to be excluded to give reasons why they should be admitted. ¹⁹⁴

More generally, the modern relationship of employer and employee is often less personal than the old relationship of master and servant was believed to be; and there are signs that the courts are prepared to re-examine or qualify the traditional equitable principle in the light of this development. ¹⁹⁵ Industrial conditions may in fact force an employer to retain an employee whom he would prefer to dismiss or to dismiss one whom he is perfectly willing to retain. For example, in *Hill v C.A. Parsons Ltd* ¹⁹⁶ employers were forced by union pressure to dismiss an employee. The dismissal amounted to a breach of contract and the court issued an injunction to restrain the breach, thus in effect re-instating the employee. As the employers and the employee were perfectly willing to maintain their relationship, the decision does not violate the rationales for the general equitable principle against the specific enforcement of employment contracts. An injunction to restrain dismissal can also be issued in respect of a period during which no actual services are to be rendered under the contract. Thus where an employee had been suspended on full pay while disciplinary proceedings against him were in progress, it was held that the employers could be restrained from dismissing him before the disciplinary proceedings had run their full course ¹⁹⁷; and they could, a fortiori, be so restrained if they had purported to dismiss the employee without any recourse to the disciplinary procedure which governed the employment relationship. ¹⁹⁸

Other contracts involving "personal" service

27-027

Specific performance may be refused in respect of contracts involving personal service even though they are not contracts of service. Thus it has been held that an agreement to allow an auctioneer to sell a collection of works of art cannot be specifically enforced by either party ¹⁹⁹; and that specific relief was not available to compel a fee-paying school to reinstate a pupil who had been excluded for alleged misconduct, since the "breakdown of trust" had made it undesirable to require the parties "to co-exist in a pastoral and educational relationship". ²⁰⁰ Similarly an agreement to enter into a partnership will not be specifically enforced ²⁰¹ as "it is impossible to make persons who will not concur carry on a business jointly for their common advantage". ²⁰² But a contract for the sale of a share in a partnership may be specifically enforced where it does not involve personal service or continuing personal relations between the contracting parties. ²⁰³ Even where personal service or a continuing personal relationship is involved, the court can order the execution of a formal partnership agreement and leave the parties to their legal remedies on the agreement. ²⁰⁴ Similarly, the court can order the execution of a service contract even though that contract, when made, may not be specifically enforceable. ²⁰⁵

Services not of a "personal" nature

27-028

Specific performance is refused in the above cases because the courts are reluctant to force the parties to enter into, or to continue in, a personal relationship against the will of one of the parties. It follows that the refusal of specific performance on this ground is limited to cases in which the services are personal in nature. Specific enforcement of a contract for the supply of services which are not of this nature may, indeed, be refused on some other ground, e.g. because "mutual confidence [has]

broken down” between the person to whom the services were to be provided and their provider.²⁰⁶ But there is no general rule against the specific enforcement of a contract merely because one party has contracted to provide services.²⁰⁷ Thus specific performance can be ordered of a contract to publish a piece of music,²⁰⁸ and sometimes of contracts to build.²⁰⁹ It has, indeed, been suggested that a time charterparty cannot be specifically enforced against the shipowner because it is a contract for services²¹⁰; but the services that the shipowner undertakes to provide under such a contract²¹¹ will often be no more personal than those to be rendered by a builder under a building contract. Denial of specific performance in the case of time charters is best explained on other grounds.²¹²

Provision of services to consumers

27-029

We saw above²¹³ that under the Consumer Rights Act 2015, where “a contract for a trader to supply a service to a consumer”²¹⁴ is breached, in that “the service does not conform to the contract”,²¹⁵ the consumer “has the right to require repeat performance”²¹⁶ and “the right to a price reduction”.²¹⁷ However, the 2015 Act also allows the consumer to seek other remedies,²¹⁸ including “specific performance”.²¹⁹ The problem is that the specific enforceability of the trader’s obligations could cut across the principle that contracts involving “personal” service are not specifically enforceable,²²⁰ even if they are not contracts of employment e.g. if the “trader” were a skilled professional such as an architect who acted as an individual contractor. In such a case, the solution is that specific performance could be refused on the ground that it was not “open to the consumer in the circumstances”.²²¹ Furthermore, the nature of the remedies of repeat performance and price reduction suggests that they are intended to provide remedies for *defective* performance, i.e. where “the service does not conform to the contract”. Hence, in cases of refusal to perform or other total failure in performance, there must be some doubt whether specific performance would be available under the Act, since its availability is limited to a breach of a term to which the remedies of repeat performance or price reduction apply.

Constant supervision and continuous duties

27-030

The court will not specifically enforce a contract under which one party is bound by continuous duties, the due performance of which might require constant supervision by the court.²²² In *Ryan v Mutual Tontine Association*²²³ the lease of a service flat gave the tenant the right to the services of a porter who was to be “constantly in attendance”. Specific enforcement of this right was refused on the ground that it would have required “that constant superintendence by the court, which the court in such cases has always declined to give”.²²⁴ For the same reason the courts have refused specifically to enforce a tenant’s undertaking to cultivate a farm in a particular manner²²⁵; the obligations of a railway company to operate signals and to provide engine power²²⁶; a contract to keep an airfield in operation²²⁷; a contract to keep a shop open²²⁸; the obligations of a shipowner under a voyage charterparty²²⁹; a contract to deliver goods by instalments²³⁰; one which “would require an unacceptable degree of supervision [of the seller’s performance] in a foreign land”²³¹; and a long-term contract to supply catering services to a convention centre which would require “daily and detailed co-operation” between the parties.²³² The difficulty of supervision is also one ground that has been given for the refusal of the courts in some cases specifically to enforce contracts to do building work²³³ or to keep buildings in repair.²³⁴ But in such cases specific performance is sometimes ordered and no practical difficulty seems to have arisen in enforcing such orders.²³⁵ This suggests that the “difficulty” of supervision has been somewhat exaggerated; and various devices at the court’s disposal can be deployed to overcome it. The court can, for example, appoint a receiver to perform the acts specified in the order,²³⁶ or appoint an expert to act as officer of the court for the purpose, or it can authorise the claimant to appoint a person to act as agent of the defendant for the purpose of performing those acts.²³⁷ Where the acts to be done under the contract are not to be done by the defendant personally, the court can order him simply to enter into a contract to procure those acts to be done. From this point of view, *Ryan v Mutual Tontine Association*²³⁸ may be contrasted with *Posner v Scott-Lewis*²³⁹ where the lessor of a block of luxury flats covenanted, so far as lay in his power, to employ a resident porter to perform a number of specified tasks. It was held that the

covenant was specifically enforceable in the sense that the lessor could be ordered to appoint a resident porter for the performance of those tasks.

Competing factors

27-031

This balancing of arguments for and against ordering specific performance in cases of the kind discussed in para.27-030 above is well illustrated by *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* ²⁴⁰ where a 31-year lease of premises for use as a food supermarket in a shopping centre contained a covenant by the tenant to keep the premises “open for retail trade during the usual hours of business”. Some six years after the commencement of the lease, the supermarket was running at a loss and the tenant ceased trading there. The main reason given by the House of Lords for refusing to order specific performance was the difficulty of supervising the enforcement of the order since the question whether it was being complied with might require frequent reference to the court. For this purpose, Lord Hoffmann distinguished between orders (such as that sought here) “to carry on an activity” and orders “to achieve a result”. In the latter case, “the court ... only has to examine the finished work” ²⁴¹ so that compliance with the order could be judged ex post facto: this explains the cases in which building contracts had been specifically enforced. ²⁴² It should, however, be emphasised that difficulty of supervision was not the sole ground for refusing specific performance. Lord Hoffmann also referred to a number of other factors, such as the “heavy-handed nature of the enforcement mechanism” ²⁴³ by proceedings for contempt; the injustice of compelling the tenant to carry on business at a loss which might well exceed the loss which the landlord would be likely to suffer if the covenant were broken; the fact that the terms of the order cannot be drawn with sufficient precision, ²⁴⁴ and the fact that it was not “in the public interest for the courts to require someone to carry on business at a loss if there is any plausible alternative by which the other party can be given compensation,” ²⁴⁵ i.e. by way of damages. Reliance on such factors suggests that, if the court attaches sufficient importance to the claimant’s interest in specific enforcement, it will not be deterred from granting such relief merely on the ground that such a course will require constant supervision. The outcome in each case will depend on the “cumulative effect” ²⁴⁶ of this factor together with any others which favour, ²⁴⁷ or (as in the *Co-operative Insurance* case) militate against, specific relief. ²⁴⁸

Building contracts: specific enforcement against builder

27-032

The general rule is that a contract to erect a building cannot be specifically enforced against the builder. There seem to be three reasons for this rule. First, damages may be an adequate remedy if another builder can be engaged to do the work. Secondly, the contract may be too vague to be specifically enforced if it fails to describe the work to be done under it with sufficient certainty. ²⁴⁹ And thirdly, specific enforcement of the contract may require more supervision than the court is willing to provide. ²⁵⁰ But where the first two reasons do not apply, the third has not been allowed to prevail. Specific performance of a contract to erect or to repair buildings can therefore be ordered if (i) the work is precisely defined; (ii) damages will not adequately compensate the claimant; and (iii) the defendant is in possession of the land on which the work is to be done so that the claimant cannot get the work done by another builder. ²⁵¹

Building contracts: specific enforcement against owner

27-033

The converse question may also arise whether the builder can, in effect, compel the owner to allow him to complete the work. In *Hounslow (London Borough) v Twickenham Gardens Ltd* ²⁵² a building contract gave the builder a contractual licence to enter the owner’s land to execute the agreed work. The licence was held to be irrevocable till the work had been done, but the owner wrongfully purported to terminate it and sought an injunction to restrain the builder from entering the land, and damages for trespass. These claims failed as the purported termination was wrongful and ineffective.

It seems, however, that if the licence had not been irrevocable, or if the owner's active co-operation had been required for the completion of the work, the builder's sole remedy would have been in damages.²⁵³

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1. Fry, *Specific Performance*, 6th edn (2012); Jones and Goodhart, *Specific Performance*, 2nd edn (1996); Sharpe, *Injunctions and Specific Performance*, 2nd edn; Spry, *Equitable Remedies*, 5th edn (1997).
 175. *Johnson v Shrewsbury & Birmingham Ry* (1853) 3 D.M. & G. 914; *Brett v East India Shipping Co* (1864) 2 H. & C. 404; *Britain v Rossiter* (1879) 11 Q.B.D. 123, 127; *Rigby v Connol* (1880) 14 Ch. D. 482, 487. See also *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523 at [77] and [126]. In that case the point arose in the context of the Supreme Court's judgment that a contract of employment could not be brought to an end by one party's (the employer's) unaccepted repudiatory breach. For the converse situation, in which the court rejected a claim for an interim injunction or specific performance by musicians who had been engaged to take part in one of the defendants' theatrical productions, see *Ashworth v The Royal National Theatre* [2014] EWHC 1176 (QB). This was "a standard case where on a traditional analysis loss of confidence is the primary block to this type of relief" (at [23]). The claimants' dismissal was the result of the defendants' "artistic judgement"; the relief sought would, if granted, have a "destabilising impact" on the relevant production (at [24]). Moreover, the case was "miles away" from the "impersonal" relationships that may fall within the exceptions to the general rule discussed in para.27-026 (at [23]). cf. *Whitwood Chemical Co v Hardman* [1891] 2 Ch. 416 (injunction); *Taylor v NUS* [1967] 1 W.L.R. 532 (declaration); *Chappell v The Times Newspapers* [1975] 1 W.L.R. 482 (injunction); *Scandinavian Tanker Trading Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 A.C. 694, 700-701; cf. *Wishart v National Association of Citizens' Advice Bureaux* [1990] I.C.R. 794 (where no employment relationship ever came into existence); *Wilson v St Helen's BC* [1999] 2 A.C. 52 at 77.
 176. *Bainbridge v Smith* (1889) 41 Ch. D. 462.
 177. *Pulbrook v Richmond Consolidated Mining Co* (1878) 9 Ch. D. 610; *Hayes v Bristol Plant Hire Ltd* [1957] 1 W.L.R. 49; cf. *British Murac Syndicate v Alpertton Rubber Co* [1915] 2 Ch. 186.
 178. *Young v Robson Rhodes* [1999] 3 All E.R. 524 at 534.
 179. Injunctions in respect of industrial action may lie against the *organisers* of such action, e.g. under Trade Union and Labour Relations (Consolidation) Act 1992 ss.226 or 235A (inserted by Trade Union Reform and Employment Rights Act 1993 s.22) but not against *individual employees*.
 180. Pt X.
 181. Employment Rights Act 1996 ss.113-117. Under ss.129(9) and 130 of the 1996 Act, orders may be made for the continuation of the contract, but these do not give rise to the remedy of specific performance; cf. also the remedies for unlawful discrimination in employment cases provided by Equality Act 2010 s.124. Under that section, the Employment Tribunal can, in such unlawful discrimination cases, make an order declaring the rights of the parties, but the employer can, in the last resort, be required only to pay compensation.
 182. *Johnson v Unisys Ltd* [2001] UKHL 13; [2003] 1 A.C. 518 at [78] per Lord Millett; Lord Steyn at [23] states the proportion to be "only about three per cent". Contrast the view of Sedley L.J. in *Grady v Prison Service* [2003] EWCA Civ 527, [2003] I.C.R. 753 at [24], describing the remedy for unfair dismissal as being "primarily directed at the restoration of a contractual relationship".
 183. *Johnson v Unisys Ltd*, above n.172 at [23].
 184. *Francis v Kuala Lumpur Councillors* [1962] 1 W.L.R. 1411; *Vidyodaya University Council v Silva*

[1965] 1 W.L.R. 77; *Gunton v London Borough of Richmond-upon-Thames* [1981] Ch. 448; *Marsh v National Autistic Society* [1993] I.C.R. 453; cf. *Mezey v South West London and St George's Mental Health N.H.S. Trust* [2007] EWCA Civ 106, [2007] I.R.L.R. 244 (injunction against invalid suspension of employee). A declaration may also be made that a decision by a disciplinary committee leading to dismissal was void for failure to comply with the rules of natural justice: *Stevenson v United Road Transport Union* [1977] I.C.R. 893; but this does not amount to a declaration that the contract remains in operation, at 906; cf. *R. v Berkshire H.A. Ex p. Walsh* [1985] Q.B. 152 (judicial review not available as remedy for allegedly wrongful dismissal of senior nursing officer by Health Authority since no "public law" issue was involved); *R. v Derbyshire CC Ex p. Noble* [1990] I.C.R. 808; *McLaren v Home Office* I.C.R. 824 (claim by prison officer raised no issue of public law); see also *Krebs v NHS Commissioning Board* [2013] EWHC 3474 (Admin), [2014] Med. L.R. 70 where an NHS dentist was held to have no public law remedy in respect of the termination of his contract with the NHS: his rights under that contract were "private contractual rights" so that there was "no breach of public law rights" (at [70]); *Roy v Kensington, etc., Family Practitioner Committee* [1992] 1 A.C. 624 (private law remedy available to general practitioner in respect of practice allowance); contrast *R. v Secretary of State for the Home Department Ex p. Benwell* [1985] Q.B. 554 (judicial review available as a remedy for allegedly wrongful dismissal of prison officer; not followed on other grounds in *R. v Secretary of State for the Home Department Ex p. Broom* [1986] Q.B. 198); *R. v Civil Service Appeal Board Ex p. Bruce* [1989] I.C.R. 171 (judicial review refused to dismissed civil servant as other, preferable, remedies available); *R. v Crown Prosecution Service Ex p. Hogg*, *The Times*, April 14, 1994 (no judicial review of dismissal of lawyer employed by Crown Prosecution Service). For exceptions to this aspect of the principle against specific enforceability, see below after n.182.

- 185. Employment Rights Act 1996 Pt VIII, as substituted by Employment Relations Act 1999 ss.7, 8 and 9 and Sch.4 and amended by Employment Act 2002 s.1, and see s.17; Maternity and Parental Leave Regulations 1999 (SI 1999/3312) reg.18.
- 186. The Regulations cited in n.175 above do not specify civil remedies for infringement of the right.
- 187. See *Clark* (1969) 32 M.L.R. 532.
- 188. *Ridge v Baldwin* [1964] A.C. 40; *Ganz* (1967) 30 M.L.R. 288; *Malloch v Aberdeen Corp* [1971] 1 W.L.R. 1578; *Chief Constable of the North Wales Police v Evans* [1982] 1 W.L.R. 1155; *R. v Secretary of State for the Home Department Ex p. Benwell* [1985] Q.B. 554 (above, n.174); *McLaughlin v H.E. the Governor of the Cayman Islands* [2007] UKPC 50, [2007] 1 W.L.R. 2839 (declaration that such a dismissal was ineffective in law to determine the officer's tenure of office and consequential financial relief). cf. *Jones v Lee* (1979) L.G.R. 213 (injunction against dismissal of teacher). The line between "ordinary" and "public" employment is by no means clear cut: see *Barber v Manchester Regional Hospital Board* [1958] 1 W.L.R. 181; *Tucker v Trustees of the British Museum* [1967] C.L.Y. 1430; and criticisms of the *Vidyodaya University* case, above n.174, in *Malloch v Aberdeen Corp*, above, at 1595.
- 189. *Thomas v University of Bradford* [1987] A.C. 795, 824; for subsequent proceedings, see [1992] 1 All E.R. 964, where it was held by the visitor that the lecturer's removal would have been invalid for procedural irregularities if these had not been waived by the lecturer.
- 190. *Pearce v University of Aston (No.2)* [1991] 2 All E.R. 469. The visitor's decision on the interpretation of the university's statutes is not subject to judicial review: *R. v Hull University Visitor Ex p. Page* [1993] A.C. 682 (where the visitor had held the dismissal to be in accordance with those Statutes).
- 191. *Young v Ladies Imperial Club Ltd* [1920] 2 K.B. 522; below, para.27-078. See also Equality Act 2010, making it unlawful for an "association" (as defined in s.107) to discriminate against a person in the circumstances specified by the Act by (inter alia) not accepting that person's application for membership (s.101(1)(c)) or by depriving him or her of membership (s.101(2)(b)). The county court has jurisdiction to determine a claim relating to such discrimination (s.114(1)(d)) but "must not grant an interim injunction ... unless satisfied that no criminal matter would be prejudiced by doing so" (s.114(6)(a)). Section 119(2) further provides that, in such proceedings for unlawful discrimination, the county court "has power to grant any

remedy which could be granted by the High Court (a) in proceedings in tort". These words would empower the county court to issue (for example) a quia timet injunction, but s.119(7) provides that the county court "must not grant a remedy other than an award of damages or a declaration unless satisfied that no criminal matter would be prejudiced by doing so". It may be inferred from the double negative in this provision and in s.114(6)(a) above that, if the court were so satisfied, then it could issue an injunction against refusal to admit an applicant to membership, or against expulsion of a member, if such conduct amounted to unlawful discrimination under the 2010 Act.

192. cf. *Nagle v Feilden* [1966] 2 Q.B. 633; below, para.27-081; doubted on the availability of specific relief in *R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan* [1993] 1 W.L.R. 909, 933.
193. It is here assumed that the exclusion is not on account of a "protected characteristic" within Equality Act 2010 s.4 and therefore is not unlawful within s.13(1).
194. *Royal Society for the Prevention of Cruelty to Animals v Att-Gen* [2002] 1 W.L.R. 448.
195. See *C.H. Giles & Co Ltd v Morris* [1972] 1 W.L.R. 307. cf. (in Scotland) *Peace v Edinburgh CC* [1999] I.R.L.R. 417. *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523 at [119].
196. [1972] 1 Ch. 305; *Hepple* [1972] C.L.J. 47; cf. *Irani v Southampton, etc. H.A.* [1985] I.C.R. 590 (where the employers retained confidence in an employee but had dismissed him because of differences between him and another employee); *Powell v Brent LBC* [1988] I.C.R. 176; *Hughes v Southwark LBC* [1988] I.R.L.R. 55; for recognition of the approach adopted in these cases, see *Lauritzencool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [2005] 1 W.L.R. 3686 at [11]. *Jones v Gwent CC* [1992] I.R.L.R. 521, 526 goes even further and is hard to reconcile with the authorities cited in n.174, above; and *Grady v Prison Service* [2003] EWCA Civ 527; [2003] 3 All E.R. 745 at [22] ("rare case").
197. *Robb v Hammersmith and Fulham B.C.* [1991] I.R.L.R. 72. *Young v Robson Rhodes* [1999] 3 All E.R. 524; below, para.27-073; *Gryf-Lowczowski v Hitchinbroke Healthcare NHS Trust* [2005] EWHC 2407, [2006] I.R.L.R. 100.
198. *Lauffer v Barking, Havering and Redbridge University Hospitals* [2009] EWHC 2360 (QB).
199. *Chinnock v Sainsbury* (1861) 30 L.J.Ch. 409; cf. *Mortimer v Beckett* [1920] 1 Ch. 571.
200. *R. v Incorporated Froebel Educational Institute, Ex p. L* [1999] E.L.R. 488 at 493; cf. *R. v Fernhill Manor School* [1993] F.L.R. 620 (no judicial review of expulsion from private school). For statutory power to order reinstatement of state school pupils, see School Standards and Framework Act 1998 ss.66, 67, discussed in *R. (on the application of L) v Governors of J. School* [2003] UKHL 9; [2003] 1 All E.R. 1012. cf. *A v Lord Grey's School* [2004] EWCA Civ 382, [2004] Q.B. 1231 where damages were recovered by a pupil whose expulsion from a state school was found to amount to breach of the Human Rights Act 1998 Sch.1 Pt II art.2 and whose request for *reinstatement* had been denied.
201. *Scott v Rayment* (1868) L.R. 7 Eq. 112; *England v Curling* (1844) 8 Beav. 129, 137.
202. *England v Curling*, above, at 127; cf. *Internet Trading Clubs Ltd v Freeserve (Investments) Ltd*, Transcript June 19, 2001 at 30 (refusal specifically "to enforce an ongoing business relationship"); *Malcolm v Chancellor Masters and Scholars of the University of Oxford*, *The Times*, December 19, 1990 (specific performance of a contract to publish a book refused as the process of publication would have required continued co-operation between author and publishers; for further related proceedings, see [2002] EWHC 10; [2002] E.L.R. 277). On the same principle, specific performance has been refused of a house-sharing arrangement which had been made between members of a family who later quarrelled: *Burrows and Burrows v Sharp* (1991) 23 H.L.R. 82, where the basis of liability was not contract but proprietary estoppel; contrast *Stallion v Albert Stallion Holdings (Great Britain) Ltd* [2009] EWHC 1950 (Ch), [2010] 2 F.L.R. 78, another proprietary estoppel case, where the effect of the court's order was to

- “create the situation in which the equity requires the claimant to live with the defendant” (at [138]). This was an “unusual step” (at [138]) as these parties had been successively married to the same man, since deceased; but it was justified on the ground that they had both lived there for a “considerable time both before and after [their late husband’s] death” (at [138]).
203. See *Dodson v Downey* [1901] 2 Ch. 620. cf. *Pena v Dale* [2003] EWHC 1065, [2004] 2 B.C.L.C. 508, where specific performance was ordered of an agreement by which A, a shareholder in a private company, granted an option to B to acquire a minority shareholding in the company. Since exercise of the option would not give B any right to participate in the day to day management of the company, the existence of personal animosity between A and B was no bar to specific relief (at [136]).
204. As in *England v Curling* (1844) 8 Beav. 129, where the object of obtaining such an order was to prevent one of the contracting parties from competing in business with the other and to procure a judicial determination of the exact terms that had been agreed.
205. *C.H. Giles & Co Ltd v Morris* [1972] 1 W.L.R. 307; cf. *Posner v Scott-Lewis* [1987] Ch. 25 (below, para.27-030).
206. *Vertex Data Sciences Ltd v Powergen Retail* [2006] EWHC 1340 (Comm), [2006] 2 Lloyd’s Rep. 591 at [42] (no injunction to restrain recipient of outsourcing services from terminating the contract); *Ericsson AB v EADS Defence and Security Systems Ltd* [2009] EWHC 2598 (TCC), [2010] B.L.R. 131 at [47] (injunction to restrain a party from terminating a “sophisticated contract” refused as it would have required the parties to continue to work together after they had “fallen out with each other” and “one of them had lost confidence in the other”).
207. e.g. *Regent International Hotels v Pageguide, The Times*, May 13, 1985 (injunction against preventing claimant company from managing a hotel); *Posner v Scott-Lewis* [1987] Ch. 25 (below, para.27-030); *Lauritzencool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [2005] 1 W.L.R. 3686, below, para.27-076; *Ferrara Quay Ltd v Carrillion Construction Ltd* [2009] B.L.R. 367 at [71] (where the injunction, originally granted ex parte, was discharged on other grounds).
208. *Barrow v Chappel & Co Unreported*, July 30, 1951; cited in *Joseph v National Magazine Co* [1959] Ch. 14. It is assumed that it can be clearly shown exactly what is to be published: cf. below, para.27-047.
209. Below, para.27-032.
210. *Scandinavian Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 A.C. 694, 700–701; *Lauritzencool AB v Lady Navigation Inc*, above n.193 at [9], where counsel reserved the right “to ask the House [of Lords] to review this proposition ...”.
211. See *Isabella Shipowner SA v Shagang Shipping Co Ltd (The Aquafait)* [2012] EWHC 1077 (Comm), [2012] 2 Lloyd’s Rep. 61 at [38] per Cooke J. (although a time or voyage charterparty is a contract for services, “the relationship between owner and charterer is not anything like those which exist in the entertainment or sporting world” where the nature of the services is such “as to make negative injunctions for breach of the contracts of service impossible ...”).
212. See below, para.27-030 at n.219.
213. See above, para.27-021.
214. See Ch.4 of Pt 1 of the Consumer Rights Act 2015 s.48(1). Section 48(2) states that “[t]hat does not include a contract of employment or apprenticeship”. It is quite hard (though not impossible) to think of a situation in which a “trader” would be an employee of the “consumer” within the definitions of those terms in s.2(2) and 2(3) of the Act. One such possibility could arise where the “trader” was a person acting “for purposes of that person’s ... craft [or] profession” within s.2(2) of the Act, and was so acting “personally”. See below, Vol.II, para.38-527.
215. s.54(3) of the Consumer Rights Act 2015. See below, Vol.II, paras 38–530 to 38–539.

- [216.](#) ss.54(3)(a) and 55 of the Consumer Rights Act 2015. See below, Vol.II, para.38-541.
- [217.](#) ss.54(3)(b) and 56 of the Consumer Rights Act 2015. See below, Vol.II, paras 38-542, 38-544.
- [218.](#) s.54(6) of the Consumer Rights Act 2015.
- [219.](#) s.54(7)(c) of the Consumer Rights Act 2015.
- [220.](#) See above, paras 27-025—27-027.
- [221.](#) s.54(7) of the Consumer Rights Act 2015.
- [222.](#) This principle plainly does not apply to continuous obligations to pay money, e.g. under an agreement to pay an annuity, for it is well settled that such an agreement can be specifically enforced: above, para.27-008.
- [223.](#) [1893] 1 Ch. 116.
- [224.](#) [1893] 1 Ch. 116 at 123. In *Vertex Data Science Ltd v Powergen Retail Ltd* [2006] EWHC 1340 (Comm), [2006] 2 Lloyd's Rep. 591 at [42] the principle was, unusually, applied because the services to be supplied by the claimant would require constant supervision. For this case, see also above, para.27-028.
- [225.](#) *Rayner v Stone* (1762) Eden 128; *Phipps v Jackson* (1887) 56 L.J.Ch. 550; cf. *Hill v Barclay* (1810) 16 Ves.Jun. 402 (tenant's covenant to repair); contrast *Jeune v Queens Cross Properties Ltd* [1974] Ch. 97 (landlord's covenant to repair); *Barrett v Lounava* (1982) Ltd [1990] 1 Q.B. 348 (landlord's implied covenant to repair).
- [226.](#) *Powell Duffryn Steam Coal Co v Taff Vale Ry* (1874) L.R. 9 Ch.App. 331; *Blackett v Bates* (1865) L.R. 1 Ch.App. 117.
- [227.](#) *Dowty Boulton Paul Ltd v Wolverhampton Corp* [1971] 1 W.L.R. 204; for later proceedings in this case, see [1973] Ch. 94.
- [228.](#) *Braddon Towers Ltd v International Stores Ltd* [1987] E.G.L.R. 209 (decided in 1959); *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, below, para.27-031.
- [229.](#) *De Mattos v Gibson* (1858) 4 D. & J. 276. The view expressed in *Scandinavian Tanker Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 A.C. 694, 700–701, that a time charter cannot be specifically enforced against the shipowner, is best explained on the ground that such enforcement would require too much supervision.
- [230.](#) *Dominion Coal Co v Dominion Iron & Steel Co* [1909] A.C. 293. But see above, para.27-015 at n.86. In *Thames Valley Power Ltd v Total Gas and Power Ltd* [2005] EWHC 2208, [2006] 1 Lloyd's Rep. 441 (above, para.27-016) the court declared that a buyer was “entitled to damages and an order by way of specific performance” of the suppliers’ obligation under a long term contract for the supply of gas. At the time of the order, the contract had nearly five years to run but no reference was made to any difficulty of supervision, perhaps because the suppliers had indicated their willingness to continue the supply if the decision on the issue of liability went against them (at [58]).
- [231.](#) *TTK LIG Ltd* [2011] EWCA Civ 1170, [2012] 1 All E.R. (Comm) 429 at [95].
- [232.](#) *Kudos Catering (UK) Ltd v Manchester Convention Complex Ltd* [2013] EWCA Civ 38, [2013] 2 Lloyd's Rep. 270 at [17]. The point arose in the context of the construction of an exemption clause and was made in support of the argument that the construction relied on by the recipient of the services would render the agreement “devoid of contractual content since there [was] no sanction for non-performance” (at [19]) by that party.

- [233.](#) Below, para.27-032.
- [234.](#) *Flint v Brandon* (1803) 8 Ves. 159; *Wheatley v Westminster Brymbo Coal Co* (1869) L.R. 9 Eq. 538; but see *Jeune v Queens Cross Properties Ltd*, above, n.215.
- [235.](#) See *Storer v G.W. Ry* (1842) 2 Y. & C.C.C. 48 (agreement to construct and “for ever thereafter to maintain one neat archway”: specific performance decreed); *Kennard v Cory Bros* [1922] 2 Ch. 1 (mandatory injunction to keep a drain open); *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch. 64.
- [236.](#) cf. *Gibbs v David* (1870) L.R. 20 Eq. 373 (receiver appointed in a rescission action to run a mine).
- [237.](#) cf. Law of Property Act 1925 s.101; Insolvency Act 1986 s.44 (as amended by Insolvency Act 1994 s.2).
- [238.](#) Above at n.213.
- [239.](#) [1987] Ch. 25; *Jones* [1987] C.L.J. 21.
- [240.](#) [1998] A.C. 1.
- [241.](#) [1998] A.C. 1 at 13; all the other members of the House of Lords agreed with Lord Hoffmann’s speech.
- [242.](#) Below, para.27-032.
- [243.](#) [1988] A.C. 1, 12.
- [244.](#) [1988] A.C. 1, 13, and at 14: “The fact that the terms of a contractual obligation are sufficiently definite to escape being void for uncertainty, or to found a claim for damages, or to permit compliance to be made a condition of relief against forfeiture, does not necessarily mean that they will be sufficiently precise to be capable of being specifically enforced.” See below, para.27-047.
- [245.](#) [1988] A.C. 1 at 15.
- [246.](#) [1988] A.C. 1 at 16.
- [247.](#) See *Luganda v Service Hotels* [1969] 2 Ch. 206 (mandatory injunction ordering defendants to allow a protected tenant, who had been wrongfully locked out of a room in a residential hotel, to resume his residence in the hotel); cf. *Films Rover International Ltd v Cannon Film Sales Ltd* [1987] 1 W.L.R. 670, 682 (for further proceedings, see [1989] 1 W.L.R. 912); *Sutton Housing Trust v Lawrence* (1987) 19 H.L.R. 520.
- [248.](#) cf. *Shiloh Spinners Ltd v Harding* [1973] A.C. 691, 724 where difficulty of supervision is said to be no longer a bar to relief against forfeiture for breach of a covenant to repair (as it had been in *Hill v Barclay* (1810) 16 Ves.Jun. 402), but the possibility is recognised that such difficulty sometimes “explains why specific performance cannot be granted”. cf. also the interpretation of these remarks in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, 14 as relating to relief against forfeiture rather than to the availability of specific performance and doubting their interpretation in *Tito v Waddell (No.2)* [1977] Ch. 106, 322.
- [249.](#) As in *Mosley v. Virgin* (1796) 3 Ves. 184; cf. below, para.27-047.
- [250.](#) Above, para.27-030.
- [251.](#) *Wolverhampton Corp v Emmons* [1901] 1 Q.B. 515, as modified by *Carpenters Estates Ltd v Davies* [1940] Ch. 160; *Jeune v Queens Cross Properties Ltd* [1974] Ch. 97 (landlord ordered to restore collapsed balcony in performance of repairing covenant); *Price v Strange* [1978] Ch.

337, 357; cf. Landlord and Tenant Act 1985 s.17; *Gordon v Selico* (1986) 278 E.G. 53; *Barrett v Lounava* [1990] 1 Q.B. 348; *Tustian v Johnson* [1993] 2 All E.R. 675, 681; reversed in part on other grounds [1993] 3 All E.R. 534; *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch. 64, 69, 75 ; and see *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* [1993] A.C. 334, where the House of Lords took the view that it had jurisdiction to restrain a building contractor by injunction from stopping work, but refused such relief as a matter of discretion.

[252.](#) [1971] Ch. 233; contrast *Mayfield Holdings v Moana Reef* [1973] 1 N.Z.L.R. 309.

[253.](#) cf. *Finelli v Dee* (1968) 67 D.L.R. (2d) 393.

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Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 27 - Specific Performance and Injunction ¹

Section 4. - Other Grounds for Refusing Specific Performance

General

27-034

Specific performance is a discretionary remedy. ²⁵⁴ It may be refused although the contract is binding at law and cannot be impeached on some specific equitable ground (such as undue influence); although damages are not an adequate remedy ²⁵⁵; and although the contract does not fall within the group of contracts, discussed above, which will not be specifically enforced. But the discretion to refuse specific performance is “not an arbitrary ... discretion but one to be governed as far as possible by fixed rules and principles”. ²⁵⁶ In particular, the court may refuse to order specific performance on the grounds, some of which overlap, to be discussed in the following paragraphs. Its discretion to refuse specific performance on such grounds cannot be excluded by the terms of the contract. ²⁵⁷

Impossibility

27-035

Specific performance will not be ordered against a person who has agreed to sell land which he does not own and cannot compel the owner to convey to him, ²⁵⁸ “because the court does not compel a person to do what is impossible”. ²⁵⁹ The position is the same where a person has agreed to assign a lease and the landlord withholds his consent, without which the assignment cannot lawfully be effected. ²⁶⁰ Impossibility of enforcing an order of specific performance (e.g. because the defendant is not, and has no assets, within the jurisdiction) may also be a reason for refusing to make such an order. ²⁶¹ On the other hand, where property which is the subject to a contract of sale is merely subject to a charge given to secure a loan made by a third party, then an undertaking to pay, given by solicitors for the vendor to the purchaser can be specifically enforced. ²⁶² The case was “not one of impossibility” ²⁶³ since the charge could be paid off ²⁶⁴; and, although the loan agreement did not oblige the third party to release the charge, ²⁶⁵ there was no doubt that he would do so on being paid the sums due to him under the charge and the relevant loan agreement. ²⁶⁶ Nor is performance impossible merely because the object which it was designed to achieve has been achieved by other means. This is illustrated by a case ²⁶⁷ in which the time charterer (A) had given an undertaking to the disponent owner (B) to give “such security as may be required to prevent [the] arrest [of the ship] or to secure [her] release”. The ship having been threatened with arrest, it was held that A’s undertaking could be specifically enforced even though B had already put up bail to secure the ship’s release. Teare J. said ²⁶⁸ that:

“The form of the order for specific performance would be that [A] provide bail or other security in place of that provided by the ship-owner. That is not ordering [A] to do something which is impossible.”

Severe hardship to defendant

27-036

⚠ Specific performance may be refused on the ground that the order will cause severe hardship to the defendant. Thus in *Denne v Light* ²⁶⁹ the court refused to order specific performance, against the buyer, of a contract to purchase farming land wholly surrounded by land which belonged to others and over which the buyer would have no right of way. Specific performance may also be refused where the cost of performance to the defendant is wholly out of proportion to the benefit which performance will confer on the claimant ²⁷⁰; and where the defendant can put himself into a position to perform only by taking legal proceedings against a third party (especially if the outcome of such proceedings is in doubt.) ²⁷¹ Severe hardship may be a ground for refusing specific performance even though it results from circumstances which arise after the conclusion of the contract, which affect the person of the defendant rather than the subject matter of the contract, and for which the claimant is in no way responsible. For example, in *Patel v Ali* ²⁷² a purchaser's claim for specific performance of a contract for the sale of a house was rejected after a four-year delay (for which neither party was responsible), the vendor's circumstances having during this time changed disastrously as a result of her husband's bankruptcy and of an illness which had left her disabled. On the other hand, "mere pecuniary difficulties" would "afford no excuse". ²⁷³ Thus the purchaser of a house will not be denied specific performance merely because the vendor finds it difficult, on a rising market, to acquire alternative accommodation with the proceeds of the sale. ²⁷⁴, and even where the death of the vendor's husband resulted in the vendor's inability to work from anxiety and depression. ²⁷⁵ ⚠ Nor will specific enforcement be refused merely because compliance with the order exposes the defendant to the risk of a strike by his employees ²⁷⁶, or the loss of its entire interest in a joint venture.

²⁷⁷ ⚠

Adjustments to mitigate harshness

27-036A

⚠ The court may, instead of denying specific performance, make adjustments to the specific performance order to mitigate its harshness, taking into account the proportionality between the adverse consequences of specific performance without adjustment, the defendant's degree of fault, and the adequacy of damages to compensate the claimant for any variation to its entitlement. In

Airport Industrial GP Ltd v Heathrow Airport Ltd ²⁷⁸ ⚠ Morgan J. permitted a two-year delay on the time of performance in the context of an obligation of 999 years duration, subject to damages being paid to the claimant for the delay, to allow the defendant time to implement a method of performance that was more advantageous for it but would take longer compared with a more immediate method which was likely to render it insolvent. However,

"the court's order should seek to specify milestones to be achieved with provision for a default position [i.e. an obligation to revert to the immediate method] to apply if the defendant does not achieve a milestone." ²⁷⁹ ⚠

Unfairness and surprise

27-037

The court may refuse specific performance of a contract which has been obtained by means that are unfair, even though they do not amount to grounds on which the contract can be invalidated. ²⁸⁰ In *Walters v Morgan* ²⁸¹ the defendant agreed to grant to the claimant a mining lease over land which the

defendant had only just bought on terms very disadvantageous to the defendant. Specific performance was refused on the ground that the defendant was “surprised and was induced to sign the agreement in ignorance of the value of his property”.²⁸² It seems that mere failure by the claimant to disclose factors which affect the value of the property, or the defendant's willingness to contract with him, would not be a ground for refusing specific performance. Something more must be shown: for example, that the claimant has taken unfair advantage of his superior knowledge. In *Walters v Morgan* the court relied on the fact that the claimant had hurried the defendant into the transaction before he could discover the true value of the property, or time to deliberate and take advice. On the same principle it seems that specific performance may be refused where the claimant has taken advantage of the defendant's drunkenness, though it was not so extreme as to invalidate the contract at law.²⁸³ The claimant's failure to disclose his own breach of the contract, reducing the value of the subject matter,²⁸⁴ has also been held to be a ground for refusing specific performance, even though the non-disclosure was not a ground for setting the contract aside at law.

Inadequacy of consideration

27-038

The authorities on inadequacy of consideration as a ground for refusing specific performance are not easy to reconcile. On the one hand it is settled that *mere* inadequacy of consideration is not a ground for refusing to grant the remedy.²⁸⁵ On the other hand the statement that inadequacy of consideration is not a ground for refusing specific performance unless it is “such as shocks the conscience and amounts in itself to conclusive and decisive evidence of fraud”²⁸⁶ is probably too narrow, even when allowance is made for the possibility that fraud may have had a wider meaning in equity than at law. The best view seems to be that specific performance may be refused where inadequacy of consideration is coupled with some other factor not necessarily amounting to fraud or other invalidating cause at law—for example, unfair surprise²⁸⁷ or unfair advantage taken by the claimant of his superior knowledge or bargaining position,²⁸⁸ even though such other circumstances do not justify rescission of the contract.²⁸⁹ Specific performance may also be refused on the ground of mistake, even though the mistake does not affect the validity of the contract at law.²⁹⁰

Lack of consideration

27-039

On the principle that equity will not assist a volunteer, specific performance will not be ordered of a gratuitous promise²⁹¹ even though it is binding at law because it is made by deed or supported by a nominal consideration²⁹² so that an action at law for the agreed sum or for damages can successfully be brought upon it. Where such a promise is made to a trustee for the benefit of a third party, it has been held that the trustee ought not to enforce the promise at law against the promisor²⁹³ unless the promise can be considered to create a trust which is “already perfect”.²⁹⁴ Under the Contracts (Rights of Third Parties) Act 1999, promises for the benefit of a third party are (if the statutory requirements are satisfied) enforceable not only by the promisee, but also by the third party,²⁹⁵ who has the right of enforcement even though he has not provided any consideration for the promise.²⁹⁶ The third party has, moreover, available to him any remedy, including specific performance, that “would have been available to him in an action for breach of the contract if he had been a party to the contract”.²⁹⁷ Nothing in the Act, however, affects the principle that equity will not aid a volunteer. Hence it is clear that if, between promisor and promisee, the contract is binding at law only because it is contained in a deed or supported by no more than nominal consideration (moving from the promisee), then equity will not order specific performance at the suit of the third party, any more than it will do so at the suit of the promisee. However, so long as substantial consideration has been provided by the promisee, specific performance can be ordered at the suit of the third party, even though he has not provided any consideration for the promise.

The principle that equity will not aid a volunteer does not apply where an option to buy land is granted by an instrument for which no substantial consideration is given but which is binding because it is made by deed or supported by a nominal consideration. Such an option has some of the characteristics of an offer coupled with a legally binding promise not to revoke²⁹⁸; and it may

therefore be exercised notwithstanding an attempted revocation. The resulting contract *of sale* can be specifically enforced ²⁹⁹ so long as *that* contract is supported by substantial consideration. The equitable principle likewise does not affect the validity of a *completed gift*: it is concerned with the enforceability of gratuitous *promises*. ³⁰⁰

Conduct of the claimant

27-040

"The conduct of the party applying for [specific] relief is always an important element for consideration". ³⁰¹ Thus specific performance may be refused if the claimant fails to perform a promise which he made in order to induce the defendant to enter into the contract, but which is neither binding contractually, nor (because it relates to the future) operative as a misrepresentation. ³⁰² Specific performance may also be refused if the claimant's main object in seeking this form of relief is to avoid a set-off that could have been raised against a claim by him for damages. ³⁰³ A similar view may be taken where the claimant has made misrepresentation but the right to rescind for that misrepresentation has been lost. But if the right has been lost by reason of the defendant's affirmation of the contract, ³⁰⁴ he will not be allowed to rely on the misrepresentation as a defence to specific performance since he in turn would be guilty of "unconscionable inconsistency in conduct" ³⁰⁵ in seeking, after affirmation, to invoke the misrepresentation for this purpose. But his conduct would not be open to such criticism where the right to rescind had been lost by *impossibility of restitution* arising otherwise than from the defendant's conduct. ³⁰⁶ Hence, in a case of this kind the misrepresentation, though no longer a ground for rescission, could be relied on as a defence to the equitable remedy of specific performance. ³⁰⁷

27-041

For the purpose of the principle stated in para.27-040, it may suffice if the claimant has acted unfairly in performing the contract, even though he has not broken any promise. Specific enforcement of a solus petrol agreement ³⁰⁸ has accordingly been denied to an oil company on the ground that the company had given discounts to other garages and had thereby made it impossible for the defendant garage to trade on the terms of the agreement except at a loss. ³⁰⁹ On the other hand, a claimant would not be acting inequitably merely by denying benefits to a defendant if the claimant had done so in accordance with the scheme under which the benefits were to be provided and with the claimant's previously announced policy in operating the scheme. ³¹⁰

27-042

An action could formerly be brought on a contract for the sale of land against a party who had provided written evidence of it by one who had not. ³¹¹ It had, however, been held that the principle stated in para.27-040 above was a ground for denying specific performance to a purchaser of land if he refused to perform a stipulation to which he had agreed, but which could not be enforced against him for want of written evidence. ³¹² A contract for the sale of land must now be made (and not merely evidenced) in writing signed by the parties and the writing must incorporate all the terms on which they have expressly agreed. ³¹³ Hence if the stipulation in question was such a term, but was not contained in the documents, specific performance would now be refused on the different ground that no contract had come into existence. An alternative possibility is that the stipulation might have been intended to take effect as a collateral contract. ³¹⁴ In that event, the main contract would be valid but the reasoning of the cases referred to above might still lead the court to refuse specific performance to the purchaser if it considered that the vendor would not be adequately protected, after being ordered to perform, by his claim for damages for breach of the collateral contract. ³¹⁵

Mistake, misrepresentation and delay

27-043

Specific performance may be refused on the ground of mistake, misrepresentation and delay even

where these factors do (or did) not justify rescission or bar a common law remedy such as damages or the action for the agreed sum. The effect of these factors on the availability of specific performance is discussed elsewhere in this book. ³¹⁶

In-utility

27-044

The courts will not ordinarily order specific performance of an agreement for a lease, where the term to be granted under the agreement will have expired by the time the order is made. ³¹⁷ Similarly, specific performance will not be ordered of an agreement for a lease at the suit of a tenant who has so conducted himself that the landlord would have been justified in forfeiting the lease, had it been granted. ³¹⁸ Likewise, specific performance of a promise to issue share warrants has been refused where “the time for the exercise of the option which ought to have been issued” had “long since expired”. ³¹⁹ Similarly, because “[t]his court will not make pointless orders or orders that are in vain”, specific relief will not be ordered against a company that “has no presence here”, requiring that company to do an act in a foreign country. If such an order were made, it would not be “apparent ... how that [order] could be enforced if it were broken” since “none of the traditional methods of enforcement would work”. ³²⁰ On the other hand, specific performance of an obligation to obtain a warranty from a party which was insolvent and dissolved was ordered where there was evidence that any warranty obtained would be backed by insurance cover. ³²¹

Contracts expressed to be terminable

27-045

If a contract is expressed to be revocable by the party against whom an order of specific performance is sought, the order will be refused as the defendant could render it nugatory by exercising his power to terminate. ³²² On this ground a contract to enter into a partnership at will is not specifically enforceable. ³²³ The same is true of a contract for a lease which by virtue of the contract itself would contain a stipulation enabling the defendant to determine the lease as soon as it was executed ³²⁴, but a tenancy from year to year, determinable by either party by half a year’s notice to quit, is specifically enforceable. ³²⁵

Conditional contracts

27-046

On a principle similar to that stated in para.27-045 above, an obligation which, under the contract alleged to give rise to it, is subject to a condition precedent not within the control of the party seeking the remedy will not be specifically enforced before the condition has occurred ³²⁶; here too the making of the order could turn out to be nugatory if the condition were not satisfied. The occurrence of the condition removes this obstacle to specific performance. ³²⁷

Vagueness

27-047

An agreement may be so vague that it cannot be enforced at all, even by an action for damages. ³²⁸ But although an agreement is definite enough to be enforced in some form of legal proceedings, it may still be too vague to be enforced specifically. ³²⁹ Thus specific performance has been refused of a contract to publish an article as to the exact text of which the parties disagreed. ³³⁰ The reason for refusing specific performance in these cases appears to be that the court would find it difficult or impossible to state in its order precisely what the defendant was bound to do in obedience to the order; and precision is essential since failure to comply with the court’s order may lead to attachment for contempt. ³³¹ However, if an obligation can be performed in a number of different ways:

“[i]t is open to the court, in order to give its order specificity and effectiveness, to spell out what performance is required in the particular circumstances of the case.”

Moreover, it is appropriate in such cases “to include a liberty to apply, so that the parties can, if it becomes necessary, come back for further directions”.³³² In addition, an agreement is not too vague to be specifically enforced merely because it is expressed to be subject to such amendments as may reasonably be required by one (or by either) party.³³³

Goodwill

27-048

The difficulty of precisely formulating the court’s order was once thought to prevent the specific enforcement of contracts for the sale of goodwill alone, without business premises. Thus, Sir William Grant M.R. asked rhetorically of such a contract:

“In what way ... is the court to decree the transfer of such a business? What is it that I am to direct [the vendor] to do?”³³⁴

But in *Beswick v Beswick*³³⁵ specific performance was ordered of a contract for the sale of goodwill without business premises at the suit of the personal representative of a vendor who had performed his part; and it was said by two members of the House of Lords that specific performance could have been ordered against the vendor, if he had not yet made the transfer.³³⁶ The older, contrary, authorities³³⁷ were not cited; but it seems that they have been made obsolete by the growing legal³³⁸ and commercial precision of the concept of goodwill.

Contract specifically enforceable in part only

27-049

In *Ryan v Mutual Tontine Association*³³⁹ the court refused specifically to enforce a landlord’s undertaking to have a porter “constantly in attendance”; and it seems unlikely that the court would, even now, order the landlord to enter into a contract with a porter *on such terms*.³⁴⁰ A claim that the landlord should be ordered simply to appoint a porter was also rejected on the ground that:

“when the court cannot grant specific performance of the contract as a whole, it will not interfere to compel specific performance of part of a contract.”³⁴¹

This does not mean that the court cannot order specific performance of one individual obligation out of a number imposed by a contract³⁴²; it means only that it will not make such an order in relation to one such obligation if it cannot so enforce the rest of the contract.³⁴³ Even in this restricted sense, the rule is by no means an absolute one. Thus where a monetary adjustment can be made in respect of the unperformable part the court may order specific performance with compensation.³⁴⁴

Human rights and public interest

27-050





Specific performance has been ordered of a contract to grant a licence to use a hall for a political meeting because, inter alia, the remedy would promote freedom of speech and assembly.³⁴⁵ The

same sort of consideration may also lead to a denial of specific performance. In *Ashworth v The Royal National Theatre* *Ashworth v The Royal National Theatre* ³⁴⁶ the court refused an application made by musicians for an order for specific performance or a mandatory injunction requiring the Royal National Theatre to re-engage them. As Cranston J. explained,

“Section 12(1) and (4) of the Human Rights Act 2010, provides that, in considering whether to grant any relief which may affect the right of freedom of expression in Article 10 of the European Convention on Human Rights, the court must have particular regard to the importance of that right.” ³⁴⁷

To grant specific performance in this case would interfere with the theatre's right to artistic freedom. Likewise, in granting an injunction against a strike called without complying with statutory requirements, account has been taken of the effect of the strike, not only on the employers, but also of the “wider public”. ³⁴⁸

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1. Fry, *Specific Performance*, 6th edn (2012); Jones and Goodhart, *Specific Performance*, 2nd edn (1996); Sharpe, *Injunctions and Specific Performance*, 2nd edn; Spry, *Equitable Remedies*, 5th edn (1997).
 - ^{254.} *Scott v Alvarez* [1895] 2 Ch. 603, 612; *Stickney v Keeble* [1915] A.C. 386, 419.
 - ^{255.} *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, 12 (“even when damages are not an adequate remedy”).
 - ^{256.} *Lamare v Dixon* (1873) L.R. 6 H.L. 414, 423; *Holliday v Lockwood* [1917] 2 Ch. 56, 57; *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] A.C. 1, 16.
 - ^{257.} *Quadrant Visual Communications Ltd v Hutchison Telephone (UK) Ltd* [1993] B.C.L.C. 442.
 - ^{258.} See *Castle v Wilkinson* (1870) L.R. 5 Ch. App. 534; *Watts v Spence* [1976] Ch. 165; cf. *Elliott & Elliott (Builders) Ltd v Pierson* [1948] Ch. 453 (where the vendor sold land owned by a company that he controlled).
 - ^{259.} *Forrer v Nash* (1865) 35 Beav. 167, 171.
 - ^{260.} *Wilmott v Barber* (1880) 15 Ch. D. 96; *Warmington v Miller* [1973] Q.B. 877. And see *Sullivan v Henderson* [1973] 1 W.L.R. 333; above, para.27–010, n.57; contrast *Rose v Stavrou* [2000] L.&T.R. 133, where the remedy sought was not specific performance but a declaration.
 - ^{261.} *Locobail International Finance Ltd v Agroexport (The Sea Hawk)* [1986] 1 W.L.R. 657, 665.
 - ^{262.} *Clark v Lucas Solicitors LLP* [2009] EWHC 1952 (Ch), [2010] 2 All E.R. 955; the order was made under “the inherent supervisory jurisdiction of the court over solicitors” (at [11]).
 - ^{263.} *Clark v Lucas Solicitors LLP* [2009] EWHC 1952 (Ch) at [57].
 - ^{264.} *Clark v Lucas Solicitors LLP* [2009] EWHC 1952 (Ch) at [57].
 - ^{265.} *Clark v Lucas Solicitors LLP* [2009] EWHC 1952 (Ch) at [16].
 - ^{266.} *Clark v Lucas Solicitors LLP* [2009] EWHC 1952 (Ch) at [58].
 - ^{267.} *Farencos Shipping Co Ltd v Daebo Shipping Co Ltd (The Bremen Max)* [2008] EWHC 2755 (Comm), [2009] 1 Lloyd's Rep. 81.

- [268.](#) *Farenco Shipping Co Ltd v Daebo Shipping Co Ltd (The Bremen Max)* [2008] EWHC 2755 (Comm) at [23].
- [269.](#) (1857) 8 D.M. & G. 774; cf. *Wedgewood v Adams* (1843) 6 Beav. 600. See also *Sullivan v Henderson* [1973] 1 W.L.R. 333, above, para.27–010, n.57; *Jaggard v Sawyer* [1995] 1 W.L.R. 269 (injunction); *Insurance Co v Lloyd's Syndicate* [1995] 1 Lloyd's Rep. 273, 276 (injunction).
- [270.](#) *Tito v Waddell (No.2)* [1977] Ch. 106, 326; *Morris v Redland Bricks Ltd* [1970] A.C. 652.
- [271.](#) *Wroth v Tyler* [1974] Ch. 30 (where an additional ground for refusing specific performance was that the third party against whom the proceedings would have to be taken was the defendant's wife, so that the proceedings would tend to split up the family); cf. *Watts v Spence* [1976] Ch. 165, 173.
- [272.](#) [1984] Ch. 238.
- [273.](#) [1984] Ch. 238 at 288; cf. *Francis v Cowcliffe* (1977) 33 P. & C.R. 386.
- [274.](#) *Mountford v Scott* [1975] Ch. 258; cf. *Easton v Brown* [1981] 3 All E.R. 278.
- [275.](#)  *Shah v Greening* [2016] EWHC 548 (Ch).
- [276.](#) *Howard E. Perry & Co v British Railways Board* [1980] 1 W.L.R. 1375.
- [277.](#)  *Man UK Properties Ltd v Falcon Investments Ltd* [2015] EWHC 1324 (Ch).
- [278.](#)  [2015] EWHC 3753 (Ch) at [133]–[134].
- [279.](#)  [2015] EWHC 3753 (Ch) at [133].
- [280.](#) For example, on the ground of misrepresentation, duress or undue influence.
- [281.](#) (1861) 3 D.F. & J. 718; cf. *Evans v Llewellyn* (1781) 1 Cox C.C. 333; *Quadrant Visual Communications v Hutchison Telephone (UK) Ltd* [1993] B.C.L.C. 442; contrast *Mountford v Scott* [1975] Ch. 258; *Heath v Heath* [2009] EWHC 1908 (Ch), [2010] 1 F.L.R. 610, where one ground for refusing to order specific performance was that it “would not be right or fair” (at [26]) to do so.
- [282.](#) (1861) 3 D.F. & J. (1861) 718, 723. And see *Falcke v Gray* (1859) 4 Drew 651.
- [283.](#) *Malins v Freeman* (1837) 2 Keen 25, 34. The same principle would probably apply where the defendant's judgment was impaired by drugs: see *Irani v Irani* [2000] 1 Lloyd's Rep. 412 at [425], where it was the *validity* of the contract, not any question of the *remedy* for its breach, that was in issue.
- [284.](#) *Quadrant Visual Communications v Hutchison Telephone (UK) Ltd*, above, n.267.
- [285.](#) *Collier v Brown* (1788) 1 Cox C.C. 428; *Western v Russell* (1814) 3 v & B. 187; *Haywood v Cope* (1858) 25 Beav. 140.
- [286.](#) *Coles v Trecothick* (1804) 9 Ves. 234, 246.
- [287.](#) Above, para.27-037; cf. *Mortlock v Buller* (1804) 10 Ves. 292.
- [288.](#) *Falcke v Gray* (1859) 4 Drew. 651.
- [289.](#) See *Mortlock v Buller*, above n.273.

- [290.](#) e.g. *Malins v Freeman* (1837) 2 Keen 25; after *Great Peace Shipping Ltd v Tsavliris Shipping International (The Great Peace)* [2002] EWCA Civ 1407, [2003] Q.B. 679 (above, paras 6-058, 6-059) a mistake which is not sufficiently “fundamental” to invalidate the contract at law is no longer a ground for rescission in equity, but it could still be a ground for refusal of specific performance. And, see para.27-043.
- [291.](#) *Jeffreys v Jeffreys* (1841) Cr. & Ph. 138.
- [292.](#) See *Re Parkin* [1892] 3 Ch. 510; *Cannon v Hartley* [1949] Ch. 213. Contrast *Gurtner v Circuit* [1968] 2 Q.B. 587 where the agreement between the Minister and the Motor Insurers’ Bureau was said to be specifically enforceable by the Minister. The agreement was made by deed but no consideration seems to have moved from the Minister. cf. above, paras 18–136—18–137.
- [293.](#) *Re Pryce* [1917] 1 Ch. 234; *Re Kay* [1939] Ch. 239; criticised by Elliott (1960) 76 L.Q.R. 100; Hornby (1962) 78 L.Q.R. 228; Matheson (1966) 29 M.L.R. 397; Barton (1975) 91 L.Q.R. 236; Meagher and Lehane (1976) 92 L.Q.R. 427. This rule does not apply where a promise in favour of a third party volunteer is made to a promisee who has provided consideration: *Beswick v Beswick* [1968] A.C. 58. above, para.18–022, below, paras 27-055, 27-056.
- [294.](#) *Fletcher v Fletcher* (1844) 4 Hare 67, 74.
- [295.](#) Above, paras 18-090 et seq.
- [296.](#) Above, para.18-102.
- [297.](#) s.1(5) of the 1999 Act.
- [298.](#) See above, para.4-193, n.1234.
- [299.](#) *Mountford v Scott* [1975] Ch. 258.
- [300.](#) *T Choithram International SA v Pagarani* [2001] 1 W.L.R. 1; *Pennington v Waine* [2002] EWCA Civ 227; [2002] 1 W.L.R. 2075.
- [301.](#) *Lamare v Dixon* (1873) L.R. 6 H.L. 414, 413; *Chappell v Times Newspapers Ltd* [1975] 1 W.L.R. 482; *Wilton Group v Abrams* [1990] B.C.C. 310, 317 (“commercially disreputable” agreement). And see above, para.27-037.
- [302.](#) *Lamare v Dixon*, above n.287.
- [303.](#) *Handley Page Ltd v Commissioners of Customs and Excise* [1970] 2 Lloyd’s Rep. 459.
- [304.](#) Above, paras 7-132—7-137.
- [305.](#) *Geest Plc v Fyffes Plc* [1999] 1 All E.R. (Comm) 672, 694.
- [306.](#) Above, paras 7-118 et seq.
- [307.](#) *Geest Plc v Fyffes Plc*, above, n.291, at 694. And see below, para 27–043.
- [308.](#) Above, para.16-134.
- [309.](#) *Shell UK Ltd v Lostock Garages Ltd* [1977] 1 W.L.R. 1187.
- [310.](#) *Ministry of Justice v Prison Officers Association* [2008] EWHC 239 (QB), [2008] I.R.L.R. 380.
- [311.](#) Law of Property Act 1925 s.40, replacing part of Statute of Frauds 1677 s.4, and repealed by Law of Property (Miscellaneous Provisions) Act 1989 ss.1(8) and 4 and Sch.2; and see above, para.5-011.

- [312.](#) See *Martin v Pycroft* (1852) 2 D.M. & G. 785, 795; *Scott v Bradley* [1971] Ch. 850.
- [313.](#) Law of Property (Miscellaneous Provisions) Act 1989 s.2(1).
- [314.](#) Above, para.5-030.
- [315.](#) i.e. on the principle of “mutuality” as now understood: below, para.27–053.
- [316.](#) See above, paras 6-061, 7-111; below, paras 28-135 et seq.
- [317.](#) *Walters v Northern Coal Mining Co* (1855) 5 De G.M. & G. 629; cf. *Anon. v White* (1709) 3 Swan. 108n; *Nesbitt v Meyer* (1818) 1 Swan. 223.
- [318.](#) *Gregory v Wilson* (1851) 9 Hare 683.
- [319.](#) *De Jongh Weill v Mean Fiddler Holdings* [2005] All E.R. (D) 331 (Jul) (QBD, July 22, 2005) at [75]; for earlier proceedings in this case, see [2003] EWCA Civ 1058.
- [320.](#) *SSL International Plc v TTK LIG Ltd* [2011] EWHC 1695 (Ch) at [91], cited on appeal [2011] EWCA Civ 1170, [2012] 1 All E.R. (Comm) 429 at [85] and approved, at [95] and [97].
- [321.](#) *Liberty Mercian Ltd v Cuddy Civil Engineering Ltd* [2014] EWHC 3584, at [103]–[107].
- [322.](#) *Wheeler v Trotter* (1737) 3 Swan. 174n. cf. *R (Supportways Community Services Ltd) v Hampshire CC* [2006] EWCA Civ 1035, [2006] B.L.G.R. 836 (relief by way of the public law remedy of judicial review not available to compel (specific) performance of a contract after it had been terminated).
- [323.](#) *Hercy v Birch* (1804) 9 Ves. 357; *Sheffield Gas Co v Harrison* (1853) 17 Beav. 294; cf. *Wheeler v Trotter* (1737) Swan. 174n; but contrast *Allhusen v Borrie* (1867) 15 W.R. 739.
- [324.](#) See *Lewis v Bond* (1853) 18 Beav. 85.
- [325.](#) *Lever v Koffler* [1901] 1 Ch. 543; but see *Clayton v Illingworth* (1853) 10 Hare 451, in which, however, the suit was dismissed merely “in the absence of any authority”; and cf. *Gray v Spyer* [1922] 2 Ch. 22 (tenancy for year).
- [326.](#) *Chattey v Farndale Holdings Inc* [1997] 1 E.G.L.R. 153.
- [327.](#) cf. *Wu Koon Tai v Wu Yau Loi* [1997] A.C. 179, 189.
- [328.](#) Above, para.2-147, *Waring & Gillow v Thompson* (1912) 29 T.L.R. 154.
- [329.](#) *Collins v Plumb* (1810) 16 Ves. 454 as explained in *Catt v Tourle* (1869) L.R. 4 Ch.App. 654, 658; *Wilson v Northampton & Banbury Junction Railway Co* (1874) 9 Ch. App. 279, as explained in *Tito v Waddell (No.2)* [1977] Ch. 106, 322–323; cf. *Vertex Data Science Ltd v Powergen Retail Ltd* [2006] EWHC 1340 (Comm), [2006] 2 Lloyd’s Rep. 591 (above, para.27–027, n.214) at [46]. For recognition of the above possibility in a case in which the actual claim was one for damages, see *Durham Tees Valley Airport Ltd v Bmibaby Ltd* [2010] EWCA Civ 485, [2011] 1 Lloyd’s Rep. 68 at [90]; for this case, see above, para.2-151. The agreement in this case might not have been specifically enforceable against the claimant as such an order would require “constant supervision” (see above, para.27–030 at n.217). Similar reasoning might apply to a claim for specific performance by the claimant; such a claim could also give rise to a problem of mutuality of remedy (see below, para.27–051). And see *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1988] A.C. 1, 13, and at 14: “The fact that the terms of a contractual obligation are sufficiently definite to escape being void for uncertainty, or to found a claim for damages, or to permit compliance to be made a condition of relief against forfeiture, does not necessarily mean that they will be sufficiently precise to be capable of being specifically enforced.” See further, *118 Data Resource Ltd v IDS Data Services Ltd* [2014] EWHC 3629 at [23]–[30], where specific performance on a summary

judgment was denied in respect of a clause allowing the claimant to enter the defendant's offices to ensure compliance with the agreement, because there was no mechanism to ensure that the defendant only searched for material relating to the agreement and not for other commercially sensitive information; and it was unclear what the claimant could do if it found a breach.

- [330.](#) *Joseph v National Magazine Co* [1959] Ch. 14; cf. *Slater v Raw*, *The Times*, October 15, 1977.
- [331.](#) cf. *Lawrence David Ltd v Ashton* [1989] I.C.R. 123, 132; *Lock International Plc v Beswick* [1989] 1 W.L.R. 1268.
- [332.](#) *Alfa Finance Holdings AD v Quarzwerke GmbH* [2015] EWHC 243 at [8]–[9].
- [333.](#) *Sweet & Maxwell Ltd v Universal News Services Ltd* [1964] 2 Q.B. 699; *Alpenstow Ltd v Regalian Properties Plc* [1985] 1 W.L.R. 721.
- [334.](#) *Bozon v Farlow* (1816) 1 Mer. 459, 472.
- [335.](#) [1968] A.C. 58.
- [336.](#) [1968] A.C. 58 at 89B, 97C.
- [337.](#) *Bozon v Farlow*, above; *Baxter v Connolly* (1820) 1 J. & W. 576; *Coslake v Till* (1826) 1 Russ. 376; *Thornbury v Beville* (1842) 1 Y. & C.C.C. 554, 565; *Darbey v Whitaker* (1857) 3 Drew. 134, 139.
- [338.](#) See *Trego v Hunt* [1896] A.C. 7.
- [339.](#) [1893] 1 Ch. 116; above para.27–030.
- [340.](#) An order requiring the landlord to enter into a contract with a porter could be made where the landlord's undertaking specified the tasks to be done by the porter, as in *Posner v Scott-Lewis* [1988] Ch. 25, above para.27–030.
- [341.](#) *Ryan v Mutual Tontine Association* [1893] 1 Ch. 116, 123.
- [342.](#) See *Odessa Tramways Co v Mendel* (1878) 8 Ch. D. 235, where such an order was made.
- [343.](#) *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch. 64, 72–73; *Odessa Tramways Co v Mendel* (1878) 8 Ch. D. 235 (where contract is severable, specific performance of each part can be separately ordered); *Internet Trading Club Ltd v Freeserve Investments Ltd* [2001] E.B.L.R. 142 at [30], where specific performance of an unseverable part was refused.
- [344.](#) Below, paras 27-059—27-064.
- [345.](#) *Verrall v Great Yarmouth B.C.* [1981] Q.B. 202. See also Human Rights Act 1998 s.12 on Freedom of expression: “(1) This section applies if a court is considering whether to grant any relief which, if granted, might affect the exercise of the Convention right to freedom of expression”; *Imutran Ltd v Uncaged Campaigns Ltd* [2001] 2 All E.R. 385.
- [346.](#) [2014] EWHC 1176 (QB).
- [347.](#) [2014] EWHC 1176 (QB) at [27].
- [348.](#) *British Airways Plc v Unite the Union* [2009] EWHC 3541 (QB), [2010] I.R.L.R. 423 at [83]; for further proceedings, resulting in the discharge of the injunction, see [2010] EWCA Civ 669, [2010] I.C.R. 1316; cf. *Serco Ltd v National Union of Rail, Maritime and Transport Workers* [2011] EWCA Civ 226, [2011] 3 All E.R. 913 at [77] for the discharge of the injunction in that case. Contrast *Araci v Fallon* [2011] EWCA Civ 688, where the argument that specific enforcement by injunction would have been prejudicial to the interests of the public or to a

section of it was rejected and the injunction was granted (see at [59], [60], [74]) in circumstances described in para.27–067 below. In *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] 2 All E.R. 622 one question was whether damages should be awarded in lieu of an injunction (against a noise nuisance) under the power of the court discussed in para.27–083. Lord Neuberger P. at [118] and [124] seems to accept that “public interest” was a relevant factor in such cases, but as Lord Neuberger P. pointed out, there might be conflicting considerations of public interest in such cases: see at [124] for illustrations; while Lord Sumption at [157], [158] seems to regard the relevance of “public interest” in the present context with more scepticism.

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Section 5. - Mutuality of Remedy

Requirement of mutuality of remedy

27-051

The court will sometimes refuse to order specific performance at the suit of one party if it cannot order it at the suit of the other. Thus a party who undertakes to render personal services or to perform continuous duties cannot claim specific performance ³⁴⁹ where the remedy is, because of the nature of those services or duties, not available against him ³⁵⁰; and for the same reason a minor cannot get specific performance. ³⁵¹ Such cases were once explained on the ground that the remedy of specific performance must be mutual; and it was said that this requirement had to be satisfied at the time when the contract was made. ³⁵²

Qualifications of the requirement

27-052

There are, however, many cases in which specific performance can be ordered in favour of a party even though it could not at the time of contracting have been ordered against him. ³⁵³ If A promises to grant a lease of land to B who in return undertakes to build on the land, B's promise to build may not be specifically enforceable ³⁵⁴; but if B actually performs the building work he can get specific performance of A's promise to grant the lease. ³⁵⁵ Specific performance cannot be ordered against a person who sells land which he does not own and cannot force the owner to convey to him ³⁵⁶; but if he becomes owner before the purchaser repudiates ³⁵⁷ he can get specific performance. ³⁵⁸ Conversely, a vendor with defective title may be compelled to convey at a reduced price although he could not himself have got specific performance. ³⁵⁹ It seems that a person of full age can get specific performance of a voidable contract made during his minority even though he could have elected to repudiate the contract. ³⁶⁰ And a victim of fraud or innocent misrepresentation can get specific performance although he may be entitled to rescind the contract, so that it could not be enforced against him. ³⁶¹

Time when requirement must be satisfied

27-053

Cases of the kind described in para.27-052 above show that the requirement of mutuality does not have to be satisfied at the time of contracting: the crucial time is that of the hearing. ³⁶² The requirement was reformulated by Buckley L.J. in *Price v Strange*: the court "will not compel a defendant to perform his obligations specifically if it cannot at the same time ensure that any unperformed obligations of the plaintiff will be specifically performed, unless, perhaps, damages would be an adequate remedy for any default on the plaintiff's part." ³⁶³ In that case the defendant had promised to grant an underlease to the plaintiff who had, in return, undertaken to execute certain internal and external repairs. It was admitted that the plaintiff's undertakings were not specifically enforceable; the only remedy available to the defendant for any default on the plaintiff's part might

have been in damages, and this might have been inadequate,³⁶⁴ especially if the plaintiff was of doubtful solvency. But in fact the plaintiff had done the internal repairs and had been wrongfully prevented from doing the external ones by the defendant, who later had these done at her own expense. Thus, by the time of the hearing, all the repairs had been completed, so that specific enforcement of the defendant's promise to grant the underlease would not expose her to the risk of having no remedy except damages in the event of the plaintiff's default. Hence, specific performance was ordered on the terms that the plaintiff make an allowance in respect of the repairs done by the defendant. The principle that mutuality is judged by reference to the time of the hearing similarly accounts for the rule that a person who has been induced to enter into a contract by misrepresentation can specifically enforce the contract against the other; for by seeking this remedy he affirms the contract³⁶⁵ and so gives the court power to hold him to it.³⁶⁶ The court has no such power when specific performance is claimed on behalf of a minor: "the act of filing the bill by his next friend cannot bind him"³⁶⁷ (sc. to perform his side of the bargain.) Similarly, it seems that lack of mutuality would still be good reason for refusing specific performance to A where A agreed to serve B in consideration of B's promise to convey a house to him and B repudiated before A had completed the agreed service.

1. Fry, *Specific Performance*, 6th edn (2012); Jones and Goodhart, *Specific Performance*, 2nd edn (1996); Sharpe, *Injunctions and Specific Performance*, 2nd edn; Spry, *Equitable Remedies*, 5th edn (1997).

³⁴⁹. *Blackett v Bates* (1865) L.R. 1 Ch.App. 117; cf. *Page One Records Ltd v Britton* [1968] 1 W.L.R. 157 (injunction); a dictum in *Warren v Mendy* [1989] 1 W.L.R. 853, 866 rejects the requirement of mutuality even in this situation, but the ground for refusing specific relief is that stated in para.27–071 below.

³⁵⁰. Above, paras 27–024, 27–025, 27–027, 27–030, 27–032.

³⁵¹. *Flight v Bolland* (1828) 4 Russ. 296; *Lumley v Ravenscroft* [1895] 1 Q.B. 683.

³⁵². Fry, *Specific Performance*, 6th edn (2012), pp.219, 386. Here we are concerned with mutuality of remedy as a *necessary* requirement. It is also sometimes regarded as a *sufficient* condition when it is said that specific performance can be ordered against a contracting party *merely because* the remedy is available to him: this is one reason why specific performance is available *against* a purchaser of land, above, para.27–007. The phrase "lack of mutuality" is also sometimes used to refer to the situation in which a contract purports to be made by an exchange of promises one of which is not binding. In such a case there is no mutuality of *obligation* and accordingly there may be no contract at all; above, paras 4-186–4-190.

³⁵³. This possibility was formerly illustrated by the rule that specific performance of a contract for the sale of land could be ordered against a party who had signed a note or memorandum of the contract by one who had not: see *Seton v Slade* (1802) 7 Ves. 265; *Martin v Pycroft* (1852) 2 D.M. & G. 785, 795. Now neither party would have a right of action since no contract would come into existence unless it was in writing signed by both: Law of Property (Miscellaneous Provisions) Act 1989 s.2(1).

³⁵⁴. Above, para.27–032.

³⁵⁵. *Wilkinson v Clements* (1872) L.R. 8 Ch.App. 96.

³⁵⁶. Above, para.27–035.

³⁵⁷. *Halkett v Dudley* [1970] 1 Ch. 590, 596; cf. *Cleadon Trust v Davies* [1940] 1 Ch. 940.

³⁵⁸. *Hoggart v Scott* (1830) 1 Russ. & My. 293; *Wylson v Dunn* (1887) 34 Ch. D. 569.

³⁵⁹. *Mortlock v Buller* (1804) 10 Ves. 292, 315; *Wilson v Williams* (1857) 3 Jur.(N.S.) 810.

- [360.](#) *Clayton v Ashdown* (1714) 9 Vin.Abr. 393 (G. 4) 1.
- [361.](#) Above, para.7-111.
- [362.](#) cf. *E. Johnson & Co (Barbados) Ltd v NSR Ltd* [1997] A.C. 400, 410–411.
- [363.](#) [1978] Ch. 337, 367–368; adopting Ames, 3 Col.L.Rev. 1; *Rainbow Estates Ltd v Tokenhold Ltd* [1999] Ch. 64, 69, 75. See also *Sutton v Sutton* [1984] Ch. 184 where the argument of lack of mutuality was rejected because one of the claimant's promises had been performed, even though another was not binding. Specific performance was refused on grounds of public policy, above, para.16–053.
- [364.](#) cf. *National Provincial Building Society v British Waterways Board* [1992] E.G.C.S. 149 where specific performance of a contract for the sale of land was claimed by an assignee of the purchaser's rights and it was held to be a defence that the purchaser's obligation to develop the land remained unperformed and no satisfactory remedy was available to the vendor as the purchaser had been compulsorily wound up without sufficient assets to meet the vendor's claim. If the claimant can be ordered to give additional, satisfactory security, he can obtain an order of specific performance even though he has not yet performed and is not ordered immediately to do so: *Langen & Wind Ltd v Bell* [1972] Ch. 685.
- [365.](#) Above, para.7-132.
- [366.](#) This reasoning still holds good in the situation described in the text above. It was formerly used to explain the now obsolete rule stated in n.339 above: see *Martin v Mitchell* (1820) 2 J. & W. 413, 427; *Flight v Bolland* (1828) 4 Russ. 298, 301.
- [367.](#) *Flight v Bolland*, above, at 301.

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Introduction

27-054

Where A promises B to render some performance in favour of C, the first question is whether B can specifically enforce the promise against A; the second is whether C can do so.

^{1.} Fry, *Specific Performance*, 6th edn (2012); Jones and Goodhart, *Specific Performance*, 2nd edn (1996); Sharpe, *Injunctions and Specific Performance*, 2nd edn; Spry, *Equitable Remedies*, 5th edn (1997).

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(a) - Claim by Promisee

Promisee seeking specific performance in favour of third party

27-055

In *Beswick v Beswick* ³⁶⁸ A promised B (in return for B's transfer of his business to A) to pay an annuity to B's widow, C, after B's death. The House of Lords held that this promise could be specifically enforced by B's personal representative (who happened to be C) against A. ³⁶⁹ Thus A was ordered to pay the annuity to C, who in this way obtained the benefit of a contract to which she was not a party even though the case did not fall within any exception to the common law doctrine of privity of contract. ³⁷⁰ Under the Contracts (Rights of Third Parties) Act 1999, ³⁷¹ C will in many such cases be entitled in his own right to enforce against A the term in the contract containing the promise in favour of C; and where C takes this course, the need for B to seek specific performance in favour of C will be much reduced. But it will not be altogether eliminated since there may still be situations in which C will not have any such right against A because C cannot satisfy the requirements set out in the 1999 Act for the acquisition of such rights. ³⁷² The Act also expressly preserves B's right to enforce any term of the contract against A even where C has acquired a right of enforcement against A. ³⁷³ For example, in *The Alexandros T* ³⁷⁴ specific performance was granted in favour of insurers (B) to prevent an insured party (A), which had accepted a sum in full and final settlement of its claims against "the Underwriters" under its insurance policies, from bringing further proceedings against the insurer's employees, servants or agents (C) in respect of the same matter. The scope of B's remedy by way of specific performance therefore continues to call for discussion. In holding that this remedy was available to B, the House of Lords in *Beswick v Beswick* stressed the following points:

- (1)
that B's remedy at law was inadequate as the damages that he could recover would be merely nominal ³⁷⁵;
- (2)
that the promisor (A) had already received the entire consideration for his promise ³⁷⁶;
- (3)
that the contract could have been specifically enforced by A, had B refused to perform his promise to transfer the business ³⁷⁷;
- (4)
that A's promise was one to pay an annuity and would have been specifically enforceable if it

had been made to B for his own benefit ³⁷⁸;

(5)

that, apart from B's inadequate remedy by way of damages, B had no other, more satisfactory, remedy at law ³⁷⁹; and

(6)

that, if the promise had been made to B for his own benefit, specific performance would not have been refused on any of the other grounds which have been discussed in this chapter. ³⁸⁰

Possible limitations on the remedy

27-056

It therefore does not follow from *Beswick v Beswick* that the promisee can in all cases of contracts for the benefit of a third party obtain an order of specific performance in favour of the third party. In particular, the case is not direct authority for the availability of such a remedy in any of the following situations:

(1)

where the promisee has a remedy at law other than for nominal damages: e.g. for substantial damages, ³⁸¹ for recovery of the consideration provided by him, ³⁸² or for the agreed sum ³⁸³;

(2)

where the promisor has not received the whole (or any part of the) consideration for his promise;

(3)

where the contract, if wholly executory, could not have been specifically enforced by the promisor ³⁸⁴; and

(4)

where the promise sued upon would not have been specifically enforceable by the promisee, if it had been made to him for his own benefit.

It is submitted that in such cases specific performance should neither be granted merely because the contract provides for performance in favour of a third party, nor refused merely because it would not have been available, had there been no third party in the case. As a general principle, the promisee should be able to obtain specific performance in favour of the third party whenever that is the most appropriate method of enforcing the contract which was actually made. ³⁸⁵ But it should be open to the defendant to resist specific enforcement by showing that this remedy would lead to one of the undesirable results against which the established limitations on the scope of the remedy ³⁸⁶ are meant to provide protection.

Examples

27-057

The scope of the promisee's remedy of specific performance in favour of third parties may be illustrated by a series of examples. In discussing these, an attempt will be made to apply the general statement made at the end of the preceding paragraph; but in the present state of the authorities some of the solutions put forward can be no more than tentative.

(a)

A promises ³⁸⁷ B to render personal services to C. B should not be able to obtain specific performance in favour of C, because the policy of the rule against the specific enforcement of contracts to render personal services ³⁸⁸ applies no less where the services are to be rendered to a third party than where they are to be rendered to the promisee.

(b)

A promises B to pay £1,000 to C immediately, in return for B's promise (as yet unperformed) to serve A for one year. B should not be able to obtain specific performance in favour of C, because the grant of this remedy would expose A to the asymmetry that the requirement of mutuality of remedy ³⁸⁹ is intended to prevent.

(c)

The facts are as in (b), except that B has performed the service. Specific performance in favour of C should not be refused merely because A could not, when the contract was made, have obtained specific performance against B. Now that A has obtained the whole of what he bargained for, he cannot suffer the asymmetry that the requirement of mutuality is intended to prevent. ³⁹⁰

(d)

A promises B to pay £1,000 per annum to C for 10 years in return for B's promise (as yet unperformed) to transfer to A 100 shares in the X company; the shares are freely available in the market. Specific performance in favour of C should not be refused to B merely because specific performance could not have been ordered against him. ³⁹¹ The asymmetry against which the mutuality rule is intended to protect A from can here be prevented by making the order in favour of C conditional on B's making the agreed transfer. Specific performance in favour of C might, however, be properly refused if the factors mentioned in example (g) below (relating to mitigation) operate so as to cause hardship to A.

(e)

Examples (b) and (d) can be varied by supposing part performance by B. It is submitted that this should not generally affect the outcome; but that, by way of exception to this general principle, specific performance in favour of C should, perhaps, be ordered in a case like example (b) if B had substantially (though not completely) performed his promise so that the risk of asymmetry to A as a result of the order was minimal. ³⁹²

(f)

A (an insurance company) promises B to pay a sum of money to C in 20 years' time. The contract does not fall within any of the exceptions to the doctrine of privity of contract. ³⁹³ B has duly paid all the premiums. B should be able to obtain specific performance in favour of C though in a two-party case B's remedy would have been, not an order for specific performance, but an action for the agreed sum. ³⁹⁴ It should make no difference that B might, in the event of A's refusal or failure to pay C have a substantial remedy at common law: e.g. for the recovery of

the premiums as paid on a total failure of consideration,³⁹⁵ or for the agreed sum (e.g. if he is named as an alternative payee),³⁹⁶ or for substantial damages in respect of foreseeable loss arising from A's default.³⁹⁷ In spite of the availability of such common law remedies, specific performance in favour of C is here the most appropriate³⁹⁸ remedy for the enforcement of the contract; and to grant it would not conflict with any of the policies limiting the scope of the remedy in a two-party case.

(g)

A promises B that, in return for an immediate payment of £1,000 by B he will supply 10 tons of coal to C in six months' time. A fails to deliver the coal as agreed; and after breach the market price rises. If the promise had been made to B for his own benefit, B would have been bound to mitigate by taking reasonable steps to procure a substitute (i.e. by buying against A in the market where this was possible.) One reason for refusing B specific performance in such a case is that the grant of the remedy would in substance deprive A of the benefit of the mitigation rule.³⁹⁹ It is not easy to see how this rule can be applied to contracts for the benefit of a third party; for if the promisee's damages are nominal⁴⁰⁰ he can hardly mitigate, and it does not seem that there can (at common law⁴⁰¹) be any requirement that the third party must take steps to mitigate loss. Yet specific performance in favour of C could cause considerable hardship to A in such a case and should probably be refused if such hardship is established.

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1. Fry, *Specific Performance*, 6th edn (2012); Jones and Goodhart, *Specific Performance*, 2nd edn (1996); Sharpe, *Injunctions and Specific Performance*, 2nd edn; Spry, *Equitable Remedies*, 5th edn (1997).
 - ³⁶⁸. [1968] A.C. 58; above, para.18–022; Goodhart (1967) 83 L.Q.R. 465; Fairest [1967] C.L.J. 149; Treitel (1967) 30 M.L.R. 687.
 - ³⁶⁹. Similar orders had been made in *Keenan v Handley* (1864) 12 W.R. 930; *affirmed* (1864) 2 D.J. & S. 283; *Peel v Peel* (1869) 17 W.R. 586; *Drimmie v Davies* [1899] 1 I.R. 176 (but in this case there was probably a trust in favour of the third party); and in *Hohler v Aston* [1920] 2 Ch. 420.
 - ³⁷⁰. Above, Ch.18.
 - ³⁷¹. Above, paras 18–090 et seq.
 - ³⁷². e.g. because the requirements of ss.1(1) and (2) are not satisfied; see above para.18–096 for the question whether they would be satisfied on the facts of *Beswick v Beswick*, above.
 - ³⁷³. s.4 of the 1999 Act.
 - ³⁷⁴. *Starlight Shipping Co v Allianz Marine and Aviation Versicherungs* [2014] EWHC 3068 (Comm), [2014] Lloyd's Rep 57.
 - ³⁷⁵. 1968] A.C. 58 at 81E, 102A; cf. at 73B, 83F. Lord Pearce, alone, thought that damages would be substantial, at 88F. cf. above, para.18–049.
 - ³⁷⁶. [1968] A.C. 58 at 83A, 89B, 97C, 102C; cf. at 73C; and see *Hart v Hart* (1881) 18 Ch. D. 670, 685.
 - ³⁷⁷. [1968] A.C. 58 at 89B, 97C; as to the specific enforceability of B's promise, see above, para.27-054.
 - ³⁷⁸. Above, para.27-008. The first three cases cited in n.355, above, were also annuity cases; the

contract in the fourth case was a contract for the disposition of an interest in land and so specifically enforceable.

- [379.](#) Possible remedies are referred to in para.27-057 (examples (e) and (f)).
- [380.](#) i.e. in paras 27-034—27-050 above.
- [381.](#) Above, para.18-049.
- [382.](#) Above, para.18-047. This remedy was probably not available in *Beswick v Beswick*. There was no “total failure of consideration,” both by reason of the facts stated in n.376 below, and because A had made one payment to the widow.
- [383.](#) Above, para.18-048. The mere fact that the action for the agreed sum is available to the claimant is no bar to specific performance: see *Miliangos v George Frank (Textiles) Ltd [1976] A.C. 443*.
- [384.](#) The requirement of mutuality of remedy could give rise to difficulty in such a case: see below, para.27-057 at n.375.
- [385.](#) See especially *Beswick v Beswick [1968] A.C. 58, 88G, 102B* and the citation with approval by Lord Pearce at 90–91 of a dictum of Windeyer J. in *Coulls v Bagot’s Executor & Trustee Co Ltd (1967) 40 A.L.J.R. 471, 488*; and cf. above, para.27-005.
- [386.](#) See especially, paras 27-024—27-025, above.
- [387.](#) The “promises” in this and the following examples are assumed to be binding contractually.
- [388.](#) Above, para.27-024.
- [389.](#) Above, para.27-051.
- [390.](#) Above, para.27-053. In *Beswick v Beswick* itself (above, n.371) the contract provided that B should serve A as consultant for life in return for a payment of £6 10s. per week. This stipulation had been performed and was also held not to destroy “mutuality” because of its minimal importance (see *[1968] A.C. at 97C*).
- [391.](#) Above, para.27-010; damages would be an adequate remedy for A in a two-party case.
- [392.](#) cf. example (c) at n.376 above.
- [393.](#) Above, paras 18-079—18-138.
- [394.](#) Above, para.27-006. And see above, para.27-056 at n.367.
- [395.](#) Above, para.18-047. To restrict B to such a remedy would be unjust if the policy had matured and its value at the maturity was worth substantially more than the premiums which had been paid.
- [396.](#) For the question whether, or when in the case of a contract to pay money to a third party an action for the agreed sum can be brought by the promisee, see above, para.18-048.
- [397.](#) e.g. if B had contracted with C to procure A’s payments to C, or was otherwise under a legal obligation to ensure that they (or corresponding payments) were made, or (possibly) if it was foreseeable that B would make a substitute provision for C in the event of A’s default, whether or not B was under a legal obligation to do so; above, para.18-056; Treitel (1967) 30 M.L.R. 687. For the question whether B could recover damages in respect of C’s loss, see above paras 18-054 et seq.
- [398.](#) See, above, para.27-005 at n.27. cf. *Gurtner v Circuit [1968] 2 Q.B. 587* as to which see above,

para.27-039 n.278; *Sears v Tanenbaum* [1969] 9 D.L.R. (3d) 425.

[399.](#) Above, para.27-002. This argument would apply even if the case fell within s.52 of the Sale of Goods Act 1979, e.g. because the goods were ascertained.

[400.](#) cf. above, para.27-009.

[401.](#) If C (not B) brings the action under s.1(1) of the Contracts (Rights of Third Parties) Act 1999, he would be required, by virtue of s.1(5) to comply with the mitigation rules.

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(b) - Claim by Third Party

Effect of Contracts (Rights of Third Parties) Act 1999

27-058

Under this Act, C is in many cases entitled in his own right to enforce against A the term in the contract between A and B containing A's promise in favour of C. ⁴⁰² The Act expressly lists specific performance as one of the remedies available to C where it would have been available to him "if he had been a party to the contract"; and it states that the rules relating to specific performance "shall apply accordingly". ⁴⁰³ Some of these rules will apply to a claim by C in the same way as they apply to one by B: e.g., if A's promise is one to render personal services to C, that promise will not be specifically enforceable at the suit of either B or C. Other rules will obviously apply with some modification; e.g., if A promises B to pay a lump sum to C, then the most appropriate remedy for B might be specific performance in equity, while for C it would be a common law action for the agreed sum. Where C claims specific performance of A's promise under the 1999 Act, the application of the limitations on the scope of the remedy will need to be worked out on a case by case basis in the light of the policies which have given rise to these limitations in two-party cases.

^{1.} Fry, *Specific Performance*, 6th edn (2012); Jones and Goodhart, *Specific Performance*, 2nd edn (1996); Sharpe, *Injunctions and Specific Performance*, 2nd edn; Spry, *Equitable Remedies*, 5th edn (1997).

^{402.} Above, paras 18-090 et seq.

^{403.} s.1(5) of the 1999 Act.

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Section 7. - Specific Performance with Compensation ⁴⁰⁴

Misdescription

27-059

Apart from stipulations relating to errors or misdescription, a vendor of land could not at law sue on an executory contract if the land did not correspond with the contractual description. But in such cases equity could order specific performance with “compensation”—i.e. with adjustment of the purchase price. This jurisdiction may be exercised where the area of the land sold is less than that stated in the contract, ⁴⁰⁵ where there is a defect of title, ⁴⁰⁶ and where there is a physical defect. ⁴⁰⁷

27-060

A vendor may obtain specific performance with compensation provided that the misdescription is not fraudulently or wilfully made, ⁴⁰⁸ that it does not affect the substance of the purchaser’s bargain, ⁴⁰⁹ and that adequate compensation for the defect or deficiency can be made by a monetary adjustment. ⁴¹⁰ A purchaser may succeed in a claim for specific performance with compensation even though the misdescription is of a degree of seriousness that would preclude the grant of the remedy to the vendor. ⁴¹¹ But the remedy will not be granted to a purchaser where it will prejudice third parties, ⁴¹² where it will inflict undue hardship on the vendor, ⁴¹³ where the purchaser knows the true facts at the time of contracting, ⁴¹⁴ or where compensation cannot readily be assessed in money. ⁴¹⁵ In these cases the purchaser may be entitled to rescind; but if he seeks specific performance he can enforce the contract only without compensation. ⁴¹⁶ This rule also applies where there is no misdescription in the contract but only a misrepresentation inducing it ⁴¹⁷; but under s.2(2) of the Misrepresentation Act 1967 the court has in such a case a discretion to declare the contract subsisting and to award “damages” in lieu of rescission. ⁴¹⁸ The effect of the exercise of this discretion would be similar to that of specific performance with compensation. The main difference between the old equitable and the new statutory powers is that the former was exercisable only before, ⁴¹⁹ while the latter can be invoked even after, completion. ⁴²⁰

Condition against error or misdescription

27-061

A contract for the sale of land may provide that errors and misdescriptions shall not annul the sale but shall give rise to a claim for compensation; sometimes the provision may purport to exclude the purchaser’s right to compensation for error or misdescription. The first question in such a case is as to the true construction of the provision. Generally it will not apply to defects of title ⁴²¹; but it is not invariably restricted to physical defects and may apply where the extent of a restrictive covenant is wrongly stated in the contract. ⁴²²

27-062

A provision of the kind described in para.27-061 above will not protect the vendor where his misdescription was wilful or fraudulent, ⁴²³ so that in such a case the purchaser can resist a claim for

specific performance and rescind the contract. The position was held to be the same ⁴²⁴ where the defect was substantial ⁴²⁵ and where compensation could not readily be assessed in money. ⁴²⁶ These cases seem to be applications of what later became known as the doctrine of fundamental breach ⁴²⁷ and similar cases would now seem to turn on the construction of the provision in question ⁴²⁸ rather than on any substantive rule making it impossible to exclude the court's power to order specific performance with compensation. Provisions of the present kind are not subject to the requirement of reasonableness under ss.2 to 4 of the Unfair Contract Terms Act 1977 ⁴²⁹ since those sections do not apply to any contract so far as it relates to the creation or transfer of an interest in land. ⁴³⁰ However, the Unfair Terms in Consumer Contracts Regulations 1999, ⁴³¹ and the Consumer Rights Act 2015 that replaces it, apply to contracts for the sale of an interest in land by a commercial supplier to a consumer. ⁴³² Thus, where a developer enters into a contract for the sale of a house, ⁴³³ terms of the kind here under discussion would not bind the consumer if they were "unfair" within the meaning given to that legislative expression. ⁴³⁴

Effects of misdescription as a misrepresentation

27-063

Further problems as to the effectiveness of a condition against error or misdescription can arise where the misdescription did not form part of the contract but was only a misrepresentation inducing it; or where it originated as such a misrepresentation and was later incorporated in the contract as one of its terms. In such cases, the representee can rescind the contract for misrepresentation, ⁴³⁵ and if the misrepresentation related to a matter that was substantial this right to rescind would not normally be affected by a condition of the kind here under discussion. ⁴³⁶ If, on the other hand, the matter misrepresented was *not* substantial, it is likely that the court would, even in the absence of such a condition, reject a claim to rescind for misrepresentation by declaring the contract as subsisting and awarding damages in lieu of rescission. ⁴³⁷ The further question then arises, whether a condition against error or misdescription would, in such a situation, be ineffective under s.3 of the Misrepresentation Act 1967. ⁴³⁸ Under this section, a contract term which would exclude or restrict any remedy available to a contracting party by reason of a misrepresentation made before the contract was made is subject to the requirement of reasonableness. Before the Act, it was held that a condition which excluded the right to rescind *and* the right to compensation entitled the vendor to enforce the contract without compensation. ⁴³⁹ Now, such a condition might well be regarded as unreasonable in so far as it excluded the purchaser's right to compensation, or his right to rescind for a misrepresentation relating to a matter that was of substantial importance. ⁴⁴⁰ But the requirement of reasonableness is likely to be satisfied if the matter misrepresented was of only minor importance, and the condition, while excluding the right to rescind, *provided* for compensation. Such a condition would not prejudice the purchaser: it would only give contractual effect to the right that the vendor would have had, even in the absence of the condition, to specific performance with compensation, or to the result that the court would be likely to reach under s.2(2) of the Misrepresentation Act 1967. ⁴⁴¹ Indeed, in one respect a condition in these terms might even benefit the purchaser; for the equitable rule that compensation could be claimed only *before* completion ⁴⁴² does not apply where the contract contains such a provision. ⁴⁴³ In respect of contracts made on or after October 1, 2015, s.3 of the Misrepresentation Act 1967 is amended by the Consumer Rights Act 2015 so as no longer to apply to "a term in a consumer contract within the meaning of Part 2 of the Consumer Rights Act 2015". ⁴⁴⁴ These terms are controlled under the 2015 Act by the general test of unfairness in s.62.

Compensation to vendor

27-064

A condition which provides for compensation may also entitle the vendor to compensation for errors to his disadvantage. ⁴⁴⁵

1. Fry, *Specific Performance*, 6th edn (2012); Jones and Goodhart, *Specific Performance*, 2nd edn (1996); Sharpe, *Injunctions and Specific Performance*, 2nd edn; Spry, *Equitable Remedies*,

5th edn (1997).

- [404.](#) Harpum [1981] C.L.J. 108.
- [405.](#) *Aspinalls to Powell and Scholefield* (1889) 60 L.T. 595.
- [406.](#) *Burrow v Scammell* (1881) 19 Ch. D. 175.
- [407.](#) *Shepherd v Croft* [1911] 1 Ch. 521; cf. *Lyons v Thomas* [1986] I.R. 666 (where the defects arose after contract).
- [408.](#) *Price v Macaulay* (1852) 2 De G.M. & G. 339, 345; *Shepherd v Croft* [1911] 1 Ch. 521; *Re Belcham & Gawley's Contract* [1930] 1 Ch. 56 (where the vendor knew of the existence of the defect).
- [409.](#) *Re Fawcett & Holmes' Contract* (1889) 42 Ch. D. 150; *Jacobs v Revell* [1900] 2 Ch. 858; *Watson v Burton* [1957] 1 W.L.R. 19; cf. *Flight v Booth* (1834) 1 Bing.N.C. 370; *Re Puckett & Smith's Contract* [1902] 2 Ch. 258; *Ridley v Oster* [1939] 1 All E.R. 618; *Walker v Boyle* [1982] 1 W.L.R. 495.
- [410.](#) *Cato v Thompson* (1882) 9 Q.B.D. 616, 618.
- [411.](#) Williams, *Vendor and Purchaser*, 4th edn (1936), p.725.
- [412.](#) *Willmot v Barber* (1880) 15 Ch. D. 96 (covenant not to assign lease without licence of lessor).
- [413.](#) *Durham v Legard* (1865) 34 Beav. 611; *Rudd v Lascelles* [1900] 1 Ch. 815.
- [414.](#) *Castle v Wilkinson* (1870) L.R. 5 Ch. 534.
- [415.](#) *Rudd v Lascelles*, above, n.399.
- [416.](#) *Durham v Legard*, above, n.399.
- [417.](#) *Gilchester Properties Ltd v Gomm* [1948] 1 All E.R. 493; cf. *Clayton v Leech* (1889) 41 Ch. D. 103; *Rutherford v Acton-Adams* [1915] A.C. 866.
- [418.](#) Above, paras 7-104—7-110.
- [419.](#) *Joliffe v Baker* (1883) 11 Q.B.D. 255; *Clayton v Leech* (1889) 41 Ch. D. 103; the position is different where the contract expressly provides for compensation: below, para.27-063 at nn.428 and 429.
- [420.](#) Misrepresentation Act 1967 s.1(b) leads to this result.
- [421.](#) *Re Beyfus and Master's Contract* (1888) 39 Ch. D. 110; and see *Debenham v Sawbridge* [1901] 2 Ch. 98, 107, 108.
- [422.](#) *Re Courcier and Harrold's Contract* [1923] 1 Ch. 565.
- [423.](#) *Duke of Norfolk v Worthy* (1808) 1 Camp. 337; *Re Terry and White's Contract* (1886) 32 Ch. D. 14, 29; *Shepherd v Croft* [1911] 1 Ch. 521, 531; see above, paras 7-143, 15-150.
- [424.](#) *Flight v Booth* (1834) 1 Bing.N.C. 370; *Jacobs v Revell* [1900] 2 Ch. 858; *Re Puckett and Smith's Contract* [1902] 2 Ch. 258; *Lee v Rayson* [1971] 1 Ch. 613.
- [425.](#) See *Dimmock v Hallett* (1866) L.R. 2 Ch.App. 21; *Re Terry and White's Contract* (1886) 32 Ch. D. 14, 29; *Re Fawcett and Holmes' Contract* (1889) 42 Ch. D. 150; *Re Puckett and Smith's Contract* [1902] 2 Ch. 258; *Lee v Rayson* [1971] 1 Ch. 613; contrast *Re Courcier and Harrold's Contract* [1923] 1 Ch. 565; *Beyfus v Lodge* [1925] Ch. 350; *Watson v Burton* [1957] 1 W.L.R. 19

- [426.](#) *Brooke v Rounthwaite* (1846) 5 Hare 298; *Rudd v Lascelles* [1900] 1 Ch. 815; and see Williams, *Vendor and Purchaser*, 4th edn (1936), pp.728–732.
- [427.](#) Above, para.15-023.
- [428.](#) *Photo Production Ltd v Securicor Transport Ltd* [1980] A.C. 827; *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd* [1983] 2 A.C. 803; above, paras 15-025, 15-026.
- [429.](#) Above, paras 15-096 et seq.
- [430.](#) Unfair Contract Terms Act 1977 Sch.1 para.1(c).
- [431.](#) SI 1999/2083.
- [432.](#) *London Borough of Newham v Khatun* [2004] EWCA Civ 55, [2005] Q.B. 37.
- [433.](#) SI 1999/2083 required that the contract be on “written standard terms”, see below, Vol.II, paras 38-221 to 38-223; but this has been dispensed with under the Consumer Rights Act 2015.
- [434.](#) See above, paras 15-096—15-115, and below, Vol.II, paras 38-220—38-316.
- [435.](#) Misrepresentation Act 1967 s.1(a); above, para.7-113.
- [436.](#) Above, at n.411.
- [437.](#) Misrepresentation Act 1967 s.2(2); above, para.7-105.
- [438.](#) As amended by Unfair Contract Terms Act 1977 s.8; above, paras 7-146—7-153.
- [439.](#) *Re Courcier and Harrold’s Contract* [1923] 1 Ch. 565.
- [440.](#) *Walker v Boyle* [1982] 1 W.L.R. 495; cf. *Cremdean Properties Ltd v Nash* (1877) 244 E.G. 547; *South Western General Property Co v Marton* (1982) 263 E.G. 263.
- [441.](#) Above, at n.423.
- [442.](#) Above, para.27-060 at n.405.
- [443.](#) *Bos v Helsham* (1866) L.R. 2 Ex. 72; *Re Turner and Skelton* (1879) 13 Ch. D. 130; *Palmer v Johnson* (1884) 13 Q.B.D. 351.
- [444.](#) s.75; Sch.4 para.1 of the Consumer Rights Act 2015.
- [445.](#) *Leslie v Thompson* (1851) 9 Hare 268.

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Consolidated Mainwork Incorporating Second Supplement

Volume I - General Principles

Part 8 - Remedies for Breach of Contract

Chapter 27 - Specific Performance and Injunction ¹

Section 8. - Injunction

Negative contracts

27-065

Where a contract is negative in nature, or contains an express negative stipulation, breach of it may be restrained by injunction. ⁴⁴⁶ In such cases an injunction is normally granted as a matter of course, so that the fact that “damages would be an adequate remedy ... is not generally a relevant consideration where the injunction restrains the breach of a negative covenant.” ⁴⁴⁷ But as the remedy is an equitable one, it is in principle a discretionary remedy and it may be refused on the ground that its award would cause such “particular hardship” ⁴⁴⁸ to the defendant as to be oppressive to him. ⁴⁴⁹ An injunction would not be “oppressive” merely because observance of the contract was burdensome to the defendant ⁴⁵⁰ or because its breach would cause little or no prejudice to the claimant, ⁴⁵¹ for, in deciding whether to restrain breach of a negative stipulation, the court is not normally concerned with “the balance of convenience or inconvenience”. ⁴⁵² This rule, however, applies only to a *prohibitory* injunction restraining a defendant from *future* breaches. If the defendant has already broken his contract (e.g. by fencing land that he promised to leave open) he may be ordered by a *mandatory* injunction actually to undo the breach. Such an order is subject to a “balance of convenience” test, and may, accordingly, be refused if the prejudice suffered by the defendant in having to restore the original position heavily outweighs the advantage that will be derived from such restoration by the claimant. ⁴⁵³ On the other hand, the court will also, in applying the balance of convenience test, take account of the nature of the breach. Thus where the defendant had in breach of a restrictive covenant erected a building so as to block the claimant’s sea view, a mandatory injunction was granted as the breach had been committed deliberately, with full knowledge of the claimant’s rights, and as damages would not have been an adequate remedy. ⁴⁵⁴ Where the injunction, though negative in form, resembles a mandatory injunction, the court will take into account the adequacy of damages in determining whether to grant the injunction. ⁴⁵⁵

Interim injunctions

27-066

⚠ Applications for interim injunctions are likewise, in general, ⁴⁵⁶ subject (inter alia) to the “balance of convenience” test. ⁴⁵⁷ ⚠ One application of the balance of convenience test is to cases where the injunction is sought for such a period that to grant it would amount in substance to a final resolution of the dispute between the parties. The court will, in considering such a claim for interim relief, take into account the likelihood of the claimant’s success at the eventual trial. ⁴⁵⁸ The court can also take into account the financial prejudice which is likely to be suffered either by the claimant if the injunction is refused, ⁴⁵⁹ or by the defendant if it is granted, ⁴⁶⁰ and if at the trial the dispute were to be resolved in that party’s favour. An award of damages to that party might then be an “inadequate” remedy for reasons discussed earlier in this Chapter ⁴⁶¹: e.g. because there was an appreciable risk of the other party’s not being able to pay the amount of the award.

⚠ Damages may also be inadequate where the infringement of the interest that a party is trying to

protect by way of an injunction is a person's privacy or reputation. ⁴⁶² !

27-067

! The "balance of convenience" test does not apply where an interim injunction is sought to restrain "a plain and uncontested breach of a clear covenant not to do a particular thing". ⁴⁶³ The point is illustrated by *Araci v Fallon*, ⁴⁶⁴ ! where a well-known jockey agreed with the claimant racehorse owner to ride the latter's horse Native Khan when requested to do so by the claimant and also, when the jockey had been so requested, "not to ride for any other horse". After having been requested by the claimant to ride Native Khan in the Epsom Derby on June 4, 2011, the jockey, who had agreed to ride another horse, owned by another owner, in the Derby on May 30, 2011 told the claimant that he would not ride Native Khan in that race. In view of the "deliberate and cynical" ⁴⁶⁵ nature of the defendant's breach, the grant of the injunction was not subject to the balance of convenience test ⁴⁶⁶, where the breach was of this nature, there must be special circumstances (such as the fact that the broken promise was unlawful for restraint of trade, ⁴⁶⁷ or that the grant of the injunction would be oppressive ⁴⁶⁸) going beyond a mere balance of convenience, to induce the court to exercise its discretion to refuse to grant an injunction. ⁴⁶⁹

Exclusive alternative remedy

27-068

An injunction will not be granted to restrain breach of a restrictive covenant affecting land against a body which has acquired the land under statutory powers where the legislation has provided an exclusive remedy by way of statutory compensation. ⁴⁷⁰

Oppression

27-069

We shall see later in this Chapter ⁴⁷¹ that the court has power by statute to award damages in lieu of specific performance or injunction. That power is likely to be exercised if the injury to the claimant is small, if it can readily be estimated in money, if compensation in money would adequately compensate the claimant and if the grant of an injunction would be oppressive to the defendant. ⁴⁷² These conditions were satisfied, and an injunction was accordingly refused, in *Jaggard v Sawyer*, ⁴⁷³ where the defendants had built a house on land which could be reached only by committing a breach of covenant and a trespass against neighbouring house-owners, including the plaintiff. An injunction restraining such access would have rendered the new house "landlocked and incapable of beneficial ownership" ⁴⁷⁴; and this would have been oppressive as the defendants had acted "openly and in good faith" ⁴⁷⁵ and not "in blatant disregard of the plaintiff's rights" ⁴⁷⁶ in building the house. The test is, again, one of *oppression*, ⁴⁷⁷ rather than one of *balance of convenience*: if the plaintiff had sought interlocutory relief *before* the house had been built, she "would almost certainly have obtained it". ⁴⁷⁸

Express negative promises

27-070

Specific performance will not generally be ordered of contracts of personal service ⁴⁷⁹, and the same principle generally precludes the specific enforcement of such a contract by an injunction restraining the employee from committing a breach of his positive obligation to work or the employer from dismissing the employee in breach of contract. ⁴⁸⁰ But a contract to render personal services may contain an express negative promise that can be enforced by injunction without indirectly compelling the employee to work for the employer, or the employer to employ the employee. In *Lumley v Wagner* ⁴⁸¹ the defendant had agreed with Mr Lumley to sing at the Drury Lane theatre on two nights a week for a period of three months, and not to use her talents at any other theatre during that period, without

Mr Lumley's written consent. She then agreed for a larger payment to sing during the three months for Mr Gye at Covent Garden, and to abandon the agreement with Mr Lumley. Lord St. Leonards L.C. granted an injunction, restraining her from singing for Mr Gye. He said:

"It is true that I have not the means of compelling her to sing, but she has no cause of complaint if I compel her to abstain from the commission of an act which she has bound herself not to do." ⁴⁸²

On the same principle, breach of negative stipulation against performing services as an actor for anyone except the employer may be restrained by injunction. ⁴⁸³ Such an injunction may provide an inducement to perform the positive obligation, but it falls short of indirectly compelling the employee to do the agreed work.

No indirect specific performance

27-071

Breach of a negative stipulation in a contract for personal services will not, however, be restrained by injunction where the effect of the court's order would be to leave the defendant with no alternatives except to perform the services or to remain idle. If, therefore, compliance with the negative promise, which it is sought to enforce, would preclude him from working for anyone else in any trade or profession whatsoever, an injunction will be refused. ⁴⁸⁴ Where the promise is merely one not to work in a *particular* capacity (e.g. as a singer or as an actress) for third parties, one view is that the promise may be enforced by injunction because the injunction would not prevent the employee from earning a living by doing other types of work. ⁴⁸⁵ But it might be quite unreasonable to expect an employee to do this; and later cases support the view that an injunction should not be granted except where it leaves the employee with some other *reasonable* means of earning a living. ⁴⁸⁶ The point is illustrated by cases in which professional entertainers or athletes have entered into long-term exclusive contracts with managers, in whom they then lost confidence. It has been held that the managers could not obtain injunctions either against their clients, ⁴⁸⁷ or against third parties with whom those clients had entered into substitute management contracts, ⁴⁸⁸ if the effect of the injunction would "as a practical matter" ⁴⁸⁹ force the clients to make use of the services of the original manager; and this would commonly be the case since such persons cannot successfully work without a manager.

Injunction should not impose undue pressure on employee

27-072

An injunction, in cases of the kind discussed in para.27-071 above, will always put some pressure on the defendant to perform his positive obligation to render the agreed services; and the view that this factor is, of itself, a ground for refusing to grant the injunction ⁴⁹⁰ is, with respect, hard to reconcile with the reasoning of *Lumley v Wagner*. ⁴⁹¹ The crucial question, in these cases, is whether the injunction would put *undue* pressure on an employee to perform his positive obligation to work; and this question can give rise to difficult issues of fact and degree. In *Sunrise Brokers LLP v Rodgers* ⁴⁹² Underhill L.J. explains that:

"a degree of financial hardship short of actual destitution may suffice to engage the principle. What is required is a realistic evaluation of whether the pressures operating on the employee in the particular case are in truth liable to compel him to return to work for the employer."

The burden of proof is on the employee. ⁴⁹³ In one case ⁴⁹⁴ a newspaper reporter undertook during the term of his contract not to work for others; the contract provided for termination by 12 months' notice. The reporter gave only two months' notice of termination, and it was held that he could be restrained

by injunction from breach of the negative stipulation. This was said not to subject him to undue pressure since the employers had undertaken to go on paying him, to allow him to go on working for them for the rest of the contract period, and not to claim damages if he should choose simply to draw his pay without doing such work. But the position might have been different if the employers had merely undertaken to go on paying him, without allowing him to work. In such cases, the court can balance the employee's interest in continuing to work (so as to maintain his skill and reputation) against any prejudice likely to be suffered by the employer if the employee works for a third party; and, where the remedy is discretionary, ⁴⁹⁵ the court may refuse to grant the injunction if it is satisfied that breach of the negative stipulation will not seriously prejudice the employer. ⁴⁹⁶ A fortiori, injunctive relief will be denied to the employer where his refusal to allow the employee to work amounts to a breach of the contract of employment on the employer's part. ⁴⁹⁷ However, where the employee refuses to work, there is no "rule requiring [the employer] to give some form of undertaking as to remuneration which goes beyond their obligations under the contract, in order that they should be entitled to obtain an injunction". ⁴⁹⁸ The test is "not simply whether the employee will suffer some degree of hardship by being held to the negative obligations in his contract—and certainly not ... whether he will be prevented from earning his living during the period of the restraint." ⁴⁹⁹

Services not of a personal nature



27-073

The discussion in para.27-072 above reflects the reluctance of the courts to enforce negative stipulations in contracts of employment by injunction where the effect of so doing would be to put undue pressure on an employee to perform his positive obligation to serve. Where, however, the contract is one to render services which are not of a personal nature, an injunction in (substantially) negative terms may be available against a party who has promised to provide the services, even though the practical effect of such an injunction may be to compel performance of that party's positive obligation to render the services. For example, a shipowner who has let his ship out under a time charter may be restrained by injunction from employing the ship inconsistently with the charterparty. ⁵⁰⁰ However, the availability of injunctive relief may, even where the services are not of a personal nature, be subject to other restrictions discussed earlier in this chapter: for example, such relief may be refused because of a breakdown of the requisite mutual confidence between the provider and the recipient of the services. ⁵⁰¹

Restraint of trade

27-074

! Another type of contract containing a negative promise, which is often enforced by injunction, is that restraining an employee or the vendor of a business from competition with the employer or purchaser. ⁵⁰² Such contracts are at common law invalid unless reasonable, ⁵⁰³ while the cases discussed in para.27-072 above assumed that the promise is valid and turn on the question whether an injunction would indirectly compel specific performance of the positive obligations of the contract. Yet it is arguable that the purpose of the negative stipulation in *Lumley v Wagner* ⁵⁰⁴ was to restrain competition, as it might have been physically possible for the defendant to sing at Drury Lane for two nights a week and to sing elsewhere on other nights. Yet the judgment does not discuss the question whether the contract was invalid for restraint of trade. It used to be thought that the two lines of cases could be distinguished on the ground that the restraint cases concerned the validity of covenants which took effect *after* employment; while the *Lumley v Wagner* line of cases concerned the remedy for breaches of covenants operating *during* employment. There may be considerable force in this view where the term of the engagement is fairly short (as it was in *Lumley v Wagner*), since in such a case the negative stipulation is likely to be reasonable, and therefore valid under the rules relating to restraint of trade, by reason of its limited duration. But there are other situations in which the distinction between covenants operating *after* and those operating *during* employment may be hard to draw or not obviously relevant in the particular context, especially where a service contract is a long-term one or gives the employer a series of options to renew it, ⁵⁰⁵ or where long periods of notice have to be given to terminate the contract. ⁵⁰⁶ Stipulations which operate *during* employment (no less than those which operate *thereafter*) can therefore sometimes have their validity tested under the

restraint of trade doctrine ⁵⁰⁷; but even where their *validity* is not subject to these tests, the *remedy* of injunction is likely to be granted only where these tests are satisfied. ⁵⁰⁸ The employer will be allowed to enforce such a stipulation by injunction only if this remedy will not put the sort of pressure on the employee that was discussed in para.27-072 above. ⁵⁰⁹ It is further submitted that, even where a covenant in restraint of trade takes effect after the period of service, and is valid, it may be appropriate not to enforce it by *injunction* (but only by an action for damages) if the grant of an injunction would leave the employee with no other reasonable means of making a living than to comply with the covenant. In such a case, the grant of an injunction might well be regarded as oppressive and refused on that ground, and the employer be left to his remedy in damages. ⁵¹⁰ Moreover, an injunction to enforce a valid restraint of trade may be denied if the claimant's delay has induced the defendant's detrimental reliance. ⁵¹¹  A short delay (even of two months) may make it inequitable to grant an injunction where it was deliberately timed to cause avoidable loss to third parties. ⁵¹² 

Severance

27-075

A negative stipulation, which is too widely expressed to be enforced by injunction as it stands, may be severed and enforced in part. Severance is not here governed by the rules relating to severance of promises in illegal contracts. The question is not whether severance alters the nature of the contract but simply whether an injunction to enforce such part of the negative stipulation as the claimant specifies amounts to indirect specific performance of a positive obligation, which will not be specifically enforced. In *Warner Bros Pictures Inc v Nelson* ⁵¹³ a film actress agreed to act for the claimants for a fixed period during which she undertook not only that she would not *act* for third parties, but also that she would not “*engage in any other occupation*” without the claimant's written consent. The claimants applied for an injunction to restrain her from acting for third parties. The court could clearly not restrain her from breach of all the negative undertakings, since that would force her to choose between idleness and performance of the obligation to serve. But this objection was “removed by the restricted form in which the injunction is sought”. ⁵¹⁴ The defendant was restrained simply from acting for third parties. ⁵¹⁵ Of course, if the negative stipulation, though operating only during employment, had been as a whole invalid for restraint of trade, the question of severance would have been determined by the principles governing the severance of promises in illegal contracts. ⁵¹⁶

Implied negative promises

27-076

An injunction to restrain the breach by an employee of a stipulation in a contract of employment will be issued only if the contract contains an *express* negative promise. ⁵¹⁷ The remedy has been restricted in this way because in employment cases an injunction may put so much economic pressure on the person who is to render the service that he will in fact be forced to perform the positive part of the contract, and compulsion of this kind is traditionally regarded as undesirable. ⁵¹⁸ But where the defendant's obligation is not one to render personal services, there is less objection to an injunction which puts pressure on him to perform his positive undertaking, even though it may not be specifically enforceable; and in cases of this kind the courts have been willing to *imply* negative stipulations and to restrain their breach by injunction. Thus an injunction has been issued to prevent a shipowner from using a ship under charter inconsistently with the charterparty, ⁵¹⁹ or fixing her with any third party during the period of the charterparty, ⁵²⁰ to restrain breach of a promise to give a “first refusal” to purchase of land, ⁵²¹ to restrain breaches of various exclusive dealing agreements, ⁵²² and of agreements to submit disputes to arbitration. ⁵²³ Similarly, a seller of uncut timber has been restrained from interfering with the right of the buyer to enter the land to cut down the timber and to take it away: this was “not specific performance in the sense of compelling the vendor to do anything. It merely prevents him from breaking his contract”. ⁵²⁴ In such cases of commercial arrangements “involving the employment of no named individuals” ⁵²⁵ it is not an objection to the grant of an injunction that the “practical effect” of this form of relief would be to “compel performance” ⁵²⁶ in the sense that the “only realistic course” which the injunction left to the defendants was to perform the

positive obligations imposed by the contract. ⁵²⁷

27-077

In the cases not involving employment contracts discussed in para.27-076 above, a negative stipulation, though not express, can readily be implied, and its enforcement by injunction does not amount to indirect specific performance. The position would be different where the vagueness of the positive part of the contract made it impossible to say precisely what the defendant had undertaken *not* to do ⁵²⁸; and also where the only negative stipulation which could be implied was one that would embrace the whole positive obligation. For example, if a seller had simply contracted to deliver a quantity of unascertained generic goods such as “100 tons of coal” an injunction “not to break the contract” or “not to withhold delivery” would be indistinguishable from an order of specific performance and would not normally ⁵²⁹ be granted. ⁵³⁰ And the implication of a narrower negative stipulation (e.g. not to sell to anyone else) would not fairly arise from the contract. Similarly, in a case ⁵³¹ arising out of a number of time charterparties, it was held that the shipowners could not be restrained by injunction from “taking any step preventing the performance of” the contracts ⁵³²; but injunctions were granted in the more restricted form of restraining them from employing the vessels in question inconsistently with the charterparties or fixing them with third parties during the period of the charterparties. A distinction was there drawn between an injunction giving rise to *practical* compulsion to perform (of the kind described in para.27-076 above) and one which was “as a *matter of law* pregnant with an affirmative obligation to perform”, ⁵³³ such as one “not to break the contract” or “not to take steps to prevent its performance”. An injunction of the latter kind was “tantamount to” ⁵³⁴ or “juristically indistinguishable from” an order of specific performance ⁵³⁵ and so not available in respect of contracts which were not specifically enforceable. ⁵³⁶ An injunction which did not result in such *legal* compulsion to perform the contract was available to restrain breach of a contract, such as a charterparty, even though it resulted in *practical* compulsion of the kind referred to above. Such practical compulsion was a ground for refusing an injunction in personal service cases of the kind discussed in para. 27-071 above but the same objection to this form of relief did not extend to cases in which the services to be rendered under the contract were not of the same personal nature. ⁵³⁷

Expulsion from associations

27-078

The rules of a members’ club or trade union may have contractual force; and wrongful expulsion from such an association in breach of its rules may be restrained by injunction. ⁵³⁸ Where the expulsion is wrongful because the proper procedure for expulsion has not been followed, ⁵³⁹ the court may nevertheless refuse an injunction on the ground that the procedural defect did not cause any prejudice to the claimant. ⁵⁴⁰ And where the statutory right of an individual not to be expelled from a trade union is infringed, the only remedies provided by the statute are by way of declaration and compensation. ⁵⁴¹

Injunction against refusal to contract

27-079

⚠ Generally a person cannot be restrained by injunction from refusing to contract with another, particularly if it would force an entity to engage in a long-term contract with another ⁵⁴² ⚠; but there are at least three possible exceptions to this rule. These are discussed in paras 27-080 to 27-082 below.

Legislative provisions against refusal to contract

27-080

The first exception (or group of exceptions) arises under legislative provisions making it unlawful to

refuse to enter into a contract with a person on certain specified grounds, such as that person's race, sex, religion or belief, sexual orientation, age or the fact that he suffers from a disability. ⁵⁴³ Such refusal may in certain circumstances, and subject to the provisions of the relevant legislation, be restrained by injunction. ⁵⁴⁴ An injunction may similarly be granted (and damages awarded) against persons whose withholding of supplies from distributors amounts to an abuse of a dominant position contrary to European Community ⁵⁴⁵ or United Kingdom ⁵⁴⁶ competition law. ⁵⁴⁷ On the other hand, the only remedies provided by legislation for infringement of the statutory right not to be excluded from a trade union are by way of declaration and compensation. ⁵⁴⁸ The same is true of the remedies provided by legislation for discrimination in employment on grounds of religion or belief, sexual orientation or age. ⁵⁴⁹ However, it seems that injunctive relief may be available in cases of unlawful discrimination on the ground of sexual orientation in fields other than employment, e.g. by suppliers of services, by persons disposing of premises and by educational establishments. ⁵⁵⁰

Rules of associations restricting the right to work

27-081

The second exception to the general rule stated in para.27-079 above arises where the refusal is based on the rules of an association and unreasonably deprives a person of the right to work in some trade or profession. In *Nagle v Feilden* ⁵⁵¹ the claimant was refused a trainer's licence by the stewards of the Jockey Club on the sole ground that she was a woman. It was held that her claim for (inter alia) an injunction against the stewards ordering them to grant her a licence ought not to have been struck out as disclosing no cause of action. On the facts of *Nagle v Feilden* an injunction could now be issued on the ground that the refusal constituted unlawful sex discrimination ⁵⁵², but the common law principle recognised in the case could (if still valid ⁵⁵³) also apply where such a refusal gave effect to a policy of discrimination that was not in terms made unlawful by legislation. This might be the position where a person was refused admission to an association, and so deprived of the opportunity of exercising a profession, on political grounds that had no bearing on his competence in that profession. ⁵⁵⁴


Aiding and abetting breach of an injunction

27-082



The third exception to the general rule stated in para.27-079 above is illustrated by *Acrow Automation v Rex Chainbelt Inc.* ⁵⁵⁵ The defendant company refused to supply components to a manufacturer in obedience to instructions given by an associated company; these instructions had been given in breach of an injunction against the latter company not to interfere with the manufacturer's business. It was held that the defendant company (which knew of the injunction) could be restrained from obeying the associated company's instructions, and that it could be ordered to make reasonable efforts to supply the manufacturer, since its refusal to supply him amounted to aiding and abetting a breach of the injunction against the associated company. These orders against the defendant company were made even though there was no previous contract between the defendant company and the manufacturer for the supply of the goods in question.

1. Fry, *Specific Performance*, 6th edn (2012); Jones and Goodhart, *Specific Performance*, 2nd edn (1996); Sharpe, *Injunctions and Specific Performance*, 2nd edn; Spry, *Equitable Remedies*, 5th edn (1997).

⁴⁴⁶. *Martin v Nutkin* (1724) 2 P.Wms. 266. An injunction cannot be granted to restrain a party to a contract from doing acts which have, because the contract has been brought to an end, ceased to be breaches of the contract: see *Medina Housing Association v Case* [2002] EWCA Civ 2001, [2003] 1 All E.R. 1084. It is, of course, possible for a negative stipulation to continue to apply after positive obligations of performance have come to an end, whether by notice or by lapse of time, as in the restraint of trade cases discussed in para.27-074, below.

- [447.](#) *Araci v Fallon* [2011] EWCA Civ 668 at [70], per Elias L.J. citing para.27-060 of the 30th edition of this book (para.27-065 in the present edition) with apparent approval. Since in that case damages were *not* an adequate remedy (above para.27-009 n.45 and below, para.27-067) it can be argued that the point made in the dictum cited in the text above did not strictly arise. Contrast *Tye v House* (1998) 76 P. & C.R. 188 where adequacy of damages was held to be relevant in refusing to award an injunction against the seller's breach of an exclusivity agreement in respect of land because the exclusivity did not require the vendor to sell to the prospective purchaser, only to compensate the latter's wasted expenses.
- [448.](#) *Insurance Co v Lloyd's Syndicate* [1985] 1 Lloyd's Rep. 273, 276 (where there was no such hardship). cf. above, para.27-036 (severe hardship).
- [449.](#) See below, para.27-069.
- [450.](#) cf. above, para.27-036.
- [451.](#) *Kemp v Sober* (1851) 1 Sim.(N.S.) 517; *Tipping v Eckersley* (1855) 2 K. & J. 264; *Marco Productions Ltd v Pagola* [1945] K.B. 111; *Hollis & Co v Stocks* [2000] I.R.L.R. 712.
- [452.](#) *Doherty v Allman* (1878) 3 App.Cas. 709, 720; cf. *Warner Bros Pictures Inc v Nelson* [1937] 1 K.B. 209, 217; *Wakeham v Wood* (1982) 43 P. & C.R. 40; *Att-Gen v Barker* [1990] 3 All E.R. 257, 262.
- [453.](#) *Sharp v Harrison* [1922] 1 Ch. 502; *Shepherd Homes Ltd v Sandham* [1971] Ch. 340; for subsequent proceedings, see [1971] 1 W.L.R. 1062; *Films Rover International Ltd v Cannon Film Sales* [1987] 1 W.L.R. 670 (for further proceedings, see [1989] 1 W.L.R. 912); *Sutton Housing Trust v Lawrence* (1987) 19 H.L.R. 520 (mandatory and prohibitory injunction); *Reed v Madon* [1989] Ch. 408; *Land Rover Group Ltd v UPF (UK) Ltd* [2002] EWHC 3183, [2003] B.C.L.C. 122 at [60], where the "balance of convenience" test was applicable also on the principle stated in para.27-066 below as the injunction was an interim one. For another such case, see *Landmark Brickworks Ltd v Sutcliffe* [2011] EWHC 1239 (QB), [2011] I.R.L.R. 976 at [80], [86]–[88].
- [454.](#) *Wakeham v Wood* (1982) 43 P. & C.R. 40; *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] 3 E.G.L.R. 15 (mandatory injunction to restrain wrongful interference with right to light); cf. *Mortimer v Bailey* [2004] EWCA Civ 1514, [2005] 2 P. & C.R. 9 (where the main issue was whether there had been undue delay in applying for a mandatory injunction to pull down an extension built in breach of covenant).
- [455.](#) See also *QBE Management Services (UK) Ltd v Dymoke* [2012] EWHC 80 (QB), [2012] I.R.L.R. 458 where the injunction was designed to deprive the defendant of any commercial advantage gained by him as a result of his breaches of duties of fidelity arising under his contract of employment with the claimant. Thus, the effect of the injunction resembled a mandatory injunction since that effect was to restore the parties to the position in which they were before the breaches had been committed. Hence one reason given for granting the injunction was that "damages would not be an adequate remedy" (at [280]).
- [456.](#) i.e., subject to the exception discussed at para.27-067 below. The "balance of convenience" test may also be excluded by the "statutory context" in which the interim injunction is sought: see *London Underground Ltd v Associated Society of Locomotive Engineers and Firemen* [2011] EWHC 3506 (QB), [2012] I.R.L.R. 196 at [13], where that context was provided by ss.219 and 221 of the Trade Union and Labour Relations (Consolidation) Act 1992.
- [457.](#)  *Texaco Ltd v Mulberry Filling Station Ltd* [1972] 1 W.L.R. 814; *Evans Marshall & Co v Bertola* [1973] 1 W.L.R. 349; *Clifford Davis Management Ltd v W.E.A. Records Ltd* [1975] 1 W.L.R. 61; *Mike Trading & Transport Ltd v R. Pagnan & Fratelli* [1980] 2 Lloyd's Rep. 546; *Locobail International Finance v Agroexport (The Sea Hawk)* [1986] 1 W.L.R. 657; *Kerr v Morris* [1987] Ch. 90, 112; *Films Rover International v Cannon Film Sales Ltd* [1987] 1 W.L.R. 670, for further proceedings see [1989] 1 W.L.R. 912; *Evening Standard Co Ltd v Henderson* [1987] I.C.R. 588; *Provident Financial Group Ltd v Hayward* [1989] I.C.R. 160; *Lock International Plc v Beswick*

[1989] 1 W.L.R. 1268; *Channel Tunnel Group v Balfour Beatty Construction Ltd* [1993] A.C. 334; *GFI Group Inc v Eaglestone*, [1994] I.R.L.R. 119; *Series 5 Software v Clarke* [1996] 1 All E.R. 853; *Tate & Lyle Industries v Cia. Usina Bulhoes* [1997] 1 Lloyd's Rep. 355; *Townsend Group Ltd v Cobb* [2004] EWHC 3432, *The Times*, December 1, 2004; *Ericsson AB v EADS Defence and Security Systems* [2009] EWHC 2598 (TCC) at [29]–[33]; *Lauffer v Barking, Havering and Redbridge University Hospitals NHS Trust* [2009] EWHC 2360 (QB) at [46]–[54]; *Serco Ltd v National Union of Rail, Maritime and Transport Workers* [2011] EWCA Civ 226, [2011] 3 All E.R. 913 at [10]. For the principles governing such injunctions, see generally *American Cyanamid Co v Ethicon Ltd* [1975] A.C. 396; *Fellowes v Fisher* [1976] Q.B. 122 and *Lawrence David Ltd v Ashton* [1989] I.C.R. 123 (holding these principles to be applicable in restraint of trade cases); *Martin & Co (UK) Ltd v Cedra Ltd* [2015] EWHC 1036 (Ch) at [63]–[64]; *AB v CD* [2014] EWHC 1 (QB) at [41], [2014] EWCA Civ 229, [2014] 3 All E.R. 667 at [6] (the appeal was allowed for the reason discussed in para.27-009 n.48); *Ashworth v Royal National Theatre* [2014] EWHC 1176 (QB) at [33]. And see *Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group* [2016] EWHC 1393 (TCC) on what is meant by the adequacy of damages for a not-for-profit organisation and on the role of the public interest in assessing the balance of convenience; *Allfiled UK Ltd v Eltis* [2015] EWHC 1300 (Ch) on the effect of the claimant's delay.

- [458.](#) *Cambridge Nutrition Ltd v B.B.C.* [1990] 3 All E.R. 523; *Lansing Linde Ltd v Kerr* [1991] 1 W.L.R. 251, 258–259; *Imutran v Uncaged Campaigns Ltd* [2001] 2 All E.R. 385; *Associated Foreign Exchange Ltd v International Foreign Exchange Ltd* [2010] EWHC 1178 (Ch), [2010] I.R.L.R. 694 (interim injunction to enforce non-solicitation covenant against employee refused as the likely outcome of the trial was that the covenant would be held unenforceable).
- [459.](#) *Themehelp Ltd v West* [1996] Q.B. 84, doubted on another point in *Group Josi Re v Walbrook Ins. Co Ltd* [1996] 1 W.L.R. 1152, 1162; *British Airways Plc v Unite the Union* [2009] EWHC 3541 (QB), [2010] I.R.L.R. 423 at [83] (balance of convenience in favour of injunction against strike over Christmas period as this was “fundamentally more damaging” than one called “at any other time of the year”). The interim injunction was discharged on another ground in further proceedings: [2010] EWCA Civ 669, [2010] I.C.R. 1316.
- [460.](#) *Cambridge Nutrition Ltd v B.B.C.* [1990] 3 All E.R. 523; *P. I. International Ltd v Llewellyn* [2005] EWHC 407, [2005] U.K.C.L.R. 530.
- [461.](#) Above, para.27-009 at n.51. See e.g. *Martin & Co (UK) Ltd v Cedra Ltd* [2015] EWHC 1036 (Ch) at [52]–[62].
- [462.](#)  *PJS v News Group Newspapers Ltd* [2016] UKSC 26 at [43]; *Kent Community Health NHS Foundation Trust v NHS Swale Clinical Commissioning Group* [2016] EWHC 1393 (TCC) at [15].
- [463.](#) *Hampstead and Suburban Properties Ltd v Diomedous* [1969] 1 Ch. 248, 259, cf. *Att-Gen v Barker* [1990] 3 All E.R. 257.
- [464.](#)  [2011] EWCA Civ 668. See also *RSM International Ltd v Harrison* [2015] EWHC 2252 (QB).
- [465.](#) [2011] EWCA Civ 668 at [61]; cf. at [70].
- [466.](#) [2011] EWCA Civ 668 at [69]; the same point is implicit in [37] and [39].
- [467.](#) [2011] EWCA Civ 668 at [39], [73]; cf. below, para.27-074.
- [468.](#) [2011] EWCA Civ 668 at [61], [70]; cf. below, para.27-069.
- [469.](#) See the references to unlawfulness and oppression in the passages cited in nn.452 and 453 above.
- [470.](#) *Brown v Heathlands Mental Health N.H. Trust* [1996] 1 All E.R. 133.

471. See below, para.27-083.

472. See the tort case of *Shelfer v City of London Electric Light Co* [1895] 1 Ch. 287, 322–333, held to be applicable by analogy in *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2009] EWHC 1456 (Ch), [2010] F.S.R. 2 at [41] to a claim for misuse of confidential information. See also the “noise nuisance” tort case of *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] 2 All E.R. 623 where the four requirements (based on the judgment of A.L. Smith L.J. in *Shelfer v City of London Electric Light Co* [1895] 1 Ch. 287 at p.322–323) were reviewed by the Supreme Court. Lord Neuberger, P. said that the approach to the problem should be “more flexible” (at [119]) than that stated in the *Shelfer* case (above). Lords Sumption and Clarke (while expressing their agreement with Lord Neuberger: see at [154], [169]), went so far as to say that the *Shelfer* case was “out of date” at [161], [171], though this view may be at least in part restricted to “the special treatment of nuisance” (at [160]) in this context; while Lords Mance at [165] and Carnwath at [247] would, while agreeing generally with Lord Neuberger’s “nuanced approach” (at [165]; cf. at [247]) in such a context attach particular importance to “the right to enjoy one’s home without disturbance”. The requirements stated in the text above do not apply where it is the wrongdoer who claims that specific relief is the more appropriate remedy since in such a case the grant of the injunction cannot be oppressive to him: *Marcic v Thames Water Utilities (No.2)* [2001] 4 All E.R. 327 reversed on another ground [2003] UKHL 66; [2004] 2 A.C. 42. All four of the requirements stated in the text above must be satisfied by the party claiming that an award of damages would be a more appropriate remedy than specific enforcement: see *HKRUK II (CHC) Ltd v Heaney* [2010] EWHC 2245 (Ch), [2010] E.G.L.R. 15 (below, n.461) at [63], where the requirement that the damages must be “small” was not satisfied (at [81]). In that case, the wrongdoer was, unusually, the claimant, the action being one for a declaration as to the wrongdoer’s rights. It does not follow from the reasoning of the case that a claim *by the injured party* for damages in lieu of an injunction would likewise have failed. In the text above, “defendant” refers to the more usual situation in which it is the wrongdoer who is the defendant.

473. [1995] 1 W.L.R. 269.

474. [1995] 1 W.L.R. 269 at 288.

475. [1995] 1 W.L.R. 269 at 289.

476. [1995] 1 W.L.R. 269 at 283. cf. the *HKRUK II* case, above n.457, where a mandatory injunction was granted against a developer who had continued with building work knowing that it would result in actionable interference with a neighbour’s right to light; and where compensation would have amounted to a considerable sum. In the circumstances, it would have been wrong to compel the injured party to accept monetary (as opposed to specific) relief (at [83]–[85]).

477. cf. above at n.438.


478. [1995] 1 W.L.R. at 289, cf. 283. See also the similar case of *Gafford v Graham* (1998) 76 P. & C.R. D18; and the tort case of *Regan v Paul Properties Ltd* [2006] EWCA Civ 1391, [2007] Ch. 135 where the claimant had begun to protest five months before interference with his right to light by the defendant became imminent and was granted injunctive relief. Contrast the further tort case of *Watson v Croft Promosport Ltd* [2009] EWCA Civ 15, [2009] 3 All E.R. 249, where an injunction against noise nuisance was granted as the wrong had caused substantial injury to the claimant, the injunction would not be oppressive to the defendants and there were no exceptional circumstances to justify the refusal of injunctive relief.

479. Above, para.27-024.


480. *Whitwood Chemical Co v Hardman* [1891] 2 Ch. 416, disapproving *Montagu v Flockton* (1873) L.R. 16 Eq. 189; *Mortimer v Beckett* [1920] Ch. 571; *Rely-a-Bell Co Ltd v Eisler* [1926] Ch. 609; *Chappell v The Times Newspapers Ltd* [1975] 1 W.L.R. 482; cf. Trade Union and Labour Relations (Consolidation) Act 1992 s.236; *Evans Marshall & Co v Bertola SA* [1973] 1 W.L.R. 349; *Scandinavian Tanker Trading Co AB v Florta Petrolera Ecuatoriana (The Scaptrade)* [1983] A.C. 694, 701; *City & Hackney H.A. v NUPE* [1985] I.R.L.R. 252; *Alexander v Standard Telephone and Cables Ltd* [1990] I.C.R. 291. For an exception to the general rule, see *Hill v C.A. Parsons & Co Ltd* [1972] 1 Ch. 305, above, para.27-026.

- [481.](#) (1852) 1 De G.M. & G. 604.
- [482.](#) (1852) 1 De G.M. & G. 604 at 619. See further n.476, below. *Lumley v Wagner* and *Warner Bros v Nelson* [1937] 1 K.B. 209 (see para.27-071) were discussed with apparent approval by Lord Wilson S.C.J. in *Société Générale, London Branch v Geys* [2012] UKSC 63, [2013] 1 A.C. 523 at [70]–[73] in support of the proposition that a contract of employment is not brought to an end by one party's wrongful repudiation which has not been "accepted" by the other. These paragraphs do not refer in so many words to the problem (discussed in paras 27-071 and 27-072) that the injunctions in these cases might have amounted to indirect specific performance of contracts of personal service (which in general cannot be specifically enforced: see above, paras 27-024 et seq.) because such injunctions could impose undue pressure on the defendants to perform their positive obligation to serve (see para.27-072); though it was no doubt with this point in mind that Lord Wilson (at [71]) refers to Lindley L.J.'s statement in *Whitwood Chemical Co v Hardman* [1891] 2 Ch. 416, 428, describing *Lumley v Wagner*, above, as "an anomaly which it would be dangerous to extend".
- [483.](#) See, e.g. *Grimston v Cunningham* [1894] 1 Q.B. 125; *Robinson & Co Ltd v Heuer* [1898] 2 Ch. 451; *Tivoli (Manchester) v Colley* (1904) 20 T.L.R. 437; *Warner Bros v Nelson* [1937] 1 K.B. 209.
- [484.](#) *Ehrman v Bartholomew* [1898] 1 Ch. 671.
- [485.](#) *Warner Bros Pictures Inc v Nelson* [1937] 1 K.B. 209; and see below, at n.479.
- [486.](#) Unless this was the position, the grant of an injunction might also be regarded as oppressive: cf. above, para.27-069.
- [487.](#) *Page One Records Ltd v Britton* [1968] 1 W.L.R. 157.
- [488.](#) *Warren v Mendy* [1989] 1 W.L.R. 853, citing criticism of *Warner Bros. Inc v Nelson* (above, n.449) in *Nichols Advance Vehicle Systems Inc v De Angelis Unreported December 21, 1979*; McLean [1990] C.L.J. 15.
- [489.](#) *Page One Records Ltd v Britton* [1968] 1 W.L.R. 157, 166. *Lumley v Wagner* was distinguished at 165 on the ground that Mr. Lumley had undertaken no obligation except to pay money; but in fact he also made a promise which was negative in substance, viz that certain parts were to "belong exclusively" to the defendant.
- [490.](#) *Young v Robson Rhodes* [1999] 3 All E.R. 524 at 534 ("to coerce the defendants ...").
- [491.](#) (1852) 1 D.M. & G. 694, above, para.27-070. *Lumley v Wagner* was cited by counsel, but not referred to in the judgment, in *Young v Robson Rhodes*, above, n.475. It seems that the defendant in the former case was not in fact "coerced" into performing her positive obligation to sing at the claimant's theatre: see Waddams, 117 L.Q.R. 431 at 440. The two cases may be distinguishable on the ground that there was no express negative covenant in *Young v Robson Rhodes*, above.
- [492.](#) [2014] EWHC 2633 at [32].
- [493.](#) *Sunrise Brokers LLP v Rodgers* [2014] EWHC 2633 at [36]–[40].
- [494.](#) *Evening Standard Co Ltd v Henderson* [1987] I.C.R. 588; cf. *SG & R Valuation Co v Boudrais* [2008] EWHC 1340 (QB), [2008] I.R.L.R. 770 (below, n.481) at [33].
- [495.](#) Above, paras 27-065–27-066 nn.439–446; cf. *Delaney v Staples* [1992] A.C. 687, 692–693 and *William Hill Organisation Ltd v Tucker* [1998] I.R.L.R. 313, discussing so-called "garden leave". See also *J.M. Finn & Co Ltd v Holliday* [2013] EWHC 3450 (QB), [2014] I.R.L.R. 102, where one reason why the employee was restrained by injunction from resigning before the end of his 12-month notice period was that during that period he would receive his full salary and so suffer no financial loss (at [73]), and the claimant had a legitimate interest in the form of

customer connections to protect.

- [496.](#) *Provident Financial Groups Plc v Hayward* [1989] I.C.R. 160. Contrast *Symbian Ltd v Christensen* [2001] I.R.L.R. 77, restraining the defendant from working for a specified competitor during the period of “garden leave”; and *SG & R Valuation Co v Boudrais*, above n.479, where the employees’ obligation to take “garden leave” for the contractually required notice period arose (or was assumed to have arisen), not under express terms of their contracts, but by virtue of alleged breaches by them of those contracts, in response to which the employers had sent them “letters of suspension” (at [3]). In *J.M. Finn and Co Ltd v Holliday* [2013] EWHC 3450 (QB) (above, n.480) the case was said not to be one in which the employee’s skills would “atrophy” (at [73]) during the 12-month notice period.
- [497.](#) *William Hill Organisation Ltd v Tucker* [1998] I.R.L.R. 313.
- [498.](#) *Standard Life Health Care Ltd v Gorman* [2009] EWCA Civ 1292 at [30]; *Sunrise Brokers LLP v Rodgers* [2014] EWHC 2633 at [30]. However, Longmore L.J. at [58] raises the conundrum following the decision that the elective theory, rather than the automatic theory, of termination of employment contracts was correct in *Geys v Société Generale* [2013] 1 A.C. 523: whether, if the employer kept the contract alive and sought an injunction, the employer was bound to continue to pay the employee; and whether an employer keeping the contract alive should be entitled to restrain the employee from working for a rival.
- [499.](#) *Sunrise Brokers LLP v Rodgers* [2014] EWHC 2633 at [33].
- [500.](#) *Lauritzencool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [2005] 1 W.L.R. 3686, below para.27-076.
- [501.](#) *Ericsson AB v EADS Defence and Security Systems Ltd* [2009] EWHC 2598 (TCC), [2010] B.L.R. 131 at [47]; above para.27-028.
- [502.](#) See above, paras 16-085 et seq.
- [503.](#) See above, para.16-102.
- [504.](#) (1852) 1 De G.M. & G. 604; above para.27-070. In *Araci v Fallon* [2011] EWCA Civ 688 (above, para.27-067 n.449) it was said at [56] to be common ground that, in that case, “restraint of trade [was] not a relevant consideration: see *Warner Brothers Pictures Ltd v Nelson* [1937] 1 K.B. 209” (below, para.27-075). The agreement in the *Araci* case (see at [11]–[14]) did not give rise to a relationship of employer and employee.
- [505.](#) See the terms of the contracts in *Warner Bros v Nelson* [1937] 1 K.B. 209 and cf. *Eastham v Newcastle United Football Club Ltd* [1964] Ch. 413.
- [506.](#) e.g. in cases of “garden leave”. See *Symbian Ltd v Christensen* [2001] I.R.L.R. 77, assuming that the restraint of trade doctrine can apply to such cases.
- [507.](#) *Young v Timmins* (1831) 1 Cr. & J. 331 as explained in *Esso Petroleum Co Ltd v Harper’s Garage (Stourport) Ltd* [1968] A.C. 269, 328–329; *A. Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 W.L.R. 1308; *Clifford Davis Management Ltd v W.E.A. Record Ltd* [1975] 1 W.L.R. 61; above, para.16-125.
- [508.](#) *William Hill Organisation Ltd v Tucker* [1998] I.R.L.R. 313; *Symbian Ltd v Christensen*, above, n.491 at [52].
- [509.](#) See above para.27-072 at nn.479 and 480, and *Delaney v Staples* [1992] 1 A.C. 687, 692–693.
- [510.](#) cf. above, para.27-069.
- [511.](#)  *Lindsay Petroleum Co v Hurd* (1874) L.R. 5 P.C. 221 and *Fisher v Brooker* [2009] UKHL 41, [2009] 1 W.L.R. 1764.

- [512.](#) **!** *Legends Live Ltd v Harrison* [2016] EWHC 1938 (QB) at [90]–[110] (claimant's delay of two months meant the defendant had become an integral part of a competing show and an injunction would affect the livelihoods of other performers).
- [513.](#) [1937] 1 K.B. 209.
- [514.](#) [1937] 1 K.B. 209 at 219; cf. *William Robinson & Co Ltd v Heuer* [1898] 2 Ch. 451; *Provident Financial Group Plc v Hayward* [1989] I.C.R. 150, 160; *Symbian Ltd v Christensen*, above, n.491.
- [515.](#) See above, para.27-071 for the question whether the injunction, even in these limited terms, left the defendant with a *reasonable* alternative means of earning a living.
- [516.](#) Contrast the *Warner Bros* case, above, n.496, with *Gledhow Autoparts Ltd v Delaney* [1965] 1 W.L.R. 1366.
- [517.](#) *Mortimer v Beckett* [1920] 1 Ch. 571. An apparent exception is *Hivac v Park Royal Scientific Instruments* [1946] Ch. 169 but the injunction was there issued to restrain breach of a duty imposed by law rather than to restrain breach of an implied negative promise. cf. *Printers & Finishers Ltd v Holloway* [1965] 1 W.L.R. 1; *Cranleigh Precision Engineering Ltd v Bryant* [1965] 1 W.L.R. 1293.
- [518.](#) Above, para.27-071.
- [519.](#) *Sevin v Deslandes* (1860) 30 L.J. (Ch.) 457; *De Mattos v Gibson* (1859) 4 D. & J. 276; *Lord Strathcona Steamship Co v Dominion Coal Co* [1926] A.C. 108, as to which see above, para.18-145; *Associated Portland Cement Manufacturers Ltd v Teigland Shipping A/S (The Oakworth)* [1975] 1 Lloyd's Rep. 581; *Lauritzencool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [2005] 1 W.L.R. 3686.
- [520.](#) *Sevin v Deslandes* (1860) 30 L.J. (Ch.) 457; *De Mattos v Gibson* (1859) 4 D. & J. 276; *Lord Strathcona Steamship Co v Dominion Coal Co* [1926] A.C. 108, as to which see above, para.18-145; *Associated Portland Cement Manufacturers Ltd v Teigland Shipping A/S (The Oakworth)* [1975] 1 Lloyd's Rep. 581; *Lauritzencool AB v Lady Navigation Inc* [2005] EWCA Civ 579.
- [521.](#) *Manchester Ship Canal v Manchester Racecourse Co* [1901] 2 Ch. 37.
- [522.](#) *Donnell v Bennett* (1883) 22 Ch. D. 835; *Metropolitan Electric Supply Co v Ginder* [1901] 2 Ch. 799; *Decro-Wall International SA v Practitioners in Marketing Ltd* [1971] 1 W.L.R. 361; *Evans Marshall & Co v Bertola SA* [1973] 1 W.L.R. 349, and see above, paras 16-131–16-145. *Fothergill v Rowland* (1873) L.R. 17 Eq. 132 requires an express negative stipulation even in these cases but has not been followed on this point. In *SAB Miller African BV v East African Breweries Ltd* [2009] EWHC 2140, [2010] 1 Lloyd's Rep. 392 (leave to appeal refused [2010] 2 Lloyd's Rep. 442) an interim injunction was granted in respect of express negative stipulations in restraint of trade between brewers (see at [174]), but not in respect of the defendant's positive obligations under the agreement (see at [177]).
- [523.](#) *Bankers Trust Co v P.T. Jakarta International Development* [1999] 1 Lloyd's Rep. 910 at 911 (injunction against proceedings in *foreign* court; in respect of *English* court proceedings, the remedy would be by way of a stay of the proceedings: below Vol.II, paras 32-051 et seq.).
- [524.](#) *Jones v Tankerville* [1909] 2 Ch. 440, 443; cf. *Hounslow LBC v Twickenham Gardens Ltd* [1971] Ch. 223; above, para.27-033; (1971) 87 L.Q.R. 309.
- [525.](#) *Lauritzencool AB v Lady Navigation Inc* [2005] EWCA Civ 579; [2005] 1 W.L.R. 3686 at [35].
- [526.](#) [2005] EWCA Civ 579 at [19], [20].
- [527.](#) [2005] EWCA Civ 579 at [33].

- [528.](#) *Bower v Bantam Investments Ltd* [1972] 1 W.L.R. 1120.
- [529.](#) For exceptional cases in which such contracts could be specifically enforced, see above, para.27-015 at n.86.
- [530.](#) cf. Fry, *Specific Performance*, 6th edn (2012), para.857; *Whitwood Chemical Co v Hardman* [1891] 2 Ch. 416, 426; *Scandinavian Trading Co AB v Flota Petrolera Ecuatoriana (The Scaptrade)* [1983] 2 A.C. 694, 701.
- [531.](#) *Lauritzencool AB v Lady Navigation Inc* [2005] EWCA Civ 579, [2005] 1 W.L.R. 3686.
- [532.](#) See the decision at first instance in the *Lauritzencool* case above, [2004] EWHC 2607 (Comm); [2005] 1 All E.R. (Comm), so far as it relates to para.12(a) of the relief claimed. There was no appeal against this aspect of the decision when it was affirmed and injunctions were granted in the more restricted form described in the text above, after n.515.
- [533.](#) *Lauritzencool* case, above n.514, [2005] EWCA Civ 579 at [6], italics supplied.
- [534.](#) [2005] EWCA Civ 579 at [6].
- [535.](#) [2005] EWCA Civ 579 at [10], quoting from *The Scaptrade*, above n.513 at 700.
- [536.](#) Above, at n.513. The apparently contrary decision in *Wake v Renault (UK) Ltd*, *The Times*, August 1, 1996 (injunction “not to terminate” a distributorship agreement which still had some years to run and was not specifically enforceable as it would require “constant supervision” (above, paras 27-030—27-031)) is, with respect, of doubtful authority. The case was not cited in the *Lauritzencool* decision and its authority is undermined to the extent that its reasoning was based on the reasoning of the decision of the Court of Appeal in *Co-operative Insurance Society Ltd v Argyll Stores Ltd* which was reversed on appeal : [1998] A.C.1, above para.27-031.
- [537.](#) Above, para.27-073.
- [538.](#) e.g. *Young v Ladies Imperial Club Ltd* [1920] 2 K.B. 523; *Lawlor v Union of Post Office Workers* [1965] Ch. 712; *R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan* [1993] 1 W.L.R. 909, 933; and see above, paras 10-072—10-080.
- [539.](#) See, for example, *Royal Society for the Prevention of Cruelty to Animals v Att-Gen* [2002] 1 W.L.R. 448, above, para.27-026.
- [540.](#) *Glynn v Keele University* [1971] 1 W.L.R. 487; Wade (1971) 87 L.Q.R. 320.
- [541.](#) Trade Union and Labour Relations (Consolidation) Act 1992 ss.174 to 177, as substituted by Trade Union Reform and Employment Rights Act 1993 s.14.
- [542.](#)  Although it may do so exceptionally: *Woods Building Services v Milton Keynes Council* [2015] EWHC 2172 (TCC) at [9]–[11].
- [543.](#) For a summary of the grounds on which “discrimination” may be unlawful, and of the situations in which it is unlawful see Equality Act 2010 Pt 2 Chs 1 and 2; for examples of situations in which refusal to enter into a contract may amount to unlawful discrimination, see ss.39(1)(a) (employment), 101(1)(a) (membership of associations).
- [544.](#) At common law refusal to contract was sometimes punishable and actionable against persons exercising the “common callings”: see *R. v Ivens* (1835) 7 C. & P. 213; *Constantine v Imperial Hotels Ltd* [1944] K.B. 593; but there seems to be no reported case in which such a refusal was restrained by injunction. For the availability of injunctions under the Equality Act 2010 to restrain unlawful discrimination contrary to that Act, see above, para.27-025 n.171 and para.27-026 n.181. Detailed discussions of legislation specifying when discrimination is unlawful, and of the remedies for unlawful discrimination, are beyond the scope of this book.

- [545.](#) European Community Treaty art.82 (formerly art.86).
- [546.](#) Competition Act 1998 s.18.
- [547.](#) *Garden Cottage Foods Ltd v Milk Marketing Board* [1994] A.C. 130.
- [548.](#) The legislative provisions cited in n.524 above apply to exclusion, no less than to expulsion, from trade unions.
- [549.](#) See above, para.27-025 n.171.
- [550.](#) See Equality Act 2010 Pts 3 and 6; the above list is not intended to be exhaustive.
- [551.](#) [1966] 2 Q.B. 633.
- [552.](#) See Equality Act 2010 s.57; remedies in such a case would be governed by s.124 (see the reference in s.120(1)(a) to Pt 5 of the Act, which includes s.57). For remedies under s.124, see above, para.27–025 n.171.
- [553.](#) Its validity was doubted in *R. v Disciplinary Committee of the Jockey Club Ex p. Aga Khan* [1993] 1 W.L.R. 909, 993. But, this must itself be doubtful in view of the matters discussed in para.27–050 on human rights and public policy.
- [554.](#) See the example given in *Nagle v Feilden* [1966] 2 Q.B. 633 at 655 (“the colour of his hair”). A person’s political views or affiliations are not in the list of “protected characteristics” given in Equality Act 2010 s.4 and elaborated in ss.5–12.
- [555.](#) [1971] 1 W.L.R. 1676.

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Chapter 27 - Specific Performance and Injunction ¹
Section 9. - Damages and Specific Performance or Injunction

Statutory power to award damages in lieu of specific performance or Injunction

27-083

Power to award damages in addition to or “in substitution for” specific performance or injunction was conferred on the Court of Chancery by s.2 of the Chancery Amendment Act 1858 (also known as Lord Cairns’ Act). That power is now vested in the High Court by s.50 of the Senior Courts Act 1981. ⁵⁵⁶ Since claims for specific performance (or injunction) can, by virtue of s.49 of that Act, be combined with claims for damages, it is normally unnecessary to resort to the special power to award damages in lieu of those remedies. But it may still sometimes be to the claimant’s advantage to invoke that jurisdiction, and its exercise has also given rise to certain special problems with regard to the assessment of damages.

No completed cause of action at law

27-084

Damages may be awarded in lieu of specific performance or injunction even though there is no completed cause of action at law. Thus in *Leeds Industrial Co-operative Society Ltd v Slack* ⁵⁵⁷ the House of Lords held that damages could be awarded in lieu of a quia timet injunction in respect of a tort which had not yet been committed and which was, therefore, not yet actionable at law. ⁵⁵⁸ A similar possibility exists where one party to a contract has committed an anticipatory breach by repudiating the contract before performance was due, and the other, instead of “accepting” the repudiation, seeks to uphold the contract and sues for specific performance. In such case the court could make an order for specific performance at once ⁵⁵⁹ even though performance was not yet due at the time of the action; and it seems that the court can, in its discretion, award damages under the Act even though there was, when the proceedings were commenced, no right to damages at common law. ⁵⁶⁰ However, a party is not in anticipatory breach of contract merely because the other fears that he will commit a breach of it; and where there is neither a present breach nor a wrongful repudiation, an injunction is not available against the former party, ⁵⁶¹ so that there can be no award of damages in lieu. On the principle of *Slack’s* case it seems, moreover, that the power to award damages in lieu of an injunction could also be exercised where an injunction is available as a matter of judge-made law against refusal to contract ⁵⁶²; and that such damages could be awarded even though the refusal gave rise to no claim for damages at common law. Where the refusal is wrongful under legislation of the kind described in para.27-080 above, rights to a quia timet injunction and to damages in lieu are likely to be regulated by that legislation. ⁵⁶³ An injunction may also be available to a third party where a contract between two others is invalid for restraint of trade; and in such cases it is arguable that damages may be awarded in lieu even though the third party has no cause of action for breach of contract against the parties to the contract in question. ⁵⁶⁴

Assessment of damages

27-085

There was formerly some support for the view that, where the value of the subject matter had risen between the time of breach and the time of judgment, the assessment of damages might be more favourable to the claimant under Lord Cairns' Act than at common law. This view rested on the assumption that common law damages for wrongful failure to deliver, or to convey, the subject-matter of the contract were necessarily based on the difference between the contract price and the market value of the subject matter *at the time of breach*. On this assumption, any subsequent increase in market value between breach and judgment was, at common law, likely to cause prejudice to the victim of the breach. In *Wroth v Tyler*,⁵⁶⁵ for example, the defendant entered into a contract to sell a house to the claimants for £6,000. The sale was to be completed in October 1971, by which time the value of the house had risen to £7,500. Meanwhile (in July 1971) the defendant had repudiated the contract; but in January 1972 the claimants started proceedings for specific performance and damages. Judgment in the action was given in January 1973, by which time the house was worth £11,500. Megarry J. held that specific performance, though in principle available, should not be ordered⁵⁶⁶ and that damages should be awarded in lieu. He assessed these by reference to the value of the house at the time, not of breach, but of judgment,⁵⁶⁷ i.e. not at £1,500 but at £5,500. One reason for assessing the damages by reference to the latter time was that they were awarded, not at common law, but under the Act, "in substitution for ... specific performance". Such damages must, it was said, "constitute a true substitute for specific performance,"⁵⁶⁸ and "be a substitute giving as nearly as may be what specific performance would have given".⁵⁶⁹

But even at common law the aim of damages is to put the claimant "in the same position ... as if the contract had been performed"⁵⁷⁰; and there seems to be no difference in substance between the phrases "as if ... performed" and "in substitution for ... specific performance". Both state the same general objective; neither is followed through to its logical conclusion. The judgment in *Wroth v Tyler* itself appears to recognise the possibility that part of the claimants' loss could have been too remote,⁵⁷¹ and the mitigation rules⁵⁷² can also reduce the amount recoverable in lieu of specific performance.⁵⁷³ In *Johnson v Agnew*⁵⁷⁴ the House of Lords accordingly expressed the view that the assessment of damages was governed by the same principles whether the damages were awarded under the Act or at common law. Even at common law damages are not invariably assessed by reference to the date of breach. This method of assessment is adopted where it would have been reasonable for the claimant to have mitigated his loss, at that date e.g. by making a substitute contract; but if, for some reason, this is not the case, the damages will be assessed by reference to some other date.⁵⁷⁵ In *Wroth v Tyler* the claimants had (as the defendant knew)⁵⁷⁶ no financial resources beyond the £6,000 that they had raised for the purpose of completing their contract with the defendant. By the time of breach they therefore could not reasonably have been expected to avoid any part of their loss by making a substitute purchase, since similar houses were financially out of their reach. The decision must now be explained on this ground and not by reference to any supposed distinction between the assessment of damages at common law and under the Act.⁵⁷⁷ Where the claimant cannot show that the breach has caused him any loss, the principles which determine whether he can nevertheless recover damages in respect of the defendant's gain, or whether the court will exercise its discretion to order an account of profits,⁵⁷⁸ appear likewise to be the same whether the claim is made under the Act or at common law.⁵⁷⁹ There seems similarly to be no difference between the assessment of damages in lieu of injunction under the Act and assessment apart from the Act where damages are based on the amount for which the claimant would have been willing to negotiate the sale of the right infringed by the defendant's conduct.⁵⁸⁰ Such negotiations would normally be assumed to have occurred after the breach⁵⁸¹; and in the *Pell Frischmann* case⁵⁸² the Privy Council took account of even later events which had actually occurred, viz the injured party's "extraordinary and unexplained delay in bringing the proceedings".⁵⁸³ It also referred⁵⁸⁴ (with apparent approval) to the earlier judgment in the *Lunn Poly*⁵⁸⁵ case, in which Neuberger L.J. had said that damages under the Act were "normally to be assessed or valued at the date of breach" but that, "given the quasi-equitable nature of such damages", the judge might "where there are good reasons, direct a departure from that norm" e.g. by selecting "a different valuation date".⁵⁸⁶ The reference here seems to be to a date "after the date of the hypothetical negotiations",⁵⁸⁷ and there is no reason to suppose that events occurring after that date could not also be taken into account in cases in which damages are assessed by reference to hypothetical negotiations as a matter of common law, or at least where the assessment is made apart from the Act.⁵⁸⁸ The passages in the *Pell Frischmann* and *Lunn Poly* cases here discussed therefore do not conflict with the view, expressed earlier in this paragraph, that there is no difference in principle between the assessment of damages under Lord Cairns' Act and such assessment apart from that Act.

27-086

The general principle that there is no difference between the assessment of damages at common law and that of damages in lieu of specific performance or injunction is based on the assumption that the damages are claimed in respect of the same breach of contract or other cause of action. The principle obviously cannot apply where there is no cause of action at common law, e.g. where specific relief is sought in equity in respect of threatened or future breaches. ⁵⁸⁹

Damages and specific performance

27-087

Damages may be awarded in addition to specific performance. For example, where a vendor's title is subject to an incumbrance and this amounts to a breach of contract, he can be ordered to convey what title he has and to pay damages based on the cost of discharging the incumbrance. ⁵⁹⁰ The court may also award damages as to part of a contract and specific performance or injunction as to the rest, ⁵⁹¹ and damages for delay in completion in addition to specific performance. ⁵⁹² Where the court grants an injunction to restrain future breaches of a contract, it can likewise award damages in respect of past breaches, i.e. in respect of those which had already taken place before the injunction was granted. ⁵⁹³

Damages after specific performance

27-088

Where an order of specific performance has been made but not been complied with, one course of action open to the injured party is to apply to the court for enforcement of the order. There was formerly some support for the view that this was the only remedy available to him, and that he could not, after having first obtained an order of specific performance, then rescind the contract and claim damages. ⁵⁹⁴ But this view was rejected by the House of Lords in *Johnson v Agnew*. ⁵⁹⁵ In that case, vendors of land were (as the purchaser knew) relying on the proceeds of sale to pay off a mortgage on the land. The purchaser failed to pay, even after specific performance had been ordered against her, with the result that the land was sold by the mortgagee. It followed that the vendors could no longer convey the land in exchange for the price; they were therefore not in a position to enforce the order of specific performance. The House of Lords held that the vendors were entitled to damages, not only under the Act, ⁵⁹⁶ but also at common law as at the date when the remedy of specific performance was aborted. It would seem that the vendors could similarly have obtained damages if the order of specific performance had been obtained, and then not been complied with, by the purchaser. ⁵⁹⁷

27-089

In *Johnson v Agnew* ⁵⁹⁸ the reason why the vendors could not enforce the order of specific performance was that they had been disabled, in consequence of the purchaser's default, from performing their side of the bargain. But the reasoning of the House of Lords is not restricted to this type of situation. It is based on the general rules applicable to cases of repudiatory breach and therefore applies even where no such disability results. The right to damages is subject only to the restriction that, where an order of specific performance has been made and not complied with, the party who had obtained the order must apply to the court for the dissolution of the order "and ask the court to put an end to the contract" ⁵⁹⁹ so as to be entitled to "recover damages instead". ⁶⁰⁰ The choice between enforcement of the order of specific performance and damages thus seems to be a matter for the injured party; and the reasoning of *Johnson v Agnew* suggests that damages can be awarded, after failure to comply with an order of specific performance, if that party then elects to claim damages.

Limits of the court's power

27-090

The power to award damages under s.50 of the Senior Courts Act 1981 exists only where the court has “jurisdiction to entertain an application for an injunction or specific performance”.⁶⁰¹ If the court has such jurisdiction, the power to award damages in lieu can be exercised even though the court in its discretion refuses to order specific relief⁶⁰²; but it will not be exercised where no attempt is made to seek specific relief, where any chance of obtaining such relief has been lost (e.g. by lapse of time), and where the only claim made was one for damages at common law.⁶⁰³ Under s.49 of the Act, common law damages can be awarded where specific performance or an injunction is claimed, even though the case is not one in which specific relief could have been ordered.⁶⁰⁴

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1. Fry, *Specific Performance*, 6th edn (2012); Jones and Goodhart, *Specific Performance*, 2nd edn (1996); Sharpe, *Injunctions and Specific Performance*, 2nd edn; Spry, *Equitable Remedies*, 5th edn (1997).
 - ⁵⁵⁶. See *Jolowicz [1975] C.L.J. 224*; *Pettit [1977] C.L.J. 367*; *[1978] C.L.J. 51*. The 1981 Act was, before the coming into force of Constitutional Reform Act 2005 and Sch.11, known as the Supreme Court Act.
 - ⁵⁵⁷. *[1924] A.C. 851*. In this case it was the defendant who asked that damages (rather than an injunction) should be awarded.
 - ⁵⁵⁸. In *Meretz Investments NV v ACP [2006] EWHC 74*, *[2007] Ch. 197* at [252] it was said at first instance that damages in lieu of a quia timet injunction would only exceptionally be awarded “before any damage at all had been suffered”. On appeal, para.[252] of the decision at first instance was cited (*[2007] EWCA Civ 1303* at [33],[62]) but not on the present point, and the actual decision was that the defendants were liable in damages for actual breach of contract: *[2007] EWCA Civ 1303* at [2], [71], [161].
 - ⁵⁵⁹. *Hasham v Zenab [1960] A.C. 316*, above, para.27–003 (but the order will be for performance on the due day).
 - ⁵⁶⁰. cf. *Oakacre Ltd v Claire Cleaners (Holdings) Ltd [1982] Ch. 197*. For another former illustration of the power (now made obsolete by Law of Property (Miscellaneous Provisions) Act 1989 s.2), see *Price v Strange [1978] Ch. 337*, 358.
 - ⁵⁶¹. *Veracruz Transportation Inc v V.C. Shipping Inc (The Veracruz I) [1992] 1 Lloyd’s Rep. 356*; *The P. [1992] 1 Lloyd’s Rep. 470*; cf. *Zucker v Tyndall Holdings Plc [1992] 1 W.L.R. 1127*; *Mercantile Group (Europe) A.G. v Aiyela [1994] Q.B. 366*, 375.
 - ⁵⁶². Above, paras 27–081—27–082.
 - ⁵⁶³. See, for example, Equality Act 2010 ss.119 (above, para.27-026 n.181) and 124 (above, para.27-025 n.171); Competition Act 1998 ss.47A and 47B, as inserted by Enterprise Act 2002 ss.18 and 19. See also *Garden Cottage Foods Ltd v Milk Marketing Board [1984] A.C. 130* (above, para.27-080) where the right to damages was said at 141 to be based on breach of statutory duty.
 - ⁵⁶⁴. According to *Newport Association Football Club v Football Association of Wales Ltd [1995] 2 All E.R. 87* the mere availability to the third party of a declaration that the contract is in restraint of trade is a cause of action; but this is hard to reconcile with the reasoning of *Eastham v Newcastle United Football Club Ltd [1964] Ch. 413*, according to which the court may grant a declaration to the third party even though that party has no “cause of action”.
 - ⁵⁶⁵. *[1974] Ch. 30*.
 - ⁵⁶⁶. See above, para.27-036.

- [567.](#) cf. *Hulbert v Avens* [2003] EWHC 76 (Ch) (equitable compensation assessed as at time of judgment). For the possibility of assessment by reference to an even later time, see *Grant v Dawkins* [1973] 1 W.L.R. 1406.
- [568.](#) [1974] Ch. 30, 58.
- [569.](#) [1974] Ch. 30 at 59. cf. *Biggin v Minton* [1977] 1 W.L.R. 701, 704.
- [570.](#) *Robinson v Harman* (1848) 1 Exch. 850, 855; above, para.26-001.
- [571.](#) [1974] Ch. 30, 61; above, paras 26-107 et seq.
- [572.](#) Above, para.26-0879.
- [573.](#) See *Radford v De Froberville* [1977] 1 W.L.R. 1262, 1286; cf. *Grant v Dawkins* [1973] 1 W.L.R. 1406.
- [574.](#) [1980] A.C. 367, 400. This decision also makes it hard to accept the suggestion that damages under the Act can, as a general rule, be based on the defendant's gain (rather than, as at common law, on the claimant's loss): see *Surrey CC v Bredero Homes Ltd* [1993] 1 W.L.R. 1361; *Jaggard v Sawyer* [1995] 1 W.L.R. 269. For other grounds for making a discretionary award based on the contract-breaker's gain, see *Att-Gen v Blake* [2001] 1 A.C. 268 (above, para.26-024) where conflicting views are expressed at 283, 291 and 298 as to the correctness of the decision in the *Bredero* case.
- [575.](#) [1980] A.C. 367 at 401; above, para.26-088; cf. *Suleman v Shahsavari* [1988] 1 W.L.R. 1181.
- [576.](#) *Wroth v Tyler* [1974] Ch. 30, 57; but for this fact the loss might well have been (at least in part) too remote: see above, para.26-119.
- [577.](#) cf. *Trafigura Beheer BV v Mediterranean Shipping Co SA* [2007] EWHC 944 (Comm), [2007] 2 All E.R. (Comm) 149 where specific restitution of goods could have been ordered (at [117]) but common law damages in tort were assessed by reference to the value of the goods at the time of judgment (at [131]–[133]) without any suggestion that the damages were awarded in lieu of specific restitution under the Act now known as the Senior Courts Act 1981 s.50.
- [578.](#) Above, paras 26-050 et seq.
- [579.](#) cf. the discussion of the Act in *Att-Gen v Blake* [2001] 1 A.C. 268, 281; cf. *Bocardo SA v Star Energy UK Onshore Ltd* [2010] UKSC 35, [2011] 1 A.C. 380 where Lord Clarke S.C.J., after discussing common law damages for trespass to land, said at [123]: “The same principles have been applied in assessing damages in lieu of injunction ...”. See also the discussion in *Lawrence v Fen Tigers Ltd* [2014] UKSC 13, [2014] 4 All E.R. 622 where there was some difference of opinion between the members of the court (see at [131], [172], [248]) on the question whether damages in lieu of injunction against a noise nuisance could be assessed by reference not only to the loss to the claimant (by way of reduction of the value of his property) but also to “the benefit to the defendant of not suffering an injunction” (at [128]), and no final conclusion on it was reached: see at [131]. The reasoning was largely based on the special policy considerations governing remedies for the tort of nuisance, so that it is of limited relevance to a pure breach of contract case.
- [580.](#) For this basis of assessment, see above, paras 26-049, 26-050.
- [581.](#) See *Pell Frischmann Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 W.L.R. 2376 at [48], citing *Lunn Poly Liverpool Ltd v Liverpool and Lancashire Properties Ltd* [2006] EWCA Civ 430, [2006] 2 E.G.L.R. 29 at [25] (“Such sum as might reasonably have been demanded by [the claimant] from [the defendant] as a quid pro quo for permitting the continuation of the breach of covenant or other invasion of the right”).
- [582.](#) Above n.563.

- [583.](#) [2009] UKPC 45 at [54].
- [584.](#) [2009] UKPC 45 at [50].
- [585.](#) Above, n.563.
- [586.](#) [2006] EWCA Civ 430 at [29].
- [587.](#) [2006] EWCA Civ 430 at [27].
- [588.](#) e.g. *Strand Electric and Engineering Co Ltd v Brisford Entertainments Ltd* [1952] 2 Q.B. 246, 252, 256; *Penarth Dock Engineering Co Ltd v Pount* [1963] 1 Lloyd's Rep. 359; *Kuwait Airways Corp v Iraqi Airways Corp* [2002] UKHL 19, [2002] 2 A.C. 883 at [87].
- [589.](#) See *Jaggard v Sawyer* [1995] 1 W.L.R. 269, 291–292; cf. *Att-Gen v Blake* [2001] 1 A.C. 268, 281.
- [590.](#) *Grant v Dawkins* [1973] 1 W.L.R. 1406.
- [591.](#) *Soames v Edge* (1860) Johns. 669.
- [592.](#) *Ford-Hunt v Raghbir Singh* [1973] 1 W.L.R. 738; cf. *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] Ch. 197 (damages for delay in substitution for specific performance). For the availability of damages for delay, see *Raineri v Miles* [1981] A.C. 1050 (where no issue as to specific performance arose).
- [593.](#) *Experience Hendrix LLC v PPX Enterprise Inc* [2003] EWCA Civ 323; [2003] 1 All E.R. (Comm) 830 at [34].
- [594.](#) See *Capital & Suburban Properties Ltd v Swycher* [1976] Ch. 319 and the authorities there cited; and see below, n.577.
- [595.](#) [1980] A.C. 367, disapproving *Capital & Suburban Properties Ltd v Swycher*, above, n.576.
- [596.](#) Such damages had been awarded in *Biggin v Minton* [1977] 1 W.L.R. 701.
- [597.](#) The contrary was decided in *Sing v Nazeer* [1979] Ch. 474, but that case followed *Capital & Suburban Properties Ltd v Swycher* (above, n.576) which is now disapproved (above, n.477).
- [598.](#) Above, para.27-088.
- [599.](#) *Johnson v Agnew* [1980] A.C. 367, 394; *G.K.N. Distributors v Tyne Tees Fabrication* (1985) 50 P. & C.R. 403.
- [600.](#) *Ng v Ashley King Ltd* [2010] EWHC 456 (Ch), [2011] Ch. 115 at [5].
- [601.](#) *Hipgrave v Case* (1885) 28 Ch. D. 356; *Lavery v Pursell* (1888) 39 Ch. D. 508; *Price v Strange* [1978] Ch. 337, 359.
- [602.](#) e.g. *Wroth v Tyler* [1974] Ch. 30 (where specific relief was refused for reasons stated in para.27-036, above); *Jaggard v Sawyer* [1995] 1 W.L.R. 269 (where specific relief was refused for the reasons stated in para.27-069, above).
- [603.](#) *Surrey CC v Bredero Homes Ltd* [1993] 1 W.L.R. 1361. For conflicting views as to the correctness of this decision, see above, para.27-085 n.556. The conditions limiting the court's power (stated in the text above) seem to be cumulative, so that the power is not excluded merely because an injunction has not been claimed or merely because, if it had been claimed, there would have been no prospect of its being granted: *Pell Frischmann Ltd v Bow Valley Iran Ltd* [2009] UKPC 45, [2011] 1 W.L.R. 2376 at [48].

[604.](#) As in *Dominion Coal Co Ltd v Dominion Iron & Steel Co* [1909] A.C. 293; cf. *Proctor v Bayley* (1889) 42 Ch. D. 390 (decided under earlier similar legislative provisions).

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