



Concentrate Questions and Answers Equity and Trusts: Law Q&A Revision and Study Guide (3rd edn)

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## p. 203 14. Equitable Remedies

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<https://doi.org/10.1093/he/9780198853213.003.0014>

**Published in print:** 06 August 2020

**Published online:** September 2020

### Abstract

The Concentrate Questions and Answers series offer the best preparation for tackling exam questions. Each book includes typical questions, bullet-pointed answer plans, suggested answers, and author commentary. This book offers advice on what to expect in exams and how best to prepare. This chapter covers questions on equitable remedies.

**Keywords:** equitable remedies, American Cyanamid Co., Human Rights Act, search orders, Civil Procedure Act, specific performance, injunctions, contracts, personal property, covenants

### Are You Ready?

In order to attempt the questions in this chapter you will need to have covered the following topics:

- Injunctions
- Interim injunctions and the *American Cyanamid* principles
- Freezing orders and search orders
- Specific performance

## Key Debates

**Debate:** claims brought based on the Human Rights Act 1998 in respect of the right to respect for private and family life and breach of confidence actions may be the basis for equitable intervention.

As in, for example, *Venables and Thompson v News Group Newspapers* [2001] 1 All ER 908, [2001] 2 WLR 1038, and *Douglas and Zeta-Jones v Hello! Ltd* [2001] 2 WLR 992, [2001] 2 All ER 289. This is a developing area and one to watch out for with new cases emerging. The widespread use of non-disclosure agreements and injunctions to prevent them being broken under breach of confidence actions are also topical (*Arcadia & ors v Telegraph* [2018] EWCA Civ 2329).

**Debate:** the problem of using equitable remedies in such a way that they would amount to contracts of slavery.

This arises in older cases such as *Lumley v Wagner* and in the modern context the question is should equitable remedies be used to enforce the carrying on of a business? *Cooperative Stores v Argyll* is an excellent example of this point.

p. 204

## Question 1

The Draconian and essentially unfair nature of [search] orders from the point of view of respondents against whom they are made requires, in my view, that they be so drawn as to extend no further than the minimum extent necessary to achieve the purpose for which they are granted, namely the preservation of documents or articles which might otherwise be destroyed or concealed.

(Per Scott J in *Columbia Picture Industries Inc. v Robinson* [1987] Ch 38)

Discuss critically.

## Caution!

■ A quotation of this sort can be followed by various commands: ‘comment’, or ‘examine’, or, as in this question, ‘discuss’. Sometimes, as here, you are required to perform the test ‘critically’. Whatever the form adopted by your examiner you are required to do two things for a degree-level answer to this question. First, you must show you know what the procedure entails. So, in this question you must

explain what the search order is all about. You will be expected to cite the relevant authorities. Secondly, you must be critical. The key is to read the quotation. This may seem obvious, but there is a great temptation in the exam room to read and digest only key words. In this question the key words are ‘search orders’. An answer which simply describes the search order procedure will achieve a pass, but little more. What is required is a critical analysis of the current use of the procedure.

- The quotation gives the lead. You should explain in what respects the procedure is considered by the judge to be ‘Draconian’. The quotation is provocative so your answer can be argumentative, even bullish. Give both sides of the argument, then come down on one side and give reasons for your decision. Provided you have argued your case well, you will not lose marks if your examiner happens to disagree with your verdict.
- As with all discussion questions, beware of losing your way. Plan your arguments in advance. Prepare a checklist of the points to be made, then tick them off as you make them. A question of this sort gives you the opportunity to show off your skills in arguing a case, provided you have a sound knowledge of the law involved.

## Diagram Answer Plan

Search orders and Civil Procedure Act 1997, s. 7

Problems regarding the abuse of search orders

Purpose of search orders

Conditions in *Anton Piller* for grant of order

Conditions for injunctions in *American Cyanamid* case compared

Necessity for full disclosure

Procedure in *Universal Thermosensors* case

p. 205

## Suggested Answer

Search orders have sometimes been described as civil search warrants, enabling the applicant to enter on the respondent's premises, search, and take relevant evidence.<sup>1</sup>

- <sup>1</sup> Start by establishing the legal basis.

Since their initial use, originally in *EMI Ltd v Pandit* [1975] 1 WLR 302, and subsequently in *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55 from which they derived their previous name 'Anton Piller orders', these orders have been extensively used. They now have a statutory basis in s. 7 of the Civil Procedure Act 1997, and are also governed by the Civil Procedure Rules 1998.

Their popularity has ensured that the injustice which they were created to remedy has been ameliorated.<sup>2</sup> However, applicants have not always been entirely honest when seeking this remedy; they have not always come to equity with clean hands. Concern has been expressed, both on the Bench and by academic writers, that such orders are being abused. In *Universal Thermosensors Ltd v Hibben*, Nicholls V-C laid out a series of guidelines for the use of these orders. He recognised that they can be both a virtue in eliciting evidence which would otherwise not have seen the light of day, and a vice in that the procedure is open to abuse. These guidelines are now laid out in Practice Direction [1996] 1 WLR 1552.

- <sup>2</sup> Establish the reason for their use but also the concomitant problems.

Search orders are sought where there is a risk that vital evidence may be lost or destroyed.<sup>3</sup> Their use has been particularly appropriate in cases where the defendant is suspected of infringing the claimant's intellectual property rights or of breaching trade secrets. They have also been used in one reported case within the field of family law ↗ (*Emanuel v Emanuel* [1982] 1 WLR 669), to enable the wife's solicitors to enter the husband's home and inspect documents relating to his financial means.

- <sup>3</sup> Explain when they are sought.

In order to bring such a case, a claimant needs evidence which might be in the hands of the defendant. It might consist of confidential documents or material such as videotapes. In the *Anton Piller* case, the defendants were the plaintiffs' selling agents. The plaintiffs believed that the defendants were selling

confidential information about their electrical equipment and plans to their competitors. However, to prove this they needed access to documents kept at the defendants' premises. The Court of Appeal granted an order which permitted them to enter the defendants' premises and inspect the documents.

It is crucial that the application is made without notice. If the other side knew of the application the risk is that the evidence would be destroyed forthwith. Surprise is a key element of the procedure. Herein lies the danger. The judge, at the hearing without notice, must rely exclusively on the word of the applicant.

In the first place, the judge may be required to determine to what extent any particular scientific or technical knowledge is the subject of patent or copyright, or is merely legitimately accepted scientific research. As Hoffmann J said in *Lock International plc v Beswick* [1989] 1 WLR 1268, 'It may look like magic but turn out merely to embody a principle discovered by Faraday or Ampère'.

Secondly, an unscrupulous applicant might abuse the power in a commercial situation by seeking to crush a competitor by the use of oppressive tactics. In *Lock International plc v Beswick*, the *Anton Piller* order was carried out by five representatives of the applicant. These were solicitors or employees of the applicant. They were, however, accompanied by 11 or 12 police officers who were armed with a search warrant in respect of alleged criminal activities of the respondent.

On appeal (noted (1990) 106 LQR 173), it was said that what had happened was regrettable, and it was unfortunate that the judge had not been informed of the involvement of the police.

Three conditions for the grant of the order were laid down<sup>4</sup> in *Anton Piller KG v Manufacturing Processes Ltd* by Ormrod LJ:

**4 Set out the conditions for grant.**

- (i) there must be a very strong *prima facie* case;
- (ii) there must be actual or potential damage of a very serious nature; and
- (iii) there must be clear evidence that the defendant has in his possession incriminating documents or things and a real risk that they might be destroyed before an application with notice can be heard.

Lord Denning MR added to these the condition that the order must do no real harm to the defendant. It would seem, however, that the fact that disclosure might expose the defendant to the risk of violence from his associates is not a defence (*Coca-Cola Co. v Gilbey* [1995] 4 All ER 711).

These conditions are more onerous than the conditions laid down in *American Cyanamid Co. v Ethicon Ltd [1975] AC 396*<sup>5</sup> for the issue of interim (formerly known as ‘interlocutory’) injunctions. This reflects the concern of the courts to protect the respondent from an abuse of process. The procedure should not be used as a means of finding out what proceedings can be brought (*Hytrac Conveyors Ltd v Conveyors International Ltd [1983] 1 WLR 44*). In other words, the material sought should be specific and should support the cause of action proposed by the claimant for the trial of the main claim. Fishing expeditions are not permitted. The orders are not, in fact, search warrants. They are precisely limited.

<sup>5</sup> Compare conditions with those under *American Cyanamid*.

When applying for the order, the applicant must make a full disclosure to the court. There is clearly a potential weakness in a procedure which only hears one side of the case. Therefore, there is a particularly strict duty for a full and frank disclosure of all relevant facts. As Scott J pointed out in *Columbia Picture Industries Inc. v Robinson [1987] Ch 38*, the procedure constitutes an apparent breach of the rule of natural justice that citizens should not be deprived of their property without a fair hearing.

In carrying out the order the applicant should be accompanied by a solicitor. Documents or other evidence may be inspected and removed according to the terms of the order. They may not be used for any other purpose unless the respondent has consented or the court has so ordered. If damage is caused to the respondent then the applicant may be obliged to pay damages which could be exemplary in nature.

Two cases have sought to limit the scope of search orders: *Tate Access Floors Inc. v Boswell [1991] Ch 512* and *Rank Film Distributors Ltd v Video Information Centre [1982] AC 380*. The former case emphasises a requirement for the claimant to make a full disclosure. In the latter case it was held that the privilege against self-incrimination could be raised by a defendant. This decision was abrogated by the Senior Courts Act 1981, s. 72, in cases relating to intellectual property.

Since the decision, the Human Rights Act 1998 has adopted the European Convention on Human Rights, of which Art. 8(1) states that everyone has the right to respect for his private and family life, his home, and his correspondence.<sup>6</sup> Article 8(2) states that there shall be no interference by a public authority with this right except in the interests of the society to which that person belongs and makes it clear that the domestic courts are to balance the rights of the individual under the Article with protection of the society in which he lives. In *C plc v P [2006] EWHC 1226 (Ch), [2007] EWCA Civ 493, CA*, C obtained a search order against P and took his computer in pursuance of the order. It was subsequently discovered that P had downloaded child pornography. This was a pre-existing document to which the defence of privilege from self-incrimination (PSI) does not apply under the

Convention. The Court of Appeal found (for different reasons) that the case was not an ‘exceptional case’ requiring departure from the **Human Rights Act 1998**, that the material had been found in the course of execution of a valid court order, and was therefore not protected by PSI. The protection afforded by the PSI rule had previously been criticised (see, e.g., Lord Templeman in *Istel (AT&T) v Tully*) and the court in *C plc v P* was in something of a dilemma as to how the offending material should be disposed of as it is an offence to be in possession of such material.

**6 Human Rights points.**

In *Universal Thermosensors Ltd v Hibben*, Nicholls V-C set out seven points of procedure. The defendant must have the opportunity to get legal advice, so the order should be served at a time that enables this to happen. If the defendant is a woman alone in a private house, the claimant’s solicitor must be a woman, or accompanied by a woman. A detailed list of items removed should be prepared at the premises and checked by the defendant. The defendant should be restrained from communicating with others, apart from a lawyer, only for a limited period of time; a week is too long. Orders at business premises should be executed in the presence of an officer or employee. The claimant should not use the opportunity for a general search of the defendant’s papers. The order should be served and supervised by an experienced solicitor independent of the claimant, who should submit a written report to the defendant and to the court at a subsequent hearing with notice.

The courts are clearly concerned to ensure that the procedure is not abused.<sup>7</sup> As an equitable remedy, the search order has shown the willingness of the courts to adapt well-established remedies to new situations. The maxim that equity will not allow a wrong to be without a remedy is still valid today, yet the dangers of the procedure are acknowledged by the courts that developed it. Concern over abuse of search orders has been expressed both by the judges and the legal profession as a whole. While such orders provide a valuable remedy, the balance must be maintained between the potential parties to a claim. Although it is unlikely that this remedy will disappear, it is likely that, in future, judges will need very cogent evidence before granting search orders.

**7 Give here some concluding comments.**

p. 209

## Looking For Extra Marks?

- This type of question may also occur as a coursework assessment which would require a deeper analysis of the literature. For example, more should be made of the article by Dockray and Laddie (1990) 106 LQR 601 and the judgment of Nicholls V-C in *Universal Thermosensors Ltd v Hibben [1992] 1 WLR 840*. The application to the European Court of Human Rights in *Lock International plc v Beswick [1989] 1 WLR 1268*, noted in the article by Dockray and Laddie, should also be considered in the light of the implementation of the **Human Rights Act 1998**. There is a decision of the Court of Appeal (*C plc v P [2007] EWCA Civ 493*) on the effect of the **Human Rights Act 1998** and the applicability of the privilege against self-incrimination (PSI) under the Convention.

## Question 2

Lex Ltd produces videos and tapes of lectures and accompanying notes for the purpose of teaching law to overseas students by distance learning. Ten staff are employed on a full-time basis. Portia, a senior member of staff, and author of a leading textbook on European law, is employed on a five-year contract to develop new materials within her field. Her contract requires her not to work for any other firm of law tutors during the period of her contract and for one year thereafter. Portia is a member of the National Union of Law Teachers (NULT).

Negotiations over conditions of service between Lex Ltd and its staff have now broken down. The following circumstances have occurred:

- a Portia, who has three years left to run on her contract, has written a letter of resignation to Lex Ltd. She has accepted an offer of employment at the Cambridge base of the tutorial firm, Law sans Larmes, which has its headquarters in Brussels.
- b All the materials that Portia had been working on have disappeared from the office, and Lex Ltd fears that they may now be in the possession of Law sans Larmes. The company has also discovered that its current students have received advertisement material from Law sans Larmes, and believes that Portia took a list of clients with her. It also believes that Law sans Larmes have bank accounts in Cambridge and Brussels, and that fees received are transferred on a regular basis to the Brussels account.

Advise Lex Ltd of any equitable remedies it may have in these circumstances.

## Caution!

- This problem question has a variety of points in it and mixes both specific performance and injunctions. They are, however, quite straightforward and not too difficult to spot.

## Diagram Answer Plan

Identify the issues

- Specific performance and injunctions

Relevant law

- Case law including (a) *Lumley v Wagner* (1852) 1 De GM & G 604; *Warner Bros Pictures Inc. v Nelson* [1937] 1 KB 209; *Warren v Mendy* [1989] 1 WLR 853; *Page One Records Ltd v Britton* [1968] 1 WLR 157; Trade Union and Labour Relations (Consolidation) Act 1992; (b) *A-G v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109; *Anton Piller KG v Manufacturing Processes Ltd* [1976] Ch 55; *Mareva Compañía Naviera SA v International Bulkcarriers SA* [1975] 2 Lloyd's Rep 509

Apply the law

- (a) Contracts of service; claim for injunction to enforce express negative stipulation (cases); problem where effect to prevent employee working at all (cases); difficulties in reconciling *Warner Bros* case with later case law.
- (b) Injunction to restrain abuse of confidential relationship; confidential information; maxim that equity will not act in vain; use of search orders

Conclude

- Advise Lex Ltd

p. 210

## Suggested Answer

(a)

Portia is in breach of her contract of employment with Lex Ltd.<sup>1</sup> An employment contract, that is, a contract *of service*, cannot be enforced specifically against an employee (**Trade Union and Labour Relations (Consolidation) Act 1992**). This statutory provision stems from the equitable principle that such contracts should not be turned into ‘contracts of slavery’ (per Fry LJ in *De Francesco v Barnum* (1890) 45 ChD 430 at p. 438). A claim for damages would provide an adequate remedy since, although Portia is a leading author etc., it is likely that she could be replaced.

<sup>1</sup> Here the key issue is set out then the law.

p. 211

Lex Ltd may, however, wish to enforce the express negative stipulation in her contract restraining her from working for anyone else during the remaining contractual period.<sup>2</sup> Earlier case law indicates that a claim for an injunction to this effect would be successful. In *Lumley v Wagner* (1852) 1 De GM & G 604,<sup>3</sup> an opera singer broke her contract which required her to sing at the plaintiff’s theatre for three months. The remedy of specific performance was refused but an injunction preventing her singing at any other theatre during the contractual period was granted. This was followed in *Warner Bros Pictures Inc. v Nelson* [1937] 1 KB 209 where the actress, Bette Davis, was prevented from working for a rival film company in breach of a no-competition clause.

<sup>2</sup> Restraint of trade point.

<sup>3</sup> Early cases.

However, these cases have been modified where it appears that to grant the remedy would mean that the defendant was prevented from working in any capacity<sup>4</sup> (*Whitwood Chemical Co. v Hardman* [1891] 2 Ch 416). In *Rely-A-Bell Burglar and Fire Alarm Co. Ltd v Eisler* [1926] Ch 609, an injunction was refused which would have enforced compliance with a stipulation by an employee not to enter into any other employment during the term of his contract. In effect, the defendant would be required to work for the plaintiff or starve. It is considered unrealistic to expect an individual with a particular talent to work in an entirely different capacity. *Warner Bros Pictures* was disapproved in *Warren v Mendy* [1989] 1 WLR 853, a case where an injunction preventing a boxer from seeking financial services from anyone other than his manager was refused. The principle was stated that an injunction

will not be granted if its effect is to prevent a person from working for anyone other than the claimant. In *Page One Records Ltd v Britton [1968] 1 WLR 157*, ‘The Troggs’, a group of musicians, appointed the plaintiff company to act as their agent for five years, and agreed not to engage any other person to act in that capacity. An injunction enforcing the negative stipulation was refused since the practical effect would have been to oblige the group to continue to employ the plaintiff company.

**4 Cases restricting application.**

The case of *Warner Bros Pictures* is difficult to reconcile<sup>5</sup> with the later cases of *Page One Records* and *Warren*. One significant difference is the length of the contracts: in *Warner Bros Pictures* the term of the contract was for not more than 20 weeks, while in *Warren* it was for two years. Issues of mutual trust and confidence are also relevant. So, where mutual confidence continues to exist between employer and employee, the court may be ready to grant an injunction (*Hill v Parsons & Co. Ltd [1972] Ch 305*). However, in this problem there is no mutual trust or confidence left.

**5 Don’t shirk the point. If it is difficult to reconcile then say so.**

The negative stipulation in Portia’s contract is that she has expressly agreed not to work for any other firm of law tutors in the UK during the contractual period. If an injunction were to be granted, then, in effect, she would be obliged to resume employment with Lex Ltd, notwithstanding that a decree of specific performance would be → unlikely to be available. Such a result is contrary to the principles expressed in the later cases and an injunction is, therefore, likely to be refused.<sup>6</sup>

**6 The likely result.**

The principle would remain the same whether the injunction was sought against either Law sans Larmes or Portia.

**(b)**

Lex Ltd may seek an injunction to prevent Portia taking its latest teaching materials.<sup>7</sup> There is a right in equity to restrain an abuse of confidential information. This does not necessarily rely on an employment relationship.

<sup>7</sup> The key issue followed by the statement of the law.

Knowledge of the list of customers is critical to Lex Ltd's commercial enterprise and would also amount to confidential information.<sup>8</sup> An interim injunction could have been sought to prevent this information being divulged (*Robb v Green [1985] 2 QB 315*). However, the information has already been acted upon, and equity will not act in vain. In *Spycatcher, (A-G v Guardian Newspapers Ltd (No. 2) [1990] 1 AC 109*), the final injunction was refused. The information had already been published worldwide and the injunction would have been futile. A claim for damages against Law sans Larmes might be appropriate if a profit has been made (*Seager v Copydex Ltd (No. 2) [1969] 1 WLR 809*).

<sup>8</sup> Application of the law to the problem.

It is unlikely that either party will be able to rely on the **Human Rights Act 1998**.<sup>9</sup> Under that Act, freedom of expression is guaranteed subject to qualifications, under Art. 10, but the nature of the publication of the teaching materials is not likely to fall under this protection. Any potential dissemination of these materials by Portia would be to the rival company and for personal profit. The information which Portia has taken is not material which is likely to be made available to the public or where publication would be in the public interest. Likewise, reliance on Art. 8, which guarantees protection of the family and home, would not be appropriate in respect of any claim by Lex Ltd (*Douglas and Zeta-Jones v Hello! Ltd [2001] 2 WLR 992, [2001] 2 All ER 289*) since the nature of the material is commercial.

<sup>9</sup> Human Rights Act point.

If Lex Ltd fears that the teaching materials have also been taken, it may seek a search order against both parties (*Anton Piller KG v Manufacturing Processes Ltd [1976] Ch 55*). This would permit the company's agents to inspect the evidence at the premises of Law sans Larmes and at Portia's home. The application is made without notice where there is a risk that the evidence might be destroyed before a claim could be brought. The application must be made, and the order served, in accordance with the procedures established in *Universal Thermosensors Ltd v Hibben [1992] 1 WLR 840*. In particular, as → the defendant is a woman, the order must be served by, or in the presence of, a woman.

Lex Ltd must show a very strong *prima facie* case and actual or potential damage of a very serious nature.<sup>10</sup> It already has evidence that the information is in the hands of Law sans Larmes and the damage to its business could be irreparable.

**10** Set out here the conditions for the grant.

Lex Ltd is clearly concerned that if it sues Law sans Larmes for damages the latter may be unable to satisfy the claim if assets are transferred abroad. It may, therefore, consider seeking a freezing injunction under the procedure established in *Mareva Compañía Naviera SA v International Bulkcarriers SA [1975] 2 Lloyd's Rep 509*. This is an order which prevents the defendant from transferring assets abroad. It is usually obtained without notice and could be sought at the same time as the search order.

The principles in *American Cyanamid Co. v Ethicon Ltd [1975] AC 396* must be satisfied.<sup>11</sup> Further to the Senior Courts Act 1981, s. 37(3), the injunction may be granted to prevent the defendant removing the assets from the jurisdiction of the court or dissipating them in some way.

**11** *American Cyanamid* principles.

Lex Ltd must show that it has a good arguable case and will be required to give an undertaking in damages in the event that it is unsuccessful at trial. In addition, it must comply with the guidelines originally established in *Third Chandris Shipping Corp. v Unimarine SA [1979] 2 All ER 972*. The remedy will only be available where there is good reason to believe that assets will be moved out of the jurisdiction or otherwise disposed of so as to defeat the claim.

Some of the assets of Law sans Larmes appear to be in Brussels.<sup>12</sup> Lex Ltd may consider the possibility of seeking a freezing injunction which covers not only the English bank account, but also the Brussels account. The Court of Appeal have affirmed in the cases of *Babanaft International Co. SA v Bassatne [1990] Ch 13*, *Republic of Haiti v Duvalier [1990] 1 QB 202*, and *Derby & Co. Ltd v Weldon [1990] Ch 48*, that there is no geographical limit to the jurisdiction of the court. However, an injunction in this form would not be available where it may adversely affect third parties and where its effect may be oppressive to the defendant.

**12** Raise here the issue about the protection of assets.

## **Looking For Extra Marks?**

- You should be able to score a good 2(i) if you work methodically through the various remedies, explaining their availability in each instance. For a first-class answer, some critical analysis of their usage is necessary.

p. 214

## **Question 3**

- a Amelia, a sculptress, agrees with Belinda to make a bust of Belinda, a world-renowned child actress, for £500. When the bust is completed, Cindy, a film buff and fan of Belinda, offers Amelia £1,000 for it. Amelia, who is in severe financial difficulties, accepts Cindy's offer.

**Advise Belinda on the availability of any equitable remedies for breach of contract in these circumstances.**

- b Delia took a long lease of the top flat on the 14th floor of a tower block being built two years ago. The service contract requires Easimoney Ltd, the freeholder, to undertake external building repairs, to have the outside of the windows cleaned once a month, and to install a lift within a reasonable period of time.

A recent gale has dislodged some tiles from the roof, and rain now leaks into Delia's flat. Despite Delia's repeated requests, the roof has not been repaired. The windows are never cleaned and the lift has not been installed.

**Advise Delia of any equitable remedies that might be available to her.**

## **Caution!**

- This is a straightforward question requiring a knowledge of the rules relating to specific performance. It is a good illustration of the need to read the question. For example, the claimant in part (a) is a child. This is not simply to add local colour to the question but is designed to raise the issue of mutuality. If you miss this point, your marks go down.
- The second part of the question requires you to know the application of specific performance to contracts requiring supervision and construction contracts. You have to know the case law. Of particular importance is the decision of the House of Lords in *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd [1998] AC 1*. (See also P. Luxton [1998] Conv 396.) If you can answer the first part, but know nothing about the cases relevant to the second, then it is too risky to tackle this

question. A superb answer to the first part but zero on the second will barely earn you a pass. But if you have specific performance at your fingertips, then this question is fairly uncomplicated if you pick up all the points.

## Diagram Answer Plan



p. 215

## Suggested Answer

(a)

The equitable remedy of specific performance is discretionary.<sup>1</sup> It will not be available where damages provide an adequate remedy, or where the claimant has acted in an inequitable manner. Neither will the court grant the remedy unless it can be enforced; equity will not act in vain. If it is unjust to the defendant to grant the remedy, it will not be awarded.

<sup>1</sup> Set out your store by explaining how this remedy is discretionary.

Normally, contracts for the transfer of personal property will not be specifically enforced.<sup>2</sup> They can usually be compensated for adequately by an award of damages. However, if the item of property has some particular rarity, or beauty or uniqueness, such as King Canute's hunting horn (*Pusey v Pusey* (1684) 1 Vern 273), then specific performance may be granted.

<sup>2</sup> Then deal with contracts of personal property explaining why they are not normally subject to the remedy of specific performance (SP).

p. 216

↳ There is statutory authority for the remedy contained in the **Sale of Goods Act 1979**, s. 52. This enables the court to grant specific performance of a contract to deliver specific or ascertained goods where it is just to do so.

The contract between Amelia and Belinda is for personal property, a bust of Belinda. In order for the remedy of specific performance to be granted there must be something unique about the property. In *Cohen v Roche* [1927] 1 KB 169, a contract for the sale of eight Hepplewhite chairs was not specifically enforceable. The chairs were not considered to be of any special value or interest. On the other hand, a contract for the sale of a ship was enforced in *Behnke v Bede Shipping Co. Ltd* [1927] 1 KB 649, where the ship was of 'peculiar and practically unique value to the plaintiff'.

The bust of Belinda is unique: there is only one in existence. It is a case which falls within the ancient jurisdiction of cases such as *Pusey v Pusey*, where the goods are distinguishable because of their rarity, rather than *Cohen v Roche*, where the goods, though rare and valuable, are still no more than ordinary commercial articles.

However, Amelia is in severe financial difficulties and, for that reason, accepts the offer from Cindy.<sup>3</sup> Since the remedy is discretionary, the court would consider whether it is equitable in the circumstances to grant Belinda specific performance of the contract against Amelia. Where a hardship would amount to an injustice (if Amelia could show that it would put her out of business) then the court may be reluctant to award specific performance of the contract (*Patel v Ali [1984] Ch 283*).

**3** Deal next with the effect of hardship.

Neither will the court act in vain.<sup>4</sup> An equitable remedy will be granted only if it can be complied with by the defendant. In *Jones v Lipman [1962] 1 WLR 832*, the defendant attempted to defeat a contract for the sale of land by transferring the land to a company he had set up for this express purpose. The court awarded specific performance because the company was a sham. Normally specific performance would not be granted against a defendant who no longer owned the property. If Amelia has already delivered the bust to Cindy, then Cindy will take free of Belinda's claim to specific performance, assuming Cindy is a bona fide purchaser without notice. In these circumstances, Belinda will have to rely on the remedy of damages for breach of contract.

**4** Then the principle that equity will not act in vain.

For specific performance to be awarded, it must be available to either party.<sup>5</sup> If there is a lack of mutuality, there is a discretion to refuse the remedy. In *Flight v Bolland (1824) 4 Russ 298*, a minor was refused specific performance as it would not have been available against him. There is judicial authority for the viewpoint that the time to determine mutuality is at the time of the trial, not the contract. ↵ In *Clayton v Ashdown (1714) 2 Eq Ab 516*, it was held that where a minor attained majority at the time of the trial the remedy would be available. This principle was confirmed by the Court of Appeal in *Price v Strange [1978] Ch 337*.

**5** This point may get missed—but not by you if you have spotted the point about a minor.

There are, therefore, various grounds on which the court may refuse to exercise its discretion to award specific performance in favour of Belinda.<sup>6</sup>

**6** Concluding sentence.

### (b)

Delia is seeking specific performance of her landlord's covenants.<sup>7</sup> The general principle is that the court will not grant specific performance of a contract where constant supervision would be required: 'Specific performance is inapplicable where the continued supervision of the court is necessary in order to ensure the fulfilment of the contract' (Dixon J, *J. C. Williamson Ltd v Lukey and Mulholland* (1931) 45 CLR 282, at pp. 297–298). Equity will not act in vain and the court is unable constantly to supervise the performance of a contract. In practice, this means that if the court might have to give 'an indefinite series of rulings in order to ensure the execution of the order', the court will not grant the remedy (*Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1). It will not, therefore, enforce a contract where such supervision would be necessary.

<sup>7</sup> Specific performance of landlord's covenants—problem where need for constant supervision and exceptions.

There are, however, exceptions to this principle and the courts, in some of the modern cases, are more willing to grant specific performance even where there are potential problems relating to supervision.

The earlier case of *Ryan v Mutual Tontine Westminster Chambers Association* [1893] 1 Ch 116 shows the application of the general principle. The lessor of a flat covenanted to appoint a caretaker who would be in constant attendance and would undertake cleaning and general portering duties. A caretaker was appointed but he was frequently absent. The Court of Appeal refused to grant specific performance as it would be unable to supervise the performance of the covenant. It awarded damages instead.

However, in *Posner v Scott-Lewis* [1987] Ch 25, specific performance of a similar covenant to employ a resident porter was awarded. The court held that if the obligation was sufficiently defined and the degree of supervision was not unacceptable, then, if the plaintiff would suffer greater hardship, the equitable remedy would be awarded.

Similarly, if the order can be defined with precision, so that the defendant knows exactly what is to be done, then the court will be more likely to grant the discretionary remedy (*Morris v Redland Bricks Ltd* [1970] AC 652, at p. 666, per Lord Upjohn).

p. 218 ↵ The strength of the claimant's case is also a relevant factor given the equitable nature of the remedy (see Spry, *Equitable Remedies*, 8th edn, Thomson Reuters, 2009).

In *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1998] AC 1,<sup>8</sup> a case concerning the enforcement of a covenant in a commercial tenant's lease to continue running the business, Lord Hoffmann distinguished between orders which require a defendant to carry on an activity and orders which require him to achieve a result. In the former case, which might involve an order to carry on

running a business over an extended period of time, the possibility of repeated applications for rulings on compliance with the order may arise. Whereas in the latter case, where a result is to be achieved, however complicated, the court may simply look at the finished result and rule on whether compliance has been effected. So cases such as *Wolverhampton Corp. v Emmons* [1901] 1 KB 515, concerning a building contract, and *Jeune v Queens Cross Properties Ltd* [1974] Ch 97, concerning repairing covenants, are exceptions to the general principle because they involve the achievement of a result—a building, or specific repair.

<sup>8</sup> This is the unmissable case—House of Lords and very important authority.

The terms in Delia's lease are threefold.<sup>9</sup> The first is to install a lift. In *Wolverhampton Corp. v Emmons* [1901] 1 KB 515, the Court of Appeal established three requirements: the building work must be clearly defined; damages would be an inadequate remedy; and the defendant has possession of the land. It would seem that these requirements are satisfied. The building work is clearly defined except that the time limit is vague. However, the court is unlikely to be unwilling to specify what would constitute a reasonable time. Since the work would have to be undertaken on part of the block of flats which is in the landlord's possession, it would be impossible for Delia to carry out the work herself. Damages would, therefore, be an inadequate remedy.

<sup>9</sup> Application to the problem here.

This exception was extended to landlords' covenants to repair in *Jeune v Queens Cross Properties Ltd* [1974] Ch 97. The Landlord and Tenant Act 1985, s. 17, now provides that specific performance of a landlord's repairing covenant may be granted. This overrides any equitable principles restricting the remedy. Delia would therefore be able to seek specific performance of the covenant to repair in respect of the damage to the roof caused by the gale.

The covenant to have the windows cleaned highlights the problem of supervision. Clearly, such a contractual obligation is ongoing and would require constant superintendence. However, applying *Posner v Scott-Lewis*, the work is clearly defined. If an order is issued requiring the landlord to appoint a firm of window cleaners to carry out the work, then the supervision required is no more than the appointment of the porter in *Posner v Scott-Lewis*. This falls into the category defined by Lord Hoffmann in the *Co-operative Insurance Society* case, as the achievement of a result. Damages might be an adequate remedy in that they would enable Delia to employ a window cleaner herself. However, to employ a window cleaner to clean the exterior of the windows on the 14th floor is not practicable and the court would no doubt take the view that it would cause greater hardship to Delia than to the landlord. Therefore, Delia has a reasonable prospect of success in enforcing this covenant.<sup>10</sup>

**10** And the conclusion.

### Looking For Extra Marks?

■ Including the range of cases across the remedies will earn extra marks especially as it covers more than one of the equitable remedies. Some discussion on the merits of specific performance versus a common law remedy of damages might be introduced. Take a look at the Luxton (1998) and Davies (2018) articles ('Taking Things Further') for some interesting approaches on this point.

### Taking Things Further

■ Davies, S. P., 'Being specific about specific performance' [2018] Conv 324–338.

*This article discusses the various merits of the availability of specific performance and considers the Canadian approach.*

■ Dockray, M. and Laddie, H., 'Piller problems' (1990) 106 LQR 601.

*This article deals with the search order.*

■ Gray, C., 'Interlocutory injunctions since Cyanamid' (1981) 40 CLJ 307.

*A broader article dealing with the post-Cyanamid principles and the changes made by that case.*

■ Luxton, P., 'Are you being served? Enforcing keep-open covenants in leases' [1998] Conv 396.

*This is a useful discussion on specific performance and the Co-operative Argyll case.*

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