



8 pages

hands
could be
clean
Positive
Equitable
Court rule
The word in
Discretion
Jurisdiction
Not asked for
(square)

EQUITABLE REMEDIES

- Remedies occupy a significant place in equitable jurisdiction as one of the contributions of equity to the extant remedies available at common law.
- Equitable remedies have the following characteristics:
 - They are only available where common law damages would be an insufficient remedy
 - They are discretionary in nature
 - They will not be granted unless the court can ensure that they can be observed since *equity acts not in vain*, and
 - They are founded on the principle that equity acts in personam
- Equitable remedies include injunction, specific performance, rectification, rescission, delivery up and cancellation of documents, account and receivership, restitution and tracing

INJUNCTION

- An injunction is an order of the court which compels a party to do or refrain from doing an act. It illustrates the maxim, *equity acts in personam*.
- It is **Mandatory or Positive** if it compels the doing of an act, and **Restrictive, Prohibitive or Negative** if it forbids it.
- Being an equitable remedy, an injunction is discretionary in nature and would be granted for the protection of right or provision of remedy where damages would not be an adequate or appropriate remedy. E.g. where the injury is continuous or irreparable.
- **Interim Injunction:** This remedy is sought where the plaintiff requires urgent, immediate or temporary relief which cannot wait until the next motion date or determination of the main suit. It has the following features:
 - It is made to preserve the status quo including until a named date or until an application on notice is heard.
 - It is made in situations of real urgency to preserve and protect the rights of the parties, including the *res*, from destruction by either party, especially where irretrievable mischief or damage may be occasioned before the completion of the hearing.
 - The applicant must not be guilty of delay in bringing the application
 - It must not be granted unless the applicant gives a satisfactory undertaking as to damages, except in recognised exceptions or under special circumstances. This is because of the high likelihood of the remedy being subjected to abuse.
 - Finally, being an equitable remedy, the conduct of the applicant is of extreme importance on whether or not it would be granted based on the maxims, "*he who comes to equity must come with clean hands*" and "*he who seeks equity must do equity*".

Definition
conditions / General principles
effectiveness
Types

Mand / Proh
(interlocutory)
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Mand / Proh
Perpetual
(interlocutory)

Mandatory
Prohibition

Perpetual
Interlocutory

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Ex-pow

- **Interlocutory Injunction:** This is an order granted pending the determination of a substantive suit to maintain the status quo during the pendency of a trial. It is different from an interim injunction in the sense that the application for it must be by a *motion on notice* supported by affidavit deposing to the facts which may sway the court to grant the application. It has the following guiding principles: The applicant must show that:
 - He has a prima facie case; an enforceable legal right recognised by law.
 - He has a real possibility, not just a probability of success at the trial
 - The balance of convenience is on his side; that justice will result in granting the application than refusing it
 - Damages cannot be an adequate compensation for his damage or injury, if he succeeds at the end of the day
 - His conduct is not reprehensible; that he has come with clean hands
 - He undertakes to damages, if his case is found to be frivolous
 - His application is not frivolous, vexatious or baseless
- An interlocutory injunction can be granted to restrain trespass to land and property, passing-off, designs and copyright, distribution of libellous materials, etc.
- An applicant must not be guilty of delay and a defendant can only be granted an interlocutory injunction if he counter-claims in a suit.
- Interlocutory injunctions can be discharged, vacated or suspended depending on the facts warranting it and also, where a court discovers it was misled in an affidavit seeking the injunction.
- **Perpetual Injunction:** A perpetual injunction is one granted after a judicial decision has been reached or at the final determination of the substantive suit. In contrast to interlocutory injunctions, the effect lasts forever, subject to appeal.
- **A Quia timet Injunction:** Though uncommon, this injunction is issued to prevent and infringement of the applicant's right which is threatened but yet to happen. The anticipated injury must be clearly threatened and ensuing damage of a very serious nature. Ordinary anticipation of injury is not sufficient. The granting of this injunction is premised on the constitutional provision that an applicant may seek redress if he is aware that his right is likely to be contravened. Section 46(1) of the 1999 Constitution.
- **Anton Piller Order of Injunction:** An Anton Piller order is a bundle of *interlocutory orders* designed to enable a prospective plaintiff to secure the preservation of relevant evidence which might otherwise be destroyed or concealed by the intended defendant.
- It is intended to prevent the defendant from frustrating the process of justice by destroying the subject matter of an action or documents or other evidence related to it. It is both injunctive and mandatory in nature and requires the defendant to give permission for a search

Quia Timet

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One Time

Clear & low evidence of injury
or that sensible injury must follow.

*Imposed before grant date
not necessary to
injury damages*

to be made of his premise and specified documents and materials be inspected and taken away, including delivering up documents not on the premises.

One Time

restrain apprehending

- It is often made *ex parte* and used in patent, copyright and passing off cases.
- The principle was laid down in the case of Anton Piller K.G v Manufacturing Process Ltd, where it was stated that the following conditions had to be met:
 - There must be an extremely strong *prima facie* case on the merits
 - The defendant's activities must be proved to result in very serious potential or actual harm to the plaintiff's interests
 - There must be clear evidence that incriminating documents or materials are in the defendant's possession
 - There must be a real possibility that such items may be destroyed before any *inter partes* application can be made.
- The order is regarded as a remedy of last resort because of the serious stigma on the defendant's business and commercial reputation and the fact that, by its very nature, it is *ex facie subversive* of the fair hearing provisions of the constitution.
- Hence, in addition to fulfilling the above conditions, there must be proportionality between the perceived threat to the plaintiff's rights and the remedy granted.
- Since the order is not a search warrant *strictu sensu*, its execution does not admit of use of force to gain access. However, it amounts to contempt of court if entry is refused.
- In its execution, safeguards must be made in order to also protect the confidentiality of the defendant's trade secrets, and the plaintiff must make an undertaking as to damages.
- **Mareva Injunctions:** A Mareva injunction is an interlocutory order restraining a defendant, usually until trial or further order, from removing his assets out of jurisdiction, or from disposing of or charging or otherwise dealing with any of his assets within the jurisdiction of the court. It is, in other words, an order freezing the defendant's assets.
- Its primary objective is to prevent the defendant from removing assets from the jurisdiction so as to deprive the plaintiff of the fruits of any judgment that may be obtained.
- It is a form of prohibitive injunction which was first recognised in the case of Mareva Caompania Naviera SA v. International Bulk Carriers SA overturning the previous position in Lister v. Stubbs, which held that a defendant could not be compelled to give security before judgment. The application is often made *ex parte* and must fulfil the following conditions:
 - The cause of action must be justifiable
 - The defendant must have assets within the jurisdiction
 - There should be a real risk that the defendant may dissipate those assets before judgment can be enforced.

Sotimini v. Ocean Steamship Nig. Ltd (1992) LPELR-3106
Hanafi v. Access Bank (2021) LPELR-54553(CA)

- Generally, Mareva do not extend to **assets outside jurisdiction**. A Mareva having extraterritorial effect – a worldwide Mareva – can only be granted in exceptional cases, viz:
 - Where the defendant has acted dishonestly or fraudulently on a large scale
 - Where the defendant has the ability to transfer large sums of money around the world quickly
 - Where the defendant is able to hide assets behind companies or in countries where they are unlikely to be found. The court would however not grant a worldwide Mareva where the defendant has sufficient assets within the jurisdiction to satisfy the plaintiff's claim.
- There are three types of Mareva, namely:
 - a) **General orders**, which cover all the defendant's assets
 - b) **Maximum- sum orders**, which cover the defendant's assets up to the amount of the plaintiff's claim together with interests and costs.
 - c) **Orders attaching to specific assets** such as a cargo, or an aeroplane.
- A Mareva must allow the defendant to use a reasonable sum each week or month to pay his or her ordinary living expenses only. It must also allow the defendant to pay legitimate trade debts as they would be paid in the ordinary course of the defendant's business.
- The order may however be **varied or discharged on any of the following grounds:**
 - I. Where the case is unsuitable for Mareva relief
 - II. Where the defendant provides sufficient security for the plaintiff's claim, and
 - III. Where the applicant is guilty of material non-disclosure of facts. *Bebbehah v. Salem*
- Mareva injunction may also be granted in aid of the execution of a judgment debt. Thus, it may be granted after judgment to restrain the judgment debtor's assets from being removed from the jurisdiction of the court. *Lister v. Stubbs*.

Discharge of Injunction: An injunction may be discharged or vacated at any time by the court on the application of either party on its own *suo motu*. Some of the grounds for this include:

- Where the injunction was granted on terms and those terms have not been fulfilled
- Where the law upon which the injunction was obtained has changed or clarified by a decision of an appellate court.
- Material non-disclosure if the injunction was granted *ex parte*
- The statement of claim being inconsistent with the *ex parte* affidavit
- The facts not justifying *ex parte relief*
- The order having an oppressive effect
- Unreasonable interference with the rights of innocent third party

- Material change in the circumstances surrounding the grant of the relief
- A failure to diligently prosecute the substantive claim with due speed.

SPECIFIC PERFORMANCE

- An order of specific performance is one which compels the person against whom it is directed to carry out his obligations under the contract.
- It is only awarded in cases where damages prove inadequate. It therefore applies to executory contracts as against damages which apply to executed contracts.
- Specific performance is discretionary in nature and cannot be obtained as of right. *Lemare v. Dixon*

Contracts Which Are Not Specifically Enforceable	Contracts Which Are Specifically Enforceable
Contracts made for no consideration, since equity will not aid a volunteer	Contract for the sale of land
Contracts lacking mutuality	Contract for the transfer of chattels and contracts relating to patents
Contracts terminable at will	Building contracts
Contracts requiring constant supervision	Arbitrators awards
Contracts of personal service	
Illegal or immoral contacts	

Defences to the Order to Specific Performance

- **Incompleteness of Contract:** An order of SP will not be made where the parties have not reached a final, complete and binding agreement. Thus, where the terms of the contract are not certain or ascertainable, the order will not be made. *Marshall v. Berridge*.
- **Absence of Writing:** Generally, all estate contracts are required to be in writing, hence any such contract not in writing is unenforceable in law. However, equity would exceptionally allow SP of such contracts where the plaintiff has part-performed his contract and the doctrine of part-performance applies to the contract. *Africa Coastal Shipping Services Ltd v. Nigeria Ports Authority*.
- **Misrepresentation by the Plaintiff:** Misrepresentation on the part of the plaintiff that made the defendant enter into the contract can be a defence against an order of SP, irrespective of whether the misrepresentation was fraudulent or innocent. *Halliday v. Lockwood*
- **Mistake:** There can be no SP where a party makes a fundamental mistake in formulating his offer or acceptance and that mistake is known to the other party. In such situation, there is

no consensus ad idem, the contract is void and equity will not allow a party to take advantage of the mistake. *Webster v. Cecil*.

- **Misdescription:** Misdescription can be a defence to SP where it is substantial, relating to the nature of interest in the property or onerous covenants. Here, the purchaser may not only resist SP, but also rescind the contract.

- **The Plaintiff's Laches/Lapse of Time:** Unlike the situation at law, in equity, the general rule is that time is not of the essence. However, in certain situations, equity will treat time as of essence, and refuse to order SP: **(a)** Where the contract expressly so provides; **(b)** Where one party has been guilty of unreasonable delay and the other party has served a notice on him requiring performance within a specified reasonable time; **(c)** where the nature of the contract is such that it must be presumed that time is intended to be of the essence. *Tilley v. Thomas*

- **Delay by the Plaintiff:** Based on equitable maxims on delay, even where time is not of the essence of a contract, if the plaintiff has been guilty of such delay that he must be taken to have abandoned the contract, will be unable to claim SP. *Mills v. Haywood*
- **Default by the Plaintiff:** Based on equitable doctrines on good conscience, SP will not be granted where the plaintiff has failed to carry out his previous obligations under the contract or had contravened any of its terms or his conduct is tainted with fraud, misrepresentation or misleading information.
- **Defective Title:** An order of SP cannot be granted against a vendor who has no title or only a defective title to the property. *Bellamy v. Debenham*
- **Constant Supervision of Court Required:** The remedy of SP will not be granted where it involves continued supervision of the court, such as contracts of personal service. *Lumley v. Wagner*
- **Inadequacy of Consideration:** SP will not be granted where the contract lacks consideration or the consideration is inadequate. *Sanusi v. Daniyan & Ors.*
- **Impossibility of Performance:** An order of SP will not be made where performance is impossible, e.g, where the property has been sold to a bona fide third party, because equity will not act in vain. *Ajoke v. Oba & Ors.*

RESCISSON

- Rescission is an equitable right to set aside a contract and to restore the parties to the position they would have been had the contract not been made (*restitution in integrum*).
- When granted, property and money exchanged must be returned and account taken. The jurisdiction of the court is often only required where the other party brings an action on the agreement or the court's assistance is required to give effect to the rescission.

Grounds for Rescission

- **Misrepresentation:** Where a party has been induced to enter into a contract by the other party, he may rescind it if he discovers the misrepresentation.

Where the misrepresentation is fraudulent, the party may, in addition claim damages. Where it is innocent, damages may not be recovered.

- **Constructive Fraud:**

- **Non-disclosure/ contracts *uberrimae fidei***

- **Misdescription**

- **Mistake** (void ab initio where fundamental; otherwise only voidable).

Loss of Right to Rescind: The right to rescind would be lost where – **(a)** The affected party affirms the contract by words or conduct; **(b)** The right is not exercised promptly giving rise to an interpretation of waiver or affirmation; **(c)** Restitution in integrum is impossible, e.g., where a third party has acquired interest in the property such that would prejudice rescission.

DELIVERY UP AND CANCELLATION OF DOCUMENTS

- The equitable remedy of delivery up and cancellation of documents is granted where a document which is void or voidable is, at the instance of a party, required to be delivered up and cancelled. The remedy is not a cause of action, but only an ancillary remedy.
- To be granted, the defect in the document must be patent, not latent. It must appear on the face of the document. Such documents include forged conveyances, forged BOEs, etc.
- The reasons for the defect on the document include forgery, misrepresentation, illegality or being contrary to public policy.
- The nature of the order is that one party is ordered to deliver a document to another for cancellation. The person seeking the remedy need not have a "good conscience" or establish a risk that the document will be used against him. This is because of the overriding public interest in bringing the existence of the document to an end. *Vauxhall Bridge Co. v. Earl of Spencer*.
- The remedy can also be obtained in respect of a valid document which has become ineffective and no longer enforceable because of satisfaction of conditions.

RECTIFICATION

- Rectification is a remedy available to correct most instruments which do not reflect accurately the continuing common intention of the parties.
- The parties must have agreed orally, the mistake only arising when the agreement is being committed into writing. It does not vary the agreement itself. *Mackenzie b. Coulson*

- For the remedy to apply, the following conditions must be satisfied:
 1. There must be a prior complete agreement
 2. The intention of the parties must have continued unchanged
 3. There must be clear evidence of a mistake common to the parties
- Usually, rectification will not be ordered where the mistake has been made by only one party, except it would be unconscionable for the party seeking its enforcement to rely on it, e.g. where there is fraud or a contract of good faith and the other party fails to make full disclosure.
- **Documents that can be rectified**, include conveyances, leases, insurance policies, BOE, etc.
- **The Effect of Rectification** is retrospective. However, the remedy will not be granted where the result sought could be conveniently achieved by other means, such as having a collateral contract or voluntary rectification.

ACCOUNT

- An order of account is a direction by the court that a series of transactions be investigated to ascertain what sum, if any, is due from the accounting party to the plaintiff. E.g, from agent to principal, trustee to beneficiary, banker to customer, etc.

RECEIVER (AND MANAGER)

- A receiver is appointed for various purposes with the primary objective of collecting and preserving property and applying same for stated purposes
- A Manager can go further by applying income from the property, collecting debts and realising assets, including carrying on business.
- The normal practice is to appoint the same person as receiver/manager and a person so appointed is expected to be impartial and act subject to the terms and conditions of his appointment.
- A receiver may be appointed out of court either through statutory power (e.g by a mortgagee) or under some contractual power (e.g by debenture holders)
- A receiver may also be appointed by the court: (a) either as an interim means of preserving property pending determination of the rights of those interested or (b) as a form of execution where a litigant has obtained judgment.

A receiver appointed out of court is *prima facie* an agent of the person who appointed him. A receiver appointed