

EQUITABLE DAMAGES: A POWERFUL BUT OFTEN FORGOTTEN REMEDY

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I INTRODUCTION

The enactment of the *Chancery Amendment Act* in 1858¹ conferred on the Court of Chancery in England a discretionary power to award damages either in addition to or in substitution for specific performance or injunction. The assessment of damages was to be as the court shall direct.² Prior to the passage of the Act, only the common law courts could award damages.³ The Act was a precursor to the combined administration of law and equity in a single Supreme Court of Judicature. Like the *Common Law Procedure Act* of 1854 which gave the common law courts limited power to grant equitable relief as well as damages, the Act gave to the Courts of Chancery a parallel power to award damages.⁴

The main object of the Act was to enable the Court of Chancery to do 'complete justice' between the parties.⁵ It enabled the Court of Chancery to award damages in cases where it previously could not. Prior to the enactment of the Act, a plaintiff would have to sue again for damages at common law. The Act avoided the necessity of the plaintiff being 'bandied about from one court to another' to obtain justice.⁶ Another object of the Act was to enable the Court of Chancery to award damages in lieu of an injunction or specific performance, even in the case of a purely equitable

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¹ Commonly called *Lord Cairns' Act*—henceforth references to this and statutory equivalents in other jurisdictions will be to 'the Act'.

² See Jill E Martin, *Modern Equity* (15th ed, 1997) 724 for a review of the legislation.

³ The Court of Chancery could rely on its inherent power to award damages in equity, as jurisdiction to award damages was conferred by Statute as early as 1393, but this was rarely invoked—see Peter M McDermott *Equitable Damages* (1994) 8 and *Surrey County Council v Bredero Homes Ltd* [1993] 1 WLR 1361, 1368.

⁴ See JA Jolowicz, 'Damages in Equity—A Study of Lord Cairns' Act' (1975) 34(2) *Cambridge Law Journal* 224.

⁵ See *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672, 676.

⁶ See *Ferguson v Wilson* (1866) LR 2 Ch App 77, 88 (Turner LJ)

claim. It was not intended to supplant or undermine the courts of common law nor was it intended to give the Court of Chancery concurrent jurisdiction in all cases of tort or breach of contract.

The Act was eventually repealed, but the English courts have acknowledged that they continue to possess jurisdiction to award equitable damages under its successor.⁷ Section 50 of the *Supreme Court Act 1981* (UK) confers jurisdiction on the High Court and the Court of Appeal to award equitable damages.⁸

The rules of common law and equity arrived in Australia and New Zealand with the English colonists. In Australia, this jurisdiction is now conferred in the various State and Territory Supreme Court Acts.⁹ For example, in Victoria, s 62(3) of the *Supreme Court Act 1958* provides:

In all cases in which the Court entertains an application for an injunction against a breach of any covenant contract or agreement or against the commission or continuance or any wrongful act or for the specific performance of any covenant contract or agreement the Court may if it thinks fit award damages to the party injured either in addition to or in substitution for such injunction or specific performance and such damages may be assessed in such a manner as the court directs.

Similarly, in New South Wales, s 68 of the *Supreme Court Act 1970* provides:

Where the Court has power—

(a) to grant an injunction against the breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act; or

(b) to order the specific performance of any covenant, contract or agreement,

the Court may award damages to the party injured either in addition to or in substitution for the injunction or specific performance.

The wording of these provisions is similar to the original 1858 Act. In substance, the legislative provisions confer on courts the power to award damages in addition to or in substitution for an injunction or specific performance.

This paper examines the differences between common law damages and equitable damages. It will make the point that there are differences between the two because of the history and the development of each remedy. It will then show that it is important for the legal practitioner to have a good understanding of the differences so that equitable damages can be sought, where, for whatever reason, common law

⁷ See *Wroth v Tyler* [1974] Ch 30, 57; *Johnson v Agnew* [1980] AC 367, 400.

⁸ Section 50 of the *Supreme Court Act 1981* (UK) provides: 'Where the Court of Appeal or the High Court has jurisdiction to entertain an application for an injunction or specific performance, it may award damages in addition to, or in substitution for, an injunction or specific performance.'

⁹ For a summary of state legislation, see McDermott, above n 3, 282, 285.

damages are not available or no longer available. It is a separate remedy made available by statute and its flexibility and reach can be put to good use for clients.

II COMMON LAW AND EQUITABLE DAMAGES DEFINED

At common law, the award of the court to a plaintiff who has proven his or her case is generally an award of damages.¹⁰ Damages is an exclusive remedy of the common law courts and is the monetary award a court of law makes to the plaintiff for the injury suffered as a result of a breach of contract or for a tort.¹¹ It can be defined as the pecuniary compensation which the law awards to a person for injury sustained by the act or default of another person. In the strict sense, 'damages' are restricted to monetary awards for breach of contract or for tort, and this paper will use damages in that sense.

There are several categories of damages, the three most common being general damages, special damages and nominal damages.¹² General damages are damages which the law will presume to be a direct, natural or probable consequence of a breach of contract or breach of a duty of care in tort. Special damages are those damages which are not presumed and must be claimed and proven specially. Nominal damages are damages awarded when a legal right has been infringed but no real damage has been suffered.

Equitable compensation is different from common law damages for breach of contract or tort because it attempts, with money, to make restitution to the injured party and is not fettered by the common law doctrines of foreseeability and remoteness.¹³ Wayne Martin, who makes a distinction between equitable compensation and damages, overlooks this distinction. He defines equitable compensation as the monetary award granted in the inherent jurisdiction of the Courts of Equity for breach of an equitable obligation, and damages as the monetary award for the infringement of a common law right *or the statutory remedy conferred by the Act*.¹⁴ This seems to add unnecessary confusion and difficulty, however, by including under the simple heading 'damages' the equitable remedy conferred by the Act. Moreover, in Australia, it has been decided that equitable compensation, not common law damages, should be awarded for such claims as breach of fiduciary duty.¹⁵ Equitable compensation can often be more substantial than common law damages

¹⁰ See Martin, above n 2, 30.

¹¹ See Adrian McInnes, *Handbook on Damages* (1992) 1.

¹² *Ibid* 2.

¹³ See *Commonwealth Bank of Australia v Smith* (1991) ALR 453, 480.

¹⁴ See Wayne S Martin, 'Principles of Equitable Compensation' in Robyn Carroll (ed), *Civil Remedies, Issues and Developments* (1996) 115 (emphasis added).

¹⁵ See *Commonwealth Bank of Australia v Smith* [1991] ALR 453, 480. See also *Re Dawson* [1966] 2 NSW 211, 216.

because equity aims not only to compensate the plaintiff but to enforce the trust which is at the heart of the fiduciary relationship.¹⁶

'Equitable damages', on the other hand, are not the same as equitable compensation or common law damages, as they are a special kind of damages. To avoid confusion with common law damages, they should be defined as 'Lord Cairns' Act damages' or damages awarded under or pursuant to the Act or its subsequent statutory successors.¹⁷ As Helsham CJ sitting in the Equity division of the NSW Supreme Court in *Madden v Kevereski*¹⁸ said:

The damages which the court may award under s 68 [of the NSW Supreme Court Act 1970, the statutory successor to the Act] are *sui generis*; the power to award them is a power to enable the court to do complete justice so far as equity considers it ought to be done, by supplementing with money the equitable remedy, or attempting with money to substitute a remedy.¹⁹

The award of damages under the Act is of a unique and different type, one created by statute and vested in the Court of Chancery. It is a creature of statute and therefore has a different and distinct jurisdictional basis from common law damages. It is an often forgotten remedy and should always be recalled in suits where common law damages cannot be claimed because they are barred or not available.

III DIFFERENCES BETWEEN COMMON LAW AND EQUITABLE DAMAGES

The confusion or controversy about the difference or similarity between common law damages and equitable damages probably arose from different and often conflicting statements made by judges about the power granted to courts pursuant to the Act. Some cases state that the assessment of damages or the principles for determining common law and equitable damages are the same²⁰ and others say that they are not.²¹ This has led one judge to say that the law in this area is in such a mess that it is time for a court to give an authoritative and concluding decision over it.²²

¹⁶ See *Canson Enterprises Limited v Broughton & Co* (1991) 85 DLR (4th) 129, 154 (McLachlin J).

¹⁷ While the award of damages has always been an exclusive remedy of the common law courts, the Court of Chancery did grant monetary restitution as a remedy for fraudulent conduct or for a breach of trust. It was a suit for an equitable debt or liability in the nature of debt for the restitution of the actual money or thing which was cheated—see *Ex Parte Adamson* quoted in J Stuckey-Clarke, "'Damages" for Breaches of Purely Equitable Rights: The Breach of Confidence Example' in Paul D Finn (ed) *Essays on Damages* (1992) 71.

¹⁸ [1983] NSWLR 305.

¹⁹ *Ibid* 307.

²⁰ See, for example, *Johnson v Agnew* [1979] 1 All ER 883; *Ansdell v Crowther* (1984) 11 DLR (4th) 614.

²¹ See, for example, *Madden v Kevereski* [1983] 1 NSWLR 305.

²² *Ibid* 306 (Helsham CJ).

Several judges have indicated that there are differences between the two types of damages.²³ In *Wentworth v Woollahra Municipal Council*,²⁴ the plaintiff commenced legal action in the Equity Division of the Supreme Court of NSW seeking a declaration that the dwelling house erected on a block of land adjoining her block of land had been built in contravention of the Woollahra Planning Ordinance Scheme, and for an injunction to demolish the house. Powell J in the first instance dismissed the action on the grounds that the non-compliance was minor, and that the Council had been authorised to consent to the building of the house. On appeal, the plaintiff amended her statement of claim to seek damages in addition to the relief she originally sought. The Court of Appeal held that Powell J had rightly refused to grant relief for the breach of the restrictive covenant, and the plaintiff was disentitled to equitable relief by reason of laches and hardship to the neighbouring owner. The plaintiff appealed to the High Court concerning the alleged breach of the restrictive covenant. Before the appeal was heard in the High Court, she sold her house, thus limiting her claim to *Lord Cairns' Act* damages under the New South Wales Act. In the course of the judgment, their Honours made several remarks about the NSW provision:

- The main objective of the Act was to enable the Court of Chancery to do 'complete justice' between the parties by awarding damages in those cases in which it had formerly denied equitable relief in respect of a legal right and left the plaintiff to sue for damages at common law;
- The incidental object of the Act was to enable the Court to award damages in lieu of an injunction or specific performance;
- The Act did not give power to the Court of Chancery to award common law damages; and
- Damages under s 68 are not common law damages and they are expressed by the statute to be given in lieu of, or in addition to the basic claim for equitable relief.

The High Court in *Wentworth* held that the breach of the Woollahra Planning Scheme Ordinance did not give rise to a private claim for damages. It also stated that it would have been advantageous if the court had jurisdiction or power to award damages to the plaintiff who has a special interest, in lieu of protecting the public right by declaration or injunction.²⁵ The Court said that s 68 did not authorise the award of damages for breach of a statutory prohibition and did not manifest any intention to create a private cause of action for damages. It held that the Act's purpose was to 'do justice between the parties by awarding damages for infringement of private rights, whether legal or equitable.'²⁶ The Act was never intended to

²³ See, for example, *Wentworth v Woollahra Municipal Council* (1982) 149 CLR 672; *Eastwood v Lever* (1863) 46 ER 859, 865; *Crabb v Arun District Council [No 2]* (1976) 121 SJ 86.

²⁴ (1982) 149 CLR 672 ('*Wentworth*').

²⁵ *Wentworth* (1982) 149 CLR 672, 681-2.

²⁶ *Ibid.*

allow an award of damages to an individual for the violation of a public right for the non-performance of a public duty.

This judgment has been criticised by Professor Paul Finn.²⁷ As he argues, there is nothing in s 68 to indicate that it was concerned exclusively with actual or threatened private rights. The Act has been used without criticism in public nuisance cases.²⁸ If a personal cause of action for damages is a precondition, it would be difficult to justify those cases which have applied the Act for purely equitable wrongs or part performance cases. Finn bases part of his argument on the history behind the Act. The Parliamentary debates during the passage of the Act and early judicial comment suggest the Act was enacted to prevent a multiplicity of actions and excess of costs brought about by the previous need to resort to both Chancery and to common law courts to vindicate rights.²⁹

Putting aside the issue for the moment that the Act has been held to be concerned with private rights only, there may be circumstances where a court should, for policy reasons, decline to grant the specific relief sought. In *Wentworth* it would have been preferable for the court to say that an injunction, effectively permitting the destruction of a building or house, is against public policy. In such a case a court should be reluctant to order the demolition of a building or a dwelling house already constructed, but could instead order damages for the plaintiff.³⁰ Reasons both social and economic likely made the Court reluctant to order an injunction to demolish the house already built. In such a case, an award of damages under the Act would be the appropriate remedy, but in *Wentworth* the Court chose not to grant damages by saying that the Act did not authorise the award of damages for breach of a statutory (public) prohibition. In such circumstances where to order the destruction of a house already constructed would be against public policy, the Court could have relied on and exercised its discretion not to grant an injunction but award equitable damages instead.

There are also judges who deny the difference between the two types of damages.³¹ For example, in *Ansdell v Crowther*,³² Lambert JA stated: 'More than 100 years have passed since the fusion of law and equity ...there is now only one set of principles in relation to damages for a breach of contract for the sale of land.'³³ In the case, the defendant agreed to purchase land from the plaintiff. The date for completion was to be on 4 July 1981. The defendant informed the plaintiff that he could not complete the purchase. The plaintiff brought an action for specific performance or damages. At the trial, the plaintiff was awarded equitable damages, but appealed.

²⁷ See Paul D Finn, 'A Road Not Taken: The Boyce Plaintiff and Lord Cairns' Act' (1983) 57 *Australian Law Journal* 493.

²⁸ See *Owen v O'Connor* [1964] NSW 1312; *Fritz v Hobson* (1880) 14 Ch D 542.

²⁹ Finn, above n 27, 505.

³⁰ See *Wrotham Park Estate Company Limited v Parkside Homes Limited* [1974] 1 WLR 798, 811.

³¹ See *Ansdell v Crowther* (1984) 11 DLR (4th) 614 (Lambert J); *New Zealand Land Development Co Ltd v Porter* [1992] 2 NZLR 462.

³² (1984) 11 DLR (4th) 614.

³³ *Ibid* 616.

The British Columbia Court of Appeal held that damages should have been assessed at the date which the plaintiff, acting reasonably, could have resold the land. Lambert JA referred to the decision of the House of Lords in *Johnson v Agnew*³⁴ which provided helpful guidance to the application of the Act. He agreed with Lord Wilberforce in the English case, who argued that there was no basis in principle, nor compelling authority, for having two separate sets of principles for determining damages, one owing its origins to common law and the other to equity.

Some of this argument can be attributed to the so-called 'fusion debate'. A number of writers³⁵ and judges³⁶ have said that the *Judicature Acts 1873-75* (Imperial) which superseded the *Lord Cairns' Act* brought about a fusion in law and equity. The *Judicature Acts* reformed the administration of justice in England.³⁷ They created the High Court of Judicature and enabled it to administer both law and equity with equity given supremacy if there was a conflict.

The English *Judicature Acts* were adopted in Australia and New Zealand (NSW adopting them only in 1970).³⁸ In many common law jurisdictions, it is now believed that the effect of the *Judicature Acts* was to fuse the common law and equity. However, this remains unclear in Australia, partly because there were never two separate court systems (except in NSW) and partly due to the deference traditionally accorded English jurisprudence. It is obvious there are different approaches taken by judges in different jurisdictions as to whether fusion occurred. In Canada and New Zealand, for instance, the issue of whether there was a fusion or not is less of a concern than bringing about a just outcome.³⁹ In Australia and in England, however, there is much less acceptance of this position.⁴⁰ The different approach taken by the different courts demonstrate that some judges are prepared to bring a judgment that would be just in the circumstances rather than rely on a strict approach to the interpretation of the jurisdiction conferred by the legislation.

Nevertheless, there are some differences, manifest most clearly in the power and reach of the Act's jurisdiction. A good example is the case of *Leeds Industrial Cooperative Society Ltd v Slack*.⁴¹ Slack brought an action for an injunction to

³⁴ [1979] 1 All ER 883.

³⁵ See Martin, above n 2; Gareth Jones and William Goodhart, *Specific Performance* (1986) 3, 21; Fiona Burns 'The Fusion Fallacy Revisited' (1993) *Bond Law Review* 152 (arguing that there is a limited but substantive fusion of law and equity).

³⁶ See Deane J in *Waltons Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513, 556; Lord Diplock in *United Holdings Ltd v Burnley Borough Council* [1978] AC 904. See also the extra judicial writing of Lord Denning in *Landmarks in the Law* (1984) 86.

³⁷ See Gino Dal Pont and Don Chalmers, *Equity and Trusts in Australia and New Zealand* (1996) 6.

³⁸ *Ibid* 8.

³⁹ The comments of Lambert JA in the British Columbia Court of Appeal in *Ansdell v Crowther* and Cooke J in the New Zealand Court of Appeal in *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299 ('*Aquaculture*') indicate that there, judges have more or less accepted complete fusion of common law and equity.

⁴⁰ See *GR Mailman and Associates Pty Ltd v Wormald (Aust) Pty Ltd* (1991) 24 NSWLR 80, 99 (Meagher J); *Felton v Mulligan* (1971) 124 CLR 367, 392 (Windeyer J); *Salt v Cooper* (1880) 16 Ch D 544.

⁴¹ [1924] AC 851 ('*Leeds*').

restrain the Society from further erection of a certain building so as not to obstruct the plaintiff's ancient windows in Albion Square in Leeds. Slack also sought an order for the defendants to pull down so much of the building that caused such an obstruction and for damages. Romer J, in the first instance, found that the building, when completed according to plan, would cause an actionable obstruction of the plaintiff's lights, but that no such obstruction had yet occurred. The learned judge also said that the interference with the plaintiff's rights would be small and capable of being estimated in money and that the plaintiff could be adequately compensated by damages. On appeal, the House of Lords held that the *Lord Cairns' Act* conferred on the Court of Chancery the jurisdiction to award damages in lieu of an injunction in the case of a threatened injury. Therefore, the court had jurisdiction to award damages in lieu of an injunction, and did so.

Leeds confirmed that equitable damages can be awarded for a threatened injury, whereas at common law, no remedy can be given where a plaintiff has not suffered any loss or injury. This is clearly a powerful remedy. When pleading such a case, however, it is important to note first, that all the elements of the statutory provision must be met before a court can award damages. Second, courts can be fickle. Thus, a plaintiff seeking to use the Act must understand that the court is being asked to invoke a powerful and coercive remedy. Finally, the award of damages under the Act is discretionary. Even if the case is made out, a court may or may not grant damages in addition to or in substitution for an injunction or specific performance.

The major differences between the two types of damages are highlighted below:

Equitable damages

May be awarded for prospective loss after date of issue of writ, and even after judgment.⁴²

At the discretion of the court.

Subject to equitable defences such as delay, mistake, acquiescence.

Common law damages

Not available for prospective loss or if plaintiff had not accepted the defendant's repudiation or put an end to the contract.

Not discretionary; awarded once the case is proven.

Equitable defences not available.

⁴² See McDermott, above n 3, 103.

An action can be brought and damages awarded *quia timet* for an apprehended tort or breach of contract.⁴³

An action can be brought but damages can only be awarded for actual injury or wrong suffered by the plaintiff.⁴⁴

Available for breach of confidence and for other purely equitable obligations.⁴⁵

Not available at common law.

Available where there is a breach of contract, where the contract is formed orally and the plaintiff has part-performed the contract.⁴⁶

Not available where a statute requires a contract to be in writing.

May be available even if limitation rules bar common law damages.⁴⁷

Not available if statute barred.

Available for breach of restrictive covenant where the defendant is not party to the action.⁴⁸

Not available at common law.

IV ASSESSMENT OF DAMAGES UNDER THE ACT

As equitable damages are awarded under statute, should the assessment of such damages be different from that of common law damages? There are different and conflicting views and cases on this issue.

The express words of the provision are not helpful in this regard. The Queensland Act, for example, provides that 'such damages may be assessed in such manner as the court shall direct.'⁴⁹ This gives a court a wide discretion to direct the assessment of damages but begs the question as to how they should be assessed. Some judges have interpreted this provision as enabling the court to award damages on a different basis from common law damages as discussed below. Presumably this gives the court more flexibility to award damages, if for example, the court orders the assessment of damages as at the date of judgment as opposed to the date of breach.

⁴³ See *Barbagallo v J&F Catelan Pty Ltd* [1986] 1 Qd R 245; *Leeds* [1924] AC 851.

⁴⁴ See *Barbagallo v J&F Catelan Pty Ltd* [1986] 1 Qd R 245, 248.

⁴⁵ See *Aquaculture* [1990] 2 NZLR 299.

⁴⁶ See *Ward v Metcalfe* [1990] BCL 1422.

⁴⁷ See Michael J Tilbury, *Civil Remedies* (1990) vol 1, 3260.

⁴⁸ See *Johnson v Agnew* [1979] 1 All ER 883, 895.

⁴⁹ See s 10 *Supreme Court Act 1863* (Qld) and s 62 of the *Equity Act 1867* (Qld).

Clearly, however, the Act does not prescribe that damages awarded under it are to be assessed on the same basis as common law damages.

A Date of Assessment of Equitable Damages

Perhaps the most controversial aspect of the assessment of equitable damages is the date for assessment. The general principle is that damages for breach of contract are assessed at the date of breach.⁵⁰ However, controversy arises because this is not an absolute rule, and a court has the power to fix such other date as may be appropriate in the circumstances.⁵¹ Arguably this does not permit a court to do whatever it thinks fit. But practically speaking, this is of small comfort, since a court, in directing the assessment of damages, can decide using a number of factors. In *Wroth v Tyler*, Megarry J relied on the words 'in lieu of specific performance' to conclude that damages under the Act were to be assessed on the date when specific performance could be ordered by the court, that is, at the date of the judgment by the court.

The flexibility to fix a date of assessment for equitable damages can have dramatic effect on either of the parties in the suit depending on whether the market is rising or falling. *Johnson v Agnew* provides a good example. The House of Lords varied the order for the date of assessment of damages not at the date when the order for specific performance was drawn up and entered (26 November 1974) but on the first date when the mortgagees contracted to sell part of the property (3 April 1975). By that later date, the value of the property had fallen, to the disadvantage of the vendor. Conversely, of course, if the court assessed equitable damages at the date of judgment in a rising property market, there could be a windfall for the vendor if the value of the property increased from the date of the breach of contract to the date of judgment.

The statute empowers the court to fix such date at which damages are to be assessed as may be just and appropriate in the circumstances. Both English and New Zealand cases say that the date of judgment is the proper date of assessment.⁵² The High Court of Australia in *Johnson v Perez*⁵³ confirmed the view that damages are to be assessed at the date of breach or when the cause of action arose. A court will only depart from this general rule whenever it is necessary to do so in the interest of justice.⁵⁴ Arguably the ability to depart from the general rule would give greater flexibility to courts in assessing damages. However, courts have been slow to articulate the grounds on which they would do so.

⁵⁰ See *Johnson v Agnew* [1980] AC 367; *Wroth v Tyler* [1974] Ch 30.

⁵¹ See *Johnson v Agnew* [1980] AC 367, 401 (Lord Wilberforce).

⁵² See *Wroth v Tyler* [1974] Ch 30, 58; *Souster v Epsom Plumbing Contractors Ltd* [1974] 2 NZLR 515. (1989) 166 CLR 351.

⁵⁴ *Ibid* 356 (Mason CJ).

B Method of Assessment of Equitable Damages

There are different approaches in common law countries as to the method of assessment of equitable damages. Both the High Court of Australia in *Wentworth* and the Supreme Court of South Australia in *Re Claridge House Ltd; Ex parte Mount v Tomlinson*⁵⁵ confirmed the view that equitable damages awarded under the Act are to be awarded or assessed on the same basis as common law damages. Opposing this view is Anderson JA's determination in *Ansdell v Crowther* in the British Columbia Court of Appeal. In New Zealand, Sir Robin Cooke has added to the debate by stating in *Chatfield v Jones*⁵⁶ that 'the damages recoverable are not limited to such as could have been awarded at common law, but I think they certainly include common law damages.'⁵⁷ This statement envisages equitable damages as something more than common law damages, but where common law damages can be a part of or a portion of equitable damages. In *Johnson v Agnew*, after an extensive survey of English cases, Lord Wilberforce came to the conclusion that, based on case authority and principle, there is 'no warrant for the court awarding damages differently from common law damages.'⁵⁸ According to His Lordship, the Act does not provide for an assessment of damages on a new basis, disagreeing with Megarry J in *Wroth v Tyler* that there is a difference between assessment of equitable damages and common law damages.

Johnson v Agnew has thus been cited as the authority for the proposition that the assessment of equitable damages and common law damages are the same.⁵⁹ This has been criticised as unsatisfactory, based on an assumption by Wilberforce that the Act was a procedural statute.⁶⁰ The problem is that it cannot be taken as a procedural statute for breach of contract cases but not a procedural statute for a *quia timet* injunction case, or restrictive covenant or part performance cases.

There are also cases that state equitable damages are awarded on a different basis from common law damages. In *Wenham v Ella*,⁶¹ Barwick CJ pointed out that '[i]n some circumstances, [equitable] damages...may exceed those which would be awarded at law; but circumstances which may justify a larger amount of damages in lieu of specific performance than would be given at law are not present in this case.'⁶²

A case where damages were assessed at the date of the judgment and would have been granted instead of an injunction is *Surrey County Council v Bredero Homes*

⁵⁵ (1981) 28 SASR 481.

⁵⁶ [1990] 2 NZLR 285.

⁵⁷ *Ibid* 289.

⁵⁸ *Johnson v Agnew* [1980] AC 367, 400.

⁵⁹ See Guenter H Treitel, *The Law of Contract* (7th ed, 1987) 806; *Chitty on Contracts* (25th ed, 1983) vol 1, 1009.

⁶⁰ See McDermott, above n 3, 108.

⁶¹ (1972) 127 CLR 454.

⁶² *Ibid* 460.

*Ltd.*⁶³ The Council sued the developer to recover common law damages for breach of a covenant to build a specified number of houses. At the time the matter was heard by the court, the defendant had sold all the houses in the development and therefore could not comply with an injunction to build the houses in accordance with the covenant. The court held that there was no case for an injunction at the date of issue of the writ and therefore equitable damages were not capable of being awarded.⁶⁴ The trial judge awarded nominal damages because the Council did not suffer any loss from the breach of the covenant. If the case had been brought to trial before the developer had built the houses or during the early construction phase of the development, the court could have granted an injunction, and equitable damages would have been awarded in substitution. The assessment of damages would be on the basis of the amount the Council would have charged for the variation of the covenant at the date of the trial.⁶⁵

In Queensland, s 68 of the *Property Law Act 1974* prescribes a method of assessment of damages for a vendor who in breach of contract fails to complete the sale of land. Damages are assessed as the 'sum at the time the contract was made [that] was reasonably foreseeable as the loss liable to result and which does in fact result from the failure of the vendor to perform the contract.' Damages are restricted to the actual loss suffered by the purchaser. This may or may not be advantageous to the plaintiff depending on the quantification of the loss and whether the property market at the relevant time was rising or falling. To protect and enforce the rights of the purchaser, the purchaser's legal representatives must ensure a claim for equitable damages is considered and pleaded as necessary.

It would seem that for a plaintiff to succeed in a claim for equitable damages to be assessed at the date of judgment or trial, special circumstances will need to be proven. These would include the inability of the purchaser to find another equivalent property after the vendor's breach, the non return of the deposit by the vendor, or whether the purchaser is duly prosecuting the claim for specific performance. The conduct of the parties would be relevant, including actions such as undue delay or mitigation of loss. It seems likely that courts would apply the general rule that damages would be assessed by taking the difference between the sale price and the market value of the property at the date of breach, taking into account any special or exceptional circumstances and adjusting the amount to be awarded as damages accordingly.⁶⁶

⁶³ [1992] 3 All ER 302.

⁶⁴ *Ibid* 316.

⁶⁵ *Ibid*.

⁶⁶ See Anderson JA's judgment in *Ansdell v Crowther* (1984) 11 DLR (4th) 614, 625 and McPherson J in *Barbagallo v J&F Catelan Pty Ltd* (1986) 1 Qd R 245, 258.

V SUBSTITUTING EQUITABLE DAMAGES

Under the relevant provision of the Act, a Court can award equitable damages in substitution for an injunction or specific performance. In many cases, damages will be the appropriate remedy because the contract may not be specifically performed by the time the court is asked to adjudicate on the matter, or it may no longer be desirable or appropriate for the defendant to perform a contract for personal services. In such cases, equitable damages would put a plaintiff, so far as money can, in the position where he or she should be but for the breach or threatened breach.

In *Jaggard v Sawyer*,⁶⁷ the full English Court of Appeal upheld the County Court's award of damages in lieu of an injunction to restrain the defendant from committing continuing acts of trespass and breaches of covenant in respect of land. The plaintiff brought a claim objecting to the defendant's plan to construct a driveway over part of the defendant's garden and roadway and sought an injunction to restrain the defendant on the ground that it breached a restrictive covenant that was in place, and was a trespass over her section of the roadway. The plaintiff did not obtain the injunction until construction was at an advanced stage. Although the judge found that the defendant breached the covenant and it would be a continuing trespass, he said the defendants were inexperienced in such matters, acted openly and in good faith. In finding against the plaintiff, the judge noted that she failed to seek interlocutory relief, the trespass would only involve light traffic over her section of the roadway and if an injunction was granted, there would be no access for the house that was built. The judge refused to grant an injunction because it would be oppressive to the defendants. Instead it was held that the plaintiff be awarded equitable damages under s 50 of the UK *Supreme Court Act 1981*.

The plaintiff appealed contending that the judge was in error in refusing the injunction because it would amount to licensing a continuing invasion of her property rights in return for a one-time payment of damages. The Court of Appeal found that the plaintiff had made out her case for an injunction, but that damages should be awarded instead. The court based this on four points: (i) the injury to the plaintiff was small; (ii) the value of loss was capable of being estimated in money; (iii) the plaintiff was adequately compensated by a small money payment; and (iv) it would be oppressive to the defendant to grant the plaintiff an injunction.

The County Court left aside the issue that by granting damages, it would license a continuing invasion of the plaintiff's property rights in return for a one-off payment of damages. Arguably, even if the injury or damage could be measured in monetary terms, a court should not be obliged to award damages in lieu of an injunction. In answer to this, the Court of Appeal stated that the plaintiff should have acted earlier and faster, and at an early stage of the building should have sought interlocutory relief.

⁶⁷ [1995] 2 All ER 189.

In certain circumstances granting equitable damages in substitution for an injunction or specific performance can be a useful and satisfactory remedy for a plaintiff. If used correctly, this remedy can be effective in bringing about the desired results for the plaintiff.

VI ADDING EQUITABLE DAMAGES

A court is empowered to award additional damages in an action for an injunction or specific performance provided the pleadings show a basis for such a relief. In *Vanmeld Pty Ltd v Cussen*,⁶⁸ the court in the first instance granted orders for specific performance of two agreements for the sale of land at Noosa Heads and Lansvale. A deed of variation between the parties concerning any failure to complete the agreements made no provision for payment of interest on purchase moneys in either agreement. On appeal to the Federal Court, Einfeld J said that although neither the statement of claim nor the application claimed interest, the applicants did not need to amend their application to seek an award of equitable damages as the authorities indicate that it is unnecessary. This means that as a Court of Equity, the Federal Court has jurisdiction to award interest in the form of equitable damages under the relevant Australian equivalent of the Act.

In many cases, equitable damages alone may be sufficient to return a plaintiff to a position equivalent to that existing prior to the breach or threatened breach and thus should be claimable in isolation. This argument can be constructed from *Vanmeld*. In *S&E Promotions v Tobin Brothers*⁶⁹ the full Federal Court of Australia upheld the Australian Capital Territory Supreme Court decision to grant an injunction against S&E Promotions Pty Ltd, the registered proprietor of the Crown Lease of a certain land in the ACT. The case involved the parties undergoing various renewal negotiations which extended beyond the period allowed under the lease. The ACT Supreme Court found that the criteria for establishing equitable estoppel was made out and orders were made against S&E Promotions including an injunction restraining S&E Promotions from taking any action. On appeal, the Full Court of the Federal Court held that S&E Promotions were under a duty to inform Tobin Brothers that its assumption that it was unnecessary to exercise any option to renew the lease under the new proposed sublease was wrong. The court also held that it had the jurisdiction as a Court of Equity to grant specific performance of the agreement entered into between the parties. The Federal Court concurred with the ACT Supreme Court in the finding of the necessary steps for an equitable estoppel to operate in this case. It also concurred with the orders for specific performance made against the appellants S&E Promotions. Unfortunately, the plaintiff did not claim for equitable damages. Presumably Tobin Brothers found the premises which they had rented suitable for their purpose and wanted to continue as a tenant there for the

⁶⁸ (1994) 121 ALR 619 ('*Vanmeld*'). See also *Barbagallo v J&F Catelan Pty Ltd* [1986] 1 Qd R 245.

⁶⁹ (1994) 122 ALR 637.

period of the new lease they had bargained for. Perhaps the plaintiff was advised not to do so by their legal representatives or had instructed their legal representatives not to press for damages but only for specific performance. This issue was not raised by either party in argument nor was it mentioned in dicta of the judgment.

If Tobin Brothers had pleaded for damages, there is no doubt that the Federal Court could have ordered damages either in substitution or in addition to the orders for specific performance. Tobin Brothers could have argued for damages in addition to specific performance on the basis that they had been lulled into a false sense of security by S&E Promotion's silence. S&E Promotions was not entitled to stand by in silence when they knew that Tobin Brothers was proceeding on the assumption that it was unnecessary for it to exercise the option and it would be three years before it needed to exercise any option under the new lease. The Federal Court could have also relied on *Waltons Stores (Interstate) Ltd v Maher*⁷⁰ where Kearney J in the Supreme Court of NSW ordered damages in lieu of specific performance pursuant to s 68 of the *Supreme Court Act 1970* (NSW).⁷¹

Therefore, even in the absence of a specific claim for damages, the plaintiff in *S&E Promotions v Tobin Brothers* could have asked for damages in addition to or substitution for the orders for specific performance against S&E Promotions Pty Ltd. If the plaintiff failed or inadvertently omitted to plead for damages in addition to or in substitution for specific performance, it does not preclude a court from acting in its equitable jurisdiction to award damages, provided the pleadings show a basis for such relief.

VII CONCLUSION

Equity developed its doctrines separate, but not isolated from, the common law. It sought to ameliorate the somewhat rigid and harsh rules that the common law developed. In doing so, equity sought to 'do justice' and to remedy any inadequacy of the common law. Law and equity today are working closely together, each changing, developing and improving through contact with the other. In the near future, it may not even matter whether a defendant's breach is a legal or equitable one. Courts may simply award an appropriate remedy to bring justice to the parties.

If the jurisdiction of the Act is invoked and properly pleaded, there is no reason why equitable damages cannot be awarded by an Australian court. For now, it is incumbent on lawyers to protect and enforce their client's rights both at law and in equity. The ability of courts to award equitable damages, either in lieu of or in addition to an injunction or specific performance, where common law damages are not avail-

⁷⁰ See review of Kearney J's decision in the NSW Court of Appeal case—*Waltons Stores (Interstate) Ltd v Maher* (1986) 5 NSWLR 407.

⁷¹ A point implicitly accepted in the High Court's determination of *Walton Stores (Interstate) Ltd v Maher* (1988) 76 ALR 513.

able, clearly points to the flexibility and power of this remedy. It behoves lawyers to be familiar with and use the jurisdiction appropriately for the benefit of their clients.