

EQUITABLE REMEDIES IN COMMERCIAL LITIGATION
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CONCURRENT SESSION 2C

**DAMAGES IN LIEU:
PRINCIPLES, DEVELOPMENT
AND CONTEMPORARY PROBLEMS**

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SETTING THE SCENE

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1. This short paper is to accompany the introductory part of the Session. The perspective is that of a practitioner in England and Wales. However, most of what I address concerns a shared international legal heritage. There are three heads:
 - 1.1 Damages in lieu: what do we mean?
 - 1.2 The damages lacuna in Chancery proceedings
 - 1.3 The Chancery Amendment Act 1858 (Lord Cairns' Act): the lacuna filled?

Damages in lieu: what do we mean?

2. The focus of this Session is damages in lieu of an injunction or specific performance¹.
3. The jurisdiction to award such damages can be found in section 50 of the Senior Courts Act 1981 (formerly known as the Supreme Court Act 1981). This 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”.

¹ The statutory power to award of damages in lieu of rescission for innocent misrepresentation under section 2(2) of the UK Misrepresentation Act 1967 is outside the scope of this Session.

4. The words “*damages in lieu*” do not appear (and indeed have never appeared in either this section or its statutory predecessor²). They are the universal lawyers’ shorthand for damages “*in substitution for*” an injunction or specific performance.
5. Although section 50 is short, it contains a number of points to bear in mind.
 - 5.1 The gateway to any award of damages in lieu is that the Court must have “*jurisdiction to entertain an application for an injunction or specific performance*”. Injunction and specific performance are two of the classic forms of relief historically granted by courts of equity. If the Court has no such jurisdiction, then it can have no jurisdiction to award damages in lieu.
 - 5.2 If the Court has jurisdiction to entertain such an application, then it has a discretion to award (a) damages in addition to an injunction or specific performance; or (b) damages in lieu of an injunction or specific performance. This Session is not directly concerned with damages in addition: but the development of the content of the concept of damages in lieu in part reflects its juxtaposition with and contradistinction to damages in addition.
 - 5.3 Parliament has not in the section sought to give guidance as to the exercise of the judicial discretion it confers.
6. That all appears reasonably straightforward on its face. But on reflection, the words are problematic.
7. Professor J A Jolowicz identified the problems succinctly in a seminal article in 1975³. In essence, just looking at the words alone, there are two sets of rocks to sail through.
 - 7.1 “Logical Monstrosity”: “*It cannot be denied that these words are obscure. Was there any case not obviously outside the jurisdiction of the [court] altogether in which it could not entertain an application? The trouble is that there is a logical difficulty in defining the scope of the jurisdiction conferred by the Act, for it bases a discretion upon a discretion. Though some equitable remedies may be more discretionary than others, all*

² They were however long-established enough amongst lawyers by the time of the enactment of the Misrepresentation Act 1967 to be used as formal language by its draftsman.

³ J.A. Jolowicz: *Damages in Equity: A Study of Lord Cairns’ Act*, CLJ Vol 34, No 2, pp224-252, at p240. NB: he was writing about the original terms of section 2 of Lord Cairns’ Act, but in substance section 50 of the 1981 Act simply seeks to replicate the 1858 provision (see further below). This is confirmed by Millett LJ in *Jaggard v Sanyer* [1995] 1 WLR 269, at 284.

equitable remedies are discretionary: a discretionary power to substitute damages for a remedy which is itself discretionary is a logical monstrosity". The lawyer's natural reaction to this state of affairs is to search for principle and logic.

7.2 Absurdity: on the other hand, the danger is that the search for principle and logic can lead to absurdity: an interpretation which says that the power to award damages is available only if the court would (but for the existence of the statutory jurisdiction) have granted an injunction or a decree of specific performance: "*On this basis the Court's choice can be exercised only within extremely narrow limits and one comes close to the reductio ad absurdum that the jurisdiction to award damages under the Act exists only when, by definition, it should not be exercised*".

8. So, how does the drafting of section 50 of the 1981 Act come about? What was it trying to achieve, and what does it actually achieve now?

The damages lacuna in Chancery proceedings

9. Every lawyer trained in the common law tradition knows of the attacks made on the Court of Chancery for its delays in the first half of the nineteenth century. One of the most prominent critics was Charles Dickens: see *Bleak House*, where the legal backdrop to the action is the apparently interminable Chancery suit *Jarndyce v Jarndyce*:

*"Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce v Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce v Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality ..."*⁴

10. Delay was undoubtedly a real concern. But the reformers of the 1850s were also grappling with a wide range of procedural and jurisdictional issues, and not just in

⁴ *Bleak House* (published in instalments 1852-3), chapter 1.

the Court of Chancery⁵. Amongst the engines of reform was the Royal Commission into the Court of Chancery, which operated for much of the 1850s.

11. One of the particular concerns of reformers was that since the decision of Lord Eldon L.C. in *Todd v Gee* (1810) 17 Ves Jun 273, the general position was that the Court of Chancery would not award damages for loss:

“except in very special cases, it is not the course of proceeding in Equity to file a Bill for specific performance of an agreement; praying in the alternative, if it cannot be performed, an issue, or an inquiry before the Master, with a view to damages. The Plaintiff must take that remedy, if he chooses it, at Law: generally, I do not say universally, he cannot have it in Equity ...”

12. The consequence was that claimants could find themselves “*bandied about*” (as the contemporary phrase was) between courts in a quest for complete justice.
13. The Chancery Commission turned its attention to this problem in its Third Report⁶. The Commission expressed its conclusions a number of related points. In particular:

- 13.1 The Court of Chancery should have jurisdiction to grant compensation in damages for the loss up to the time of the contract being performed, in addition to decreeing its specific performance.

- 13.2 If there were particular circumstances which prevented the Court of Chancery from decreeing specific performance, but the Court was satisfied that a valid contract had been entered into, and a court of law would give damages for breach of it, then the Court of Chancery should have power to give damages.

- 13.3 A claimant in the Court of Chancery who would in the ordinary course be entitled to specific performance of a contract, should be able to ask in the alternative for damages for its non-performance, in case the Court

⁵ The reforming statutes included (by way of example) the Sutors in Chancery Relief Act 1852 (which abolished the payment of fees to individual court officers); and the Common Law Procedure Act 1854 (which amongst other things gave the common law courts the power of granting injunctions).

⁶ *The Third Report of Her Majesty’s Commissioners appointed to inquire into the Process, Practice, and System of Pleading in the Court of Chancery &c* (Cmd. 2064, 1856).

should be of the opinion that the contract ought not to be specifically performed.⁷

14. There is no sign on the face of the *Third Report* that the Chancery Commission considered it was suggesting anything beyond allowing the Court of Chancery to do justice which the litigant would otherwise have to seek in a common law court.

The Chancery Amendment Act 1858 (Lord Cairns' Act): the lacuna filled?

15. Sir Hugh Cairns, the Solicitor General, introduced the bill which became the 1858 Act. The Act is nearly always referred to by his name (he became Lord Cairns in the 1860s), not its formal title. The Act is described under its title as “*an Act to amend the course of procedure in the High Court of Chancery*”. The only section now of interest is section 2: the rest concerns long superseded procedural mechanics.

16. Section 2 provides:

“In all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction against a breach of any covenant, contract, or agreement, or against the commission or continuance of any wrongful act, or for the specific performance of any covenant, contract, or agreement, it shall be lawful for the same court, if it shall think fit, to 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 manner as the court shall direct.”

17. The early evidence after 1858 suggests that there was a widespread view that section 2 was simply procedural. It solved the previous problem that the Court of Chancery could not award damages by way of relief for a successful claim in equity, even where it considered the claimant was clearly entitled to such relief.

18. For example, see *Ferguson v Wilson* (1866) LR 2 Ch App 77. Turner LJ said: “*There were [prior to 1858] many cases where a Court of equity would decline to grant specific performance, and yet the Plaintiff might be entitled to damages at law; and great complaints were constantly made by the public, that when Plaintiffs came into a Court of equity for specific*

⁷ See generally the *Third Report* at pp3-4.

*performance the Court of equity sent them to a Court of law to recover damages The object, therefore, of [Lord Cairns' Act] was to prevent parties from being so sent from one Court to the other, and accordingly the Act provides that the Court may either, in addition to or in substitution for the relief which is prayed, grant that relief which would otherwise be proper to be granted by another Court.”*⁸

19. However, the same case also identified a limitation on Lord Cairns' Act: namely that if at the time of the commencement of proceedings the Court of Chancery could not award relief (in this case, because the claim for allotment of shares would fail as all the shares had already been allotted), then the court would lack “*jurisdiction to entertain*” the application for equitable relief. Damages therefore could not be awarded under the Act. As Turner LJ put it, Lord Cairns' Act “*never was intended ... to transfer the jurisdiction of a Court of law to a Court of equity*”.
20. But that problem became academic with the passage of the Judicature Act 1873, when the Chancery and common law courts were merged into the single High Court of Justice.
21. That led to perhaps the most striking feature of the history of Lord Cairns' Act, and the strongest indication that it was thought to be merely procedural (and therefore redundant with the passage of the Judicature Act 1873): Lord Cairns' Act was repealed in 1883⁹.
22. Yet even though it was repealed, there was a line of authority during the late nineteenth century and early twentieth centuries to the effect that the 1858 Act had not only fulfilled the procedural objective of reformers, but it had gone further. It had “*wittingly or unwittingly*”¹⁰ created a new jurisdiction to award damages which had not previously existed. This was conclusively confirmed by the majority in the House of Lords in *Leeds Industrial Co-operative Society v Slack* [1924] AC 851.
23. See in particular Lord Finlay at 857-8. He pointed out that courts of law could only award damages for injury already sustained, yet the Act allowed damages in substitution for an injunction: “*Such a substitution in the very nature of things involves*

⁸ *ibid* at 88. Notably, the other Lord Justice who heard the appeal, and agreed with Turner LJ, was Sir Hugh Cairns himself.

⁹ By the Statute Law Revision and Civil Procedure Act 1883.

¹⁰ J.A. Jolowicz, *op. cit.* (note 3 above), p251.

that the damages are to deal with what would have been prevented by the injunction if granted'. That could include damages for threatened behaviour which had at the date of judgment caused no loss at all.

24. The apparent obstacle that Lord Cairns' Act had been repealed was overcome by a reference to a convoluted statutory sequence¹¹:

24.1 Section 5 of the 1883 Act contained a proviso that the repeal should not affect any jurisdiction or principle or rule of law or equity established or confirmed by any enactment so repealed.

24.2 When section 5 of the 1883 Act was itself repealed by section 1 of the Statute Law Revision Act 1898, the repealing section itself contained a proviso that it should not affect any principle or rule of law or established jurisdiction, notwithstanding that the same might have been affirmed by or derived from any of the repealed enactments.

24.3 Lord Finlay concluded: "*Though the Act is gone, the law which it laid down still exists, and this case, like many others of the same kind, has throughout, from beginning to end, been dealt with on this view*".

Conclusion

25. At paragraph 8 above I posed the question: how does the drafting of section 50 of the 1981 Act come about?

26. There are two answers to that. First, it is clearly a cut down but essentially unchanged version of section 2 of Lord Cairns' Act. Second, it appears to have been decided by Parliament that, although practitioners had survived for 98 years without having a statutory source for damages in lieu, it would be preferable to have something on the statute book.

27. I also posed a second (and rolled-up) question: What was it trying to achieve, and what does it actually achieve now? I hope I have given some insight into the answer to the first part of that question. The other speakers will address different aspects of what Lord Cairns' Act achieves today.

¹¹ See Lord Finlay in *Slack* at 861-3.