Common Law - Mingling the Waters

Mark Pawlowski considers to what extent common law damages may be available for purely equitable wrongs and whether equity is able to award compensation in the absence of legal remedies

Most of us will be familiar with Ashburner's "fluvial metaphor" describing the common law and equity as "two streams of jurisdiction [which], though they run in the same channel, run side by side and do not mingle their waters": Ashburner's *Principles of Equity*, (2nd ed., 1933), at p. 18. This metaphor represents the traditional view of the combined effect of law and equity, namely, that, despite fusion of the administration of legal and equitable rights and remedies (since the enactment of the Judicature Acts 1873-75), the two sets of rules remain separate and distinct bodies of law. In other words, legal rights remain legal rights and equitable rights remain equitable rights, although both are now administered by the same court. The obvious example is that of the trust where legal title is vested in the trustees and equitable ownership is conferred on the beneficiaries.

There have, of course, been several judicial protagonists of a more radical approach to the question of the precise interaction of common law and equitable principles in modern English law. Not surprisingly, Lord Denning M.R. in *Federal Commerce and Navigation Ltd v Molena Alpha Inc.* [1978] QB 927 opined that "the streams of law and equity have flown together and combined so as to be indistinguishable the one from the other": *ibid*, 974-975. In similar vein, Lord Diplock in *United Scientific Holdings Ltd v Burnley Borough Council* [1978] AC 904, at 924, suggested that "to perpetuate a dichotomy between rules of equity and rules of common law . . . is conducive to erroneous conclusions as to the ways in which the law of England has developed in the last hundred years". Despite these judicial pronouncements, the general consensus is that the rules of law and equity remain distinct although working more closely together.

The orthodox view

It is trite law that common law damages are available as of right whilst equitable remedies are discretionary. The former are subject to limitation (under the Limitation Act 1980) whilst the latter are subject to laches (undue delay) and other equitable concepts involving clean hands, change of position, rights of third parties, etc., which may bar equitable relief in the circumstances of the particular case. These equitable defences are, however, not available in respect of legal claims in debt, breach of contract or tort. Equitable claims appear to give rise to only equitable remedies so that, for example, the appropriate remedy for a claim involving mistake, misrepresentation or undue influence is rescission of the contract subject to equitable terms. When the court orders restitution in such cases, the basic objective is to restore the parties, as closely as possible, to their original pre-contract positions consequent upon the cancellation of the contract. There are, of course, several notable statutory exceptions to this principle. Thus, s.2(2) of the Misrepresentation Act 1967 allows the court to award damages in lieu of rescission.

Similarly, damages may be awarded instead of, or in addition to, an injunction or specific performance under s.50 of the Senior Courts Act 1981.

Of course, equity has always recognised the common law and, for this reason, equitable remedies are available for breach of a legal right (e.g., specific performance/injunction for breach of a contractual obligation or tortious wrong). The converse, however, is considered more problematic because the common law has historically never recognised equitable rights. But to what extent do the English cases bear this out as a general principle?

A full range of remedies?

A number of cases involving a non-contractual breach of confidence lend some support to the view that common law damages are available for a purely equitable wrong. In *Seager v Copydex* [1967] 1 WLR 923, for example, the appropriate remedies should have been an injunction and an account of profits for breach of the claimant's confidence protected in equity only. The Court of Appeal, however, without any real discussion of the point, awarded damages despite the purely equitable nature of the claimant's cause of action. In *Dowson & Mason Ltd v Potter* [1986] 1 WLR 1419, another case involving a non-contractual breach of confidence, the Court of Appeal assessed damages for the disclosure and use of the claimant's confidential information as being the claimants' loss of profits resulting from the wrongful disclosure so as to put the plaintiffs in the position they would have been if the defendants had not wrongly obtained and used the information (i.e., the tort measure of damages). Similarly, in *Stephens v Avery* [1988] 1 Ch 449, the claimant's statement of claim, alleging a breach of duty of a personal confidence involving sexual intimacy, sought damages for personal injury. Sir Nicholas Browne-Wilkinson V-C's judgment, at 457, appears to assume tacitly that such damages would, in principle, be recoverable despite their obvious tortious nature: see also, *Att-Gen v Guardian Newspapers Ltd (No. 2)* [1990] 1 AC 109. It seems, therefore, that, at least in the context of breach of confidence claims, a full range of remedies is available to the claimant including an injunction, account of profits and, where appropriate, damages based on a tortious assessment of the claimant's loss.

But to what extent do the breach of confidence cases provide support for a more general argument in favour of the award of damages in actions involving purely wrongs? Would, for example, a beneficiary under a trust be entitled to claim common law damages against his trustee for breach of trust? Not surprisingly, there is little direct authority in point, but in *Metall Und Rohstoff AG v Donaldson Lufkin & Jenrette Inc* [1990] 1 QB 391, at 473, Slade L.J. was clearly of the view that damages at common law were *not* recoverable for a breach of trust. This is in sharp contrast to the position in some Commonwealth jurisdictions, notably, New Zealand and Canada, where the courts have accepted a more robust approach to the availability of common law and equitable remedies regardless of the nature of the cause of action. This expansive approach is, perhaps, best illustrated by the case of *Aquaculture Corporation v New Zealand Green Mussel Co Ltd* [1990] 3 NZLR 299, 301, where the New Zealand Court of Appeal equated equitable compensation with common law damages in cases involving a breach of the equitable duty of confidence. In particular, Sir Robin Cooke P observed that "for all purposes now material, equity and the common law are mingled or merged . . . for [breach of confidence] a full

range of remedies should be available as appropriate no matter whether they originated in common law, equity or statute."

Equitable compensation?

Equity does, however, have an inherent equitable jurisdiction to award damages (based on the claimant's loss) in appropriate cases. This is in addition to the statutory jurisdiction conferred under s.50 of the Senior Courts Act 1981 and where the measure is the same as at common law: *Johnson v Agnew* [1980] AC 367. In *Grant v Dawkins* [1973] 1 WLR 1406, Goff J cited with apparent approval the decision of Turner LJ in *Phelps v Prothero* (1855) 7 De GM & G 722 to the effect that when a court of equity entertained jurisdiction, it had power to deal with the whole case (including an award of damages) in addition to granting specific relief: see also, *Oakacre Ltd v Claire Cleaners (Holdings) Ltd* [1982] 1 Ch 197.

In what circumstances then, may equitable compensation prove a useful remedy in the absence of any legal claim to damages? One example would involve involve a claimant who is forced to rely on a contract which is unenforceable at law, but binding in equity: see, *Lavery v. Pursell* (1888) 39 Ch D 508. Similarly, a claimant may have to seek recourse to equitable compensation where the defendant is in breach of a restrictive covenant which is only enforceable in equity against a successor in title: see, *Wrotham Park Estates Ltd v Parkside Homes Ltd* [1974] 2 All ER 321.

It seems also that the same test of remoteness of damage may be applied in equity as at law: *Target Holdings Ltd v. Redferns* [1995] 3 All ER 785. In *Bristol and West Building Society v Mothew* [1996] 4 All ER.698, 711, Millett LJ observed that "there is no reason in principle why the common law rules of causation, remoteness of damage and measure of damages should not be applied by analogy" in cases involving a trustee (or fiduciary) who has acted carelessly thereby causing loss to the trust.

There is some authority that exemplary and punitive damages may be awarded in equity: *Smith v Day* (1882) 21 Ch D 421, 428. Moreover, it has been suggested that equitable compensation may be reduced if part of the injury suffered by a claimant were shown to have been caused or contributed to by his own inequitable conduct. As one commentator has observed, "if the principles governing the assessment of equitable compensation are not fully developed, there is no reason why the courts should not consider the principles of the more developed common law remedy" provided that this is done by reference to the different policy objectives of the common law and equity: J Martin, [1994] Conv 13, at 21.

Conclusion

There is no doubt that the English courts have yet to fully address the interesting question of the availability of legal and equitable remedies in respect of purely equitable wrongs. In the writer's view, there is considerable scope for the future development of an equitable right to damages (along common law lines) to meet a variety of occasions where the claimant is unable to seek

legal redress due to the purely equitable nature of his cause of action. The distinction between the development of existing law and the invention of entirely novel concepts (which is no longer considered appropriate) is most clearly expressed in the judgment of Bagnall J in *Cowcher v Cowcher* [1972] 1 WLR 425, 430, where his Lordship said that equity was not past the age of child bearing but that "it's progeny must be legitimate – by precedent out of principle". It is submitted that the court's inherent power to award equitable compensation falls within equity's "legitimate progeny" and should be the subject of future judicial development along the lines already expressed in the English caselaw.

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