LAW FACULTY - VICTORIA UNIVERSITY OF WELLINGTON

IDENTIFYING EQUITABLE DAMAGES

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1983

Research Paper for

Litigation - Laws 541

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1. Creation of the Remedy

    The Inherent Power
    Lord Cairns' Act
    Repeal of Lord Cairns' Act
    The Resurrection of Lord Cairns' Act

2. Jurisdiction

3. Equitable Damages - a New Right to Damages

4. Equitable Damages in Administrative Law

5. The Exercise of the Discretion to Grant Damages in Equity

6. Specific Performance Rescission and Damages

7. Equitable Damages in the District Court

IDENTIFYING EQUITABLE DAMAGES

1. Creation of the Remedy

The Inherent Power

Before 1958 Courts of Chancery in England had a very limited inherent power to award damages. The remedy at common law was overlooked in favour of the administration of the equitable principles and remedies which had developed to meet the inadequacies of the common law, and particularly of damages as a remedy. However there were occasions in Chancery when the Court did not think it appropriate to order an injunction or specific performance or any other equitable remedy but where damages could properly have been awarded. The original inherent jurisdiction was confined to the award of damages arising out of the deterioration of property as a result of a vendor's delay in settling, or as a result of the defendant's wrongful acts following the issue of proceedings, as a result of which, specific performance became impossible. Phelps v Protheroe (1855) 7 De GM and G 722.

Because of this inability on the part of the Courts of Equity to award damages:

> "Great complaints were constantly made by the public that when plaintiffs came into a Court of Equity for specific performance, the Court of Equity sent them to a Court of Law in order to recover damages, so that the parties were bandied about, as it was said, from one Court to the other." Ferguson v Wilson (1866) LR Ch 77 at p.88 per Turner L.J.

A bill was therefore promoted following the third report of Her Majesty's Commissioners appointed to enquire into the process practice and system of pleading in the Court of Chancery, (1856) (to which Sir Hugh Cairns, a Chancery Judge, later Lord Chancellor, contributed) whose main purpose was to do away with the necessity for separate proceedings where a plaintiff could claim both

inequitable remedy, and common law damages. Jolowicz Damages in Equity - a Study of Lord Cairns' Act (1975) CLJ at 224 and 225.

Lord Cairns Act

The Chancery Amendment Act 1958 (21 and 22 Vict. c 27), known as Lord Cairns' Act provided (S. 2):

> "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."

As Jolowicz has said ((1975) CLJ supra at p 227) "This enactment did a good deal more than simply enable the Court of Chancery to award the kind of damages that could have been awarded at common law. There was created, quite possibly unintentionally, a power to award damages 'in substitution for .. injunction or specific performance,'".

Repeal of Lord Cairns' Act and the Fused Jurisdiction in England and New Zealand

To determine the status of Lord Cairns' Act in New Zealand involves a further excursion into the legislative attentions to which Lord Cairns' Act was later subject in England. The Judicature Act 1873 gave Courts of Equity powers hitherto possessed only by the Courts of Common Law to award damages. Presumably on the footing that this fusion made Lord Cairn's Act unnecessary, the Statutes Law Revision and Civil Procedure Act 1883 46 and 47 Vict c 49, designed to remove obsolete Acts, repealed Lord Cairns' Act (but not in Ireland) but by

a savings clause provided that the repeal would not affect any jurisdiction or principle or rule of law or of equity established or confirmed by any enactment so repealed. These savings provisions were themselves repealed by the Statutes Law Revision Act of 1898 which however "saves" any principle or rule of law or established jurisdiction notwithstanding that it was affirmed by or derived from repealed enactments. Lord Cairns' Act survived in England only as an Irish Statute in the reprints, but its principles are firmly embedded in a caselaw both of New Zealand and of England.

However, the view that, despite the savings provisions of the 1883 and 1893 enactments, Lord Cairns' Act was a dead letter as a result of fusion found expression in Dreyfus v Peruvian Guano Co 43 Ch D 316, and in Ryder v Hall and Anor (1905) 2 NZLR 385. In the former case Bowen LJ held that there could be no damages for a threatened wrong (the delivery of 11 cargoes of guano to the wrong party), but only damages of the common law stripe which the Courts of Chancery were now entitled to award. In the New Zealand case, Stout CJ expressed the view that as Ss 5 and 16 of the Supreme Court Acts of 1860 and 1882 gave to that Court all the equitable and common law jurisdiction of all the English Courts and "all such judicial jurisdiction as may be necessary to administer the laws of New Zealand" - "there is in my opinion no necessity to invoke Lord Cairns' Act". In this case, which involved minor flooding, damage had already occurred, and common law damages were awarded at 40 shillings in lieu of the injunction which had been sought, so that further actions by the plaintiff were effectively debarred. Once again, a Court took the view, (wrongly, it is submitted) that Lord Cairns' Act did nothing but give a power to award common law damages instead of equitable remedies, and that as a result of the fusion of law and equity, was redundant.

The Resurrection of Lord Cairns' Act

That Lord Cairns' Act survived in spirit to confer a completely new jurisdiction was put beyond doubt by the decision in Leeds Industrial Cooperative Society Ltd v Slack (1924) A.C. 851, in the House of Lords. The defendant's building when completed would obstruct the ancient rights of the plaintiff, who sought an injunction. In other

words the injury had been threatened but had not actually occurred so that while an injunction might have been granted, common law damages whether as an alternative or otherwise, would not have been available because no loss had occurred. The Court did not want to order an injunction because the prospective loss would be slight. Viscount Finlay held however that although the Act itself was repealed, by virtue of the combined effect of the Judicature Act and the repealing Statutes, the law and practice which Lord Cairns' Act laid down remained unaltered. Thus, Lord Cairns' Act does give rise to the power to award damages in cases where no such power previously existed either at common law or in equity, and must be relied upon in such cases.

As recently as 1974, it was submitted in a New Zealand Court that Lord Cairns' Act was merely than a procedural Act which did no more in its time than avoid the necessity for a litigant to go to two different Courts for complete relief. Souster v Epsom Plumbing Contractors Ltd (1974) 2 NZLR 515. McMullin J. adopted the fundamental construction in Leeds Industrial Coop Society v Slack in holding that Lord Cairns had created a new remedy based upon what was lost as a result of the Court's refusal to grant either an injunction or specific performance.

2. Jurisdiction

The whole object of Lord Cairns' Act was to enable the Court to award damages where it did not grant an application for injunction or specific performance. It follows therefore that the Court must have been in a position to contemplate granting an injunction or specific performance before it could award damages in lieu. The Court must, before it makes an award, have jurisdiction to entertain an application for one or other of these remedies. It must be the kind of case where it could have granted the remedy although obviously, not necessarily where it would have done so. It is necessary therefore to distinguish between factors which would prohibit the Court from considering the grant of the equitable remedies, which go to the jurisdiction, and factors which are among those the Court will take into account in exercising its discretion, which do not go to

the jurisdiction. Guidance may be obtained from Spry - Equitable Remedies at page 546. Examples of matters going to the jurisdiction are:

1. whether the case is within the territorial jurisdiction of the Court (i.e. whether the defendant is within the forum, has been served without it pursuant to the rules, or has submitted to the jurisdiction);

2. whether the Court has power in respect of the defendant (for example the Court may not be able to award specific performance against an an infant);

3. whether there is an adequate remedy at law - if there is, the Court cannot consider the equitable remedies and in consequence cannot consider the grant of equitable damages in lieu;

4. whether performance is impossible or illegal. In Lavery v Pursell (1888) 39 Ch D 508 specific performance could not be considered because the property in question had been sold at the time of issue of proceedings. On the other hand, in Grocott v Ayson (1975) 2 NZLR 586, while there would have been difficulty in gaining access to the land of a third party for certain works, Cooke J. reaffirmed the principle that an injunction would not be imposed where the thing to be done is impossible, unenforceable or unlawful, but that mere futility on the part of the things ought to be done, or the existence of difficulties that had to be overcome before the injunction could take effect, did not amount to an absolute bar.

On the other hand, matters of discretion which might lead to an injunction or specific performance being refused, but which would

not prevent the assessment of damages under Lord Cairns' Act include:

Difficulty of enforcement
Perpetuation of personal relationship
Laches
Acquiescence
Hardship
Mistake
Triviality of injury
Unfairness (in obtaining the right sought to be enforced)
Prior inconsistent contract (where specific performance was sought in relation to a later contract).

The presence of any of these might lead to an injunction or specific performance being refused. However, the Court has a discretion whether or not to grant equitable damages instead, or to refuse relief altogether. It will become apparent later however that equitable damages might therefore be regarded both as a licence, compulsorily issued, permitting a plaintiff to carry on an otherwise wrongful activity in exchange for damages, and as a means of compensating a plaintiff where there were defects in his case which prevented the grant of an injunction or specific performance.

There are three final points to be made about the Court's jurisdiction to award damages. First, where a contract is partly enforceable by injunction or specific performance and partly not, specific relief might be given in respect of the first part, and damages in respect of the part which is not enforceable in this way. Soames v Edge (1860) Johns 669. Second, the Court will have jurisdiction to award equitable damages even though they have not been asked for in the pleadings Dell v Beasley (1959) NZLR 89 at p.93. All that needs to be shown is that an injunction or specific performance could have been ordered. The third question to be answered concerning jurisdiction is - when must jurisdiction exist, when proceedings are issued, at the time of hearing, or at some other time? It is reasonably clear that as long as the Court has jurisdiction to grant specific performance or an injunction when the

proceedings were commenced, that is sufficient to form a foundation for the grant of damages, even if performance later becomes impossible or if the defendant later performs the contract. Equitable damages may still be awarded. Cory v Thomas Ironworks and Shipbuilding Company (1863) 11 WR 589. It appears also that as long as the Court has power at the time the proceedings are heard to make specific orders, then it should be able to award damages instead (Spry at p.551).

3. Equitable Damages - A New Right to Damages

Equitable damages will only be of interest and use in a "fused" jurisdiction if they offer something more than common law damages, since there is no longer a necessity for Court hopping. This part of the paper is therefore intended to identify cases where no damages would be available at common law but might be under Lord Cairns' Act.

Firstly, the right to be enforced may be purely equitable, without a corresponding right to legal damages, and second, even where there is a right to legal damages, Lord Cairns' Act may enable the Court to award damages for losses beyond those which could be compensated at common law.

For example:

1. Confidentiality. There is now a well-established equitable right to have certain information treated as confidential. This is a purely equitable cause of action, not necessarily based on breach of contract or tort, but warranting the grant of an injunction. In A.B. Consolidated Ltd v Europe Strength Food Co (1978) 2 NZLR 515 CA the Court considered the question whether damages would have been an adequate remedy, concluded in the particular circumstances (in which the appellant had obtained secret information about extruding biscuits during negotiations) that they would not have been, and ordered an injunction. In Seager v Copytex Ltd (No 2) (1969) 1 WLR 809, Denning LJ assumed a power to award damages in a case involving breach of confidentiality, without making specific reference to Lord

Cairns' Act, or to the inherent power. It seems clear however that in an appropriate case damages could be awarded to a victim of a breach in lieu of an injunction.

2. Part Performance

A claim based on a contract unenforceable by virtue of the Contracts Enforcement Act 1952 which is saved by the equitable doctrine of part performance entitling the parties to specific performance of it may of course attract an award of damages based on Lord Cairns' Act, even although such an award could not be made at common law. Price v Strange (1978) Ch 337 at 358.

3. Future Loss

(a) Specific performance. Specific performance can be ordered where a breach of contract is anticipated, does not amount to a repudiation, and has not yet taken place. Indeed, the cause of action is not the breach or anticipated breach of the contract, but the duty of the other party in equity to perform. A writ can therefore be issued before the time for performance has arrived. Marks v Lilley (1959) 1 WLR 749. It follows that damages could be awarded under Lord Cairns' Act for a threatened breach, in lieu of specific performance, or in addition to it. Such damages would not, clearly, otherwise, be available. The claim in Marks v Lilley was proceeded with notwithstanding settlement of the transaction concerned, to recover costs.

(b) Injunction "quia timet". It is the essence of this injunction that it is awarded only where damage is apprehended but has not yet occurred. Damages may be awarded under Lord Cairns' Act instead of an injunction, even though no wrong may actually have been done and even though no damage has yet accrued. (The prerequisites to an award at common law). Thus in Hooper v Rodgers (1975) 1 Ch. 43, a case involving the withdrawal of support from the plaintiff's land, damages were awarded. Russell LJ said:

"It is, I apprehend, clear that in respect of the support of the farmhouse no damages at common law could have been awarded. It is established by authority binding upon this Court (a) that damage is, the gist of the action in nuisance, (b) that in an action for damages based upon deprivation of support to land or buildings it is necessary to establish that the land or buildings have been physically damaged by the withdrawal of support and (c) that damages cannot be awarded at common law in a case of probable or even certain physical damage to the land or buildings from loss of support based upon a present decline in the market value of the land due to such probable or certain future physical damage. But this is a case in which a mandatory order was sought upon the defendant to take such steps as were necessary to reinstate the excavated track to its former condition so as to restore to the slope the angle of repose of the soil and thus avert the threat of future removal of support to the farmhouse. The award of damages could only be supported as equitable damages under the Chancery Amendment Act 1858 (Lord Cairns' Act) in lieu of such an injunction. The injunction, mandatory in character, would be quia timet, as preventing an apprehended legal wrong, the legal wrong requiring in this case physical damage to the farmhouse for its constitution or (save the mark) perfection."

And in Leeds Industrial Cooperative v Slack (supra) the Court awarded damages for the threatened obstruction of ancient lights, which could not have been compensated for by damages at common law.

Breach of restrictive covenant.

Where a plaintiff is not a party to a restrictive covenant applying to land, and the covenant is not protected by registration or some similar means, he has an equitable right only to enforce the covenant and, in consequence, is entitled to

damages only by virtue of Lord Cairns' Act. Wrotham Park Estate v Parkside Homes (1974) 2 All ER 321.

Fiduciary Relationships

As these are matters within the exclusive jurisdiction of the Courts of equity, the award of damages in cases concerned exclusively with regulating such relationships is not necessarily contemplated by Lord Cairns' Act. However the Courts may in appropriate cases be more inclined to exercise their inherent jurisdiction.

4. Equitable Damages in Administrative Law

Until this point is reached, wherever the Courts have had power to consider granting an injunction or specific performance, they have also accepted without question a power to award damages under Lord Cairns' Act. This is to be expected in view of the wording of Section 2 - "in all cases in which the Court of Chancery has jurisdiction to entertain an application for an injunction...or for. specific performance...it shall be lawful for the same Court, if it shall think fit, to award damages...".

It would be logical then to assume that if an injunction could be applied for in the administrative law field, then Lord Cairns' Act would permit the award of damages in addition to or in substitution for such an injunction. As far as this writer can ascertain, the issue has never squarely come before the Courts in England. It has, however, been considered in at least two New Zealand cases, and on both occasions, the Courts have shied away from contemplating an award of damages under Lord Cairns' Act, notwithstanding that an injunction might have been awarded.

It is outside the scope of this paper to consider all the circumstances in which injunctions might be awarded whether in the public or in the private law fields. What is clear however, is that an injunction" may be awarded in all cases where the award of the remedy appears to the Court to be just or convenient and where redress might be properly claimed either at law or in equity. More particularly Rule 462 of the Code of Civil Procedure provides for the grant of an injunction to restrain any officer from the breach of any

duty...which he has threatened or has already commenced to commit". And by virtue of Section 4 (1) of the Judicature Amendment Act 1972, the Court has power on an application to review to grant in respect of the exercise of a statutory power any relief the applicant might have been entitled to in proceedings inter alia, an injunction.

Before considering the New Zealand judgments and their approach to equitable damages in this field, a bare outline of the common law approach to compensation in the administrative field may be appropriate.

In Abbott v Sullivan (1952) 1 KB 189 a committee of a trade union (a domestic tribunal) had purported to expel one of its members. It was a closed shop so he lost his employment for a time. He was subsequently reinstated but claimed damages alleging that the committee had no jurisdiction to expel him. The majority of the Court (Evershed MR, Denning and Morris LJJ) held that the domestic tribunal in this case lacked jurisdiction but acted conscientiously and honestly but mistakenly, and that there was no basis or authority for extending the law of tort to cover that situation (cf where the exercise of power without jurisdiction is malicious). In Gould v Wellington Waterside Workers Industrial Union of Workers (1934) NZLR 1025 a similar action succeeded because the Union's rules amounted to a contract, and a tortious element was found to exist. In Abbott the plaintiff had been reinstated before he commenced his action, so no injunction was sought, but it was clear that notwithstanding the absence of a right to sue in tort, the Court could have granted an injunction to prevent a person being excluded from a group by means contrary to natural justice.

Elsewhere in de Smith (pp 337 - 338) under the heading "Liability in Tort for Exercise of Powers in Bad Faith" the learned authors outline the possible characteristics of such a tort. They note a general principle that the performance of a public duty in good faith is protected against civil liability (Everett v Griffiths (1921) 1 AC 631), but that this proposition is clearly inapplicable to many statutory functions involving the exercise of discretion, notwithstanding good faith, where there has been some negligent act causing damage. The common thread noted in cases where good faith is a sufficient protection is the exercise of broadly judicial function where only wilful or malicious partiality or discrimination will bring a right of action. The authors conclude:

> "It would seem however, that there is a tort as yet imperfectly defined, consisting of the infliction of damage by the deliberate abuse of public office or authority - eg: by refusing, cancelling or procuring the cancellation of a licence or procuring the making of a compulsory purchase order for improper motives. This tort is not firmly anchored in English case law; in particular, it is not certain what kind of damage has to be sustained and by whom before civil liability can arise", p.339, and further

> "The rules relating to the circumstances in which a person injured by a breach of statutory duty can recover damages form a notoriously difficult area of the law of Tort. It is accepted that the question whether an action under the Statute (as distinct from an action for a common law wrong) will lie is dependent on the intention of the legislature and that its intention must be ascertained 'by a consideration of the whole Act and the circumstances, including the pre-existing law, in which it was enacted'. But when Parliament has abstained from expressing its intention it is not unlikely that neither the draughtsman nor the sponsors of the Bill nor the majority of members of either House have addressed their minds to the matter. The answer to the question whether an action will lie for breach of a statutory duty is necessarily influenced by the views held by individual Judges as by the requirements of public

> policy. General principles of construction which circumscribe judicial discretion have been evolved; but the broader the statement of principle the more carefully must it be qualified by exception".

Although de Smith notes at p.23 that civil actions for private law remedies against public authorities and officials are generally indistinguishable from ordinary civil proceedings and (as Dicey rightly observed) there is no separate law of administrative liability, the Courts have hesitated to develope the law in this field with the gusto shown in some other areas. The temptation has been to enter, and not to emerge from, "the labyrinthine byways of the common law" (de Smith p 429). To use a phrase from de Smith again, might not the "sense of greater freedom in the field of equity" inspire a more useful development.

One difficulty which the development of an independent Tort has run into is the distinction between void and voidable administrative actions. de Smith at p.151:

> "Behind the simple dichotomy of void and voidable (invalid and temporarily invalid) acts lurks terminological or conceptual problems of excruciating complexity. To explore them fully would not be justifiable in a work of these dimensions. We should soon be engulfed in a morass of inconsistent and often unconsidered judicial dicta."

An explanation for this development is given by Lord Wilberforce in Hoffman - La Roche v Secretary of State for Trade and Industry (1974) 2 All ER 1128 at 1146. In the case, the Secretary of State applied for an injunction preventing the sale of librium and valium at higher prices following allegations that the Secretary's fixing of lower prices had been in breach of natural justice, ultra vires etc. An injunction was granted without an undertaking as to damages. In his dissenting Judgment Lord Wilberforce said:

> "It is said that no undertaking should be insisted on, unless the effect of the La Roche's group's eventual success were to

make the order void ab initio - the argument being that otherwise no injustice would result..."

Lord Wilberforce proceeds:

"This phrase void ab initio has engendered may learned distinctions and much confused thinking - unnecessarily in my opinion. There can be no doubt in the first place that an ultra vires act is simply void; see in confirmation Ridge v Baldwin (1963) 2 All ER 66. In truth when the Court says an act of administration is voidable or void, but not ab initio this is simply a reflection of a conclusion, already reached on unexpressed grounds, that the Court is not willing in casu to give compensation or other redress to the person who establishes the nullity. Underlying the use of the phrase in the present case and I suspect underlying most of the reasoning in the Court of Appeal is an unwillingness to accept that a subject should be indemnified for loss sustained by invalid administrative actions. It is this which requires examination rather than some supposed visible quality of the order itself.

In more developed legal systems this particular difficulty does not arise. Such systems given indemnity to persons injured by illegal acts of the administration. Consequently, when the prospective loss which may be caused by an order is pecuniary, there is no need to suspend the impugned administrative act. It can take effect (in our language an injunction can be given) and at the end of the day the subject can if necessary be compensated. On the other hand, if a prospective loss is not pecuniary (in our language "irreparable") the act may be suspended pending decision - in our language, interim enforcement may be refused.

There is clearly an important principle here which has not been elucidated by English law, or even brought into the open"

In other words if the administrative act is merely voidable (ie void only when it is declared to be so by the Court) then there is

supposed to be no wrongful act from which a right to damages can flow.

That the distinction (between void and voidable) can be a means (albeit a clumsy one) of enabling the Court to exercise a discretion over the remedies sought is to some extent confirmed in de Smith at p.241 fn 43. It is also a means of ensuring that a decision remains valid until successfully impugned by someone with locus standi - see Durayappah v Fernando (1967) 2 AC 337 PC.

It seems clear that in this field an injunction may be awarded in many circumstances where the Courts would not have been prepared to award damages. The jurisdiction is as ample against public authorities as it is to award injunctions against private defendants, an injunction may be awarded in circumstances which would not apply to a private individual - eg where the authority has exceeded or has threatened to exceed its statutory powers. de Smith p.443. There is no limitation in granting an injunction to cases where the authority is actuated by wilfulness or malice, in other words an injunction will be granted even although the acts complained of do not amount to tortious conduct.

Why then should the Court not exercise its power to award damages against a public body or official in lieu of an injunction, under Lord Cairns' Act? There can, it is submitted, be little doubt that conduct by such an authority which is ultra vires, in breach of a statutory duty, or in breach of the rules of natural justice, will amount to a "wrongful act" in terms of S.2 of Lord Cairns' Act. Re Princess Victoria (1954) NI 178 Lord MacDermott LCJ p.178, Dacre v Dacre (1798) 1 B & P 250 both cited in "Words and Phrases Legally Defined" 2nd Ed.Vol 5, and Emery v Emery (1946) NZLR 545 Myers CJ at p.552.

de Smith at p.245 states that breach of the audi alteram partem rule does not give rise to an action for damages unless among other things it amounts to a deliberate misuse of public functions leading to economic loss. In this particular case, it is unnecessary in de Smith's view to show that the act was void, merely illegal. In a

footnote (No.94) reference is made to Mahrah v Attorney General for Trinidad and Tobago No. 2 (1972) 2 WLR 902 PC which involved a constitutional provision for redress for breach of fundamental rights which was held to include the right to an award of damages where a person was committed for contempt in breach of the requirements of natural justice. The footnote raises the query whether damages might be awarded under Lord Cairns' Act in lieu of an injunction. And in Takaro Properties Ltd v Rowling (1976 2 NZLR 651 at 672 Beattie J. distinguished the Hoffman La Roche case on the ground that "it did not relate to a cause of action in tort but rather to damage which might have been assessed pursuant to an undertaking filed in Court for the purpose of compensating for losses proved to have been suffered following an injunction." While that may be a matter of contract or Court order, the passage might contemplate a route for compensation other than the common law.

The distinction between the ability or jurisdiction of the Court to grant an injunction in the public law field on the one hand, and the unavailability in the same case of any remedy in damages on the other is clearly demonstrated by the judgment in Attorney General & Anor (Pulford) v Birkenhead Borough and Anor (the builder) (1968) NZLR 383 of Richmond J.

Mrs Pulford lost her right of objection under town planning legislation to the construction of ugly flats next door to her property because the Council had wrongly treated the case as one for dispensation rather than as one requiring a properly notified application. She sought an injunction against the builders for the removal of the offending structures and damages against the Council for its failure to comply with its duties under the Town and Country Planning Act. Finally she sought damages in lieu of the injunction asked for against the builders. The learned Judge did not need to consider whether there was a claim against the Council for breach of

statutory duty. Mrs Pulford's claim for damages against the builder was based upon:

1. the failure of the builders to comply with the planning legislation was a tort namely breach of statutory duty, and

2. if the duty was a public duty only and not one owed to Mrs Pulford, because she suffered damage over and above the public generally, she was entitled to damages in lieu of an injunction.

In relation to a liability in damages for breach of statutory duty the Judge referred to Maceachern v Pukekohe Borough (1965) NZLR 330 and to the English view of town planning legislation, which was that such legislation limits the land owner in his free development of the land but cannot give rise to any separate action for breach of statutory duty unless what is done constitutes a nuisance, trespass, or other recognised tort. There was, the Judge concluded, no action in tort.

However, the learned Judge referred to two propositions made in Boyce v Paddington Borough Council (1903) 1 Ch 109 which decided that there were two possible bases for any claim for an injunction in relation to interference with a public right:

> First, where the interference with the public right is such that some private right is at the same time interfered with (eg obstruction of a private right of access) or
>
> Second, although no private right is interfered with, special damage peculiar to the plaintiff is suffered from the interference with the public right.

The Judge had already found that a failure to comply with the procedures under the planning legislation did not confer a private right, but that the plaintiff had suffered special damage beyond that suffered by the public at large and might therefore sue for an injunction, and held at p.390 line 50:

> "It means that the equitable remedy of injunction is available at the suit of private individuals in cases where there is no common law action for damages for breach of statutory duty, or for the interference with any private right...by analogy from the law of public nuisance."

The Judge went on to note that "the common law has developed in a restricted way as regards acknowledging the existence of any private right of action for breach of a statutory duty", which would limit the access of citizens to damages, in the way which has already been described.

The Judge then confronted directly and apparently for the first time the proposition that despite the unavailability of damages at common law, he should award damages in lieu of the injunction (which for discretionary reasons it had been conceded should not be granted) on the strength of Lord Cairns' Act.

He put the question in this way - "should Lord Cairns' Act be construed as extending to cases where the "wrongful act" is the breach of a public general duty?" He declined to so construe the act for these reasons:

1. Lord Cairns' Act assumed an injured party whereas the jurisdiction with which the Judge was concerned did not depend on damage being suffered by anybody, and in the case of a private individual (not the Attorney-General) it was necessary to prove special damage only to achieve locus standi, and not, having acquired standing, to obtain the injunction. By using the words "to the party injured" Lord Cairns' Act only contemplates a jurisdiction where there will always be a party injured.

It is submitted that while Lord Cairns' Act contemplates <u>cases</u> in which there will be an injured party (otherwise the question of damages does not arise) there is no reason to assume that the kinds of activity which S.2 contemplates will always involve injury. The Act simply enables the Court to award damages where that is the case. It is submitted that any other interpretation is not consistent with equitable principles.

2. To allow damages pursuant to Lord Cairn's Act would be inconsistent with the common law action for damages for breach of statutory duty which lays down different criteria, and that the application of Lord Cairns' Act would enable these to be circumvented by the back door.

   The absence of a remedy at common law is a prerequisite to and there may well be a good reason for giving the Act effect. As has been shown, there are cases where an injunction may be obtained in circumstances where there are no corresponding rights at law and where Lord Cairns' Act will nevertheless have application. In every such case the application of the Act may provide a remedy not in accordance with some common law principle.

3. The final reason given for not applying Lord Cairns' Act was that the purpose of the injunction was to enforce a public duty, and to substitute for that damages to a private individual was incongruous.

It is submitted that the incongruity may not exist where the breach of the public duty affects to any substantial degree only the plaintiff. The appropriateness or otherwise of damages in this situation would vary from case to case, and would be a matter for the exercise of the Court's discretion rather than a matter going to the jurisdiction. The purpose of an injunction is generally to enforce a duty, and it has been noted already that there is nothing inherently unique about actions in the public law field.

The other New Zealand case in which the application of Lord Cairns' Act to an administrative law situation was considered is Stininato v Auckland Boxing Association & Others (1978) 1 NZLR 1 (CA). In that case a boxer sought declarations and damages in respect of the refusal of his application, and successive applications, for a licence as a professional boxer. The Court refused to allow damages under Lord Cairns' Act, first because no injunction had been claimed by the appellant at any stage.

The second ground for declining to act was expressed by Cooke J. as follows:

> "If, the action of members of a domestic tribunal were held to be sufficiently "wrongful" to justify an award of damages, there is no reason why this evolution should not be brought about directly by development of the law of tort. It would be neither necessary nor desirable to fall back on the old statutory jurisdiction of a Court of Chancery, especially as this sort of problem, in the borderland between tort and administrative law, must be remote of anything that the Chancery Commissioners or Parliament could have had in mind, in 1856 or 1858: compare Attorney General v Birkenhead Borough" p.9, and later
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> "Whatever room there may be for damages in administrative law, it could not be right, in a case of this kind and on such restricted arugment, to let them in by the sidewind of a discretion under Lord Cairns' Act".

Once it is acknowledged that Lord Cairns' Act will provide a remedy in circumstances where none is available at common law, it is submitted that although development in the law of torts had not reached the point where a new category of tort can yet be clearly perceived, if a Court has decided that it has jurisdiction to award an injunction in a case arising in the public law field, it must ipso facto have concluded that no adequate remedy exists at common law. As the remedies created by Lord Cairns' Act are designed to compensate a party in circumstances where the Court has declined in its discretion to order an injunction, it is submitted that there is no good reason why the administrative law field should be picked out by the Courts in New Zealand as the one department of law to which Lord Cairns' Act should have no application. It is submitted further that the discretionary remedy and the discretion associated with it (exercised in accordance with accepted principles) would be a useful means of developing the law relating to compensation in the administrative field.

As a counterpoint to the dicta of Cook J. in Stininato, the complexity with which the common law appears to be developing in this field, expressed by the trenchant comments of Lord Wilberforce, may,

itself be a good reason why the evolution of damages in administrative law may not be brought about by the development of the law of tort, and why such evolution might well occur under Lord Cairns' Act.

The one are of administrative action in which neither an injunction nor specific performance may be obtained is in respect of Acts of the Crown ("Her Majesty in right of New Zealand") or of officers of the Crown where the relief would in effect be agaisnt the Crown. Section 17 Crown Proceedings Act 1950.

The rationale for such a provision has been that in times of emergency the Government may have to do unlawful acts infringing individual rights and it would be detrimental to the public if a grieved party were to be able to obtain the immediate intervention of the Court to prevent that. De Smith at p.445. Other common law jurisdictions, Australia for example, have not seen the need to prevent in this way interlocutory relief being obtained to restrain unlawful acts done by the Crown or its servants. As the Act must, it appears, be interpreted to deprive the Court of its jurisdiction to award the special remedies, equitable damages will also be unavailable against the Crown while the enactment continues in force.

5. <u>The Exercise of the Discretion to Grant Damages in Equity</u>

The first general proposition to be made about the exercise of this discretion is that when its jurisdiction to grant an injunction or specific performance has been established by reference:

(a) in the case of an injunction to the breach of a common law right or "Independently of any question as to the right at law, ...an injury, whether arising from a violation of an unquestionable right or from a breach of contract or confidence" in respect of which the Court of Chancery had an original independent jurisdiction (4 Halsbury 24 para 916) or ;

(b) in the case of specific performance, to a breach of contract

where there was no adequate remedy at law, and where the other elements giving the Court jurisdiction are present, then the Court will generally grant an injunction or specific performance. Sefton v Tophams Ltd (1965) Ch 1140 at 1169.

The second general proposition is that having refused to exercise its discretion to grant an injunction once jurisdiction has been established, it does not follow that the equitable damages will necessarily be granted - all equitable relief of whatever kind be refused. Spry, Equitable Remedies (1981) 556.

The third general proposition about the exercise of the discretion to award damages is that the very existence of a power to award equitable damages will affect the Court's decision whether or not to grant special relief. Where the Court has a choice it may not grant the relief it would have done had the power to award damages not been available. However the Court will only substitute damages where the hardship to the defendant in ordering specific enforcement outweighs the inconvenience to the plaintiff if damages only are awarded. In other words, would it be highly unreasonable to make an order "in specie" when damages would be sufficient. Norton v Angus (1926) 38 CLR 523 at 529. It should be borne in mind here that an award of damages may be the course preferred by a defendant as it enables him to carry on an activity, or to retain property, profitably perhaps, for the payment of a sum of money, which would otherwise be denied to him altogether.

Equitable technique forbids the laying down of rigid rules for the exercise of the discretion, and this is particularly so in the case of damages in equity which depends on the exercise of a discretion whether or not to award damages) upon a discretion (whether or not to order an injunction/specific performance). However a series of fairly rigidly expressed rules as to when equitable damages might be awarded were spelt out in Shelfer v City of London Electric Lighting Co Ltd (1895) 1 Ch 287 at 322 - 323, as follows:

1. Injury to the plaintiff's rights is small;

2. it can be estimated in money;

3. it can be compensated by a small money payment;

4. it would be oppressive to the defendant to grant specific relief.

The Judge gave his reasons for restricting the exercise of the discretion thus: "A person in committing a wrongful act (whether it be a public company for public purposes or a private individual) is not thereby entitled to ask the Court to sanction his doing so by purchasing his neighbour's rights, by assessing damages in that behalf, leaving his neighbour with the nuisance, or his lights dimmed, as the case may be. In such cases the well-known rule is not to accede to the application, but to grant the injunction sought".

That Shelfer's case should not be treated as fettering, the discretion made available by Lord Cairns' Act was made clear in Fishenden v Higgs and Hill Ltd (1935) 152 L.T. 128, 141 by Romer LJ and in Colls v Home and Colonial Stores (1904) A.C. 179. The dangers of taking too narrow an approach to the discretion to award damages in Lord Cairns' Act are pointed out by Spry (supra) at p.558 and by Jolowicz in Damages in Equity - A Study of Lord Cairns' Act 1975 CLJ 224 where the very restrictive approach to Lord Cairns' Act seemingly adopted by the House of Lords in Redland Bricks Ltd v Morris (1970) AC 652 when one Judge at least in the House of Lords regarded Lord Cairns' Act as having no application because the plaintiffs have not made out an adequate case for a mandatory injunction (to restore support to a neighbouring property), was described as being so extraordinary a proposition that it cannot have been the intention of the Judge to make it (but see Pettit, 1977 CLJ 369 infra). The Court of Appeal in Hooper v Rogers (1971) Ch 43 did not consider itself so restricted in the exercise of its discretion under the Act, and readily awarded damages in lieu of a mandatory injunction quia timet which in the exerise of its discretion it elect not to make. In Hooper v Rogers damages were awarded instead to enable an excavated slope to be restored to prevent potential damage.

Specific examples of the exercise of the discretion are summarised below, remembering that there are no rigid rules about the application of this discretion.

(a) Extent of Loss

In Ryder v Hall (supra) the Court was not prepared to make a mandatory injunction requiring the defendant, Canute like to roll back flood waters reposing on the plaintiff's land as a result of the defendant's action without causing loss or damage to the plaintiff, but the Court awarded nominal damages of 40 shillings for the express purpose of preventing the plaintiff from coming back to Court (there had already been two trials with special juries). In Carpet Import Co v Beath (1972) NZLR 37 a fire escape protruding over the plaintiff's land from some storeys up was regarded as a suitable object for the award of damages, rather than a mandatory injunction. In Ellis v Rasmussen (1911) 30 NZLR 316 (CA) the flooding of the plaintiff's land by a dam which drove a water wheel upon which the defendant relied for his business was regarded as a fit subject for an award of damages rather than an injunction restoring the status quo ante.

(b) Damages Insufficient

Where prospective loss is concerned, the Courts may decline to award damages because of the difficulty of assessing the loss. Such an award may simply prejudice a plaintiff by preventing him from making a claim in respect of the appropriate loss when it arises. Stellin v Hutt Speedways Ltd (1950) GLR 77, in which nuisances likely to arise every Saturday from the operation of the speedway could not in the view of O'Leary J. be compensated by a single payment of damages.

(c) Conduct and Motive

In AB Consolidated v Europe Strength Food (supra) the Court rejected the defendant's suggestion that damages would be an adequate remedy and awarded an injunction in part because the defendant was guilty of obvious and witting plagiarism. And in Dell v Beasley (1959) NZLR 89, damages were awarded in lieu of specific performance in part

because of a misleading manner in which the plaintiff and her agents conducted the negotiations. Such considerations as fraud, misrepresentation, non-disclosure, unfairness, or want of clean hands on the part of the plaintiff may also have the result that both relief in specie and equitable damages are refused.

(d) Laches and Acquiescence

Similarly, these equitable considerations may lead the Court to refuse an injunction or specific performance, but to award equitable damages to a plaintiff, a full-back position for the dilatory. And where such considerations have led a defendant to change his position, all equitable relief, including damages under Lord Cairns' Act, may be refused. Malhotra v Chaudhury (1978) 3 WLR 825.

(e) Hardship

This factor has been considered in the general discussion of the exercise of the discretion, above. Most of the cases involve a balancing of the relative significance to the parties of the making of an injunction on the one hand and an award of damages on the other. In Dell v Beasley the excessive price asked of the defendant for the property was regarded as a factor which could be taken into account. See also Ellis v Rasmussen (supra).

Measure of Equitable Damages

In some cases (where there is jurisdiction to grant neither an injunction nor specific performance) damages at common law only may be claimed. In other cases, where there is no claim at common law, but where the claim is based solely on the invasion of rights or interests of an equitable character, damages will not be available at common law and may be claimed solely by virtue of Lord Cairns' Act, and thirdly, cases will arise where a plaintiff is entitled to damages either under Lord Cairns' Act or at common law, (where the breach of a common law right may be restrained by injunction or enforced by specific performance).

It will therefore be of interest to determine whether and the extent to which the measure of damages in equity differs from the principles which apply to the assessment of common law damages.

Since Leeds Industrial Cooperative Society Ltd v Slack (supra) the approach towards the measure of damages under Lord Cairns' Act has evolved to the point (Lord Wilberforce in Johnson v Agnew (HL) (E)) (1980) AC 367) where the dilemma facing counsel as to whether to seek equitable damages or damages at common law where both might be available is now largely resolved.

It will be recalled that Leeds Industrial Cooperative Society Ltd v Slack established that:

> "The power to give damages in lieu of an injunction must in all reason import the power to give an equivalent for what is lost by the refusal of an injunction" (or of specific performance).

On the face of it, this test might well give rise to a very difference measure of damages than that at common law, which seeks "restitutio in integrum" in respect of damage actually suffered as a result of the acts or breaches of the defendant, rather than as a result of the Court's refusal to grant a specific remedy.

Thus in Grocott v Ayson (1975) 2 NZLR 59 the Court in that case was prepared to assess damages on the basis of the cost of reinstating a retaining wall to prevent future damage (c.f. Hooper v Rogers) after making various equitable adjustments. Such an award would clearly have been unavailable at common law and Cooke J. relied upon the decisions in Wroth v Tyler (1973) 1 All ER 897, Grant v Dawkins (1973) 1 All ER 897 and Souster v Epsom Plumbing Contractors Ltd (supra). He stated:

> "In those cases it has been held that, whatever may be the measure of damages at common law, under the Act damages in lieu of specific performance of a contract for the sale of land may be calculated on the value of the land at the date of assessment, rather than the date of the breach of contract;

> such damages are to cover the area which would have been covered by an order for specific performance. Where, as here, damages are to be assessed in lieu of a quia timet injunction for apprehended harm, a somewhat similar idea may be invoked; but there is even less analogy with the common law, since no cause of action for that harm has yet accrued."

Megarry J. in Wroth v Tyler noted that the normal measure of damages for breach of contract for sale of land was the difference between the contract price and the market price of the land at the date of the breach, normally the date of settlement. He noted that the common law rule may not be inflexible, but preferred to rely on Lord Cairn's Act which justified the assessment of damages on a basis not identical with that of the common law. (p.919) He cited the passage already quoted from the Leeds case (from the speech of Viscount Finlay), noting the refusal of the injunction or specific performance as the starting point for assessing damages in equity. He concluded that the Act entitled him to award damages by reference to a period subsequent to the date of breach on the basis that the plaintiffs were entitled to be put in the position they would have been in at the date of judgment, had the contract been performed. He noted (at p.922) that the second rule in Hadley v Baxenale did not exclude the possibility of damages at common law to cover the foreseeable effects of inflation.

It was noted both in Wroth v Tyler, and in Souster v Epsom Plumbing Contractors Ltd (by McMullin J. at p.523) that the measure of damages at common law had tended to be limited to those suffered at the date of breach. The learned Judge cited a number of cases which appeared to award damages in respect of period subsequent to that date but in the end left open the question of whether the common law allowed a more flexible approach, and applied the principles in Lord Cairns' Act to assess damages based on the difference in value between the contract price and the date of judgment rather than settlement.

Damages were similarly assessed in Malhotra v Choudhury (1979) 1 All ER 186 (CA) but the date for valuing the property was moved back a year.

In all these cases the question what was the true measure of damages at common law was left to one side, and the view was taken that whatever the answer, Lord Cairns' Act enabled the Court to fix damages on a different basis to that applying at common law. It will be noted that no attempt has been made at this point to distinguish between damages in lieu of specific performance, and damages in lieu of injunction, simply because the issue in both cases is whether the Court is entitled to measure damages differently in equity than it would do at common law.

In Johnson v Agnew (supra) it could still be argued by Counsel that from the passing of Lord Cairns' Act in 1858 until Wroth v Tyler, there was no case in which damages had been assessed other than on a common law basis, and that although the Judge had material to assess damages at common law he thought he had jurisdiction to award another style of damages allowing something extra which the Act was never intended to confer. And the headnote states "that, although damages might be awarded under S.2 of the Chancery Amendment Act 1858 in some cases in which they could not be recovered at common law, the Act did not warrant the assessment of damages otherwise than on a common law basis". The headnote is incorrect.

Lord Wilberforce at p.400 held:

> "Since the decision of this house, by majority, in Leeds Industrial Co-operative Society Ltd v Slack it is clear that the jurisdiction to award damages in accordance with S.2 of Lord Cairn's Act (accepted by the House as surviving the repeal of the Act) may arise in some cases in which damages could not be recovered at common law; (examples are given). To this extent the Act created a power to award damages which did not exist before at common law. But, apart from these and similar cases where damages could not be claimed at all at common law, there is a sound authority for the proposition that the Act does not provide for the assessment of damages on any new basis. The wording of S.2 "may be assessed in such manner as the Court shall direct" does not so suggest, but clearly refers only to procedure".

The Judge concluded that if the test adopted by Wroth v Tyler (and the other cases above cited) established a different basis from that applicable at common law, then the cases were wrong. He cited Malhotra v Choudhury (supra) for the proposition that both equity and the common law would award damages on the same basis - in that case as on the date of judgment, and left open the question at what date damages for breach of contract for the sale of land however awarded ought to be assessed, and rather than tie the plaintiff to the date of the original breach, in this case assessed damages at the date when the contract was lost to the plaintiff.

From Johnson v Agnew, a distinction may be drawn between cases where damages can only be obtained under Lord Cairns' Act and cases where there is a coextensive right at common law to damages.

Where there is a coextensive right, damages under Lord Cairn's Act must be assessed on the same basis as damages at common law. On this footing, Lord Cairn's Act would only be of advantage by enabling damages to be awarded in the absence of any prayer for damages.

In those cases where damages are not available at common law but where there is equitable jurisdiction to grant an injunction or order specific performance, then it is submitted that the measure outlined in Leeds Industrial Coop.Society Ltd v Slack based upon the loss suffered as a result of the refusal of the Court to grant the specific remedy (subject to such adjustment as equity requires) continues to be the proper measure.

Having concluded that the method of assessing damages in lieu of specific performance should be the same as that used at common law, Cook J. in Crofts & Anor v GUS Properites Ltd No A 602/75, 10 June 1981 Christchurch Registry (unrep) observed, from Souster v Epsom Plumbing Ltd, Roth v Tyler, and Bousaid v Andry that damages for loss of a bargain should be assessed at the date when the contract is brought to an end by the action of the Court in refusing specific performance: this subject the observations of Quilliam J. in Hickey v Bruhns (1977) 2 NZLR 71 that where delay has been caused by a plaintiff the date of assessment should be adjusted.

The extent to which Lord Cairns' Act is now interpreted as giving rise to a remedy in damages not available at common law, for which principles based solely on the Act must be developed, one might question the appropriateness of regarding the wording of S.2 to which Lord Wilberforce referred as procedural only, and therefore as diminishing the Court's discretion in the measure of damages.

6. Specific Performance Rescission and Damages

Common law damages are available as of right on a breach of contract for the sale of land. Equitable damages may be awarded as a matter of discretion following the refusal of a decree of specific performance. Because common law damages cannot be recovered unless claimed, and equitable damages are discretionary, damages should be expressly claimed in the pleadings. Specific performance and common law damages may be claimed in the alternative but an election of remedy must be made at the trial. Johnson v Agnew at p.392.

The decision in Johnson v Agnew finally decided whether or not there was a right to damages after a decree of specific performance proved fruitless. A number of propositions were stated by Lord Wilberforce in the course of the judgment.

Where a vendor has already accepted the repudiation of a contract by the other party, both are discharged from further performance, but the right to common law damages remains - the contract is not rescinded ab initio and can be sued upon.

If the order for specific performance is made, the contract survives and the enforcing party cannot treat it as being at an end except by obtaining a fresh order to that effect.

Dealing with the issue before him, the Judge noted that there was some authority (Henty v Schroder) 12 Ch D 666 to Capital & Suburban Properties Ltd v Swycher (1976) Ch 319) to the effect that damages could not be obtained once the Court had made an order putting an end to the contract so releasing the plaintiff from his obligations (presumably on the basis that the contract was then a nullity ab initio). See Oakley - Damages in Lieu of a Decree for Specific Performance (1978) CLJ 41.

Lord Wilberforce concluded that both on rescission/acceptance of repudiation and upon cancellation of the contract following an aborted order for specific performance, the Court could award damages - under Lord Cairns' Act, because having invoked the equitable jurisdiction in making the decree of specific performance, control of the matter had subsequently to be exercised according to equitable principles (at p.399). As has been seen, the Judge concluded that the basis for the assessment of damages was the same in equity and at common law for the purposes of this case.

7. Equitable Damages in the District Court

By S. 34 of the District Courts Act 1947 the District Court has jurisdiction to hear and determine proceedings for specific performance where the value of the property does not exceed $12,000 (S.34 (1)(b)), and by S.41 may (within these limits) give any remedy which a Judge of the High Court could give. The District Court therefore has jurisdiction to award damages in lieu of specific performance under Lord Cairns' Act.

The District Court has power under the ancilliary jurisdiction in S.41 to order an injunction in the context of an action where a substantial part of the claim (whether small or large) is a money claim within the jurisdiction of the Court.

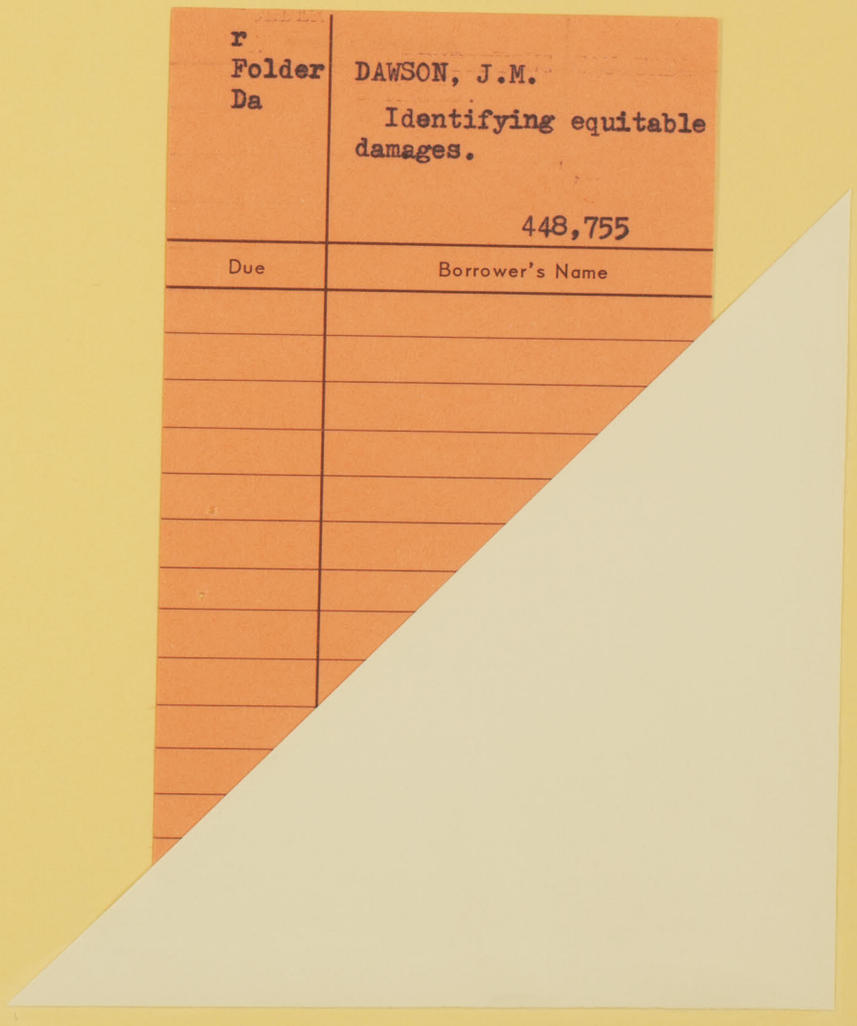
If the Court can grant an injunction, it may award equitable damages in lieu or in addition.

Care must be taken however where a quia timet injunction is being claimed. In analysing Hooper v Rodgers and Redland Brick Ltd v Morris, it has been argued, Pettit in Lord Cairns' Act in the County Court: a Supplementary Note 1977 CLJ p.309, that either

(a) where a quia timet injunction is sought, it cannot be ancilliary to a claim for damages as is required in the District Court because by definition damage has not yet been suffered and cannot therefore be claimed at common law independently of a claim under Lord Cairns' Act which can only be invoked if the Court has jurisdiction to grant the injunction in the first place; or

(b) if in those cases there was jurisdiction to grant an injunction (as asserted by Jolowicz in the CLJ article already referred to),then the Court had jurisdiction to award equitable damages in satisfaction of past and future loss arising out of the facts alleged, and the fact that equitable damages had not been claimed in the Redland Brick case should not have been used by the Court as a reason for declining this relief. Jurisdiction to award equitable damages would be limited to $12,000.

It is suggested that if some loss has actually occurred for which damages are claimed, then the District Court will have jurisdiction to grant a quia timet injunction (or damages in lieu) in respect of future loss, but if all that is sought is an injunction in respect of future loss, then the injunction is sought as a sole rather than as an ancillary remedy and the District Court will not have jurisdiction to entertain the application (or, by extension) to award damages under Lord Cairns' Act.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