University of HUDDERSFIELD
University of Huddersfield Press

Fields: journal of Huddersfield student research
Available open access at: https://www.fieldsjournal.org.uk/

FIELDS Journal of Huddersfield student research

Equity: Balancing certainty and flexibility to secure justice

J. G. Griffin

University of Huddersfield, Queensgate, Huddersfield, HD1 3DH
University of Cambridge, The Old Schools, Trinity Lane, Cambridge, CB2 1TN

ARTICLE INFO

Article history:
Received 17 October 21
Received in revised form 16 December 21
Accepted 21 March 2022

Keywords:
Equity and the Common Law
Equitable Remedies
Certainty
Flexibility
Constructive Trusts
Injunctions
Specific Performance
Equitable Damages
Recission
Rectification

ABSTRACT

The development of legal principles which arise from judicial decisions, forming the common law, are often criticised for their apparent rigidity. Equity has thus traditionally filled the role of counteracting this nature, flexibly reactive to the circumstances of those coming before the law. However, expectations that equity is simply counterbalancing the often unfair rigours of strict law obscures today's reality that it is more than just flexible. Indeed, equity can be just as rigid in its application as the common law, being necessarily both prescriptive and vague in parts to mitigate otherwise unfair outcomes. This proposition suggests that the common law and equity are achieving unexpected forms of alignment, which may eventually prompt them to become indistinguishable without necessitating their fusion.

Indeed, observing the gradual development within the judicial application of equity and its alignment with flexibility yields a limited perspective to analyse how equity achieves justice. Instead, equitable remedies, generally regarded as being the purest form of equity in action, can be studied to identify how equity at its most flexible encapsulates aspects of rigidity. Such a duality between seemingly counterposing variables demonstrates an increase in overall effectiveness. Further, drawing a comparison with common intention constructive trusts identifies that this phenomenon is not limited to equitable remedies alone.

The significance of this analysis is twofold: first, it broadens the prevailing perspective of debate, which adheres to a binary view juxtaposing certainty versus flexibility; and second, it suggests that the relationship between equity and the more rigid common law is one of co-dependence, rather than the two systems being either fused or independent. Indeed, equity and the common law cannot exist without each other, as both interact to varying extents in the pursuit of justice. Crucially, this insight presents new benchmarks for the mechanisms of justice, requiring that just outcomes may not be achieved without maximising both reliability and fairness.

University of HUDDERSFIELD
University of Huddersfield Press

Fields: journal of Huddersfield student research
Available open access at: https://www.fieldsjournal.org.uk/

FIELDS Journal of Huddersfield student research

Introduction

A foundational requirement of any legal system, whether constructed under the civil law tradition of a central code of law or within the common-law tradition of judge-made law, is an ability to encapsulate a degree of certainty. After all, there is justice in all persons being subject to the same rules. Yet, such blunt certainty must also be tempered by equity, preventing unconscionability and unfairness. Such as system must respond to the specific circumstances of those coming before the law, individuals ultimately living unequal lives, and bending strict legal principles to achieve justice. As such, equity has the power to overrule common law principles to achieve justice while not being a substitute for the common law.

In essence, equity is regarded as the system which operates where the common law (meaning judge-made law) does not provide a just outcome. The precise relationship between the common law and equity has formed the subject of much academic and judicial debate over the years. This has waxed and waned since their introduction as independent sources of law, fluctuating between fusion and complete separation. However, what remains largely unexplored is a recognition that equity has developed to become a combination of both certainty and flexibility. Further, this combination permits it to soften the common law's rigidity, irrespective of context, and identifies a new co-dependence between the two systems of law.

Equity and the common law

Common law systems of justice, such as the United Kingdom (UK), have long struggled to ensure that the imposition of common law principles, developed by the judiciary, take effect fairly. This need for fairness in application ultimately gave rise to equity. Its roots were applied, according to John Seldon (writing in 1654), in a manner which varied with the 'length of the Chancellor's foot'. [1] Such an assessment was perhaps broadly accurate, as justice relied upon the personal sense of morality of the given Chancellor of the day. Nonetheless, modern equity has witnessed much academic debate concerning the extent to which the common law and equity can, and have, merged. The Queen's Bench Division of the courts, the stronghold of the common law, adopting equity, and the Chancery Division, the successor of the Chancellor acting as the 'King's conscience', adopting common law principles, has gone some way towards affecting an amalgamation. However, commentators such as

[1] Oliver S Rundell, 'The Chancellor's Foot: The Nature of Equity' (1959) XXVII(2) University of Kansas City Law Review 71, 72.

Walter Ashburner remained unconvinced, considering that 'the two streams of jurisdiction, though they run in the same channel, run side by side, and do not mingle their waters'. [2] This perspective was categorically refuted by several notable experts, such as Lord Diplock,[3] confirming that the distinction between the areas of authority is moot given judges administer both legal and equitable systems. What has not disappeared, however, is the sense that the competing aims of making the law certain on the one hand and flexible on the other cannot always be resolved. Thus, it is left to the judge to achieve an effective balance in any given case.[4]

The underlying presumption beneath this debate is the continued disparity many highlight between the common law and equity. It is because of this presumptive lens of separation that further fusion between the two systems elicits such a critical discussion when considering the balance of flexibility and consistency and the overarching aims of fairness within equity. Established debate exists in favour of greater fusion,[5] as well as against efforts to bring common law and equity closer into line.[6] There is also little consensus regarding the extent of current fusion[7] and its effects.[8] The dimension considered in this article could suggest support for the notion of equity and common law remaining separate entities. However, just as nuance pervades in the discussion over flexibility and certainty, so too it exists when considering the benefits of eliminating discrepancies between the two systems.

Much has changed within equity over the years, with it being left to commentators to attempt to track and make sense of those changes. For example, the fusing of the two systems[9] could be cited as either the moment where equity began to lose its ability to fill the gaps within the law or where its primacy was enshrined. This aspect of the debate centres around the notion of whether the two systems have become blurred, or whether this blurring is simply the creation of a purported 'fusion fallacy', used to critique proponents such as Lord Denning [10] for believing that equity and the common law are indistinguishable from one another.[11] Others argue that equitable remedies are being used to protect common law rights, [12] supporting the notion that the lines between equity and the common law are blurred but not entirely combined. Fundamentally, the field is focused upon

---

2 Walter Ashburner, *Principles of Equity* (Butterworth & Co 1902).

3 *United Scientific Holdings Ltd. v Burnley Borough Council* [1978] AC 904, 925.

4 Oliver S Rundell, 'The Chancellor's Foot: The Nature of Equity' (1959) XXVII(2) University of Kansas City Law Review 71.

5 Andrew Burrows, 'We Do This at Common Law but That in Equity' [2002] 22(1) Oxford Journal of Legal Studies 1.

6 F.W. Maitland, Equity: A Course of Lectures (2nd edn, Cambridge University Press 1936) 60; Jill Martin, 'Fusion, Fallacy and Confusion; a Comparative Study' [1994] Jan/Feb Conveyancer and Property Lawyer 13.

7 Jill Martin, 'Fusion, Fallacy and Confusion; a Comparative Study' [1994] Jan/Feb Conveyancer and Property Lawyer 13.

8 Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' [1994] 110(Apr) Law Quarterly Review 238.

9 Judicature Act 1873.

10 United Scientific Holdings Ltd. *v.* Burnley Borough Council [1978] AC 904.

11 Jill Martin, 'Fusion, Fallacy and Confusion; a Comparative Study' (1994) Jan/Feb Conveyancer and Property Lawyer 13.

12 Anthony Mason, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110(Apr) Law Quarterly Review 238.

an opposing dynamic between equity and the common law in which 'the conflict between legal certainty and justice (equity) will never come to an end. … *The one or the other of these twin objectives of the law will dominate; there is no permanent solution.*',[13] and indeed, modern commentators focus instead on celebrating the differences between equity and the common law, resisting their amalgamation[14] and appreciating their individual strengths. What the literature misses, however, is that there is no war, no need for fusion and no need for separation; equity and the common law are co-operative, co-dependent systems of law designed to achieve justice together.

Crucially, however, the further development of common law areas, such as trusts law, and the increasing need for certainty[15] has arguably led to a commensurate growth in the need for flexibility, providing a broader ambit in the application of equity. However, such developments have not found universal favour, with both commentators and the judiciary arguing that the unrestrained expansion of equity into business has potentially done more harm than good.[16] This is because commercial issues often require a higher degree of certainty than equity offers. Consequently, the commercial prominence of English law internationally may perhaps mean that flexibility will become a secondary consideration, with equity being forced into adhering to stricter 'principles', undermining its effectiveness. Nonetheless, an intellectual distinction remains between equity and the common law where a practical one existed before the fusion of the courts. It is to that intellectual distinction that the analysis below turns its focus, supporting the contention that equity is not just flexible in achieving justice. Indeed, it also brings certainty in its operation, making it just as reliable as the common law.

This understanding does not rely upon an artificial perception of fusion or even an alignment between equity and the common law. Indeed, the disparity between the two systems of law is nowhere more apparent than in its most basic precepts. For example, common law rights act in rem (against property) while equity acts in personam (against a person), thus calling them personally to account for acting unconscionably.[17] This means that equity has a clear historical purpose, driven by the need for a system to work in tandem with the common law, responding to its operation to prevent unconscionable actions even where they are in accordance with the law.[18] Ultimately, equity performs many roles to achieve justice, with equitable remedies, originating from where an award of monetary damages would be an insufficient remedy to a given wrong, sitting at the fore. Further, the scope for equitable remedies is seemingly broader than ever, which is just one reason why they will form the main focus of this

---

13 Paul Neuhaus, 'Legal Certainty Versus Equity in the Conflict of Laws' (1963) 28(4) Law and Contemporary Problems 795, 796.

14 Henry E Smith, 'Equity as Meta-Law' (2021) 130(5) Yale Law Journal 1050.

15 *Target Holdings v Redferns* [1996] 1 AC 421 [21].

16 P.J. Millett, 'Equity's Place in the Law of Commerce' (1998) 114(Apr) Law Quarterly Review 214; Lord Briggs of Westbourne, 'Equity in Business' (2019) 135(Oct) Law Quarterly Review 567.

17 *Westdeutsche Landesbank v Islington LBC* [1996] AC 669.

18 *Rochefoucauld v Boustead* [1897] 1 Ch 196.

analysis. This will become evident in the following discussion, where specific cases of equity handling issues familiar to the contemporary legal world are explored.

Effectiveness of equity: Equitable remedies

Equity will be judged as effective if it successfully steps in to prevent unfair outcomes under the common law. Fairness will be determined by what ought to be done in any given circumstance for the morally correct outcome to prevail, where it might not have been done under the common law. Importantly, whether equity is effective should not be confused with the question of whether it is efficient.[19]

The debate around effectiveness is an important one, but for the purposes of this article, a detailed discussion of legal philosophy cannot be accommodated. However, even without this aspect of the debate, it is clear that the operation of law must necessarily be both flexible and consistent if it is to be effective in achieving justice. Achieving one of these aims traditionally appears at cross-purpose to the other, which informs the segregation and consideration of primacy between the common law and equity. As such, equity has traditionally been measured in achieving effectiveness on a critique centred around the idea of a continuum of flexibility; specific cases and areas of law arguably require differing degrees of such flexibility. Yet, equity must operate in a manner which is in keeping with its own maxims and the restrictions of both statute and established legal doctrine. Thus, it cannot act flexibly to the point of applying irregularly in any given context. Consequently, if equity is to be considered effective at ensuring justice, it must achieve a balance between being flexible and consistent. Indeed, the need to accommodate existing maxims and legal norms, as well as to operate consistently where similar contexts of unconscionability arise, gives equity predictability in its application which amounts to certainty.

Equitable remedies are mainly considered because they are widely recognised as the definitive example of equity in action, softening the rigidity and omissions of the common law to achieve justice. The focus of this article is predominantly upon injunctions (a court order which prohibits/compels specific behaviour) and specific performance (a court order which requires compliance with agreed conditions of a contract/legal agreement). These remedies provide a sufficient depth of analysis to lend credibility to the assertion that equity is not limited to being flexible. However, the narrower focus excluding some equitable remedies responds to the variety of different types of injunctions available (prohibitory; mandatory; quia timet; and interim). Nevertheless, other remedies (namely rescission and rectification) will also be briefly considered to demonstrate the scope of remedies, largely confirming the overall conclusion drawn in this article. Further debate over the operation of just one equitable maxim will be observed separately through the topic of restitution, but

---

[19] Anthony J. Duggan, 'Is Equity Efficient?' (1997) 113(Oct) Law Quarterly Review 601.

maxims are not the focus of this analysis.

Injunctions: Filling the gaps?

The traditional perception of equity is focused on its flexibility, although there is no suggestion here that this flexibility is one of equity's key strengths. Thus, even though most injunctions[20] issued by the court are prohibitory in nature, which means they are designed to stop people/legal entities such as companies from continuing specific behaviours, how this is achieved is reactive to the context in which the issue arises. For example, the general test laid down in *American Cyanamid v Ethicon Ltd*[21] requires a serious question to be tried, and that damages would be an adequate remedy if an injunction is not granted. Moreover, the balance of convenience of the parties, in addition to special factors such as the existence of a restraint of trade contrary to public policy, will be considered.[22] However, in certain pressing cases,[23] the court may instead assess the merits of the case as opposed to whether a serious issue is to be considered. This demonstrates that the rules in applying such injunctions are to a certain degree flexible, ensuring the individual facts of the case can be considered where necessary.

In some cases, prohibitory injunctions (which impose restrictions preventing specific behaviour, such as producing specific goods or publishing specific information) can be so flexibly applied that they often have the same effect as imposing a mandatory injunction (which operate by requiring specific behaviour be carried out). Where they arise in the context of business, they can even overlap in some cases with specific performance. This occurred in the case of *Sky Petroleum v VIP Petroleum*,[24] where an order to not 'fail to deliver' functioned as a double negative such that, even though it was a prohibitory injunction, it imposed an obligation to deliver. This shows a notable degree of intersection, whereby a prohibitory injunction can offer the same functional remedy as a mandatory injunction. Nonetheless, this is not to suggest that equity is unnecessarily complex where, what could be two separate orders, will usually be combined into one, [25] thus eliminating duplication.

Injunctions ultimately follow the *de minimis* (nominal harm not warranting legal action) principle,[26] meaning there is a minimal amount of harm/inconvenience which the courts recognise that the parties should absorb before seeking legal action. While this arguably represents an inflexibility in equitable remedies, it, in fact, primarily shows a consistent approach to their operation. Notwithstanding, this is not an inflexibility for the sake of consistent application, but rather a recognition that the law should not be encouraging costly litigation at a cost to the taxpayer in cases where the cost outstrips the value of the decision.

In addition, injunctions will only be granted where

---

20 Senior Courts Act 1981, s 37.
21 [1975] AC 396.
22 *Araci v Fallon* [2011] EWCA Civ 668.
23 *Martin & Co (UK) Ltd v Cedra Ltd and another* [2015] EWHC 1036 (Ch).
24 [1974] 1 WLR 576.
25 *Seven Seas Properties Ltd v Al-Essa* [1989] 1 ALL ER 296.
26 *Warner-Lambert Company LLC v Generics (UK) Ltd* [2018] UKSK 56, para 67.

common law damages are an insufficient remedy, with damages similarly subject to *de minimis*. The effect of this consistency between equity and the common law is that the two systems of law work co-operatively in their effort to screen out frivolous litigation. This can be seen in the case of *Armstrong*,[27] where the claimant objected to the defendant having built a sewer on his land, despite this having caused no damage. The focus of the case revolved around the defendant having obtained the claimant's oral consent to building the sewer before he was aware that he owned the land. While the court did identify a wrong had occurred on a collateral issue, an injunction over the construction of the sewer was prevented because it was a minimal harm. So, though it was unclear whether an injunction could be issued where the party seeking equitable relief had agreed to the harm before he understood his rights ahead of this judgement, there is evident certainty in the application of principles such as *de minimis*, transcending the divide between the two systems of law.

Arguably, this demonstrates how such limiting parameters to the operation of injunctions can lead to uncertainty in many borderline cases, potentially supporting the notion of equity being ineffective. However, in as much as these principles are consistently applied, there is predictability. This means that the particular context in which equity will apply injunctions is put into abeyance to principles governing its operation. This ensures consistency in determining when injunctions will not be available, in addition to parity with the common law. Consequently, this exemplifies how the common law and equity remain distinct but operate co-operatively to provide just outcomes for the parties to an action while also ensuring the effective utilisation of the courts.

Certain standards of operation are necessary to utilise the most appropriate means of achieving justice. For example, justice is served by making a builder pay compensation for sub-standard work (with common law damages) yet would not be achieved by compelling the builder to do the work again (through equitable remedies such as a mandatory injunction or specific performance). Indeed, there is no guarantee that the work would be of a higher standard the second time. Thus, equity is sufficiently certain in its use, following rigid rules of application to offer predictability while remaining reactive to the context of application and being prepared to step aside where the common law offers the best outcome.

Nevertheless, injunctions themselves have an essential role to play, filling in the gaps of unfairness created by the inflexibility of the common law. This has been clear in many cases. Take, for example, instances where a Claimant suffers no damage, but there is a risk of an act such as trespass. This occurred in the case of *Goodson v Richardson*,[28] where an injunction was issued in which there was a 'deliberate and unlawful invasion by one man of another man's land…'.[29] In this instance, equity

---

[27] *Armstrong v Sheppard and Short* [1959] 2 QB 384.
[28] [1874] 9 Ch App 221.
[29] Ibid, 244 (Lord Selborne LC).

stepped in to provide a remedy where the common law could not. Such outcomes show a continuing need for equity to work alongside the common law, notably in cases where a remedy in personam is required.

Similarly, equity offers *quia timet* injunctions, with quia timet meaning 'because he fears' in Latin. This is an appropriate name, as such injunctions arise because the common law is limited to act retrospectively, coming into action only after a harm has occurred. Quia timet injunctions, however, are essentially an order for damage which is yet to occur, dealing with a deficiency in the common law in failing to restrain wrongful acts before they are committed. The common law standing idly by while damage occurs, which often cannot be rectified as if it had never occurred, is, therefore, a flawed means of securing justice. Ultimately, it is only by equity offering an alternative that the potential for such injustice is mitigated. The nature of quia timet injunctions means that they are thus regarded as a uniquely equitable solution. Their reach also naturally necessitates a degree of certainty to ensure consistent application. With this in mind, similar cases[30] have arguably only interpreted and defined the requirements which trigger them differently, yet this is often seen as a failure of certainty in equity. This lack of a defined, inflexible test could increase uncertainty and support the notion of equity failing to ensure fairness. Notwithstanding, the standard appears consistent among cases, with the general rules of equity (in terms of its use as an alternative to damages and its use as a punitive award) applying in all contexts.[31] Additionally, the fact that quia timet injunctions have a degree of flexibility based on the defendant's behaviour shows that they often strike a balance between even-handedness and discretion.

By contrast, there are distinct differences between perpetual and interim injunctions: the former will be awarded at the end of the case, while the latter will act on an intermediary basis to prevent further action from the potential infringer. Interim injunctions are useful in upholding the law and mitigating continuing damage, where the common law would be unable to before trial.[32] While interim injunctions are not theoretically regarded as a replacement to a trial, many parties will use the indicative nature of such injunctions to settle (oftentimes in intellectual property cases). This is a positive aspect to equity, as waiting until full trial may not be viable; this is compounded by the need to maintain counsel throughout the interim, and so such measures are arguably an equitable measure which is necessary, 'prevent[ing] a litigant, who must necessarily suffer the law's delay, from losing by that delay the fruit of his litigation.'[33] This further confirms an understanding that equitable remedies mitigate otherwise unfair outcomes under the common law.

---

30 *Canada Goose UK Retail Ltd v Persons Unknown* [2019] EWHC 2459 (QB); *UK Oil and Gas Plc v Persons Unknown* [2021] EWHC 599 (Ch); *Mace Ltd v Persons Unknown* [2021] EWHC 276 (QB); *Randall v Oates* [2021] 3 WLUK 443.

31 *Redland Bricks v Morris* [1970] AC 652.

32 *Steffen Hair Designs v Wright* [2004] EWHC 2995 (Ch).

33 *Hoffman La Roiche v Secretary of State for Trade and Industry* [1975] AC 295, 355 (Lord Wilberforce).

While the analysis above may be considered a form of 'cherry picking' to suit a specific analytical narrative, an exploration of interim injunctions in more detail confirms the analytical points made. Equity operates on the basis of a consistent pattern: the application of equity follows established parameters and is flexible only in how that consistency accommodates the specific context of individual cases. However, this is far from the random and unpredictable face of a system which needs to be either fused with the common law or excluded entirely from the legal system.

Interim injunctions

An interim injunction is a provisional measure in cases pending trial. They serve the purpose of requiring a party to either do or refrain from doing a specific act where there would otherwise be an injustice. One form of interim injunction is that of the search (Anton Piller) order.[34] These are of increasing importance when observing the topic of equitable remedies and an issue of much contention. Ultimately, there is an evident need for remedies such as search orders and freezing orders[35] over assets, irrespective of whether they are held domestically within the jurisdiction (e.g. the UK) or outside of it. They are required to preserve evidence or property which may otherwise be lost to justice. This function can be of great importance in cases of urgency,[36] or where there is the possibility of serious damage or destruction of evidence.[37] However, it necessarily raises several salient concerns that bear consideration in this article. Notably, an issue arises when discussing the notion of attending court *ex parte*, meaning without notice (in other words, without all the parties being present). This is because the defendant will be unaware of the court hearing, thus unable to argue his case. Examples of cases, such as *Columbia Picture Industries Inc v Robinson*,[38] also show the possibility of such *ex parte* actions effectively closing down a defendant's business.[39] This exemplifies a potential conundrum to such orders, which require a high degree of certainty to prevent unfair application. In seeking to achieve justice, they risk becoming the tools of injustice.

Given such noted concerns, it is perhaps unsurprising that a strict list of safeguards exists, limiting the exercise of interim injunctions such as search orders.[40] To make such an order, there must be an extremely strong case based on its merits, a high likelihood of very serious damage and the real possibility of destruction or corruption of material in the defendant's possession. Further, it must be shown to the court that any harm caused to the defendant and his business affairs would not be excessive. The claimant is also required to put a cross-undertaking in damages into the court to compensate for any unwarranted financial detriment which may occur. The case of *Universal Thermosensors Ltd v Hibben*[41] also lays out several fundamental guidelines, such as ensuring orders are

---

34 *Anton Piller v Manufacturing Processes Ltd* [1976] Ch 55.
35 *Mareva Compania Naviera SA v International Bulkcarriers SA* [1980] 1 ALL ER 213; *Derby & Co v Weldon* [1990] Ch 65.
36 *N (No. 2)* [1967] ALL ER 161.
37 *Abela v Fakih* [2017] EWHC 269 (Ch).
38 [1986] 3 ALL ER 338.
39 Jill Martin, 'Equitable and inequitable remedies' (1990) 91(1) Kings College Law Journal 1.
40 *Anton Piller v Manufacturing Processes Ltd* [1976] Ch 55.
41 [1992] 1 WLR 840.

executed during office hours so that the defendant has access to a solicitor and that they are carried out in the presence of the defendant or his representative. This suggests that search orders are rightfully carried out with caution and in adherence to strict rules, although considerations regarding flexibility and certainty are perhaps not mutually exclusive. Indeed, the fairest and most equitable solution must account for both parties' situations while ultimately following strict guidelines to avoid becoming oppressive.

Notwithstanding the above analysis, several other important factors to consider in the operation of search orders may either refute or support the notion of such fair application. Indeed, equity will not step in where an individual has been complicit in a wrong.[42] The defendant will also have recourse to challenge an order, [43] which shows further protection afforded to the defendant in the event of a search order being incorrectly applied. While the need for the claimant to provide a cross-undertaking in damages may be considered an additional form of protection, ensuring that search orders are fairly applied, it does represent a potential impediment. This is because the claimant may be deterred from bringing a claim where they foresee the potential loss if they are unsuccessful or unable to meet the cost of any potential damage to the defendant. This presents a risk of some being 'priced out' of seeking justice. Nevertheless, the above analysis shows that equity works both certainly and flexibly to achieve the best outcome while not trading one party's justice at the cost of another's. Equity consistently adheres to safeguards that are applied to every case while also remaining flexible as inequities arise. Thus, it can be seen as an effective mechanism for achieving justice, either with or without the co-operation of the common law.

Historically, interim injunctions placed importance on assessing a strong *prima facie* (meaning based on first impression) case in an effort to maintain the status quo ahead of the full trial. [44] Under this practice, there was room to critique the justice in what effectively became a 'mini trial'. Here, parties were either not all present, had insufficient time to identify the best evidence or strongest arguments, or worked off facts which were often in dispute. Consequently, the court adopted a new approach: considering who had the most to lose [45] and directing its efforts towards imposing the least harm, as harms and gains were 'balanced' against each other. This was referred to as the *balance of convenience* test. Under this approach, the strength of the case only warranted consideration as an exception, [46] or a last resort. [47] Over time, the consistency in the courts' rigid adherence to the ~~*balance of convenience*~~ test resulted in the identification of an increasing number of special factors that would suspend the test's application in

---

42 *Coca Cola v Gilbey* [1996] FSR 23.

43 *Gadget Shop v Bug.com* [2000] ChD 28; *Rank Film Distributors v Video Info Centre* [1981] AC 380; *Dormeuil Freres SA v Nicolian International (Textiles) Ltd* [1988] 1 WLR 1362.

44 *J T Stratford and Son Ltd v Lindley* [1965] AC 269; *Harman Pictures NV v Osborne* [1967] 1 WLR 723.

45 *American Cyanamid Co v Ethicon* [1975] AC 396 (Lord Diplock).

46 *Fellows & Son v Fisher (1976) QB 122.*

47 *Cambridge Nutrition Ltd v BBC* [1990] 3 All ER 523 (CA).

favour of consideration according to statutory requirements or the merits of the case.[48] This detracted from the benefits of equity's discretion and flexibility,[49] as well as undermining its operational certainty. Nonetheless, it is a testament to the development of equity that this imbalance has now been corrected,[50] with later cases showing that the courts will consider the strength of the parties' cases as a first course of action where it is easily apparent. Now, only where that is not possible does the balance of convenience become the focus of the courts' attention. In other words, equity is consistent in applying a specific procedure focused on achieving justice by the best means; the precision in which this is achieved is recognised as being open to improvement. There are no new criteria established in achieving this, with the courts simply engaging a 'course correction', shifting focus from an emphasis placed on one parameter to another. Thus, the parameters remain certain, with only the priority they are given flexing.

A freezing injunction is an order to preserve assets. Such orders are far-reaching, with the power to affect all forms of assets, even applying to third parties who hold assets belonging to a defendant. Thus, such remedies must correctly balance the need for flexibility and certainty. Arguably, such measures are oppressive and run counter to the purpose of equitable remedies.[51] Indeed, past cases have shown the hardship which can be caused by freezing assets, where releasing funds after the order was imposed in a civil action to pay for legal counsel on a separate criminal case resulted in both the defendant and his solicitor being held in contempt of court.[52] However, much like search orders, freezing injunctions are subject to a range of safeguards,[53] with a high standard of proof necessary. This ensures equitable application as far as is possible. Additionally, a freezing injunction will only cover assets up to the claimed amount, allowing the defendant to continue using any remaining assets. Crucially, there is seemingly a conflict between the limitations in place which ensure consistency and the level of flexibility afforded to equitable remedies. Indeed, these measures are necessary to ensure such remedies are fair but unoppressive, which only appears to be the basis of inconsistency where it is not appreciated that equity is necessarily mediating between different inequities. The rights of the civil claimant rightly take priority over the needs of the defendant in a different legal action. Thus, without both discretion and limiting parameters, equity would be unsuitable in mediating between competing claims on justice.

Before reaching a conclusion about injunctions, there are also defences to consider. These encompass a consistent list of options that can

---

48 For example, the Trade Union and Labour Relations (Consolidation) Act 1992, s221(1); *NWL Ltd v Woods (1979) 1 WLR 1294; Cayne v Global Natural Resources* (1984) 1 All ER 225.

49 Jean-Philippe Groleau, 'Interlocutory injunctions: revisiting the three-pronged test' (2008) 53 McGill L.J 269, 280.

50 *Series 5 Software v Clarke* [1996] 1 ALL ER 853.

51 Filip Saranovic, 'Rethinking the scope of freezing injunctions' (2018) 37(3) Civil Justice Quarterly 383.

52 *TDK Tapes Distribution (UK) v Videochoice* [1985] ALL ER 345

53 Scott Ralston, 'Freezing order in the Court of Appeal: what safeguards is the respondent entitled to expect' (2010) 29(1) Civil Justice Quarterly 19.

include grounds of delay, [54] acquiescence, [55] hardship, [56] the claimant's conduct [57] and public interest/private rights.[58] This could raise questions over the benefits of balancing flexibility and certainty within equity; indeed, being excluded from claiming due to a delay is arguably inequitable.[59] Nonetheless, this defence, much like the others above, exists to ensure fairness, as it would be unjust to allow a claim if it was reasonable for the other party to assume there would not be one.[60] Ultimately, the court cannot order such a remedy if the individual cannot carry out the remedial action or if they have no control over the act. The court will also decide if/when such remedies are used, meaning that discretion can be exercised, even in cases where the conditions to obtain relief would otherwise appear met. This means that injunctions seemingly deal with the hard edges of the law while ensuring equity where the common law would cause inequity.

Ultimately, it appears clear that equity remains a marriage of flexibility and certainty. In cases of injunctions specifically, the potential for harsh outcomes for defendants must be carefully balanced with underlining guidelines, principles and defences. Further, it appears clear that discretion, furthering flexibility, can also help to increase effectiveness in this way, ensuring that obtaining an injunction is not a case of simply ticking boxes. Nonetheless, further examples of remedies must be considered, such as specific performance, in order to ensure the relationship between flexibility and certainty is not simply confined to injunctions.

Specific performance

Specific performance is an equitable remedy utilised 'instead of damages, only when it can by that means do more perfect and complete justice.'[61] Crucially, specific performance ably demonstrates how equity fills the gaps left by the common law in situations where the best solution is for a party to fulfil their contractual obligations[62] but common law remedies, such as damages, are inadequate.[63] This can be due to difficulty in quantifying damage[64] or where the obligation is continuing. [65] Additionally, whereas damages at law require a breach of contract, this is not necessarily the case with specific performance.[66] Critically, equitable remedies show once again their ability to step in where the common law, orientated to provide certainty at the expense of reactivity, delivers inadequate justice.

The fact that civil law jurisdictions incorporate the right to exact specific performance for claimants as a primary remedy demonstrates that this equitable

---

54 *Johnson v Wyatt* (1863) De GJAS 18; *Bates v Lord Hailsham of St Marylebon* [1972] 1 WLR 1373; *HP Bulmer Ltd & Showerings Ltd v Bollinger SA* [1977] 2 CMLR 625.

55 *Richards v Revitt* (1877) 7 ChD 224; *Jones v Stones* [1999] 1 WLR 1739.

56 *Attorney General v Colchester Corp* [1955] 2 QB 207.

57 *Tinsley v Milligan* [1994] 1 AC 340 (Lord Goff).

58 *Miller v Jackson* [1977] QB 966.

59 *Gafford v Graham* [1998] 4 WLUK 162 (CA); Property Law Bulletin, 'Remedies: delay defeats injunctions' (1998) 19(3) PLB 20; Estates Gazette, 'He who hesitates' (1999) 9942 EG 134.

60 *Nelson v Rye* [1996] 1 WLR 1378.

61 *Wilson v Northampton and Banbury Junction Rly Co* (1874) 9 Ch App 279, 284 (Selborne LC).

62 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1988] AC 1; *Westfields Homes Ltd v Keay Homes (Windrush) Ltd* [2020] EWHC 3368 (Ch).

63 *Beswick v Beswick* [1968] AC 58.

64 *Co-operative Insurance Society Ltd v Argyll Stores (Holdings) Ltd* [1988] AC 1.

65 *Beswick v Beswick* [1968] AC 58.

66 *Marks v Lilley* [1959] 2 All ER 647; *Hasham v Zenab* [1960] AC 316 (PC).

remedy plays an important role in providing flexibility to the application of any legal system. This is significant given the nature of civil law jurisdictions as the epitome of certainty, entrenched in a way that common law is not. Notwithstanding, it is argued that specific performance in civil law countries remains a rare remedy regardless, tempering this assertion.[67] It is maintained that specific performance can and is used in a range of situations and plays a meaningful role in upholding fairness by balancing the duality of certainty and flexibility. Indeed, it has been argued that the remedy should be favoured less in cases such as land, where it was historically available automatically on the grounds of being unique and thus irreplaceable.[68] Likewise, it has also been contended that this should be expanded and that specific performance should be made available in a similar way for contracts for the sale of unique personal property.[69] Regardless, the supposition that equity can be linearly shifted one way or another to increase or decrease certainty is flawed. Indeed, it can be asserted that movement away from specific performance in certain instances might, in fact, increase uncertainty. Observing the shift within Canadian courts away from the automatic availability of specific performance in cases of land shows that ambiguity can flow from having a restricted and unclear scope of application.[70]

Another point to consider is when specific performance is automatically unavailable. Indeed, it could be argued that limiting the courts from exercising their discretion in cases where the contract requires supervision is inequitable. The limiting nature of this general rule often means that specific performance is not available as a remedy in most cases of repair or building contracts. Therefore, it could be argued that equity does not go far enough when compensating for the inflexibility of strict law. Additionally, the lack of availability of specific performance in personal service contracts reinforces this, as it perhaps leaves many without an adequate remedy when their contracts are unfairly terminated. Nonetheless, the idea of forcing an employer to take back wrongfully dismissed employees is rightfully only available in the most exceptional cases. For example, in the case of *Ashworth v Royal National Theatre*,[71] a theatre engaged professional musicians to play at a production but subsequently terminated their contracts. Specific performance would have compelled the theatre company to continue working with the musicians pending trial, which would have interfered with their right to artistic freedom.[72] Further, compelling the contracting party or employee to continue carrying out a service could perhaps be likened too closely to that of court compelled 'slavery'. Notwithstanding, this is not necessarily a rigid rule, as previous case law shows instances of specific performance being made

---

67 Henrik Lando, 'On the enforcement of specific performance in civil law countries' (2004) 24(4) International Review of Law and Economics 473.

68 Martin Dixon, 'Challenging received wisdom' (2018) 2 Conveyancer and Property Lawyer 105.

69 Mark Pawlowski and James Brown, 'Sale of land and personal property: the purchaser as beneficial owner' (2020) 34(2) Trust Law International 63.

70 Paul Davies, 'Being specific about specific performance' (2018) 4 Conveyancer and Property Lawyer 324.

71 [2014] EWHC 1176 (QB).

72 Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.

available under circumstances of contracts of repair, compelling parties to repair what they had built when materials failed to perform as expected.[73] It is also clear that specific performance is often awarded in cases where it is a more suitable alternative to other remedies.[74]

The central argument here is that specific performance is a necessary tool which is utilised responsively to the context in which it is relevant to consider. Yet, a debate is ongoing over whether its use is too broad or too narrow. Crucially, this again highlights how finely equity must, and largely does, deploy certainty of rules with the flexibility of discretion. Expecting equity to respond to anything but the context before the court consequently appears as a critique in search of a universally accepted equilibrium, where certainty and flexibility are wrongly regarded as opposites on a single continuum. However, this analysis identifies that certainty and flexibility are, in fact, co-operatively employed through equitable remedies such as specific performance to achieve the most appropriate remedial outcome.

Equitable damages

Ultimately, the courts may award damages as well as/instead of other equitable remedies.[75] Indeed, there are many situations where common law damages may be inadequate (for example, in cases of secrets, reputation or potential future damages).[76] In such cases, equity has the scope to award punitive damages to balance the inequity where an injunction would be insufficient.[77] Where exemplary damages are not available under the common law, this means equity can step in to ensure that no wrong is overlooked. Indeed, it is in these voids that injustice manifests. Thus, equitable remedies can still act to mitigate 'the rigours of strict law'.[78] Nonetheless, it could be argued that such concepts ultimately blur the lines between common law and equity, as there are situations where both equitable and common law damages are possible, leading to the conclusion that such areas are ill-defined.[79] Additionally, the fact that such decisions are made at the discretion of the court naturally leads to the claim that they are surrounded by too much uncertainty. Nonetheless, the clear distinction to be drawn is in the punitive nature of equitable damages, imposing a financial cost to a moral wrong, in contrast to common law damages, which can only cover the actual loss suffered. Thus, the discretion afforded in the awarding of equitable damages, coupled with their possible use alongside the common law, shows an amalgamation of certainty and flexibility. After all, equity responds consistently when faced with the same wrongs, maintaining the freedom also to identify and respond to new contexts of unconscionability.

---

73 *Blue Manchester Ltd v North West Ground Rents Ltd* [2019] EWHC 142 (TCC); Lucy Shepherd and Luke Holden, 'Enforcement by specific performance' (2019) 370 Property Law Journal 12.

74 *Lexington Insurance Co v Flashpoint Ltd* [2001] 1 WLUK 398; Allen and Overy, 'Specific performance where damages an inadequate remedy' (2001) 16(4) Butterworths Journal of International Banking & Financial Law 197.

75 Senior Courts Act 1981, s50.

76 *Leeds Industrial Cooperative Society Ltd v* Slack [1924] AC 851.

77 *Ferguson v Wilson* (1866) 2 Ch App 77.

78 *Crabb v Arun District Council* [1976] Ch 179, 187 (Lord Denning MR).

79 Ian Davidson, 'The equitable remedy of compensation' (1981) 13 Melb U. L. Rev. 349.

Rescission and rectification

Rescission aims to restore the parties to their position before a contract or transaction was made. In any given sense, the meaning of rescission must be determined by the context in which it is referred to, highlighting how essential flexible application is to ensuring justice. Principally, confusion emerges because the word lacks a primary meaning.[80] In cases outside of those involving a contract voidable at common law and with easily recoverable damages or property,[81] it is often the case that rescission steps in as an equitable remedy to facilitate *restitutio in integrum* (restoring an injured party to their original condition) where the common law would be unable to do so.[82] Ultimately, it is clear that rescission fills an important gap within the law, where an injured party should be restored to the position they were in before an injury, not because there has been some provable breach, but because equity will not suffer the legal system to be unresponsive to the use of sharp practices (e.g. misrepresentation or undue influence), or even simple human error (e.g. where a seller is mistaken about whom they are contracting with). This highlights how the moral indignation of equity fuels both its flexibility in terms of the wrongs it responds to, as well as its consistency. With this, it works to counteract unfairness.

Similarly, rectification aims to correct a written instrument to make it congruent with the parties' intentions. Thus, the parties must have been in complete agreement regarding the document's terms but erred in their transcription.[83] While it may be argued that there is little need for rectification in equity, due to the ability under common law to correct an obvious mistake,[84] correcting a document within the common law is only available where the intention of the parties is evident from the document itself. Therefore, this equitable remedy is required to act as a mainstay of fairness in cases of a common mistake. Notwithstanding, there is no rectification available if a term is deliberately omitted or added[85] based on a mistaken belief of fact.[86] This could show that equitable remedies are failing to step in and fulfil their purpose, mitigating unfairness where what ought to have been done in light of the full facts was not. However, this point is invalid, as it is unimportant regarding fairness whether the parties had all material facts in their minds.[87] This is essentially the case in order to strike a balance between curing inequity and giving rights to individuals who may otherwise exploit the remedies available. This again leads to the conclusion that both flexibility and consistency are required to

---

80 *Buckland v Farmer and Moody* [1978] 3 ALL ER 929 (Buckley LJ).

81 *Stone v City and Country Bank* (1877) 3 CPD 282 (CA); *Jones v Keene* (1841) 2 Mood & R 348.

82 *Smith v Chadwick* (1883) 9 App Cas 187 (HL); *Redgrave v Hurd* (1881) 20 Ch D 1 (CA); *Oakes v Turquand* (1867) LR 2 HL 325; *Angel v Jay* [1911] 1 KB 666 (DC); *Allcard v Skinner* (1887) 36 Ch D 145 (CA); *Great Peace Shipping Ltd v Tsavliris Salvage (International) Ltd* [2002] EWCA Civ 1407; *Ross River Ltd v Cambridge City Football Club Ltd* [2007] EWHC 2115 (Ch).

83 *Frederick E Rose (London) Ltd v William H Pim Jnr & Co Ltd* [1953] 2 QB 450.

84 *Burchell v Clark* (1876) 2 CPD 88, 97 (CA) (Amphlett LJ).

85 *Rake v Hooper* (1900) 83 LT 699.

86 *Worrall v Jacob* (1817) 3 Mer 256; *City and Westminster Properties (1934) Ltd v Mudd* [1959] Ch 129; *Lord Irnham v Child* (1781) 1 Bro CC 92.

87 *Barrow v Barrow* (1854) 18 Beav 529.

achieve justice and for equity to perform its role co-dependently with the common law effectively.

Equity is not without 'teeth' in securing compliance with its remedies. Any individual who fails to comply with a court order, including an undertaking (in cases such as an undertaking in lieu of injunction), will be in contempt of court. This would result in fines or imprisonment, or the sequestration of assets in the case of companies. An injunction is also fully capable of binding third parties.[88] Consequently, it is argued that equitable remedies can be relied upon, perhaps even more broadly than their common-law counterparts. [89] Arguably, injunctions are unfair on the grounds of being overly flexible when considering the implications for third parties. Nonetheless, this is an unfounded point, as injunctions must be expressed in exact terms, with casual, accidental or unintentional acts not giving rise to liability.[90] This reinforces the analysis that equity is both consistent in when it will be relevant but reactive to the context for its precise terms. Additionally, any activity in breach of an injunction will be treated as void for illegality, demonstrating the strength of injunctions when considering non-compliance. Indeed, this shows equity yet again ensuring justice.

The analysis so far has chosen the best example of equity in action in the guise of its remedies. However, in order to identify that this combination between certainty and flexibility within equity is an effective means of ensuring justice, either in tandem with the operation of the common law or seemingly in its stead, the same effect in a context in which equity has been perceived as being less than an ideal development must be shown. Consequently, the following focuses on constructive trusts.

Constructive trusts

Constructive trusts arise in a host of different circumstances, such as where property has come into the hands of an alleged trustee by way of an unconscionable dealing or the breach of a fiduciary duty. [91] While institutional constructive trusts possess a narrow definition, arising in a limited range of very specific contexts by operation of the law and without the court's discretion, the same is not true of either 'new model' or remedial constructive trusts. Instead, these types of constructive trusts involve a degree of flexibility and discretion, being wholly reliant upon either the unconscionability of the context or the need to change a wrong at the point of judgement. Consequently, this exemplifies that the supposition of equity solely operating based on an almost random exercise of discretion is inaccurate. Indeed, institutional constructive trusts serve the same overarching purpose of equity, which is to prevent injustice, and because the same situations consistently trigger them, they function in an environment of certainty comparable to the common law. This supports the notion of equity and the common law sharing similar standards of

---

88 *Acrow (automation) Ltd v Rex Chainbelt Inc* [1971] 3 ALL ER 1175; *A-G Times Newspapers Ltd* [1992] 1 AC 191.

89 Zhong Xing Tan, 'Illegality and the promise of universality' (2020) 6 Journal of Business Law 428.

90 *Fairclough v Manchester Ship Canal* (1897) 41 Sol Jo 225 (CA).

91 Albeit this is now regarded as historical: *Bray v Ford* [1896] AC 44; *Reading v Attorney-General* [1951] AC 507; *Tito v Waddell (No2)* [1977] Ch 106.

certainty, which is essential if they are to function co-operatively.

The claim that the operation of institutional constructive trusts appears congruent with the common law because they operate consistently across a range of triggering circumstances requires further explanation. Ultimately, unconscionability consistently arises in a range of circumstances. For example, where trustees or fiduciaries breach their duties,[92] irrespective of how that breach occurs, because they have abused the power their position afforded them; where a breach of trust involves a third party 'stranger' who dishonestly assisted,[93] or who knowingly holds trust property which should be returned there is a wrong which needs to be corrected or a benefit which needs to be removed;[94] or where property would be inherited as an inevitable consequence of an unlawful killing,[95] which similarly represents a gain that cannot in good conscience be ignored. All of these circumstances are bound by a common thread. That is, the legal system cannot sit by inactively in the face of these contexts. There is no flexibility here, but a simple recognition that these are all contexts which are consistent in giving rise to an unconscionability if a benefit is to be derived or a wrong not to be corrected. However, the consistency applied by the courts in recognising institutional constructive trusts exceeds even this response to a wrong. This is because it is not applying a general rule, defining the circumstances in which liability will arise, which could easily catch the unwary as they flex to extend to new contexts. Instead, institutional constructive trusts only arise in a finite set of circumstances, which means they are already sufficiently clear and certain to be avoided. This is precisely the same level of certainty as that adopted by the common law. Thus, there is arguably no need for equity to become 'fused' with the common law or to grow to be more certain.

While certainty is called for, especially in cases involving property and trusts, there arguably remains a need for discretion in the operation of 'new model'[96] constructive trusts, which are flexible enough to fill in the existing gaps within the common law. This is because they cover situations in which institutional constructive trusts are not recognised but which come within the broader concept of correcting an unconscionability. Consequently, new model constructive trusts have occurred unexpectedly, even where their application may run contrary to the law,[97] due to addressing the overarching need for justice. This does not mean that the 'tenderest exchanges of a common law courtship…' should 'assume an unforeseen significance…'[98] where common intention constructive trusts are construed to give force of law to 'pillow talk', recognising a beneficial interest for a cohabitant on the slimmest of evidence. It does, however, mean that there are areas in which the

---

92 *Boardman v Phipps* [1966] UKHL 2.

93 *Ivey v Genting Casinos (UK) Ltd* [2017] UKSC 67.

94 *BCCI (Overseas) Ltd v Akindele* [2001] Ch 437.

95 *Re Crippen* [1911] P 108.

96 *Hussey v Palmer* [1972] EWCA Civ 1 (Denning MR); *Binions v Evans* [1972] 2 ALL ER 70; *Eves v Eves* [1975] 3 ALL 769; *Re Cleaver* [1981] 1 WLR 939; *Ashburn Ansalt v Arnold* [1988] 2 ALL ER.

97 *Peffer v Rigg* [1977] 1 WLR 285; *Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044.

98 *Hammond v Mitchell* [1992] 2 ALL ER 109 (Waite J).

common law is inadequate; it is for equity to meet this deficit. However, there are places where these constructive trusts have been found to create uncertainty in response to an ad hoc unconscionability. Indeed, this is because they cannot entirely be predicted (for example, in cases giving rights to third parties without legal precedent or regarding the rule concerning registered land), thus undermining confidence in the law.[99]

Notwithstanding, the courts may be gradually moving away from the operation of this form of trust.[100] It is debatable if this is a positive development, designed to limit the scope of constructive trusts and thereby increase predictability within the law, or whether it is designed to limit the range of mechanisms by which justice can be achieved.

Conversely, remedial constructive trusts have proven too flexible in their operation at the point of judgement,[101] prompting them to be disapproved in the UK, with calls on other common law jurisdictions to adopt the same approach.[102] However, considering the adoption of equity worldwide,[103] there yet remains conflict in their operation.[104] This can only increase the level of uncertainty within the law.[105] This arguably shows equity as being ill-defined and unreliable, leading to uncertainty in a separate way and, notwithstanding there are multiple advantages to be offered by adopting remedial constructive trusts,[106] the UK has limited the degree to which equity can be truly flexible without also offering some degree of certainty.

In summary, the elimination of remedial constructive trusts and the decline in the use of the 'new model' variant have arguably shored up the predictability of equity while simultaneously eroding the scope of constructive trusts to affect justice. It could be argued that institutional constructive trusts should be able to identify all avenues of potential unconscionability,[107] thus negating the need for other forms of constructive trusts which rely upon discretion or arise unpredictably. However, the common law is subject to equivalent flexibility in how it is interpreted in line with changing policy, yet this is never

---

99 *Binions v Evans* [1972] 2 ALL ER 70; *Peffer v Rigg* [1977] 1 WLR 285; *Lyus v Prowsa Developments Ltd* [1982] 1 WLR 1044.

100 *Re Polly Peck Ltd (No 2)* [1998] 3 All ER 812 (Nourse LJ); Katy Barnett, 'Chasing will-o'-the-wisp: the English courts' impossible quest for 'certainty' in constructive trusts over bribes' (2019) 25(3) Trusts & Trustees 319.

101 *Neste Ov v Lloyds Bank plc* [1938] 2 Lloyd's Rep 658; *Bailey and Anor v Angrove's PTY Limited* [2016] UKSC 47; *FHR European Ventures LLP v Cedar Capital Partners LLC* [2016] EWHC 359.

102 *FHR European Ventures LLP v Cedar Capital Partners LLC* [2016] EWHC 359; *Bailey and Anor v Angrove's PTY Limited* [2016] UKSC 47.

103 *Muschinski v Dodds* [1985] HCA 78; *Sorochan v Sorochan* [1986] 2 SCR 38.

104 *London Allied Holdings Limited v Lee* [2007] 2061 (Ch) (Etherton J).

105 Azfer Khan, 'Certain uncertainty: thoughts against the remedial constructive trust' (2017) 23(8) Trusts & Trustees 859.

106 Charlie Webb, 'The myth of the remedial constructive trust' (2016) 69(1) Current Legal Problems 353; William Gummow, 'Dishonest Assistance and Account of Profits' (2015) 74 Cambridge Law Journal 405; Graham Virgo, 'The Genetically Modified Constructive Trust' (2016) 2 Canadian Journal of Comparative and Contemporary Law 579.

107 Paul Matthews, 'English Law and the Remedial Constructive Trust' (1998) 4 Trust & Trustees 14; Charlie Webb, 'The myth of the remedial constructive trust' (2016) 69(1) Current Legal Problems 353.

considered a cause to curtail the operation of policy or the reliability of the common law.

Conclusion

There are clearly distinct arguments on both sides of the debate regarding whether equity successfully mitigates injustice. Indeed, observing the nuances of interim injunctions espouses the fact that this debate is far from clear-cut. Notably, there would seem to be times when the full facts of a case will not be available and, equally, times when simply observing the stronger case might not lead to an equitable outcome. Considering specific performance, it also seems that simply restricting the operation of equitable remedies does not necessarily increase certainty; this demonstrates the difficulty in perceiving legal systems through the lens of opposing ends of a continuum, flexibility and certainty, which is not representative of reality. Equitable instruments, such as constructive trusts, would seem to reveal the broader function of equity: the need for clarity in specific cases necessitates the narrowly defined nature of such mechanisms, which is just one way of affecting overall certainty. Functionally, equity serves to balance different parties' needs, juggling competing wrongs to mitigate against otherwise unjust legal outcomes and delivering the necessary flexibility required by an effective legal system. While much has developed within equity over the years, it continues to play a crucial and unacknowledged role. This is directed towards achieving justice through both reliability and fairness in tandem with the common law and not in spite of it.

Acknowledgements

My thanks are expressed to Dr Amanda Warren-Jones for her guidance and support throughout the development of this article, in addition to her teaching of the equity and trusts module during my undergraduate legal studies.

Bibliography

Primary Sources

Statute

Judicature Act 1873
Senior Courts Act 1981
Trade Union and Labour Relations (Consolidation) Act 1992

Cases

Abela v Fakih [2017] EWHC 269 (Ch)
Acrow (automation) Ltd v Rex Chainbelt Inc [1971] 3 ALL ER 1175
A-G Times Newspapers Ltd [1992] 1 AC 191
Allcard v Skinner (1887) 36 Ch D 145 (CA)
American Cyanamid v Ethicon Ltd [1975] AC 396
Angel v Jay [1911] 1 KB 666 (DC)
Anton Piller v Manufacturing Processes Ltd [1976] Ch 55
Araci v Fallon [2011] EWCA Civ 668
Armstrong v Sheppard and Short [1959] 2 QB 384
Ashburn Ansalt v Arnold [1988] 2 ALL ER
Ashworth v Royal National Theatre [2014] EWHC 1176 (QB)
Attorney General v Colchester Corp [1955] 2 QB 207
Bailey and Anor v Angrove's PTY Limited [2016] UKSC 47
Barrow v Barrow (1854) 18 Beav 529
Bates v Lord Hailsham of St Marylebon [1972] 1 WLR 1373
BCCI (Overseas) Ltd v Akindele [2001] Ch 437
Beswick v Beswick [1968] AC 58
Binions v Evans [1972] 2 ALL ER 70
Blue Manchester Ltd v North West Ground Rents Ltd [2019] EWHC 142 (TCC)
Boardman v Phipps [1966] UKHL 2
Bray v Ford [1896] AC 44
Buckland v Farmer and Moody [1978] 3 ALL ER 929
Burchell v Clark (1876) 2 CPD 88 (CA)
Cambridge Nutrition Ltd v BBC [1990] 3 All ER 523 (CA)
Canada Goose UK Retail Ltd v Persons Unknown [2019] EWHC 2459 (QB)
Cayne v Global Natural Resources (1984) 1 All ER 225
City and Westminster Properties (1934) Ltd v Mudd [1959] Ch 129

Treaties

Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

Secondary Sources

Journals

Allen and Overy, 'Specific performance where damages an inadequate remedy' (2001) 16(4) Butterworths Journal of International Banking & Financial Law 197

Barnett K, 'Chasing will-o'-the-wisp: the English courts' impossible quest for 'certainty' in constructive trusts over bribes' (2019) 25(3) Trusts & Trustees 319

Burrows A, 'We Do This at Common Law but That in Equity' [2002] 22(1) Oxford Journal of Legal Studies 1

Davidson I, 'The equitable remedy of compensation' (1981) 13 Melb U. L. Rev. 349

Davies P, 'Being specific about specific performance' (2018) 4 Conveyancer and Property Lawyer 324

Dixon M, 'Challenging received wisdom' (2018) 2 Conveyancer and Property Lawyer 105

Duggan A.J., 'Is Equity Efficient?' (1997) 113(Oct) Law Quarterly Review 601

Estates Gazette, 'He who hesitates' (1999) 9942 EG 134

Groleau J, 'Interlocutory injunctions: revisiting the three-pronged test' (2008) 53 McGill L.J 269, 280

Gummow W, 'Dishonest Assistance and Account of Profits' (2015) 74 Cambridge Law Journal 405

Khan A, 'Certain uncertainty: thoughts against the remedial constructive trust' (2017) 23(8) Trusts & Trustees 859

Lando H, 'On the enforcement of specific performance in civil law countries' (2004) 24(4) International Review of Law and Economics 473

Lord Briggs of Westbourne, 'Equity in Business' (2019) 135(Oct) Law Quarterly Review 567

Martin J, 'Equitable and inequitable remedies' (1990) 91(1) Kings College Law Journal 1

Martin J, 'Fusion, Fallacy and Confusion; a Comparative Study' [1994] Jan/Feb Conveyancer and Property Lawyer 13

Mason A, 'The Place of Equity and Equitable Remedies in the Contemporary Common Law World' (1994) 110(Apr) Law Quarterly Review 238

Matthews P, 'English Law and the Remedial Constructive Trust' (1998) 4 Trust & Trustees 14

Millett P.J., 'Equity's Place in the Law of Commerce' (1998) 114(Apr) Law Quarterly Review 214

Neuhaus P, 'Legal Certainty Versus Equity in the Conflict of Laws' (1963) 28(4) Law and Contemporary Problems 795

Pawlowski M and Brown J, 'Sale of land and personal property: the purchaser as beneficial owner' (2020) 34(2) Trust Law International 63

Property Law Bulletin, 'Remedies: delay defeats injunctions' (1998) 19(3) PLB 20

Ralston S, 'Freezing order in the Court of Appeal: what safeguards is the respondent entitled to expect' (2010) 29(1) Civil Justice Quarterly 19

Rundell O.S., 'The Chancellor's Foot: The Nature of Equity' (1959) XXVII(2) University of Kansas City Law Review 71

Saranovic F, 'Rethinking the scope of freezing injunctions' (2018) 37(3) Civil Justice Quarterly 383

Shepherd L and Holden L, 'Enforcement by specific performance' (2019) 370 Property Law Journal 12

Smith H.E., 'Equity as Meta-Law' (2021) 130(5) Yale Law Journal 1050

Tan Z.X., 'Illegality and the promise of universality' (2020) 6 Journal of Business Law 428

Virgo G, 'The Genetically Modified Constructive Trust' (2016) 2 Canadian Journal of Comparative and Contemporary Law 579

Webb C, 'The myth of the remedial constructive trust' (2016) 69(1) Current Legal Problems 353

Books

Ashburner W, *Principles of Equity* (Butterworth & Co 1902)

Maitland FW, Equity: A Course of Lectures (Chaytor AH and Whittaker WJ, 2nd edn, Cambridge University Press 1936)