# SPECIFIC PERFORMANCE: MUTUALITY: DAMAGES IN LIEU: A QUESTION OF JURISDICTION OR DISCRETION

*PRICE* v. *STRANGE*[1]

In an introduction to his judgment, Buckley, L.J. succinctly stated the problem to be resolved:

> Each of the two main questions for decision . . . is of a considerable historical age, of some general importance and remarkably devoid of direct judicial comment. Coincidently they both date from the year 1858 . . . They are, first, whether Sir Edward (Fry) was right in the view expressed in his celebrated work that the date at which the existence of mutual availability of specific performance as a remedy . . . must be found to exist is, as a general rule, the date of the contract; and, second, whether Lord Cairns' Act is applicable in the present case.[2]

Essential to the answering of these questions was a determination whether mutuality affected the court's jurisdiction to entertain the plaintiff's claim for specific performance, or whether it was merely a factor to be considered in the exercise of the court's discretion to grant an equitable remedy. By characterising mutuality as going to discretion and not to jurisdiction, the English Court of Appeal appeared to be following a trend towards making specific performance a more flexible and readily available remedy that it traditionally has been considered to be.

**Facts**

The defendant, Mrs. Strange, was tenant of certain premises. The plaintiff, Mr. Price, was holding over on an underlease of part of the premises. On February 10, 1974, the defendant orally agreed to grant to the plaintiff a new underlease for a term equivalent to the defendant's own lease (less a nominal reversion), with minor variations in terms and at an increased rent. In consideration, the plaintiff orally agreed to carry out certain repairs to the interior and exterior of the building. The oral agreement was substantially recorded in a letter the plaintiff sent to the defendant on February 11, 1974, but the defendant never signed any written document concerning the new underlease. The plaintiff paid rent at the increased rate and completed the interior repairs, but was prevented

[1] [1977] 3 All E.R. 371 (C.A.).
[2] *Id.* 386b.

from carrying out the exterior repairs when the defendant purported to repudiate the agreement. The defendant then had the exterior repairs done at her own expense, but continued to accept rent at the increased rate.

The plaintiff sought specific performance of the oral agreement for a new underlease, or alternatively, damages in lieu of specific performance under the Chancery Amendment Act 1858, s. 2 (Lord Cairns' Act).[3]

**Counsel's Arguments**

The defendant conceded at the hearing that the repair work done by the plaintiff and the payment and acceptance of the increased rent were sufficient acts of part performance to take the case out of the Law of Property Act 1925, s. 40.[4] However, she argued that specific performance could not be granted because at the date the contract was entered into the remedy was not mutual: that is, the defendant could not have obtained specific performance against the plaintiff to execute the repairs because such obligations were not amenable to specific performance. The relevant date to assess mutuality was the date the contract was entered into. Therefore, subsequent performance of the obligations which could not be specifically enforced would not cure the lack of mutuality. In addition, lack of mutuality was not merely one of many discretionary factors to be taken into account when deciding whether or not to grant specific performance. It deprived the court of "jurisdiction to entertain an application" for specific performance. Therefore, the court had no power under Lord Cairns' Act to award damages in substitution for specific performance.

The defendant submitted that the law on mutuality and damages in equity was correctly stated in *Fry on Specific Performance*[5] and based her argument on the following extracts:

A. A *contract* to be specifically enforced by the court *must*, as a general rule, *be mutual*, — that is to say, such that it might, *at the time it was entered into*, have been enforced by either of the parties against the other of them.

B. The mutuality of a contract is, as we have seen, to be judged of at the time it is entered into. (So that it is no objection to the plaintiff's right, that the defendant may by delay, or other conduct on his part subsequent to the contract, have lost his right against the plaintiff).
From the time of the execution of the contract being the time to judge of its mutuality it further follows, that the *subsequent performance* by one party of terms which could not have been

[3] The Supreme Court Act 1970-1972 (N.S.W.) s. 68, confers a similar jurisdiction on the Supreme Court of New South Wales.
[4] The Conveyancing Act 1919-1976 (N.S.W.) s. 54A is the New South Wales equivalent.
[5] 6th ed. (1921).

enforced by the other *will not prevent the objection* which would arise from the presence of such terms.

C. It has been further held that the doctrine of part performance does not extend to enable the court to award damages on a parol contract of which specific performance could not have been granted.[6]

The plaintiff conceded that the repair work to be executed under the oral agreement was not such as a court would specifically enforce, but nevertheless contended that the relevant date to assess mutuality was at the time of the hearing and not the time the contract was entered into. Mutuality was merely one of the factors which, like hardship or delay, had to be considered when the court was exercising its discretion to grant or withhold an equitable remedy such as specific performance. Therefore, the appropriate time to consider mutuality was at the date of hearing. If by that date the initial lack of mutuality had been cured by the performance of the obligations which could not have been specifically enforced, then it was open to the court to grant specific performance.

If the court rejected this first submission, the plaintiff argued that, since mutuality went to discretion, the refusal of a decree of specific performance for lack of mutuality at the date of contract did not deprive the court of "jurisdiction" to entertain an application for specific performance. The court could, therefore, award damages in substitution for specific performance under Lord Cairns' Act. Thus, the plaintiff sought to demonstrate that Fry's propositions were wrong.[7]

The trial judge reluctantly agreed with the defendant, approved Fry's statements and dismissed the suit. The plaintiff appealed.

**Questions of Law Raised on Appeal**

(i) Was mutuality to be assessed at the date of contract or at the date of hearing?

(ii) If lack of mutuality was to be assessed at the date of contract, had the defendant by her conduct lost the right to rely on it?

(iii) Was mutuality merely one of many discretionary factors to be considered in granting an equitable remedy, or did its absence deprive the court of "jurisdiction" to consider specific performance and, consequently, damages in lieu thereof?

(iv) Being a contract for the execution of building repairs, did the court, as a matter of settled principle, lack "jurisdiction" to award specific performance?

**Decision**

Appeal allowed; specific performance decreed, with an enquiry as to proper compensation to the defendant for repairs she had carried out. The

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[6] *Id.* pp. 219, 222-223, 283-284 (emphasis added).

[7] Summary of counsel's submissions is taken from the judgment of Goff, L.J., *Price* v. *Strange, supra* n. 1 at 376-377.

Court of Apeal unanimously held that Fry's propositions were wrong.

Mutuality of remedy was merely one of the discretionary factors to be considered where the remedy of specific performance was sought and lack of mutuality did not result in the court being without "jurisdiction" to entertain a claim for specific performance. Since lack of mutuality went to discretion and not to jurisdiction, it had to be considered in relation to the facts and circumstances existing at the time of the hearing and not the date of contract.[8]

If, as in this case, the plaintiff's contractual obligations (which could not by their nature be specifically enforced) had been performed by the date of the hearing, it was open to the court to order specific performance of the agreement since the initial lack of mutuality had been cured.[9]

Specific performance could still be awarded where, as in this case, the defendant had partially cured the initial lack of mutuality by performing some of the plaintiff's obligations. This was because:

(a) By standing by and allowing the plaintiff to spend time and money in carrying out an appreciable part of the work, the defendant had created an equity against herself (*per* Goff, L.J.). Buckley, L.J. was of the opinion that the plaintiff's failure to fulfil personally all his obligations was due not to his own default, but to the defendant's unjustified repudiation of the contract. Such conduct was a breach of her implied obligation not to prevent the plaintiff from performing his part of the contract.

(b) The obligations had in fact been fully performed. Therefore the defendant was not at risk of being ordered to grant the underlease and having no remedy except in damages for subsequent non-performance of the plaintiff's agreement to put the premises in repair (*per* Goff, L.J.).

(c) The defendant could be fully recompensed by a proper financial adjustment for the work she carried out. This could be ensured by a court order.[10]

Goff, L.J. added a rider that if the above propositions of law were wrong, nevertheless the plaintiff would still be entitled to an order for specific performance because the defence of mutuality could be waived. On the facts of this case, it was clearly waived. Not only had the defendant permitted the plaintiff to start the repair work, but she also accepted the increased rent payable under the contemplated underlease and went on doing so after her purported repudiation of the agreement.[11]

*Per Curiam*

The court is not deprived of jurisdiction to decree specific performance where building repairs are involved. Although it does not often order specific performance of such contracts, either because of the diffi-

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[8] *Price* v. *Strange,* supra n. 1 at 383d, 385c, 392h, 394e, 395e.
[9] *Id.* 383e, 390d, 395e.
[10] *Id.* 383e-384c, 384e, 393b, 395e.
[11] *Id.* 384d.

culty of ascertaining precisely what is to be done, or because of the difficulty of supervising performance, the court still has power to do so.[12] (Buckley, L.J. expressed no opinion on this point, but stated at the end of his judgment that he agreed with Goff, L.J. on the incidental matters with which Goff, L.J. alone dealt and indeed agreed with his judgment).[13]

Goff, L.J. went further and stated that the court may have power to grant specific performance of contracts for personal services and other categories of contract where previously it was thought that specific peformance had to be refused as a matter of settled principle. He cited with approval the *dicta* of Megarry, J. in *C. H. Giles & Co. Ltd.* v. *Morris*.[14] *Contrast* Buckley, L.J., who stated:

> . . . there are . . . classes of contracts of which the court acting on accepted principles will not in any circumstances decree specific performance. Contracts for the sale and purchase of any commodity readily available . . . and contracts for personal services are examples. In the case of any such contract . . . the court has no jurisdiction to entertain an application for the specific performance of the contract.[15]

The court had at all times jurisdiction to entertain a claim to specific performance of the contract between the parties, and consequently had at all relevant times a discretion under Lord Cairns' Act to award damages in addition to, or in substitution for, specific performance.[16]

*Semble*

The Chancery Amendment Act 1858 (Lord Cairns' Act) enables a court to give damages where there is no cause of action at law because either the right is statute barred (as under the Statute of Frauds) or is a right recognised only in equity.[17] The authority relied on by Fry for his contrary proposition was limited. (See *infra*, comments on damages.)

**Comments**

The leading judgment was delivered by Goff, L.J. Buckley, L.J. delivered a concurring judgment, but with some significant differences of opinion and emphasis. Scarman, L.J. agreed with both Goff and Buckley, L.JJ.

*Mutuality and Discretion*

Since the trial judge had accepted Fry's propositions on mutuality as good law, the Court of Appeal concentrated on showing that Fry was wrong. In thorough and well-researched judgments, the court attacked Fry's propositions on three major grounds.

(a) The few authorities he cited were too specific to sustain the *general* rule he had extrapolated from them. They had been decided on

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[12] *Id.* 385c.
[13] *Id.* 395d.
[14] [1972] 1 All E.R. 960 at 969-970.
[15] *Price* v. *Strange, supra* n. 1 at 393j-394a.
[16] *Id.* 395c.
[17] *Id.* 348h, 393h.

other equitable principles, not on the basis of a special doctrine of mutuality.[18]

(b) His propositions had been subjected to severe academic and judicial criticism on the grounds that they were not supported by any direct authority, did not describe the practice of the courts, and were wrong in principle and policy.[19]

(c) Although there was no case law directly on the point, his propositions were inconsistent with the reasoning and decisions in several categories of analogous cases:

(i) the vendor-purchaser cases; and

(ii) contract cases where the defendant's duty to perform his obligations was postponed until the plaintiff had performed his obligations, or where the plaintiff was obliged to perform services or carry out works, and the initial lack of mutuality had been cured by date of trial.[20]

These cases were consistent with the proposition that "want of mutuality raises a question of the court's discretion to be exercised according to everything that has happened up to the decree".[21]

Research indicated that the Court of Appeal undertook a fair and comprehensive treatment of academic comment and English authority in reaching its decision. There were no significant omissions which prejudiced the strength of opinion against Fry's proposition. Indeed, in *Beswick* v. *Beswick*, Lord Upjohn re-emphasized the discretionary nature of the defence of want of mutuality by saying it could be ignored if it was *de minimis*.[22]

The Australian authority that exists is consistent with the judgment of the Court of Appeal. In *Kell* v. *Harris*,[23] where the plaintiff, on turning twenty-one, ratified an agreement for lease he had made during his infancy, specific performance was granted. The defendant relied on Fry's proposition,[24] but the court rejected this argument. Street, J. said:

> Personal incapacity, if relied upon as precluding specific performance on the ground of want of mutuality, must, in my opinion, be a personal incapacity not only existing at the time the contract was entered into, but still subsisting at the time when proceedings are instituted.[25]

In *Macaulay* v. *Greater Paramount Theatres Ltd.*,[26] specific performance of a contract for sale of land was granted where the plaintiff had performed his unenforceable obligations to the best of his ability

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[18] *Id.* 376-379 *per* Goff, L.J.
[19] *Id.* 379-380 *per* Goff, L.J., 387-388 *per* Buckley, L.J.
[20] *Id.* 380-383 *per* Goff, L.J., 388-392 *per* Buckley, L.J.
[21] *Id.* 381d *per* Goff, L.J., referring specifically to the vendor-purchaser cases.
[22] [1968] A.C. 58 at 97 (House of Lords).
[23] (1915) 15 S.R. (N.S.W.) 473.
[24] *Id.* 475-476, *arguendo*.
[25] *Id.* 481.
[26] (1921) 22 S.R. (N.S.W.) 66.

before the suit was brought. Harvey, J. specifically disapproved Fry's propositions, and went on:

> If the part of the contract which was not certain, or could not be specifically performed, has been rendered certain, or has been performed before the suit is brought, in my opinion, this Court can and should enforce specific performance.[27]

In *Harris* v. *Gollings*,[28] the Victorian Supreme Court followed the same path as the English vendor-purchaser cases cited by the Court of Appeal. In cases where the consent of a third party was needed, the equitable principles used to justify the granting or refusal of specific performance would not have been neccessary had Fry's propositions been correct.[29]

Authorities to the contrary are weak or distinguishable. In *Woods* v. *Wolseley*,[30] specific performance of a contract involving personal services by the plaintiff was refused because mutuality was said to be determined at the date of contract. However, there was some doubt whether the personal services involved were still required at the date of trial.[31] The pronouncements on mutuality are contrary to later decisions in the same court[32] and the decision would be weakened further if it is accepted that personal services no longer automatically disentitle a court to consider specific performance.[33] *Burns* v. *Allen*[34] involved an option which the court held to be a unilateral contract. When the contract was made by the exercise of the option, there was no lack of mutuality, so the correctness of Fry's propositions was not an issue.[35]

It is submitted, therefore, that the law on mutuality formulated in *Price* v. *Strange* should be adopted by Australian courts. Contrary Australian authority is weak and distinguishable, and there are strong *dicta* from one High Court judge and several decisions at first instance consistent with it. It settles the law on mutuality in a direction consistent with

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[27] *Id.* 73-74. See also *Dougan* v. *Ley* (1946) 71 C.L.R. 142 at 154-5 *per* Williams, J.; *Hume* v. *Munro* (No. 2) (1943) 67 C.L.R. 461 at 483-484 *per* Williams, J.

[28] (1891) 17 V.L.R. 686, esp. at 699-701. See also *Powell* v. *Whyte* [1968] Qd. R. 255.

[29] *Ferguson* v. *Hullock* [1955] V.L.R. 202, esp. at 207; *cf. Dillon* v. *Nash* [1950] V.L.R. 293 at 298. See also *Bramley* v. *Parrott* (1881) 7 V.L.R. (E) 172, esp. at 176-177; *Macaulay* v. *Greater Paramount Theatres, Ltd., supra* n. 26 at 72-74; *McFarlane* v. *Wilkinson* [1927] V.L.R. 359, esp. at 369; *Doyle* v. *Heenan* [1946] V.L.R. 77; *Hume* v. *Munro* (No. 2), *supra* n. 27; *Public Trustee of N.S.W.* v. *Gavel* (1927) 40 C.L.R. 169.

[30] (1891) 12 L.R. (N.S.W.) Eq. 245, esp. at 253-254. Owen, C.J. in Equity, specifically approved Fry (Extracts A and B) and *Hope* v. *Hope* (1857) 8 De G.M. and G. 731.

[31] *Id.* 253-4. If the services were no longer needed, the learned judge thought the contract would have come to an end in any case for failure of consideration.

[32] *Kell* v. *Harris, supra* n. 23 and *Macaulay* v. *Greater Paramount Theatres Ltd., supra* n. 26.

[33] *Price* v. *Strange, supra* n. 1 at 384b, 385g-386a (*per* Goff, L.J.); *contra* Buckley, L.J. at 390d, 393j-394a.

[34] (1889) 10 L.R. (N.S.W.) Eq. 218.

[35] *Id.* 225. See also *Heppingstone* v. *Stewart* (1910) 12 C.L.R. 126 and *Boyd* v. *Ryan* (1947) 48 S.R. (N.S.W.) 163, where the initial lack of mutuality had not been cured by the date of hearing.

analogous authority and the overwhelming weight of academic comment. It is logical in principle, and enables the defence to be weighed more easily against other considerations, such as hardship, in the search for the fairest remedy. The decision is in line with a recent trend towards reclassifying certain issues as going to discretion, rather than depriving a court of jurisdiction as a matter of settled principle. It also accords with recent *dicta* that specific performance should be a more flexible and readily available remedy than in the past, and with the growing perception that a party has a *prime* contractual duty to perform his obligations rather than an election to buy their breach in damages.[36]

Most importantly, the characterisation of mutuality as a discretionary consideration accords with its rationale. The defence is designed to prevent the unfairness to the defendant that would result from compelling him to perform *in specie* his obligations with no like security against the plaintiff.[37] The advantages of such a rationale over Fry's proposition are twofold. The emphasis is placed on achieving a fair result between the parties rather than on the technical availability of specific relief to both parties. At the same time, the one beneficial aspect of Fry's rule (embodied in the first paragraph of extract B, *supra*) is preserved, because it is fair not to let the defendant rely on his own misconduct which creates a lack of mutuality to defeat a suit.

The true rationale of mutuality appears most clearly in Goff, L.J.'s reformulation of the mutuality principle:

> In my judgment, therefore, the proposition in Fry is wrong and the true principle is that one judges the defence of want of mutuality on the facts and circumstances as they exist at the hearing, albeit in the light of the whole conduct of the parties in relation to the subject-matter, and in the absence of any other disqualifying circumstances, the court will grant specific performance if it can be done without injustice or unfairness to the defendant.[38]

Buckley, L.J.'s definition is slightly narrower and more technical:

> The time at which the mutual availability of specific performance and its importance must be considered is, in my opinion, the time of judgment, and the principle to be applied can I think be stated simply as follows: the court will not compel a defendant to perform his obligations specifically if it cannot at the same time ensure that any unperformed obligations of the plaintiff will be specifically per-

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[36] *Coulls* v. *Bagot's Executor and Trustee Co.* (1967) 119 C.L.R. 460, esp. at 503; *Beswick* v. *Beswick* [1968] A.C. 58, *per* Lord Upjohn at 97-102, and the dissenting judgment of Sir Garfield Barwick in *Loan Investment Corporation of Australasia* v. *Bonner* [1970] N.Z.L.R. 724 (P.C.). See also J. D. Heydon, W. M. C. Gummow, and R. P. Austin, *Cases and Materials on Equity* (1975) p. 287.

[37] This is the essence of the definitions of mutuality given by various authorities, reproduced and approved by the Court of Appeal, *Price* v. *Strange, supra* n. 1 at 379-380, 388, 390-392. See also R. P. Meagher, W. M. C. Gummow, J. R. F. Lehane, *Equity: Doctrines and Remedies* (1975) pp. 430-431.

[38] *Price* v. *Strange, supra* n. 1 at 383d.

> formed, unless, perhaps, damages would be an adequate remedy to the defendant for any default on the plaintiff's part.[39]

The proviso concerning adequacy of damages contemplates a situation where damages would be an adequate remedy for the defendant but not the plaintiff, if roles were reversed. This is consistent with the rationale of mutuality because, in such a case, it would not be unfair to leave the defendant to his remedy in damages.

*Price* v. *Strange* was unusual in that the defendant herself performed the obligations which her wrongful conduct had prevented the plaintiff from performing. However, it is submitted that the reasoning of the decision[40] would extend to the more normal situation where the plaintiff's outstanding obligations remained unperformed. A defendant might still be said to have created an equity against himself or breached his implied obligation not to hinder the plaintiff's performance. The cases cited by Goff, L.J. to support the existence of such an equity themselves involved part performance by the plaintiff pursuant to an agreement with the defendant.[41] Goff, L.J. also stated that "the court will not be deterred from granting specific performance in a proper case, even though there remain obligations still to be performed by the plaintiff, if the defendant can be properly protected".[42]

The defendant could be "properly protected" by a decree granted on condition of full performance by the plaintiff.[43] This would also accord with the proposition that it would be inequitable to allow a defendant to rely on a want of mutuality persisting solely because of his misconduct. It would not affect cases where a statutory bar prevented full performance; specific performance might still be refused for impossibility.

It is more doubtful that the principle in the decision could be extended to where the plaintiff's unenforceable obligations, although fully performed to the date of hearing, are not limited to specified works, or services for a specified period, but continue for the length of the contract. Goff, L.J. distinguished *Ogden* v. *Fossick*[44] from the present case on this ground, and other older authorities, although inconsistent, are hostile to

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[39] *Id.* 392h.

[40] *Id.* 383e-384c (Goff, L.J.) 393a (Buckley, L.J.) and 395e (Scarman, L.J. agreeing). See "Decision", *supra*.

[41] *Id.* 383f.

[42] *Id.* 383h-384a.

[43] In his discussion (*Price* v. *Strange*, *supra* n. 1 at 377h) of *Peto* v. *Brighton, Uckfield and Tunbridge Wells Railway Co.* (1863) 1 Hem. and M. 468, 71 E.R. 205, Goff, L.J. seemed to contemplate some form of conditional order where the plaintiff had partly performed his obligations. In *Macaulay* v. *Greater Paramount Theatres, Ltd.*, *supra* n. 26, the court granted specific performance where the defendant's misconduct had frustrated the plaintiff's full performance. In *Dougan* v. *Ley*, *supra* n. 27 at 154-155, Williams, J. said, *obiter*, that the plaintiff's offer in his statement of claim to fulfil his obligations was sufficient to override the lack of mutuality.

[44] (1862) 4 De G.F. and J. 426, 45 E.R. 1249; distinguished *Price* v. *Strange*, *supra* n. 1 at 383e.

such an extension.[45] It is submitted that this extension would be valid if a more lenient view on granting specific performance in contracts of personal service and constant supervision prevails. The rationale of mutuality would not be offended where it was seen, on the circumstances of the particular case, to be more unfair to the plaintiff to refuse specific performance than it would be to leave the defendant to his remedy, if any, at law.[46]

The decision does not clarify the precise date at which mutuality is to be assessed unless one equates Goff, L.J.'s "at the hearing"[47] with Buckley, L.J.'s at "the time of judgment".[48] Earlier cases offered no conclusive answer. Most, including all the Australian authority, preferred the date the suit was instituted.[49] The difference could be critical, given the lengthy delays between institution of suit, hearing and judgment.

It is submitted that mutuality should be assessed at the latest date possible — when the decree is granted or refused — although mutuality at an earlier date should be sufficient (even if lost by the date of decree) if it does not cause unfairness. This accords with the rationale of the defence and with the principle that discretionary factors should be considered when the court's discretion is exercised. It would protect a plaintiff who had to institute a suit rapidly to safeguard himself, but who is willing to, and in fact does, perform his obligations so far as possible before the date of judgment. Finally, it is supported by *dicta* of high authority and by distinguished academic writers.[50]

The distinction between factors going to jurisdiction or discretion is most important when the court considers damages under Lord Cairns' Act. If a factor is classified as discretionary, the court can go on to consider damages in lieu of granting specific performance. If a factor is classified as depriving the court of jurisdiction to consider specific performance, damages under Lord Cairns' Act can never be considered and the plaintiff is left to his action at law. The classification, therefore, will be vital where no action at law is possible.

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[45] *Pickering* v. *Bishop of Ely* (1843) 2 Y. and C. Ch. Cas. 249, 63 E.R. 109 and *Johnson* v. *Shrewsbury and Birmingham Railway Co.* (1853) 3 De G.M. and G. 914, 43 E.R. 358. Contrast *Dietrichsen* v. *Cabburn* (1846) 2 Ph. 52, 41 E.R. 861. These were injunction cases. See also *Woods* v. *Wolseley, supra* n. 30, and *Blackett* v. *Bates* (1865) 1 Ch. App. 117, where specific performance was refused on a contract involving services which continued for the length of the lease.

[46] In a case such as the present one, inability to gain specific relief would have left the defendant with no remedy at all, because the oral agreement was unenforceable at law.

[47] *Price* v. *Strange, supra* n. 1 at 383c.

[48] *Id.* 392h.

[49] *Id.* 383c, 392a; *Kell* v. *Harris, supra* n. 23 and *Macaulay* v. *Greater Paramount Theatres Ltd., supra* n. 26.

[50] *Id.* 380b, 381d, 381g, 388d and 392e; and Meagher, Gummow and Lehane, *op. cit. supra* n. 37 at 430, and Heydon, Gummow and Austin, *op. cit. supra* n. 36 at 311-312. See also *Powell v. Whyte, supra* n. 28 at 269-270 *per* Wanstal, J. at 273-274 *per* Gibbs, J. Meagher, Gummow and Lehane state that a court "would" refuse specific performance if a contract previously mutual had ceased to be so by the date of the decree. This would seem not to be completely consistent with the discretionary nature of mutuality.

Jurisdiction in this context refers to instances where it is customary for the court to refuse to consider at all whether or not to exercise its discretion to grant specific performance.[51] Traditionally, certain categories of cases have gone to jurisdiction, and others to discretion. However, previous authorities reveal no underlying principle of classification. There is no way of predicting on which side of the line some factors will fall. *Price* v. *Strange* clearly classifies mutuality as going to the discretionary side. However, the reasoning behind this classification goes little further than previous authority towards establishing a general principle. Perhaps the most useful clue to a general test, if any exists, is to be found in the court's statements that mutuality is based on an underlying principle of fairness.[52]

Applying these statements, it is suggested that in the past certain categories were classified as going to jurisdiction because the court considered that in all cases of that type the unfairness to the defendant of specific enforcement would be so great that it should refuse to consider the remedy. Yet this test of fairness itself shows that the distinction between jurisdiction and discretion is arbitrary and not based on a discernible general principle. Whether something is "fair" depends on a balance of convenience which changes according to the facts of each case. Moreover, as Heydon, Gummow and Austin[53] have demonstrated, in the jurisdictional categories the unfairness was felt to be uniform purely for reasons of history, policy and practicability which may no longer be relevant in all situations within a category. This points to the need to classify *all* factors as discretionary, since in some exceptional areas within the old categories it could be inequitable or unfair to refuse to consider specific performance without considering the other equities involved.[54] The absence of any general principle behind the distinction means that there is no barrier in logic to this result.

The suggested abandonment of the distinction between jurisdiction and discretion gains added validity when it is remembered that the courts arguably have imposed this distinction upon themselves as a control mechanism. There seems to be no requirement in the Lord Cairns' Act provision that "jurisdiction" be interpreted in this special manner. There exists a more effective control mechanism. As Buckley, L.J. pointed out in his judgment,[55] Lord Cairns' Act gives the court a discretion to award damages. It is submitted that this is the appropriate point to control any consequences of reclassifying all factors governing the grant of specific performance as discretionary. Equity exercises its discretion in accordance with established guidelines and when the circumstances before the court are placed in the context of analogous authority any tendency towards opening the floodgates would be mitigated by well recognised criteria.

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[51] Spry, *Equitable Remedies* (1971), p. 535.
[52] *Price* v. *Strange*, *supra* n. 1 at 383d, 392h.
[53] Heydon, Gummow, Austin, *op. cit. supra* n. 36 at 306-311.
[54] *Price* v. *Strange*, *supra* n. 1 at 385c, *per* Goff, L.J.
[55] *Id.* 393f.

Since all the equitable orders are, properly understood, discretionary,[56] there would seem to be no sufficient reason why specific performance should be restricted by arbitrary and inflexible categories.

*Damages under Lord Cairns' Act*

Having allowed the appeal and ordered specific performance, it was unnecessary for the court to consider the question of damages in lieu of specific performance, but both Goff and Buckley, L.JJ. did so. Both agreed that had it been necessary, they would have granted damages in lieu in this case.

The defendant had conceded that if the court had a discretion whether to grant or to refuse specific performance, then Lord Cairns' Act applied.[57] Nevertheless, she argued that, even if lack of mutuality went to discretion (as the court held), the court still lacked jurisdiction on two further grounds.

The court rejected the defendant's first contention that the oral agreement, being for the execution of *building repairs*, was one which in accordance with "settled principles" the court could not, or would not, grant specific performance. In classifying contracts for personal services as one of the classes of contracts which can never, as a matter of "settled principle", be specifically enforced,[58] Buckley, L.J. would appear to be going directly against the line taken by Goff, L.J.[59] that the court always has "jurisdiction". Regrettably, Scarman, L.J. merely agrees with both judgments and can shed no light on this seeming disparity. Goff, L.J.'s view would seem to be the better view. Windeyer, J. in *Coulls* v. *Bagot's Executor & Trustee Co.*[60] stated that "there is no reason today for limiting by particular categories, rather than by general principles, the cases in which orders for specific performance will be made" and there would seem to be little in the way of binding authority or principle to prevent Australian courts from adopting a discretionary approach to cases involving contracts for building repairs or personal services.[61]

Under the Law of Property Act 1925, s. 40, damages could not be awarded at law, but the court felt this was no bar to an award of damages in equity under the Chancery Amendment Act 1858, s. 2 (Lord Cairns' Act). Goff, L.J. stated that not only had the Act enabled the Court of Chancery to award damages at law, "but the Act clearly went further and enabled that court to give damages where there was no cause of action at law".[62] Therefore he felt that "the absence of a right of action at law in this case is . . . immaterial".[63] Buckley, L.J. emphasised

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[56] Spry, *op. cit. supra* n. 51 at 17.
[57] *Price* v. *Strange, supra* n. 1 at 394b.
[58] *Id.* 394a.
[59] *Id.* 385-386.
[60] *Coulls* v. *Bagot's Executor, supra* n. 36 at 503.
[61] Meagher, Gummow and Lehane, *op. cit. supra* n. 37 at 420, 422.
[62] *Price v. Strange, supra* n. 1 at 384h-385a.
[63] *Id.* 385a.

that the court is invested with the discretion to award damages whenever it has jurisdiction to entertain a claim for specific performance, but not otherwise: ". . . the discretion is not confined to cases in which damages could be recovered at law".[64] Both are very positive statements, albeit *obiter dicta*. Both judges relied on *Eastwood* v. *Lever*[65] and the House of Lords decision in *Leeds Industrial Co-Operative Society, Ltd.* v. *Slack*[66] as authority for their proposition. Goff, L.J. also cited with approval *Wrotham Park Estate Co., Ltd.* v. *Parkside Homes, Ltd.*[67]

The view taken by the Court of Appeal was espoused by Spry who stated that "the power of awarding damages which is conferred by a Lord Cairns' Act provision is not limited to cases where damages might properly be awarded at law. It is in truth a much more general provision which should in no way be limited by implication".[68]

Professor J. A. Jolowicz reviewed the cases relied on by the Court of Appeal in an article entitled "Damages in Equity — A Study of Lord Cairns' Act"[69] and stated that "wittingly or unwittingly, through Lord Cairns' Act, Parliament had conferred upon the Court of Chancery, and thus in course of time upon the Supreme Court of Judicature, a discretionary jurisdiction to award damages which could not have been awarded at common law".[70] Whether this "novel jurisdiction to award damages in equity" will be as fully accepted in Australia can only be answered by the High Court, but it is submitted that it should be adopted here.

Evatt, J. in *J. C. Williamson Ltd.* v. *Lukey and Mulholland*[71] stated that the trial judge had reached "an interesting, if at the same time somewhat startling conclusion . . . . Proceeding from the position that the courts of common law could not award damages for breach of the agreement alleged, owing to the absence of the writing made requisite by the Statute of Frauds, the final decision reached is the award of those very damages, ascertained by precisely the same measure". It should be noted, however, that he did not reject this "startling conclusion", only one of the "weaker links" in the chain of reasoning.[72] If it had been true that the application of Lord Cairns' Act was limited to cases where damages might be properly awarded at law, it seems strange that the High Court in *Williamson's Case* did not rely on this proposition, but instead reversed the trial judge's decision by an elaborate discussion of part performance and its application to injunctions.

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[64] *Id.* 393h.
[65] (1863) 4 De G.J. & S. 114.
[66] [1924] A.C. 851.
[67] [1974] 2 All E.R. 321; the court awarded damages for breach of a restrictive covenant where there was no privity at law.
[68] Spry, *op. cit. supra* n. 51 at 541. See also Ashburner, *Principles of Equity* (1933), 2nd ed., p. 352; *Halsbury's Law of England*, 4th ed., Vol. 12, para. 1107.
[69] (1975) *Camb. L.J.* 224.
[70] *Id.* 227.
[71] (1931) 45 C.L.R. 282. Hereinafter *Williamson's Case*.
[72] *Id.* 303.

Nothing in any of the judgments can be taken to be directly denying the availability of damages in lieu of *specific performance*[73] where the doctrine of part performance is used to overcome the Statute of Frauds. Dixon, J. might even be read as giving tacit backing to the proposition. He stated that the power under Lord Cairns' Act to award damages "is confined to cases in which there is a title to equitable relief"[74] and, later, that such "equitable relief is obtainable, notwithstanding the Statute of Frauds, by a party who in pursuance of his contract has done acts of performance . . . although the remedy of specific performance is commonly applied in aid of a legal right, it extends to cases where, for one reason or another, there is no remedy at law, as well as to cases where the remedy at law is inadequate".[75]

Although *Williamson's Case* is authority for the proposition that the doctrine of part performance does not extend to "injunctions", it is suggested that this is not inconsistent with the *dicta* on equitable damages in ***Price* v. *Strange.***

In a later case in the Victorian Supreme Court, Sholl, J. in fact held that by reason of the Victorian Supreme Court Act 1928, s. 62(4) (Lord Cairns' Act provision) the court may give damages, either in addition to or in substitution for specific performance, in a case where the power to award specific performance depends on the application of the doctrine of part performance. He was of the opinion that there was nothing in *Lavery* v. *Pursell*, or in *Williamson's Case* to the contrary and cited the observations of Evatt, J. in the latter case (at 306) in support of the view taken.[76] This must be contrasted with the New South Wales case of *Williamson* v. *Bors*[77] where damages were barred at law by the Statute of Frauds. Specific performance was denied to the plaintiff by his own conduct and Walker, J. refused to grant damages in lieu, saying that "it was not intended that the Court of Equity should give damages when an action would not lie at law". However, he based his decision on the doubtful authority of *Lavery* v. *Pursell.*

Meagher, Gummow and Lehane[78] cite damages for part performance as an example of the "fusion fallacy" and argue that the doctrine of part performance should not be extended to give a remedy in damages, for to do so would be to allow the plaintiff to assert a right which before the Judicature Act 1873 existed neither in law nor in equity. However,

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[73] *Id.* 299 — Dixon, J. states that if the contract could not be enforced at common law by an action for damages, it could not be enforced in equity by an injunction. It may be that this proposition is not applicable to specific performance.

[74] *Id.* 295.

[75] *Id.* 297.

[76] *Dillon* v. *Nash* [1950] V.L.R. 293 at 301.

[77] (1900) 21 L.R. (N.S.W.) Eq. 302.

[78] Meagher, Gummow, Lehane, *op. cit. supra* n. 37 at 48.

the authorities cited for this proposition seem capable of alternate interpretation.[79] One authority relied on by the learned authors was rejected by the Court of Appeal. Buckley, L.J. stated that "the decision in *Lavery* v. *Pursell* did not depend on the fact that the contract in that case was an oral agreement on which damages could not have been recovered at law on account of the Statute of Frauds; it depended on the fact that specific performance had become impracticable".[80] Goff, L.J. confirmed that the case "decides nothing more than this, that the court cannot grant damages in lieu of specific performance when it is impossible to effect specific performance".[81]

Of the cases cited by the Court of Appeal as authority for their proposition that equitable damages will lie under Lord Cairns' Act where no action is available at common law, none appears to have been authoritatively considered in Australia. *Eastwood* v. *Lever*,[82] the case that "provided the first indication that Lord Cairns' Act had done more than enable a Court of Chancery to do 'complete justice' ",[83] would seem a legitimate extension based on an interpretation of Lord Cairns' Act and its successors. Where there is no cause of action at law, not because there is no substantive issue to be tried, but because a statutory bar prevents proceedings, it would seem proper that the courts should adopt a generous rather than restrictive interpretation of another statute to help overcome this bar, when it is equitable to do so. The *dicta* in *Price* v. *Strange* reinforce this legitimate means of circumventing the Statute of Frauds.

The English courts appear to be moving towards mitigating some of the injustices created by the Statute of Frauds. Whether this approach, or any part of it, will be adopted in Australia awaits judicial determination.

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[79] In all cases cited damages were not awarded because as a matter of settled principle the courts would not have granted the remedy sought and therefore could not go on to consider damages as an alternative, e.g., in *Britain* v. *Rossiter* (1879) 11 Q.B.D. 123, specific performance was denied because the court considered the doctrine of part performance related only to land. Here it was a contract for personal services. In *Marsh* v. *Mackay* [1948] St. R. Qd. 113 the Full Court held that the judgment could not stand because the Magistrates Court had no jurisdiction to grant specific performance. In the similar case of *Douglas* v. *Hill* [1909] S.A.L.R. 28, the Full Court held that had the action been brought in the Supreme Court damages could have been awarded in lieu of specific performance. *Ellul and Ellul* v. *Oakes* [1972] 3 S.A.S.R. 377 is equivocal. One judge appears to be saying the doctrine of part performance cannot be invoked in aid of a common law claim for damages (and this would be correct) and specific performance cannot be granted where everything performable was performed (at 383), whereas the other judge felt damages in equity under Lord Cairns' Act could be granted in lieu of specific performance, and felt it would be ludicrous if part performance were enough but full performance were not. Both judges bring in the Judicature Acts in a somewhat confused context (at 395).

[80] *Price* v. *Strange*, *supra* n. 1 at 394d.

[81] *Id.* at 385b.

[82] *Eastwood* v. *Lever*, supra n. 65.

[83] Jolowicz, *supra* n. 69 at 230.